Upholding the Australian Constitution Volume Twenty-seven

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

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Contents

Introduction

Julian Leeser

The Twenty-Seventh Conference of The Samuel Griffith Society was held in Canberra in August 2015. It was the third occasion on which the Society had gathered in Canberra.

The Program

The Conference opened with the sixth Sir Harry Gibbs Memorial Oration, delivered on this occasion by Nicholas Cowdery, AM, QC, former Director of Public Prosecutions in New South Wales. Appropriately in the year in which the eight hundredth anniversary of the signing of Magna Carta was marked, he took as his subject the facts and myths surrounding that famous document.

In another major address, John O'Sullivan, a leading conservative intellectual and writer, and editor of Quadrant, 2015-16, provided important insights into interactions between law and culture, particularly interactions with damaging political consequences.

In a comparably insightful paper, James Dalziel, a psychologist by profession, addressed the subject of not only why conservatives and progressives think differently, but why neither understands the way the other thinks.

There were several papers on themes concerning the role and power of the judiciary in Australia. David Tomkins considered the *McCloy* case, a matter heard early in 2015 about laws on political donations in New South Wales. Dr Tomkins' address especially focused on whether it is constitutionally permissible to ban a certain category of donors, in this instance, property developers.

Questions of faith, religion and the law are currently hotly debated both here and in the United States. Mark Fowler examined not only the High Court's decision in 2014 on whether the Commonwealth or the Australian Capital Territory could legislate for same sex marriage but also the more recent decision of the Supreme Court of the United States in *Obergefell v Hodges*.

The general matter of religious freedom and the law formed the topic of Neil Foster's comprehensive paper.

In a related paper James Allan addressed the vexed question of appointments to the judiciary and the desirability of an express policy on appointments.

No conference of the Society would be complete without discussion of federalism in Australia. This was led by the former Premier of South Australia, John Bannon, at the time a member of the Expert Advisory Panel for the proposed white paper on Reform of the Federation. Sadly, Dr Bannon died some months after his address.

In a related paper, Scott Ryan, then Parliamentary Secretary to the Minister for Education, tackled the topic of competitive federalism.

Another significant anniversary marked in 2015 was the bicentenary of the birth of Sir Henry Parkes, widely recognized within Australia as the "Father of Federation." His role in the Federation movement and, more generally, in the politics of nineteenth century Australia (especially New South Wales) forms the subject of a speech by Jane Reynolds.

The Conference again discussed the question of recognition of Aboriginal and Torres Strait Islander peoples in the context of the Abbott Government's support for the initiative of Pat Dodson, now a senator, and Noel Pearson for a series of conferences for indigenous people to debate the details of a proposal which might be submitted to Australians at referendum after consideration at a national convention.

Michael Mischin, the Attorney-General of Western Australia, provided an account of Western Australia's recent attention to indigenous recognition. And, drawing upon a project led by Damien Freeman and Shireen Morris, I presented a paper on how this matter might be addressed nationally.

Noel Pearson had been invited to address the Conference but regrettably was unable to do so owing to some family matters which kept him in Cape York. Noel is widely admired for his endeavours to lift the standard of living of his people by attacking welfare dependency and encouraging genuine economic development. Noel himself has written:

> In trying to understand conservative objections to the Expert Panel's proposals, it is important to understand the Australian mix of liberalism and conservatism and the influence of constitutional conservatism. . . . This group, convening as the Samuel Griffith Society, values liberalism and democracy. They insist on parliamentary sovereignty and are ready to accuse judges of usurping parliamentary democracy. They value the Australian Constitution as inherited wisdom.

The Society

As always at a Conference we acknowledged those members who had passed on in the previous twelve months. They include Barrie Purvis, Robert Rofe, Charles Jefferies, Ben Sandars, Ian Young, Richard Wingate and Sir James Balderstone.

I would like to pay a particular tribute to Ben Sandars. Ben's name is probably not as well-known as it should be. Ben was a long-time and loyal member of The Samuel Griffith Society. He was a psychologist who among other things developed the entrance exam for soldiers in the Special Air Services Regiment in the Australian Army.

Ben was always one to support good causes including this Society, the H. R. Nicholls Society, the Bennelong Society, the Lavoisier Group and the Isaacs Federal Electorate Council of the Liberal Party.

Every year Ben and Patti would drive to The Samuel Griffith Society Conference irrespective of its location, even travelling from Melbourne to Perth by car. We miss Ben but are delighted that Patti has continued to attend and trust she will do so for many years to come.

As usual the Society was delighted to have the continuing support of the Mannkal Foundation and the Sir Charles Court Foundation.

The 2015 Mannkal Scholars were Anish Badgeri, Lyndsay Barret, Bruce Linkermann, Danielle Lisbon, Jordan Lockhart, Fiona Poh, Bianca Talbot and Tara Woermann.

The 2015 Sir Charles Court Scholars were: Elodie Prinsloo, Simon Morgan, Aiden Depiazzi and Sherry Sufi.

Student attendance at the Conference was also made possible by donations by several members of the Society: Christopher Game, Brian Hurlock, Gary Johns, Bevan Lawrence, Sir David Smith, John Stone and Dr David Tomkins.

The Samuel Griffith Scholar at the 2015 Conference was Rick Umback.

The 2015 Conference was my last as conference convenor, a role I had undertaken for seven years. During my time as conference convenor there were a number of highlights: a visit to Government House, Hobart, at the invitation of the Governor, the late Peter Underwood, during the Society's first Conference in Tasmania; commencement of post-conference tours which included, in 2013, a river cruise on the Hawkesbury; and a visit to the home of Sir John Downer in Adelaide. These conferences included two with the largest ever attendances: Hobart and Brisbane.

There are some vital things the Society must address in the future. A first priority must be renewal of the membership – younger members, parliamentarians, lawyers, academics, economists and businesspeople with an interest in public policy.

Board members of the Society, myself included, also need to do more to ensure that, between conferences of the Society, that they are promoting the Society in their State and perhaps looking to undertake an annual event with local members so that it is not six or seven years between conferences in each jurisdiction.

While the conference papers have been the outstanding output of this Society since its foundation, it should become practice that papers are contemporaneously put on the website as well as being published in a book at a later date. This allows the media, researchers, students and others interested to access the papers when they are at their most topical.

And we must commence student clubs and a student journal in conjunction with student scholars so that our work and our Society will be sustained into the future. John McGinniss's paper on the US Federalist Society delivered at the 2008 Conference points the way.

I very much appreciate the confidence that the Society has reposed in me in following in the footseps of our inaugural conference convenor and founder, John Stone.

I commend the Society to everyone. Long may it flourish.

The papers in this volume of *Upholding the Australian Constitution* have been assembled, edited and prepared for publication by J. R. Nethercote.

Magna Carta
Its History and Enduring Relevance

The Seventh Sir Harry Gibbs Memorial Oration

Nicholas Cowdery

It is customary when delivering a memorial oration to mention the person in whose memory it is given and I shall do so only briefly, because Sir Harry was the founder of The Samuel Griffith Society in 1992 and is well known to you all. Some of you, like me, are old enough to have appeared before him on the Bench or to have been associated with him in other ways.

The Right Honourable Sir Harry Talbot Gibbs, GCMG, AC, KBE, QC was Chief Justice of the High Court of Australia between 1981 and 1987. He had a most distinguished career in the law as a Justice of the High Court from 1970, on the Federal Court of Bankruptcy and the Supreme Court of the ACT, on the Supreme Court of Queensland and as a Barrister practising in Queensland after the Second World War. In retirement from the Bench he remained active, contributing to Australian society in many significant ways. I note, however, that the two most significant events in his long life occurred in Sydney, NSW – his birth in 1917 and his death in 2005. So I am pleased to claim Sir Harry also for my State.

Sir Harry addressed this Society on three occasions, as I understand. The addresses are collected in a book he published with Sir Paul Hasluck in 1993: "Native to Australia – Three Addresses to the Samuel Griffith Society". I have not read the book, so I do not know what he said – but I think I am safe in saying that he did not speak about the Magna Carta. I have been asked to do so tonight. The invitation came to speak (as you can see from your conference program) about "The Magna Charta – its History and Enduring Relevance", but I am happy to drop the "h" which was a variation to be found in some publications at least from the 16th century. It was just another of many quirks that have contributed to the development of the myth of Magna Carta over the centuries.

As the British historian, G. M. Trevelyan, wrote of it in the 1920s:

> Pittites boasted of the free and glorious constitution that had issued from the tents on Runnymede, now attacked by base Jacobins and levellers; Radicals appealed to the letter and the spirit of "Magna Charta" against gagging acts, packed juries and restrictions of the franchise. America revolted in its name and seeks spiritual fellowship with us in its memory.

History of Magna Carta

First, the history of the document that has become many things to many people.

We have celebrated 15 June 2015 as the 800th anniversary of the sealing of the Magna Carta. But was it?

I am afraid we are jumping the gun so far as a document by that name is concerned (we are two years early); or a document containing the familiar 37 chapters (we are ten years early); or the first law in the Statute Roll of England (we are 82 years early); but it is the thought that counts

when dealing with the myths of history. Our myths are very important to us, of course, and the thoughts behind this one certainly do still matter.

All educated persons, especially (but not only) those in places with an English heritage, think they know what the Magna Carta is and why it is important to our lives. But it is helpful from time to time to re-examine objects and events that have passed into history and that over time have acquired significance and value that the originators and participants could never have foreseen. We undertook a similar exercise in April 2015, with the centenary of the landing at Gallipoli.

A common view is that King John made an agreement with the barons in 1215, that it contained new terms, that the document became "law", it created rights bestowed by the King, it has been construed and applied ever since and it is the source of much that is good in government and public administration – including constitutional guarantees, parliamentary democracy, the rule of law, the separation of powers, the independence of the judiciary, trial by jury, equality before the law and even *habeas corpus*.

Well, that is only partly true – and some is just wrong. The real story is much more interesting (although perhaps not as satisfying) and I can tell you some of it here.

A document was sealed by King John on 15 June 1215 at Runnymede on the River Thames. It was a place unnamed until this event and was sometimes an island, sometimes part of the riverbank, west of Staines. It is between Westminster, which was then occupied by the rebel barons and merchants and Windsor Castle, to which the King had been forced to retreat – so it was on neutral ground between the opposing parties. That document was the Charter of Liberties, *Carta Libertatum* (not the Magna Carta – we will come to that).

The document contained script that was very much later divided into 63 clauses or, more correctly, chapters. Such documents at that time were made on vellum (untanned calf or sheep skin), in continuous medieval Latin script and containing many abbreviations to save valuable space on that expensive writing material. (The bean counters were in operation even then.)

The first and most important chapter was not for the benefit of the barons, but granted liberties (in truth privileges, or freedom from royal control) to the English Church (being, of course, the Church of Rome at that time). That came about because a drafter and principal mover of the Charter was Stephen Langton, Archbishop of Canterbury. King John had opposed his appointment and had forced him into exile in what we now know as France and when the Pope did appoint him Archbishop in 1207, King John refused to recognise it. The services of the English Church were suspended from 1208 to 1214 and King John helped himself to Church property. (You may remember the A. A. Milne poem, "King John's Christmas": "King John was not a good man – he had his little ways. And sometimes no one spoke to him for days and days and days…")

In 1212 the Pope excommunicated England and the Royal Court and plotted to install a French Prince as King. From 1213 Langton and the barons worked together towards the 1215 Charter, Langton's motivation being the restoration of the liberties of the Church and in that he was successful – at least on vellum. The motivation of the barons was self-interest, at a time of very high economic development and wealth in England (at levels not to be seen again after the 13th Century until the 18th) – and they and their merchant friends wanted a part of that. They set out to prevent the King from helping himself to their riches.

"Free men" (perhaps up to 40 percent of the population of England of somewhere up to four million people at that time) then had their liberties declared in subsequent clauses, once the Church and the barons had been satisfied. Some later chapters do speak of all men of the kingdom and the document did refer to women.

King John sealed (not signed – there were no signatures) the charter under duress and there seems little doubt that he had no intention of ever honouring it. Pope Innocent III was affronted that his vassal, John, had been forced to the table and he annulled it on 24 August 1215. King John repudiated it at the latest on 5 September – so it survived for about 9 weeks.

Perhaps 30 copies of the Charter were made and they were still being copied in July. They were taken to the counties to be read aloud in Latin and French. The whereabouts of only four of the 1215 documents are known and they were exhibited together for the first time in the British Library and House of Lords in February this year. The copy with the King's seal has been lost.

King John died in October 1216 in Nottinghamshire, the country being in a state of civil war. Prince Louis of France had been proclaimed (although not crowned) King of England in June 1216 at Westminster, but it was not to last. John's son and heir, Henry III (then only 9 years old but supported by the barons in preference to Louis), reissued the Charter of Liberties in that year (by now down to 40 chapters) and again under his own seal in 1217 (with 43 chapters). Those chapters most onerous to the monarch had been removed. One of those (not surprisingly) was chapter 61 which gave to a group of 25 barons, to be selected by the barons, the power to enforce the charter even against the King. (Why the number 25? It is thought that the Pentateuch, the first five books of the Bible, held great significance and five times that number would be even better.)

Because a smaller (but very significant) Charter of the Forests was issued at the same time as the reissue in 1217, that Charter of Liberties became known as the Magna Carta, the big charter (actually, Magna Carta Libertatum), to distinguish it from the other, smaller, document. So it has remained, although centuries later the "magna" rather tendentiously became interpreted as signifying the importance of its contents.

Magna Carta was reissued in 1225 (a fairly definitive version of 37 chapters that we recognise now), 1234, 1237, 1253, 1265, 1297 and 1300. The 1297 text, almost identical to the 1225, is the most commonly quoted version and it became "law" in England, being entered on the Statute Roll. Australia owns one of the surviving four 1297 originals and the story of its acquisition is worth telling.

In the 1930s the small and then (but not now, I understand) impoverished King's School in Bruton in Somerset in the English West Country acquired an original 1297 Magna Carta. In 1951 they took it to the British Museum for authentication with a view to sale to raise money. It was formally identified as an original of the 1297 Magna Carta, at that time one of only two known to exist (two others were discovered later). There is uncertainty about how it came into the school's possession, but the best account seems to be that in the decades before, the school's solicitor, who had been keeping the document for someone else whose family had probably acquired it from Easebourne Priory in Sussex and had forgotten about it, put it into the school's documents box by mistake.

The British Museum was prepared to offer £2,000-2,500. The school had it independently valued at £10,000 (£12,500 with seller's commission), but the British Museum would not move

and the school engaged Sotheby's. After much manoeuvring (a story in itself, told in a fine booklet published by the Australian Senate, now in its second edition, price $10) the Library Committee of the Australian Parliament purchased it in 1952 for £12,500 (15,672 Australian pounds) and the document is now on display in Parliament House, Canberra. An area in Canberra near Old Parliament House has been designated Magna Carta Place.

The United States of America has another original of the 1297 charter, purchased in 1983 by Ross Perot for $US1.5 million from the Brudenell family of Deene Park in Northamptonshire. In 2007 Perot sold it to David Rubenstein, who has since provided it on certain terms to the US National Archives. Mr Rubenstein paid $US 21.3 million. (It can only be hoped that our government does not discover our document's true worth.)

So the reality is that the name Magna Carta dates from 1217, not 1215, and the surviving content of 37 chapters dates from 1225 and 1297 (reaffirmed in 1300). There are many such documents spanning 85 years of the 13th Century and not all identical. It did not create much that was new but rather declared existing laws and usages which the King had been flouting and it became "law" of the land in 1297. (Only three chapters are still in force in England and one in NSW, chapter 29 of the 1297, being 39 and 40 of the 1215). Its principal other party was the Church, not the barons. For several centuries after 1300 it was virtually forgotten (although dragged out and reconfirmed by Kings from time to time in gestures of goodwill towards their subjects when extra taxation was required) until Sir Edward Coke brought it back to prominence early in the 17th Century for his own purposes in his posthumously published Institutes of the Laws of England as the "Magna Charta" and divided it into chapters. It received another push along from Sir William Blackstone in the 18th Century and has been cited in many places ever since.

Enduring Relevance

So much for its history – what of its enduring relevance?

To seek out statements of the rights of humankind one needs to look well beyond the Magna Carta, to such documents as the Liberty of the Subject Act (1354), the Petition of Right (1628), the Habeas Corpus Act (1679), the Bill of Rights (1689), the Act of Settlement (1701), the French Declaration of the Rights of Man (1789), the US Bill of Rights (the first ten amendments to the Constitution of the United States – 1791), the Reform Act (1832), the Universal Declaration of Human Rights (1948) and so on into the modern era.

The significance of the document we call the Magna Carta lies not so much in the text (or any of the many versions of it and of drafts that were prepared) but in the principles behind the text – the values and concepts that support it, the idea of Magna Carta itself. The myth.

The rule of law is one of those concepts and its modern meaning may conveniently be described in the words of the Secretary-General of the United Nations, Kofi Annan, in 2004:

> For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law,

separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

The Magna Carta has provided inspiration and support for progressive development in governance world-wide since at least its 17th Century resurrection. It has been invoked in the context of more modern charters of rights as we now understand them – in 1948, in the United Nations, Eleanor Roosevelt, the champion of the Universal Declaration of Human Rights, described that instrument as a "declaration that may well become the international Magna Carta for all men everywhere".

The Americans have possibly taken the old document to their hearts even more strongly than the English (as Trevelyan noted), given that Paul Revere engraved the words on the Liberty Bowl in 1768 and that Massachusetts currency at that time had "Magna Carta" on it. Much earlier, in 1606, Coke was Chief Justice of England and he drew up the Royal Charter granted by King James I for the Virginia Company of London, which established the colony in Jamestown, Virginia, in that year. This charter declared that "The persons which shall dwell within the colonies shall have all the liberties as if they had been abiding and born within this our realm of England or any other of our dominions." These "liberties", including those in the Magna Carta, appeared in one form or another in the founding charters of Massachusetts (1629), Maryland (1632), Maine (1639), Connecticut (1662), Rhode Island (1663) and Georgia (1732). William Penn published the Magna Carta in Philadelphia in 1687, only five years after that city was founded.

From the Virginia charter of 1606 to the Charter of Massachusetts Bay of 1629 to the Constitution that William Penn wrote for the colony of West New Jersey, and his charters for his own settlement of Pennsylvania, immigrants were guaranteed that English law dating back to Magna Carta would follow them to the colonies.

The aims of The Samuel Griffith Society include the defence of the Australian Constitution and the defence of the independence of the judiciary. There are at least two provisions of the Magna Carta that connect with those aims.

More broadly, however, the idea of Magna Carta as it has developed stands for:

- **continuation of basic law** – of a framework for order and peace fashioned by and from the people – upon which contemporary laws are made and rest and which is innate and inalienable;
- **the triumph of liberties over tyranny and limits upon sovereign power**;
- **the rule of law itself** (as I have mentioned) – that no one is above the law, no matter how powerful, even a monarch, and that justice will be done according to laws that are certain and knowable in advance. That is particularly significant in modern times where the executive very often needs to be kept in check and reminded that it must operate within legal bounds;
- **the value of democratic processes in the government of the people** (although it did not create democracy);
- **independence and professional competence of the judiciary** – an aim of The Samuel Griffith Society;
- **equality before the law and due process without corruption (including the presumption of innocence and burden of proof on the prosecution)**;
- **"no taxation without representation"**, the catchcry of the American independence movement;

- **rights to property and to compensation for its seizure** – acquisition on just terms, to be found in section 51(xxxi) of the Constitution; and
- **freedom from arbitrary punishment and proportionality in sentencing (even back then the evils of mandatory sentencing were well understood)**.

It is also said to have been the origin of the law of trusts and an early example of the protection of women's rights (in that widows were not to be forced to remarry and would take their portions and inheritances). It also dealt with a multitude of local and temporal regulations that are of less enduring significance but which secured common freedoms that King John had been denying to the people.

It had nothing to do with parliamentary democracy, *habeas corpus* (not legislated until 1679 but to be found in other forms at earlier times), trial by jury (which did not begin in a form we would find familiar in criminal cases until after the Church withdrew support for trial by ordeal, coincidentally in 1215), the separation of powers, universal suffrage, freedom of religion or much else that is claimed for it – especially by unrepresented litigants.

Magna Carta, as Sir Gerard Brennan has said, lives in the hearts and minds of Australian people, having been brought with the first English settlers. As it has come to be understood and called upon over 800 years (or even 798 or 790 or 718 years), it operates as a shield against tyranny, abuse of power and oppression of the governed. It has become the talisman of a society in which the spirits of tolerance and democracy reside. In the English common law system, it is the touchstone of the rule of law and a continuing inspiration to all, well beyond its terms.

The Samuel Griffith Society may like to keep it in mind as it pursues its aims – and to remind others of its lessons.

Chapter 1

When Respectability Loses Her Virtue

John O'Sullivan

May I begin by thanking you for the invitation to address this conference of The Samuel Griffith Society. It has been a very enjoyable experience, darkened for me only by the knowledge that this present moment was bound to arrive eventually and expose both my lack of knowledge of Australian law and culture and my inability to benefit from the inspiration of the moment. As science has established, the human brain starts working from birth and continues doing so right up to when someone rises to make a public speech. But I look forward, having survived tonight, to enjoying the debates of tomorrow without reserve.

Those debates are very necessary – if sadly so. In all the nations of the Anglosphere, with the partial exception of the United States, law was until recently a political battleground mainly at the stages of electoral debate and parliamentary law-making. The courts very occasionally had to make judgments that had serious political implications. One major instance of this was the judicial decision in 1901 on Taff Vale establishing labour union immunities in British law that was partly reversed (that is, made conditional upon union strike ballots) only as late as the labour reforms of the Thatcher administration. You will know better than I of similar cases in Australia. But there was usually a general understanding that decisions of the court that made law rather than merely interpreting it could be reversed by the legislature. And the legislature's decision, like that of an editor, was final.

All that has changed in recent years with the *Human Rights Act* in the United Kingdom, the *Mabo* decision in Australia, and the growing power of Supreme Courts in Canada (where the Court recently rejected the Government's nominee on grounds that seem constitutionally dubious and politically biased) and in the United States (where the Court has taken to discerning constitutional rights founded solely in the musing of its members on the meaning of life).

In the great majority of these decisions, the political direction of change has been leftwards, and their political content has been supplied in great measure from ideas and values floating in the cultural atmosphere. That cultural atmosphere is not drawn, however, from the beliefs of the whole of society, or even of a majority of its citizens but, as the late Robert Bork used to complain, from the mindset of the academic-media-philanthropy complex that has *metastasised* since the 1960s and replaced the military-industrial complex as the dominant ideological force in political life throughout the Anglosphere.

So an organisation such as The Samuel Griffith Society, like the Federalist Society in the United States, has two responsibilities thrust upon it. The first is to make a case for returning law-making to democratic and accountable institutions, such as Parliament from the courts. The second is to make arguments within the legal community that unmask, resist, and counter the proposals for major political change that come disguised as legal reforms or constitutional necessities or sometimes as the unanticipated consequences of a myriad of minor regulations. The liveliness of your debates tells me that you are doing a fine job in relation to both responsibilities. The fact that your internal disputes are more interesting and better argued than

most of the political debates across the parliamentary floor, let alone on the ABC, suggests that the intellectual advantage remains with the liberal and conservative Right. And I fervently hope that your counsels will stiffen the spines of the governing Right here and in other countries.

They have certainly inspired me. I do not usually offer innovative constitutional advice to the people of a country where I have been living for a few weeks. I usually wait at least six months. But your debate on mentioning the First Nations in a constitutional preamble inspires me to suggest that this could work if supplemented by reference to a second notional category of Australians. We might call this group "the First Citizens," being the descendants of those Australians who settled in Australia between the First Fleet and the passage of the Constitution and who could undoubtedly claim a special role in creating the Australian polity. I think that might solve your problem.

But how would it work? Might it not stigmatise people who were neither First Nations nor First Citizens? Would it undermine the equality of all Australians? Would it encourage the legal creation of separate rights on an ethnic basis?

Well, I have given you the solution. These are essentially *technical* questions of how to implement it, and I cannot be expected to provide answers to all of them. But I can assure you that if First Citizens were to be written into a new preamble, there is no prospect at all that the courts might use it to create special rights for or otherwise favour them. On that, at least, I can confidently give you complete reassurance.

Let me turn now to the first of three ways in which culture and law interact with damaging political consequences. These three ways are: first, how a multitude of regulations, if their growth is unchecked, risks creating a passive and dependent population; second, how the attempt to change social beliefs by law and regulation pardons the criminal and stigmatises the respectable; and, third, how the post-modern belief that truth and justice are merely masks for the exercise of power creates an ideological tyranny.

The Explosion of Regulations

First, therefore, the explosion of regulations that the administrative state produces. I will begin this with a parable from Jon Donnison who, in 2014, was made BBC correspondent in Australia, and who in one of his first broadcasts told the following story:

> I was fined A$71 (US$51, £32) and threatened with court for crossing the road on a red light, unbeknown to me an offence in the State of New South Wales.
>
> The jovial policeman who stopped me asked, out of the blue, what would happen if I were to punch him in the face.
>
> "I wouldn't want to try it," I replied, looking up at his bulky frame.
>
> "Don't worry," he said. "Nothing would happen."
>
> He told me the courts would probably let me off if I argued I was having a stressful day.
>
> But jaywalking, he said, "the courts take that very seriously."

Donnison concluded:

> The laid-back, easy-come, easy-go, throw-another-shrimp-on-the-barbie stereotype of Australia is encapsulated in the vibe of its unofficial anthem, *Waltzing Matilda*, where a swagman pinches a local sheep for his supper.
>
> In reality, these days our jolly swagman would probably be pulled up for pitching his tent

without a proper permit, lighting an illegal fire or sparking up a ciggie in a public place.

Australia is without doubt one of the most rule obsessed and bureaucratic places I have ever lived.

Now, ladies and gentlemen, let me introduce you to the Cantuar Paradox: This holds that if the Archbishop of Canterbury says he believes in God, well, he is simply doing his job; but if he says he does not believe in God, well, he must really have discovered something. Equally, when a BBC correspondent criticises Australia for stopping the boats, well, he is simply doing his job. But if he says that Australia is more constricted by regulations than a blonde in a bondage magazine, then he really must be onto something.

And what Mr Donnison is onto is something that is more damaging in practice than in theory. Regulations like those to which he drew our attention are generally not objectionable in themselves. Some may be too costly for any benefit they bring; some may be too intrusive in their applications; some may not achieve their objectives. But they are intended to protect us from contaminated food, poisonous liquids, financial fraud, and any number of other risks – all of which are praiseworthy or at least defensible aims. They reflect a reasonable cultural preference, found, indeed, in most cultures, not to be poisoned or defrauded. Their bad effects mainly stem from their number, their freedom from effective democratic control, their uncontrolled multiplication, and their growing influence on ordinary citizens to be too nervous of risks and too demanding of protection. Regulatory expansionism gives bureaucracies too much control of our lives and breeds an unhealthy dependency in the general population.

When I mention dependency, I am not referring to welfare dependency. That is a bad thing, too, and it is made worse when the regulations surrounding welfare benefits offer perverse incentives – for example, for single mothers to break off relations with the fathers of their children. But the dependency bred by excessive regulations in the general population is a more general kind of passivity that gradually erodes its attachment to – and even knowledge of – its own actions and rights. We are encouraged by over-regulation to rely more and more on government officials to do for us what we could equally well do for ourselves – and, maybe more important, *not* to do what might help us solve our own problems. And the authorities themselves come to believe that they should enjoy a monopoly of action in areas where regulations covering "health and safety" are concerned.

In Britain this has led to some extraordinary interventions by the authorities on what commonsense suggests is the wrong side. In one case police prevented, by physical force, men attempting to rescue three children from a burning house on the grounds that they were not trained to do so. They were compelled to wait for the arrival of firefighters. They, alas, arrived too late and the children were burned to death. There have been several such perverse official interventions – which have made "health and safety" a popular synonym in Britain for cruel idiocy. Richard Littlejohn, the *Daily Mail* columnist, has made a specialty of writing about such occurrences.

Any idea of self-protection is discouraged by the authorities and increasingly by the surrounding elite culture. One symptom is the universal hostility in the media to the private ownership of guns and thus its absolute unwillingness outside America even to examine any arguments or statistics that might justify it. I noticed this same feature in the recent Australian coverage of shootings in America.

How likely is it that a populace that is continually encouraged, both verbally and by excessive regulation, to rely on others to protect it will show self-reliance, initiative, and courage when these are needed to save themselves or others. To take one example: would the passengers of United Airlines 93, who fought back on 11 September 2001 for others despite the certainty of death for themselves sixteen years ago, be likely to do the same in sixteen years' time. Not, I fear, if there are any Health and Safety officers on that plane.

How the attempt to change social beliefs by law and regulation pardons the criminal and stigmatises the respectable

Let me now come to the second set of ill-effects. This is produced by laws and regulations that stem not from the cultural beliefs of society but from the cultural beliefs of those in and out of government who want to transform society radically. As commonsense – which is the first target of such reformers – would suggest, a policy of transforming the beliefs of most citizens by law is likely to require much more coercion than one where regulations reflect popular opinions.

We know more about how such experiments work out from abroad than, until recently, from Anglosphere countries. Obvious examples from history are the attempts to create New Soviet Man, Aryan Man, and Yugoslav Man. Eventually these all failed. I recall the late Colm Brogan, a brilliant satirical journalist, justly beloved of Mrs Thatcher, rejoicing in the stories of drunkenness and idleness filtering out of Moscow in the 1960s. They were happy proof, he reasoned, that the Old Adam had triumphed over the New Soviet Man.

Cultural revolutions in the Anglosphere seem to be tamer affairs. They go most obviously under such names as multiculturalism, biculturalism, affirmative action. They re-define such matters as national identity to drain them of historical content and make them into safe social democratic concepts. They identify such new evils as "institutionalised racism" and conduct campaigns against them and those unfortunates in their grip such as the police or the white working class. They arrange a hierarchy of rights in which, say, gay or feminist rights trump the right of a religion to employ believers in sensitive posts. They undermine traditional markers of identity, virtue, and patriotism by treating them as bigotry or worse. And they stigmatize whole social groups such as blue collar workers who are seen as hotbeds of socially conservative bigotry.

But the wholesale transformation of society and social values inevitably goes far beyond these obvious political effects. They seek more wholesale and more subtle changes in social attitudes. To explain, let me cite a judicial quotation:

> It is a principle of English law that a person who appears in a police court has done something undesirable, and citizens who take it upon themselves to do unusual actions which attract the attention of the police should be careful to bring these actions into one of the recognised categories of crimes and offences, for it is intolerable that the police should be put to the pains of inventing reasons for finding them undesirable.

As most of you know, this was once a well-known quotation among lawyers. It is a comic parody that one legal authority took seriously. An American legal textbook in the 1960s cited it as one of the rare cases of English judges making law in the American sense. It is, in fact, an episode in A.P. Herbert's brilliant parodies of *Times* law reports that appeared originally in *Punch*, later

collected as *Misleading Cases*, which I recommend unreservedly and which refutes any argument that legal humor is no laughing matter.

It is *not*, of course, a principle of English law that someone who appears in a police court must have done something undesirable. But it was until recent decades a principle of English culture. That principle was entitled "Respectability." Philosophers and theologians look down on respectability as a tepid imitation of true virtue. Virtue consists of doing good when no-one else is looking; respectability consists of doing good because others *might* be looking. Samuel Butler replied to critics of respectability in *Erewhon*, pointing out that those who rejected respectability as inadequate were usually the very same people who never managed to live up to its unexacting standards.

To return to the main theme, however, appearing in a police court very definitely violated the tenets of respectability in the England of my youth and doubtless in the Australia of that time. But if you are changing society, then you must either undermine respectability or invert it. Thus, we gradually find ourselves reversing what society treats as vicious or virtuous. A new progressive *lumpenintelligentsia*, from kindergarten teachers to Critical Legal Theory lecturers, becomes the vehicle for transmitting these new orthodoxies to ordinary citizens on a regular daily basis. Under this transforming officialdom, respectability becomes a middle class privilege and thus itself a stigma.

At the same time the stigma of appearing in a police court, even of being convicted, is reduced or disappears entirely. Crime becomes a sign that society has offended against the criminal. In order to avoid the appearances of being either enforcers of middle class interests or gripped by institutionalised racism, the police become the paramilitary wing of *The Guardian*.

Initially, at least, parties of the Left are generally the carriers of these ideas. As my late friend from *Daily Telegraph* days, Frank Johnson, said of the UK Labour Party: "They can't nationalise industries anymore; so they nationalise people instead." But, after a while, soi-disant "progressive" members of centre-right parties tend to go along with them as well. And politics slowly evolves into a battle between progressive forces that seek to impose these new versions of respectability on conservative citizens who have to puzzle out what is going on before they can effectively resist indoctrination.

Much follows in train. Social legislation designed on such matters as gay marriage, gender parity, or ethnic proportionalism is passed with only modest resistance because many or even most people see the laws as essentially liberal measures expressing a "live and let live" attitude.

It then turns out, however, that the new laws also demand changes in the social attitudes and opinions of those who still resist the original reforms. Live and let live is replaced by the enforcement of public conformity. Speech opposing or criticising such measures is increasingly regulated, therefore, sometimes in extravagant ways. Thus, Christian bakers have been compelled by the courts not merely to sell cakes for same-sex weddings (itself a reasonable application of anti-discrimination laws) but even to inscribe words celebrating same-sex marriage on them contrary to their own beliefs. Official housing agencies in America have sought to criminalise political opposition to its social housing programs as "racist" and to ban public meetings called to resist them. New crimes are created and ordinary citizens punished for expressing traditional social or religious attitudes.

But whenever some conventional crime or social evil emerges as a major political problem – such as public drunkenness by young people – the notion of punishment disappears. Legal and police authorities propose to deal with it by raising the price of alcohol and running public health campaigns aimed at middle-aged home drinkers. In response to violent crimes, the police strongly warn ordinary citizens from "having a go" to protect their property or to save others from attack. They suggest that ordinary citizens should invest more in burglar alarms etc. In short, regulation of the law-abiding replaces the punishment of criminals as the criterion of wise public policy.

And when ordinary citizens resist or intervene against ordinary criminality, however, and their actions cause the death or injury of the criminals concerned, the police are much more zealous in prosecuting them than in pursuing the crimes of burglary or robbery that caused the fracas in the first place.

Far more punitive attitudes take over when vigilantism, race, religion, or sex are at issue since these are seen as the battle-grounds of government-mandated social change and popular resistance to it. Thus, the US Government knowingly propagates the use of false statistics that greatly exaggerate the incidence of rape, especially on college campuses, and is seeking both to remove traditional procedural protections for defendants accused of rape and to make the definition of rape cover a far larger range of sexual activities. Similarly, the Crown Prosecution Service in the United Kingdom has called for higher rates of conviction in rape cases and issued new instructions for the jury designed to bring this about. These measures reflect the feminist belief (or myth) that rape is less a rare and brutal crime of violence than the extreme end of conventional male sexual behaviour. If implemented wholeheartedly, moreover, it will confirm that view by generating more false rape convictions.

Nor, increasingly, are ordinary citizens even allowed to opt out of government-mandated social attitudes. There is currently a serious campaign, supported by governments and non-government organisations, to remove any right of conscientious objection by doctors and nurses to performing abortions. Abortion used to be a crime. It is now in many countries an individual right, though one defended as "safe, legal, and rare" and regulated in that cautious spirit. In this proposal for restricting conscientious objection, however, abortion is being treated as a public good. If the proposal succeeds, it will effectively compel pro-life doctors to leave obstetrics and other medical specialisms without having committed any professional wrong-doing and in order to further officialdom's promotion of a more than dubious social benefit.

What makes this process of inverting respectability treacherous even for its practitioners, let alone the perplexed majority, is that no one can depend upon the new progressive conventions staying upside down. The 2007 UK documentary for Channel Four, *Undercover Mosque*, demonstrates this almost too completely. Hidden cameras recorded imams in six British mosques calling for the execution of homosexuals, the murder of Jews, the bombing of Indian businesses, the deaths of British soldiers in Afghanistan, jihad against non-Muslims in England, child marriage, "hitting" young women who refuse to wear the hijab, and much else contrary to laws against inciting racial hatred and other liberal values.

On being given the video, the West Midlands Police proposed to "give equal priority" to prosecuting both imams and documentary-makers. After watching 56 hours of video footage, the police and the Crown Prosecution Service then concluded that neither could be prosecuted for lack of evidence but that the documentary had edited the imams' comments unfairly out of

context. As always with this excuse, one wonders what context could have made these comments reasonable. No matter, the imams were out of legal peril.

The police, however, continued the pursuit of the documentary, referring it to Ofcom, the official television regulator, for inciting racial hatred and undermining community safety. Even after Ofcom completely rejected the complaint, praising the documentary's fairness, the police persisted with their attacks on the program. This went on against a background of increasing controversy until the police were forced to withdraw, apologise, and pay a large sum in settlement following an action for libel mounted by Channel Four.

How on earth could such a kettle of absurdities happen? Incitement is a traditional target for legal restraint, usually on the grounds that it might disturb public order or provoke violence against individuals. Expanding the scope of such laws, however, has been part of a general political campaign to smooth the difficulties of the multicultural society and to discourage opposition to its further progress as, for instance, campaigns to restrict migration.

Undercover Mosque exposed a contradiction between these two purposes. There is little doubt that the imams were guilty of inciting racial hatred under a traditional interpretation rooted in preserving order; by pointing it out, however, the documentary-makers were guilty of undermining community cohesion and multiculturalism. It took some wriggling, but the police and the CPS plainly showed a preference for the second purpose. If the plain facts of the case (and public opinion) had not been on the side of Channel Four and Ofcom, this preference might well have prevailed.

Community cohesion, avoiding "bias," and other catchwords of multiculturalism are powerful *juju* in modern progressive bureaucracies, including those customarily thought to be conservative like the police. The Brits saw their mystical power in the recent urban scandals in which the police and local bureaucrats actually collaborated with gangs of Muslim rapists to coerce young white working-class girls into prostitution for fear of accusations of racism from "community leaders." Australians have still more recently learned that in the Martin Place siege (2014) the Sydney police gave at least equal priority to avoiding "bias crimes" against Muslims as to saving the lives of the hostages. As the television detectives say about serial killers, there's a pattern here.

And with every step in this progress, ordinary citizens become more alienated and hostile to the society they once felt was home. At best they withdraw into a private place. Social evils grow but the authorities are psychologically unable to tackle them seriously. Eventually, people rebel and social transformation meets more determined resistance. Whether that social transformation then comes to an end or resumes after a pause is not yet certain.

How post-modern belief that truth and justice are merely masks for the exercise of power creates an ideological tyranny

My third point will be very brief. It consists really of a paragraph from Orwell's 1941 essay, "England Your England." Orwell wrote:

> The hanging judge, that evil old man in scarlet robe and horse-hair wig, whom nothing short of dynamite will ever teach what century he is living in, but who will at any rate interpret the law according to the books and will in no circumstances take a money bribe, is

> one of the symbolic figures of England. He is a symbol of the strange mixture of reality and illusion, democracy and privilege, humbug and decency, the subtle network of compromises, by which the nation keeps itself in its familiar shape.

In a saner world, in an earlier England or Australia, that might very well have been the opinion held by, say, Bill Shorten or Dyson Heydon: namely, someone whose social and political views were unacceptably reactionary but who was a rock of integrity who would never allow his decision on the case before him to be influenced by his political sympathies. Maybe Shorten does privately hold that view – though he has strong personal incentives to disguise it from himself and from others.

But it is instructive that a socialist like Orwell could think and say what no ambitious left-wing politician could think or say today. The difference is explained by the triumph among progressives of post-modern views skeptical of the very notions of truth and justice which they see as mere masks for power and oppression.

Those views have made great progress in legal circles through the influence of Critical Legal Theory in the United States. They have made it possible for judges throughout the Anglosphere to think it reasonable and even virtuous to interpret the law in such a way as to impose their own personal political views on society. When the prevailing public opinion is that judges only interpet the laws, any damage is limited. Unrestrained by that, the notion of justice-as-power undermines the very notion of law and makes both law and politics arenas for conflict without end and ultimately without compromise. Orwell again:

> In England such concepts as justice, liberty and objective truth are still believed in. They may be illusions, but they are very powerful illusions. The belief in them influences conduct, national life is different because of them. In proof of which, look about you.

I do not think truth and justice are illusions. But even if they are, we have a duty to fight to restore their cultural supremacy in law schools and in society. That is what The Samuel Griffith Society exists to do – and why it deserves your support. And mine.

Chapter 2

Why Conservatives and Progressives Think Differently
Insights from Moral Psychology

James Dalziel

If politics is the art of compromise or, as Bismarck wrote, "the art of the possible," then how should we rate modern Western politics? A recent analysis of party polarisation in the United States from 1879 to 2014[1] notes that the distance between parties in 2014 was at an all time high, and substantially greater than the period from the mid-1930s to the mid-1970s. Various local commentators have observed increased polarisation in recent Australian politics.[2]

No doubt there are many reasons for the increasing polarisation and partisanship of recent politics arising from the changing nature of society, including changes in technology, education, journalism, law and religious beliefs. But can recent research in moral psychology, led by the distinguished American psychologist Jonathan Haidt[3] (pronounced "height"), help us to understand the reasons for the growing divide between progressives[4] and conservatives better?

Moral Foundations Theory

Haidt provides a new psychological explanation for the problems of political partisanship in his book, *The Righteous Mind*.[5] The central concept of the book is that many of the divisions in modern politics and society arise from disagreements about underlying moral values – in particular, how progressives and conservatives prioritise different moral values compared to each other. The core theory of Haidt and his colleagues is called "Moral Foundations Theory." It describes six foundational moral values, each conceived as a continuum between opposites:

1. Care/Harm

Based on our ability to feel (and dislike) the pain of others. It underlies virtues of kindness, gentleness, and nurturance. "Do unto others as you would have them do unto you."

2. Liberty/Oppression

Based on our reaction to those who dominate others and restrict their liberty. The hatred of bullies and dominators motivates people to come together, in solidarity, to oppose oppressors.

3. Fairness/Cheating

Based on our desire for meritocracy and proportionality. People should receive the just rewards or punishments for their actions.

4. Loyalty/Betrayal

Based on our affiliations with groups, family and nation. It underlies virtues of patriotism and self-sacrifice for the group. It is active anytime people feel that it is "one for all, and all for one."

5. Authority/Subversion

Based on a recognition of hierarchy in social interactions. It underlies virtues of leadership and followership, including deference to legitimate authority and respect for traditions.

6. Sanctity/Degradation

Based on striving to live in an elevated, less carnal, more noble way. It underlies the widespread idea that the body is a temple that can be desecrated by immoral activities and contaminants (an idea not unique to religious traditions).[6]

Haidt argues for this particular set of six moral values from both cross-cultural anthropology and evolutionary psychology perspectives.[7] While different sets of foundational morals can be proposed, the set of six presented by Haidt and his colleagues[8] is sufficient to illustrate some striking aspects of political polarisation. His survey findings from more than 100 000 people across many different countries provide quantitative depth for his findings.

The first striking finding is the differences between progressives and conservatives across these six moral foundations, based on results from the Moral Foundation Questionnaire, a survey constructed using Moral Foundation Theory. Haidt has used a number of metaphors to describe the differences[9], but I think the most useful is to imagine the six dimensions as being like sliders on an audio equaliser, with a higher slider setting representing a greater degree of importance. Figure 1 illustrates average differences between progressives and conservatives in this way[10].

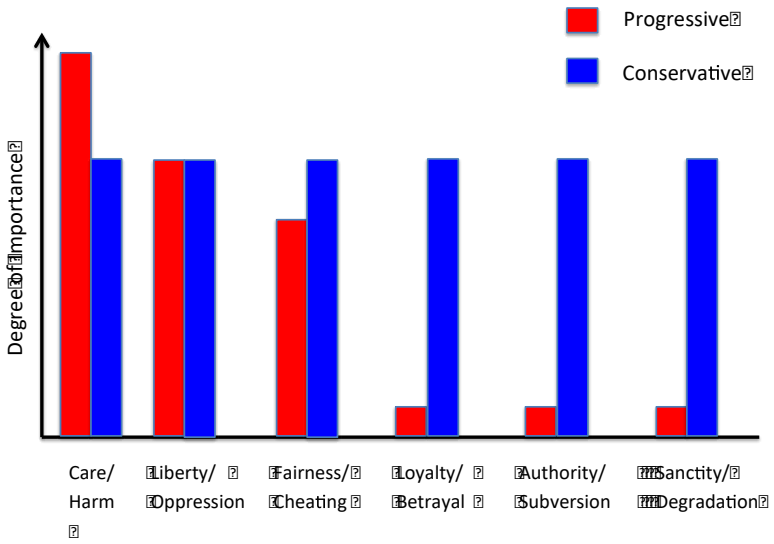

Figure 1: Graphical representation of the average differences between progressives and conservatives on the Moral Foundation Questionnaire

By way of clarification, the words liberty and fairness are often interpreted differently by progressives and conservatives. Concerning fairness[11], Haidt says:

Everyone cares about fairness, but there are two major kinds. On the left, fairness often implies equality; but on the right it means proportionality – people should be rewarded in proportion to what they contribute, even if that guarantees unequal outcomes.[12]

Hence, fairness for progressives often means that those who have suffered (that is, have experienced unfair life events) should be helped; whereas fairness for conservatives means people should receive the just rewards (or lack thereof) of their actions. Put another way, progressive fairness is about equality of outcomes, whereas conservative fairness is about equality of opportunity. Concerning liberty, Haidt says:

> Everyone – left, right, and centre – cares about Liberty/Oppression, but each political faction cares in a different way. In the contemporary United States, [progressives][13] are most concerned about the rights of certain vulnerable groups (e.g., racial minorities, children, animals), and they look to government to defend the weak against oppression by the strong. Conservatives, in contrast, hold more traditional ideas of liberty as the right to be left alone, and they often resent [progressive] programs that use government to infringe on their liberties in order to protect groups that [progressives] care most about.[14]

Even allowing for various potential qualifications about definitions, the size of the differences between progressives and conservatives, and the consistency of the data over many different contexts and countries, suggests that Moral Foundation Theory is a valuable new "toolkit" for understanding differences in the thinking of progressives and conservatives.[15]

When progressives try to imagine the moral concerns of conservatives

Haidt and colleagues conducted a fascinating follow-up study in which a subset of subjects was asked to answer the Moral Foundations Questionnaire as if they were a "typical [progressive]" or a "typical conservative". In other words, progressive voters had to imagine how a conservative would fill out the questionnaire, and vice-versa. Haidt says:

> The results were clear and consistent. Moderates and conservatives were most accurate in their predictions, whether they were pretending to be [progressives] or conservatives. [Progressives] were the least accurate, especially those who described themselves as "very [progressive]". The biggest errors in the whole study came when [progressives] answered the Care and Fairness questions while pretending to be conservatives. When faced with questions such as "One of the worst things a person could do is hurt a defenceless animal" or "Justice is the most important requirement for a society", [progressives] assumed that conservatives would disagree.[16]

In other words, progressives find it more difficult to grasp the moral concerns of conservatives than the other way around. Given that three of the six morals (Loyalty, Authority and Sanctity) rate low for progressives (to the point where some progressives do not consider these to be moral values in the first place), then a lack of understanding of these moral values might be understandable. But it is not only these values that are a problem. Indeed, the biggest divergence between what conservatives actually believe and what progressives think that conservatives believe was on the morals of Care and Fairness.

It is perhaps ironic that these findings suggest that progressives struggle to understand the moral concerns of their political opposites more than the other way around, particularly when some progressives see conservatives as less politically and intellectually astute than progressives.

Does academia need more ideological diversity?

In 2011, Haidt gave a presentation to the annual conference of the United States-based Society of Personality and Social Psychology in Texas. In it he noted that the field of social psychology (which incorporates moral psychology) sometimes conducts research on contentious political issues, such as race and gender. When Haidt asked the political orientations of his audience, approximately 800 identified as [progressives] (about 90 percent of those in attendance), 20 as centrists/moderates, 12 as libertarians and three as conservatives. That is, only a tiny fraction of social and personality psychologists identify as conservative, while a third to a half of the general population of the United States identifies as conservative.

Haidt argued that this is a problem, not for moral or ethical reasons (although this case could be made), but for scientific reasons. Critical review from a variety of perspectives is essential to effective science, but the range of critical perspectives in social psychology was limited by the lack of political diversity within the field – primarily due to the low number of centrist/moderate and conservative psychologists. Haidt also suggested that the range of topics studied within social psychology may be limited primarily to those topics of interest to progressives.

Haidt stressed that he was not making an argument for ideological equality (for example, that half of social psychologists needed to be conservative), but rather that, without a critical mass of competing viewpoints on contentious issues, any scientific field runs the risk of having insufficient critical thinking. This may limit detection of flaws in logic, experimental design and interpretation of data, leading to sub-optimal scientific outcomes for the field as a whole.

He concluded his presentation with a number of suggestions for addressing the problem, including a somewhat tongue-in-cheek suggestion of an affirmative action policy for appointing conservative psychologists, with a goal of 10 percent by 2020.

Following this talk, there was a significant response in the wider media, much of it highly critical, so Haidt decided to document the overall experience on a public webpage called "Post-Partisan Social Psychology."[17] The website provides his original presentation, together with a wide range of articles responding to his ideas. Haidt then analyses the responses and provides a variety of research evidence to address the various criticisms of his talk. Of particular note are a number of quantitative studies demonstrating discrimination against conservative academics and students in some areas of academia.

One of the most arresting aspects of the wider debate was negative comments posted on stories about the presentation. Haidt captures the essence of some responses as "there's no discrimination against conservatives, and those stupid, narrow-minded creationists could never be scientists anyway." He then notes:

> Megan McArdle, at *The Atlantic*, wrote a balanced blog post on the controversy: Unbiasing Academia[18]. But she was shocked by the vehemence of many [progressive] commenters on that post. She then wrote a second post (What Does Bias Look Like?[19]) in which she takes these commenters to task. This is a deep and nuanced examination of the nature of biased thinking. For example, she notes that many of the commenters select the narrowest possible definition of bias, use it to acquit their side of bias, and then go on to blame the victims of the bias for deserving the bias. She notes that this is the same rhetorical strategy normally used to deny and then justify racism. As she puts it: "So while in theory, it's true

> that you can't simply reason from disparity to bias, I have to say that when you've identified a statistical disparity, and the members of the in-group immediately rush to assure you that this isn't because of bias, but because the people they've excluded are all a bunch of raging assholes with lukewarm IQ's . . . well, I confess, discrimination starts sounding pretty plausible."

The message of Haidt's website, taken as a whole, could be paraphrased as follows: "Is there any better evidence for the problem of bias against conservative ideas in social psychology than the very response I received when I tried to point out the problem of bias against conservative ideas in social psychology?"

Haidt also noted that an interesting aspect of the experience was the number of academics and students who contacted him privately to share their own negative experiences with some progressive academics. In particular, conservative students said they often remained silent in class discussion, or felt discriminated against when they voiced their conservative views.

To take a December 2014 example, consider the US progressive academic (a Head of Department at a prestigious university) who felt comfortable to write publicly. "I hate Republicans",[20] and to justify this view with reference to the psychological flaws of conservatives. As a progressive colleague said to me about this article, "I typically have so little sympathy for US Republicans, but wow, imagine being a right-wing youngster in one of her classes." It is perhaps understandable that conservative students find some aspects of modern academic life chilling.

Haidt and a number of colleagues have just written a detailed analysis of the problems of bias in social psychology for a leading psychology journal.[21] This article expands on the ideas covered on the website, and provides more examples of how the dominance of progressive political views can affect the scientific quality of social psychological research. They note that universities have successfully addressed discrimination and promoted diversity in many other areas, but are struggling with fostering "ideological diversity." The irony is that ideological diversity is unpalatable to a growing number of progressive academics, and yet it would seem an essential kind of diversity for a university.

While it is beyond the scope of the current paper, it is worth noting that psychology is not the only field where the dominance of progressive views has recently been discussed, for example, Christian Smith's critique of sociology[22] and the backlash against Mark Regnerus (Smith's PhD student) about a study showing, on average, poorer adjustment outcomes for children of same sex couples compared to heterosexual couples.[23] Other disciplines where similar concerns to those identified by Haidt in social psychology could include anthropology, education[24], various fields with the title "[topic] studies", and some areas of the humanities. By contrast, there has been a significant debate in economics about the perceived conservative bias of parts of this discipline (for example, the history of political economy at the University of Sydney,[25] and the recent student walkout from a Harvard economics course by Greg Mankiw, a leading professor of economics[26]).

At the conclusion of their recent article, Haidt and colleagues note that psychology, of all disciplines, should be well placed to address bias within its own field, as psychological research provides tools for addressing bias:

> Fortunately, psychology is uniquely well-prepared to rise to the challenge. The five core

> values of [the American Psychological Association] include "continual pursuit of excellence; knowledge and its application based upon methods of science; outstanding service to its members and to society; social justice, diversity and inclusion; ethical action in all that we do." (APA, 2009). If discrimination against non-liberals exists at even half the level described in section 4 of this paper, and if this discrimination damages the quality of some psychological research, then all five core values are being betrayed. Will psychologists tolerate and defend the status quo, or will psychology make the changes needed to realize its values and improve its science? Social psychology can and should lead the way.

The debate about ideological diversity in academia is not limited to the research conducted in specific disciplines – it is also at the heart of a growing number of cases where academics, students and invited guests with non-progressive views have been prevented from speaking at universities. In some cases they have been disinvited from giving a graduation speech, in other cases seminars to debate a controversial issue have been stopped by university administrators, often due to a concern that discussion of controversial non-progressive views may cause offence or be harmful to some students. Where controversial debates do go ahead, conservative speakers are sometimes unable to speak (or finish speaking) due to loud or violent protests.

There has also been a rise in the use of "trigger warnings" for some university courses, to warn students of content that some may find distressing (e.g., some of the cases considered in a legal course on sexual assault), and some students now demand the inclusion of trigger warnings on all courses.

In the past year there have been a growing number of popular articles that describe and analyse this rapidly spreading phenomenon, such as by Jonathan Chait,27 Steven Hayward,28 Wendy Kaminer,29 Edward Schlosser30 and The Economist.31 Jonathan Haidt, together with Greg Lukianoff, have addressed this in "The Coddling of the American Mind" in the September 2015 issue of The Atlantic.32 These articles provide examples of how the dominant progressive views of many university academics, students and administrators are affecting the opportunities for discussion of controversial non-progressive ideas in some areas of academia.

Given that "Care" is the dominant moral value of many progressives (see Figure 1), it is not surprising that Care will sometimes trump Liberty (in the form of free inquiry and free speech) when the two come into conflict in the university world of today. While the dominance of progressive views in academia is not a new phenomenon (although it does appear to have increased recently33), the many examples given in the articles cited above suggest that universities are currently changing in a profound way as "harmful" ideas become unspeakable, not just undesirable.

It is troubling that society's institution for the pursuit of truth and understanding, the university, has reached a point where the dominant moral value of many of its members is not Liberty, in the form of free inquiry, but Care. Going further, moderates and conservatives who might provide an alternative view to this ideological milieu are under-represented in some discipline areas34 and, according to Haidt's data, conservative academics and students experience active discrimination.35 This poses a problem not just for universities, but for the societies they serve.

Controversial social issues and Moral Foundations Theory

Finally, Moral Foundations Theory can be used to analyse controversial social and political issues in contemporary society, as many of these issues arise from a conflict between two (or more) moral values where progressives and conservatives prioritise these values in different ways. Figure 2 provides a graphical way of thinking about where these conflicts lie.

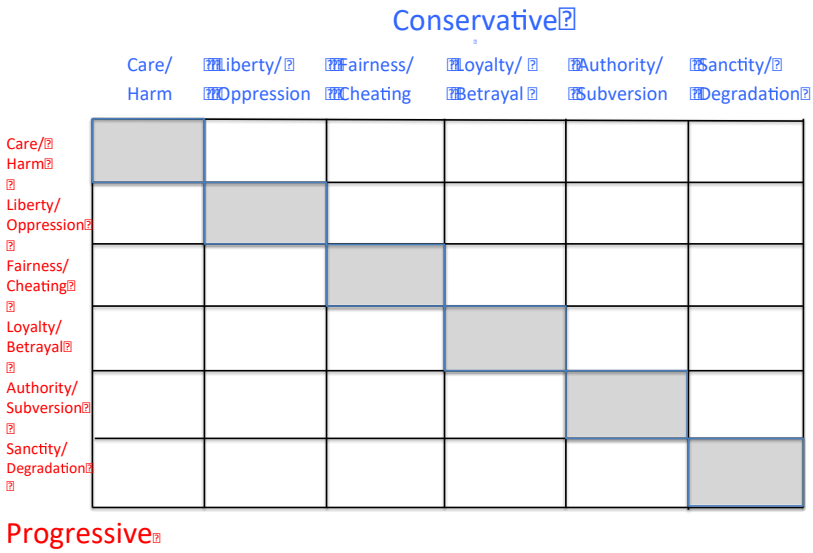

Figure 2: A table for analysing conflicting moral values between progressives and conservatives on moral issues, based on Moral Foundations Theory

Consider a contentious issue in the United States – that of gun control. Debate over gun control is primarily a matter of Care for many progressives, while it is primarily a matter of Liberty for many conservatives, and hence debate on this topic can be located in the second cell of the top row of the table. Many other political and moral debates between progressives and conservatives can be analysed using this table better to understand the primary moral drivers of each side of a given debate.

Given the controversial nature of many potential topics, the many conflicting issues that may be involved, and the wide range of differences in personal views compared to broader ideological groups, the purpose of this table can be easily misunderstood. Its goal is simply to attempt to identify where two moral values may be in conflict over a contentious issue, and which moral value is most important to different groups in society. In some cases an issue won't be able to be reducible to a single cell within the table (although, even then, it may be possible to gain better understanding of the views of others from the process of attempting to locate the focus of the debate on the table).

The Constitution, Law and Moral Foundations Theory

How, then, might the insights of Moral Foundations Theory be applied to the Australian Constitution (and by extension, other countries' constitutions)?[36] From the perspective of Moral Foundations Theory (especially Figure 1), a constitution has an implicit collection of settings on the "audio equalizer" of moral values. Indeed, many debates on moral issues in legal contexts arise from conflicts between two or more moral values, and hence judges are required to weigh

up the relative importance of each relevant moral value in order to come to a decision. Ultimately, these decisions rely on individual and collective legal interpretations of the relative priorities of different moral values implicit, and sometimes explicit, in a constitution.

Human rights laws may pose an interesting challenge for this process. Nick Cater has provocatively argued[37] that the importation of human rights laws into the Australian legal system has set up potential conflicts between the Constitution and existing laws, and the new human rights laws, which are often adopted due to extra-territorial legal developments (such as United Nations declarations). It is possible that the implicit audio equalizer settings of moral values are different between the Constitution and existing laws and the new human rights laws, and, if so, how are the differences in prioritisation of moral values to be resolved between potentially competing legal frameworks? Moral Foundations Theory may provide a new "toolkit" for analysing these legal issues in Australia (and elsewhere).

Conclusion

Chesterton, writing in another context more than a hundred years ago, captured much of the modern challenge arising from conflicting moral values:

> When a religious scheme is shattered (as Christianity was shattered at the Reformation), it is not merely the vices that are let loose. The vices are, indeed, let loose, and they wander and do damage. But the virtues are let loose also; and the virtues wander more wildly, and the virtues do more terrible damage. The modern world is full of the old Christian virtues gone mad. The virtues have gone mad because they have been isolated from each other and are wandering alone. Thus some scientists care for truth; and their truth is pitiless. Thus some humanitarians only care for pity; and their pity (I am sorry to say) is often untruthful.[38]

Like Haidt, it is my hope that Moral Foundations Theory provides a new toolkit for understanding moral differences in society. By fostering greater understanding of the moral perspectives of others, it can lead to a more harmonious society, where care and truth (and other moral values) can co-exist. It may also provide a framework for thinking about the relative moral priorities implicit in the Constitution of Australia and other laws.

Endnotes

1. PolarizedAmerica.com – see especially http://polarizedamerica.com/images/polar_housesenate_difference_2014.png Another study about polarisation in the United States has shown that political animosity now exceeds racial biases – see http://news.stanford.edu/news/2014/october/dems-gop-polarized-10-08-14.html

2. For example, at the end of 2013, a former Australian Federal Senator captured the local mood in this way when reviewing Haidt's book: "If you look back over the political year, undoubtedly hate will show up in a fairly prominent way. When the Howard Haters enjoyed their moments in the sun, the commentariat sat quietly by. Perhaps they enjoyed the petty little jibes about his eyebrows, or his lips, or whatever. Then the Rudd Haters emerged. It was a difficult birth for this group because so many of them were in his own party. Then we saw a new and energetic group coalesce as the Gillard Haters. They got

more than their fair share of attention because there are some who apparently think it is fine to heap scorn on blokes but not so on women. Our political landscape is the poorer for all this. It is simply primal bloodletting. It adds nothing of substance to the discussion of issues. Nor is it smart. Why, then, do we see so much of it?" *See* http://www.smh.com.au/comment/ditching-the-hate-would-improve-debate-20131222-2zsti.html

3. Apart from the Haidt's research described in this paper, he has also written about links between traditional religious ideas and positive psychology (see J. Haidt, *The happiness hypothesis: Finding modern truth in ancient wisdom*, Basic Books, 2006) and other research on moral psychology not covered here concerning moral intuition and reasoning (see Haidt, J., "The new synthesis in moral psychology." *Science* 316.5827 (2007): 998-1002, or ch1-4 of *The Righteous Mind*). His latest research (not yet published) is on different moral narratives about capitalism: "Capitalism as exploitation" versus "Capitalism as liberation" – see http://righteousmind.com/why-economists-dont-agree/

4. This paper uses the categories "progressives" and "conservatives" to refer to voters who choose the views associated with Left and Right political ideologies respectively. In Haidt's US context, he often uses "liberal" in place of progressive, but this can be confusing in an Australian context where the Liberal Party of Australia is a right-wing party.

5. J. Haidt, *The Righteous Mind: Why good people are divided by politics and religion,* Vintage, 2012. For a wide range of articles, interviews and related resources, see the book's accompanying website: http://www.righteousmind.com/ One of the best starting points is Haidt's interview with Bill Moyes – see https://vimeo.com/36128360.

6. Text adapted from *The Righteous Mind*, especially chapter 7 and http://www.moralfoundations.org.

7. While Haidt gives a detailed defence of the theoretical basis of Moral Foundations Theory in *The Righteous Mind*, I must admit I do not always find the arguments from evolutionary psychology to be completely persuasive – as with some evolutionary psychology (and evolutionary biology) arguments, these can be at risk of proposing theories about past development to explain current observed states which cannot be falsified (see Karl Popper, "The Logic of Scientific Discovery"). Also, there can be a tendency implicitly to ascribe a purposeful evolutionary teleology to current observed states, when a given state may be entirely a by-product of some other unrelated development (see Richard Lewontin, "Biology as Ideology"). My view is that most of the moral behaviours that Haidt explains with evolutionary psychology can also be explained with a social learning theory (with the exception of some of Haidt's research on disgust). However, the practical value of Haidt's data for understanding political polarisation remains even if some of the underlying theoretical model can be explained in different ways.

8. For a detailed discussion of Moral Foundations Theory, including comparisons with other moral theories, and exploration of other possible foundations beyond the six described, see Graham, J., Haidt, J., Koleva, S., Motyl, M., Iyer, R., Wojcik, S., & Ditto, P. H. (2013), "Moral Foundations Theory: The pragmatic validity of moral pluralism". *Advances in Experimental Social Psychology*, 47, 55–130. I would agree with the authors that honesty/dishonesty looks promising as an additional foundation, and I would suggest another possibility in honour/shame, especially for understanding some historical (for example, Ancient Roman) and non-Western cultures.

9. In *The Righteous Mind*, Haidt uses the metaphor of six moral "taste buds" (see chapter 6) – but, in my experience, this metaphor can be unhelpful for those who are new to Haidt's research, as it can imply a kind of trivial "menu-like choice" among moral values which sits uneasily with the powerful feelings most people have about moral values. On p. 297, 302 and 306 Haidt provides a different graphical representation to the "audio equalizer" metaphor, but it does not convey the differences between political orientations in a single graphic. In my view, the best illustration of Moral Foundations Theory is Haidt's "sliders on an audio equalizer" metaphor as used in his interview with Bill Moyes (see 17:30 and onwards) at https://vimeo.com/36128360. It is worth noting that Figure 1 is a summary and metaphor for the actual data – for details see chapter 8 and related research articles. One criticism of the slider representation I have heard from progressive colleagues is that the total "amount" of space given to all progressive morals is less than the total "amount" of space given to all conservative morals, which visually implies that conservatives have "more morals" than progressives, which is an unhelpful by-product of this representation. Further research is needed to explore this issue, and potentially a revised visual presentation is needed which shows equal total "amounts" of morality for both approaches (just distributed in different ways across the categories according to the pattern identified).

10. For further details, see chapter 8 of *The Righteous Mind*. The survey is publicly available at http://www.yourmorals.org/ Any given individual may have quite different scores and may not at all fit the pattern aligned to their voting preference, but the results illustrate typical averages across those who identify as progressive and conservative voters. Note that conservative in this case does not include libertarian, who have a quite different pattern with a lower average Care score and a very high average Liberty score. Interestingly, Haidt notes that the pattern exists not just in Western countries, but in all countries he has studied to date where he has sufficient data (see chapter 8, footnote 5 and his 2008 TED talk).

11. In Haidt's earlier five category moral framework, his survey questions about Fairness included aspects of Liberty/Oppression and more progressive concepts of fairness (fairness as equality, not just proportionality), which led to higher scores for Fairness by progressives than for conservatives in the earlier research (for example, Figure 8.2, *The Righteous Mind*, 161). However, once Haidt and his colleagues revised the theory and survey to incorporate Liberty/Oppression as a sixth category, the Fairness dimension was revised to make it primarily about proportionality. This is the basis for the moderate scores for progressives compared to the higher scores for conservatives in Figure 1, which is based on the later research. Some of Haidt's early presentations on Moral Foundations Theory use the five category model and the earlier data, for example, his 2008 TED talk – see http://www.ted.com/talks/jonathan_haidt_on_the_moral_mind?language=en.

12. *The Righteous Mind*, chapter 7, 138.

13. I have replaced "liberal" in Haidt's original text with "progressive" to make it clearer for an Australian readership.

14. *The Righteous Mind*, chapter 8, 182. In a footnote at the end of this quote (56) Haidt explains this further as follows: "Berlin 1997/1958 referred to this kind of liberty as 'negative liberty' – the right to be left alone. He pointed out that the Left had developed a new concept of 'positive liberty' during the twentieth century – a conception of the rights and resources that people needed in order to enjoy liberty."

15. In one sense, the usefulness of this theory and data is independent of the researcher, but given that questions about political (and religious) orientation are so common when discussing this topic, it is worth noting that Haidt describes himself as coming from a progressive background, but as a result of doing this research, he now considers himself a centrist and, more importantly, that he has tried to step back from having partisan interests in politics in order to understand the ideas of all sides better. In terms of religion, Haidt identifies as an atheist, coming from a Jewish background raised in New York.

16 *The Righteous Mind*, chapter 12, p. 287.

17. http://people.stern.nyu.edu/jhaidt/postpartisan.html.

18. http://www.theatlantic.com/national/archive/2011/02/unbiasing-academia/70955/

19 http://www.theatlantic.com/national/archive/2011/02/what-does-bias-look-like/71153/

20. http://inthesetimes.com/article/17426/we_cant_all_just_get_along

21. http://journals.cambridge.org/images/fileUpload/documents/Duarte-Haidt_BBS-D-14-00108_preprint.pdf.

22. Smith, Christian, *The sacred project of American sociology*, Oxford University Press, 2014.

23. http://chronicle.com/article/An-Academic-Auto-da-F-/133107/

24. Given my own research interests in the past decade have been primarily in education, it will be interesting to apply Moral Foundations Theory to issues in schooling and higher education. For some early ideas on using Moral Foundations Theory in teacher training, including the use of online training resources, see J. Dalziel, (2014). Implementing Developing Scenario Learning with Branching for Moral Values in Teacher Training. http://lams2014.lamsfoundation.org/docs/paper3.pdf .

25. http://www.bmartin.cc/pubs/86is/JonesStilwell.html

26 http://harvardpolitics.com/harvard/an-open-letter-to-greg-mankiw/

27. http://nymag.com/daily/intelligencer/2015/01/not-a-very-pc-thing-to-say.html.

28. http://www.nationalreview.com/article/413675/grievance-school-steven-f-hayward.

29 https://www.washingtonpost.com/opinions/the-progressive-ideas-behind-the-lack-of-free-speech-on-campus/2015/02/20/93086efe-b0e7-11e4-886b-c22184f27c35_story.html.

30. http://www.vox.com/2015/6/3/8706323/college-professor-afraid.

31. http://www.economist.com/news/united-states/21654157-student-safety-has-become-real-threat-free-speech-campus-trigger-unhappy.

32. http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/.

33. https://www.insidehighered.com/news/2012/10/24/survey-finds-professors-already-liberal-have-moved-further-left.

34. There is considerable debate on the reasons for this under-representation. Apart from a discrimination-based argument, there are other compelling arguments such as self-selection: Neil Gross provides a detailed exploration of this view in *Why are professors liberal and why do conservatives care?*. Harvard University Press, 2013.

35. See http://people.stern.nyu.edu/jhaidt/postpartisan.html. While it is beyond the scope of the current paper, it is also worth noting other groups that potentially experience discrimination at universities are conservative religious groups, for example, Yancey, George and David A. Williamson, *So Many Christians, So Few Lions: Is There Christianophobia in the United States?*. Rowman & Littlefield, 2014.

36. Given my limited legal expertise, these comments are made tentatively, and should be regarded with considerable caution until legal scholars can evaluate the ideas presented.

37. Nick Cater, *The Lucky Culture: and the Rise of an Australian Ruling Class*. (2013) – especially chapter 12.

38. Gilbert Keith Chesterton, *Orthodoxy,* Moody Publishers, 1908/2013.

Chapter 3

Implied Freedoms and Political Donations
The *Unions NSW* and *McCloy* cases

David Tomkins

Since its enactment the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) (hereafter the "*EFED Act*") has been amended 17 times to date (including a name change in 2008).[1] Some of these amendments have been relatively minor, others more substantial. Some have been more politically controversial than others. Perhaps not surprisingly, it is some of the most politically controversial amendments to the *EFED Act* which were the subject of constitutional challenge in *Unions NSW v State of New South Wales*[2] and *McCloy v State of New South Wales*.[3] In *Unions NSW* the High Court held that section 96D of the *EFED Act,* which made it unlawful to accept a political donation unless the donor was on the electoral roll, and section 95G(6), which included spending by an affiliated organisation in a political party's cap on electoral communication expenditure, fell foul of the implied freedom of political communication in the Commonwealth Constitution.[4] In *McCloy* the High Court has heard argument on whether sections 96GA and 96GB (a ban on political donations by "prohibited donors," in particular from property developers), section 95B (caps on political donations) and section 96E (restrictions on indirect campaign contributions) similarly fall foul of the implied freedom of political communication. Judgment in *McCloy* is currently reserved.

Legislative background

In 2008 section 96E was inserted into the *EFED Act*, prohibiting certain indirect campaign contributions. In 2009, a new Division 4A (sections 96GA – 96GE) was inserted into Part 6 of the *EFED Act*,[5] in particular banning political donations by property developers. As enacted in 2009, section 96GA made it unlawful both for property developers to make political donations and for others to accept a political donation from a property developer. In 2010 this ban on political donations by property developers was expanded to include donations by tobacco, liquor and gambling industry business entities as well.[6] At the same time new divisions 2A (sections 95AA – 95D) and 2B (sections 95E – 95J) were inserted into Part 6 of the Act.[7] Division 2A of Part 6 places caps on political donations in State elections (for example, section 95A sets a cap of $5 000 for donations to registered parties and to groups and a cap of $2 000 to candidates, to unregistered parties and to third-party campaigners) while Division 2B of Part 6 places a cap on electoral communication expenditure in State election campaigns (for example, section 95F(2) sets a cap per party of $100 000 per electoral district in which an endorsed candidate stands, meaning that a party endorsing candidates in all 93 seats of the Legislative Assembly would be allowed to spend a maximum of $9.3 million on electoral communication in a State general election).

Following a change in government after the March 2011 New South Wales State election, section 95G was amended in 2012 by adding subsections (6) and (7) to include "affiliated

organisations" in the calculation of a party's electoral communications spending cap. As originally enacted in 2010, section 95G placed a cap on the amount of money registered political parties could spend on electoral communication; as a result of the 2012 amendments this cap on a party's electoral communication spending would now also include spending by affiliated organisations (notably by trade unions affiliated with the ALP). Also amended in 2012 was section 96D. Prior to this, section 96D had made it unlawful to accept a political donation unless the donor was on the electoral roll or was an entity with a "relevant business number" (that is, an ABN or some other number allocated or recognised by the Australian Securities and Investments Commission for the purposes of identifying the entity). The 2012 amendment to section 96D removed reference to donations from entities with a "relevant business number," leaving only persons on the electoral roll able to make political donations.

Factual background to the *Unions NSW* and *McCloy* cases

The 2012 amendments (which were introduced by a Liberal-National Coalition Government) quite clearly had an adverse impact on trade unions and the Australian Labor Party, the latter of which has long relied on affiliated trade unions for donations and campaign support. Section 96D had the effect of preventing all trade unions from making political donations; in addition, the provision as amended in 2012 also covered corporations and all natural persons not on the electoral roll. Section 95G(6) had the effect of including in the ALP's electoral communication spending cap expenditure by trade unions affiliated with the ALP.

Unions NSW and a number of trade unions sought to challenge the constitutional validity of the 2012 amendments to sections 95G(6) and 96D. They argued that these provisions were outside the power of the New South Wales Parliament to enact on account of the implied freedom of political communication in the Commonwealth Constitution or, alternatively, an implied freedom of political communication in the *Constitution Act* 1902 (NSW) or an implied freedom of association under the Commonwealth Constitution.

The High Court challenge to the 2008-10 amendments (which were introduced by a Labor Government) in *McCloy* came about less directly. In August 2014, during the course of hearings arising out of the Independent Commission Against Corruption's (ICAC's) Operation Spicer, it was revealed that two Liberal members of the New South Wales Legislative Assembly — Tim Owen, the member for Newcastle, and Andrew Cornwell, the member for Charlestown — had accepted political donations as candidates in the 2011 State election from Jeffery McCloy, a local property developer (who at the time of the ICAC hearings was the independent Lord Mayor of Newcastle), contrary to the *EFED Act*. In light of these revelations Owen and Cornwell resigned their seats in the Legislative Assembly; McCloy resigned the Lord Mayoralty. McCloy, however, together with two related companies, subsequently launched a High Court challenge to the constitutionality of the various provisions of the *EFED Act* which had rendered the donations to Owen and Cornwell unlawful, viz. section 96GA (the ban on political donations by prohibited donors — in this case property developers), section 95A (caps on political donations) and section 96E (the outlawing of certain indirect campaign contributions). Just as the trade unions had argued in respect of the 2012 amendments in *Unions NSW*, McCloy argued that the 2008-10 amendments were outside the power of the New South Wales Parliament to enact on account of the implied freedom of political communication under the Commonwealth Constitution.[8]

Constitutional background: implied freedom before *Unions NSW*

The implied freedom of political communication was first held by the High Court to exist in *Nationwide News v Wills*[9] and *Australian Capital Television v Commonwealth,*[10] a pair of decisions in which judgment was handed down on the same day. Its existence was controversial at the time and has remained so. In *Australian Capital Television* Justice Daryl Dawson strongly dissented, arguing that no such implication could or should be drawn from the Constitution.[11] More recently, the implication's existence has been subject to judicial criticism by Justice Ian Callinan in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[12] and by Justice Dyson Heydon in his final judgment on the High Court in *Monis v The Queen*.[13]

The implied freedom has also been the subject of considerable academic criticism.[14] In spite of this, the implied freedom of political communication now appears to be a prominent feature of the Australian constitutional landscape and it seems unlikely that the High Court would seek to re-open the fundamental question of its existence. As Williams, Brennan and Lynch have noted, the "rejectionist strain of thought" on the High Court espoused by the likes of Justices Dawson, Callinan and Heydon JJ "is an isolated position and the unanimous judgment in *Lange* appears to have successfully entrenched the implied freedom in Australian constitutional law."[15] And, as Michael Sexton, SC, remarked to The Samuel Griffith Society in 2012, "Following its imaginary origins twenty years ago, it [sc. the implied freedom of political communication] has had an erratic but steadily upward trajectory in the courts, and most particularly in the High Court."[16] However, even putting to one side the question of whether the implied freedom of political communication exists outside the mind of the High Court, there remains much about it that is unclear.

Since it was first enunciated in 1992 the implied freedom of political communication has undergone significant development and substantial reformulation by the High Court, most notably in *Lange v Australian Broadcasting Corporation*[17] as modified in *Coleman v Power*.[18] The current "orthodoxy" is what is known as the *Lange* test as modified in *Coleman* ("the *Lange-Coleman* test"). The implication is said to arise from the system of representative and responsible government (at the federal level) set up by the Commonwealth Constitution, in particular sections 7 and 24, and the amendment procedure in section 128 and consists of two limbs, viz. (1) whether a law effectively burdens freedom of communication about government or political matters either in its terms, operation or effect; and (2) if so, whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by section 128 for submitting a proposed amendment of the Constitution to the informed decision of the people. As is apparent, the second limb itself contains two distinct aspects, viz. (a) the legitimacy of the law's end; and (b) the proportionality of the means of achieving the law's legitimate end. This, then, leaves us with essentially three enquiries in asking whether a law falls foul of the implied freedom of political communication:

- Does the law effectively burden political communication?
- If so, does it do so for a legitimate end? and
- If so, does it do so in a proportionate manner?

Recent case law makes it clear that answering these questions is far from straightforward. Some have pointed to the "deeply subjective nature of the tests that have been formulated by the High Court to assess whether a particular legislative provision contravenes the implied freedom."[19]

A particularly significant recent development is the decision in *Monis v The Queen*.[20] *Monis* is an interesting decision for a number of reasons. Only six judges sat in *Monis*; the six-judge bench of the High Court was evenly split 3-3 in the result and the outcome was determined by a statutory majority under section 23 of the *Judiciary Act* 1903 (Cth). Moreover, the way in which *Monis* made its way to the High Court made a real difference to the result on account of the two differing statutory majority provisions in section 23 of the *Judiciary Act*. Since the case had come on appeal from a State Supreme Court, the statutory majority which prevailed was that provided for by section 23(2)(a), viz. that which agreed with the outcome in the court below; the result of this was that the law in question was held to be within the power of the Commonwealth Parliament[21] and Monis's convictions under that law stood.

Had the same case come to the High Court by a route other than appeal, say an application for removal under section 40 of the *Judiciary Act* for determination by the High Court of the constitutional issue before final judgment had been given in the court below, a different statutory majority — that comprising the Chief Justice of the High Court – would have prevailed in accordance with section 23(2)(b) of the *Judiciary Act* and the law in question would have been held to be beyond the power of the Commonwealth Parliament and Monis's conviction would have been quashed.

Another interesting thing about *Monis* is that the 3-3 split corresponded with the 3-3 gender divide on the High Court (with the three male judges finding the legislation constitutionally invalid and the three female judges finding it valid) and this aspect of the case has also not gone without comment.[22]

Perhaps the most interesting thing about the decision in *Monis*, however, was that half of the High Court (and, as we have noted, a half that would have constituted a statutory majority had the matter come before the High Court on an application for removal rather than on appeal) was prepared to hold that section 471.12 of the *Criminal Code* (Cth) served no legitimate purpose under the *Lange-Coleman* test.

Hitherto, cases involving the implied freedom of political communication had typically been decided on the basis (or, at any rate, a concession by the relevant parties) that the law was not proportionate in the way it burdened political communication which assumed that the law at least pursued a legitimate end. In *Monis*, however, not only were several High Court judges prepared to hold that a law which criminalised the use of the postal service in a way which "reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive" did not serve a legitimate purpose under the *Lange-Coleman* test but also on display was a stark divide in judicial opinion on this question. How could three judges find that the law served no legitimate purpose while another three find that it did? Is a decision about the legitimacy of a law's purpose based on non-legal (for example, political) criteria and dependant on the subjective views of judges or are there objective legal criteria which judges (whatever their personal political opinions concerning the laws under challenge) can apply to determine a law's legitimacy (and, indeed, its proportionality in achieving this end)? This is a vexed question which

goes to the heart of some of the criticisms of whether courts of law can and should exercise judicial review on grounds of proportionality.[23]

Regardless of such questions about the propriety of courts engaging in this form of review, questions about the application of the *Lange-Coleman* test abound. What counts as political communication? What kind of burdening of political communication is necessary to implicate the implied freedom? When will the end of legislation which burdens political communication be illegitimate and when will the means be disproportionate? If the implication arises from the system of representative and responsible government at the *federal* level, should the implied freedom apply to *State* laws about purely *State* political matters? As Professor Anne Twomey has argued, if the implication is not to degenerate into an implied freedom of communication *simpliciter*, but is to remain an implied freedom of *political* communication that is in fact *derived from* the constitutional basis stated in *Lange*, might there not be some "political" matters that are of purely State concern (for example, State electoral funding laws pertaining purely to State elections) which sit outside the operation of the implication and cannot be explained away by a simplistic invocation of the "indivisibility" of political communication?[24] What is the relationship, if any, between the implied freedom of political communication and other constitutional implications, such as the *Melbourne Corporation*[25] principle? Is there, in addition to an implied freedom derived from the system of representative *federal* government, a separate implication in the Commonwealth Constitution derived from the system of representative *State* government? And, regardless of whether there is or is not, can an implied freedom of political communication be found in *State* constitutions (and, if so, which State constitutions for there are some important differences among State constitutions, not least with respect to entrenchment)? Many of these questions were present in *Unions NSW* and *McCloy*.

Unions NSW

The case came before a full bench of the High Court as a special case. The questions referred to the full bench were:

(1) whether sections 95G(6) and 96D were invalid on account of the implied freedom of political communication under the Commonwealth Constitution;
(2) whether there was an implied freedom of political communication under the *Constitution Act* 1902 (NSW) and, if so, whether sections 95G(6) and 96D were invalid on account of this;
(3) whether section 96D was invalid under section 109 of the Commonwealth Constitution on account of inconsistency with section 327 or Part XX of the *Commonwealth Electoral Act* 1918 (Cth); and
(4) whether section 96D was invalid on account of any freedom of association provided for in the Commonwealth Constitution.[26]

The High Court answered the first question in the affirmative and, consequently, found it unnecessary to answer the remaining questions. Bound up in this first question, however, are a number of further questions about the application of the implied freedom of political communication to State electoral laws such as the *EFED Act*.

Scope of the implied freedom under the Commonwealth Constitution: does it apply to (purely) State matters?

In some of its early implied freedom decisions before the important re-formulation in *Lange*, the

High Court had seemingly proclaimed the indivisibility of political communication along Commonwealth-State lines – that is, even though the implication was said to arise from the system of *federal* government set up by the Commonwealth Constitution it was, nevertheless, believed by many that it would apply to political communication generally (that is, not only to political communication about matters directly of federal political concern).[27] And, in *Lange* itself, the High Court stated that, as a result of the implied freedom, the defence to defamation of qualified privilege must be recrafted to allow for political communication and that this communication should not be limited to matters of federal politics but should also include communication about matters of State, territory, local and even foreign/international politics.

As a result of this, many concluded that the pre-*Lange* indivisibility of political communication continued post-*Lange*. In a paper published before the *Unions NSW* case, however, Professor Anne Twomey argued that to draw this conclusion is to misread *Lange*: while *Lange* had held that the defence of qualified privilege which had to be re-crafted as a result of the implied freedom was to include matters of State, territory, local or even international politics, *Lange* did not decide that the constitutional implied freedom itself necessarily extended to include all matters of State, territory, local or even international political concern.[28]

If this was a misreading of *Lange* it was, however, a common one. Twomey then argued that when its precise constitutional basis is considered the implied freedom may not apply to State electoral laws concerned purely with State elections (such as the *EFED Act*).

Whether the Commonwealth implied freedom of political communication would apply to such provisions is doubtful, especially as they are not intended to affect political donations in relation to Commonwealth elections and would seem to have little if any bearing upon Commonwealth political matters. The Commonwealth implied freedom is only likely to apply if:

(a) The attempt to isolate the limitations on political donations so that they only have an impact on State electoral campaigns has failed and the law is regarded as having an impact upon Commonwealth elections;
(b) The High Court reverts to its *Stephens* view that all political discourse is "indivisible"; or
(c) The High Court draws a new implication of representative government and freedom of political communication at the State level from provisions in the Commonwealth Constitution concerning the States or achieves the same outcome through attributing essential characteristics to a constitutional expression.[29]

Perhaps not surprisingly, in *Unions NSW* the Solicitor-General for New South Wales, Michael Sexton, SC, argued along these very lines:

> While there may be an overlap between political discussion of federal and State matters, that [sc. the sections of the *EFED Act* under challenge] is an area that is by definition outside the scope of the implied freedom. The making of a political donation at State or local level does not affect the capacity of the people to exercise a free and informed choice in a federal election or referendum.[30]

The majority, however, responded in its judgment:

> The complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate necessitate that a wide view be taken of the operation of the freedom of political communication. As was observed in *Lange*, these factors render inevitable the conclusion that the discussion of

> matters at a State, Territory or local level might bear upon the choice that the people have to make in federal elections and in voting to amend the *Constitution*, and upon their evaluation of the performance of federal Ministers and departments.[31]

Has the High Court adequately answered the argument of Professor Twomey and others that, notwithstanding what the High Court held in *Lange*, the implied freedom does not apply to State electoral laws only affecting State elections because the purported constitutional basis for the implied freedom (essentially matters that could affect the informed decision of the electorate at a federal election or a federal constitutional referendum) does not extend that far, lest the implied freedom of political communication degenerate into an implied freedom of communication *simpliciter*?

In my view, the answer is "no." While the courts are there to resolve disputes between litigants and not enter into academic debates for the sake of entering into academic debates, this is an important question about the constitutional basis and extent of the implied freedom. It would appear that the High Court has, as Professor Twomey suggested might happen, effectively reverted to its *Stephens* view that all political discourse is indivisible without adequately grounding it in the stated basis for the implication in *Lange* (as modified in *Coleman*).

Interplay between the implied freedom of political communication and the Melbourne Corporation principle

In *Unions NSW* counsel for New South Wales, and for Queensland and Victoria intervening, all mounted arguments that the *Melbourne Corporation* principle influences the way in which the implied freedom of political communication applies in relation to State electoral laws. For instance, the Solicitor-General for New South Wales argued that the regulation of State electoral processes is a "fundamental constitutional function of the State" and that the ambit of the implied freedom must therefore be construed so as not to impair a State's capacity to exercise its constitutional functions such as this one.[32]

The High Court rejected these arguments with the answer that "there is no constitutional principle which accepts that the States can legislate to affect the *Commonwealth Constitution*, including its implications."[33] With respect to their Honours, this is hardly an adequate response to the arguments raised by these States. The States were not arguing that they could legislate to affect the Commonwealth Constitution; rather, they were arguing that, properly construed, the Commonwealth Constitution did not affect the States' own legislation.

The question is not whether the States can legislate while invoking *Melbourne Corporation* to avoid the application of another part of the Constitution; rather, the question is what the true extent of the implied freedom of political communication is and that, in discerning its true extent, other constitutional implications such as the *Melbourne Corporation* principle may be relevant, especially given that we are dealing with an implication of, and not an explicit textual requirement for, the freedom of political communication.

What is political communication?

In the United States the making of a political donation has been held to be an act of speech protected by the First Amendment to the United States Constitution.[34] The plaintiffs in *Unions*

NSW argued that "the making and acceptance of a political donation constitutes political communication" as "it serves as a general expression of support for a candidate or a party,"[35] while the defendant and the interveners all disputed this. The High Court in *Unions NSW* did not decide the issue but did offer the following broad statement on political communication:

> Political communication may be undertaken legitimately to influence others to a political viewpoint. It is not simply a two-way affair between electors and government or candidates. There are many in the community who are not electors but who are governed and are affected by decisions of government. Whilst not suggesting that the freedom of political communication is a personal right or freedom, which it is not, it may be acknowledged that such persons and entities have a legitimate interest in governmental action and the direction of policy. The point to be made is that they, as well as electors, may seek to influence the ultimate choice of the people as to who should govern. They may do so directly or indirectly through the support of a party or a candidate who they consider best represents or expresses their viewpoint. In turn, political parties and candidates may seek to influence such persons or entities because it is understood that they will in turn contribute to the discourse about matters of politics and government.[36]

Does the law burden political communication?

As already mentioned, the plaintiffs in *Unions NSW* had argued that the making of a political donation was itself an act of political communication. If this were the case then the ban in section 96D on the making of a donation would seem ipso facto to amount to a burdening of political communication. As the High Court did not resolve the issue of whether a donation itself is an act of political communication it could not hold that political communication was burdened in this way. Instead, it held that there was a burdening of political communication because section 96D "effects a restriction upon the funds available to political parties and candidates to meet the costs of political communication by restricting the source of those funds."[37] With respect to section 95G(6) the Court held that it burdens political communication "in restricting the amount of electoral communication expenditure in a relevant period."[38]

Legitimacy of legislative ends

The general purpose of the legislation as a whole was not in dispute; the plaintiffs readily accepted that the legislation as a whole had a legitimate aim, viz, "to regulate the acceptance and use of political donations in order to address the possibility of undue or corrupt influence being exerted."[39] The plaintiffs argued, however, that section 96D did nothing calculated to promote the achievement of those legitimate purposes and that there was no purpose to the prohibition on donors not on the electoral roll other than its own achievement.

In other words, the plaintiffs argued that there was no rational connexion between the legitimate overall aim of the legislation and this particular provision with the result that the particular provision served no legitimate end. The High Court agreed.[40]

With respect to section 95G(6) the defendant had argued its purpose was to render efficacious the cap on expenditure by registered parties, arguing that it was legitimate to ensure that the effectiveness and fairness of the generally applicable caps were not circumvented.[41] The High Court, however, did not accept this argument. Instead, it inferred that the section's purpose was to reduce the amount which a political party affiliated with industrial organisations may incur by way of electoral communication expenditure and likewise limit the amount able to be spent by

an affiliated industrial organisation and seeing no logical connexion between this and the general anti-corruption purposes of the *EFED Act* held that it, too, served no legitimate purpose under the *Lange-Coleman* test.[42]

Proportionality of the legislative means

Finally, it is worth noting that the High Court held that because there were no legitimate ends the question of the proportionality of the means did not arise for consideration.[43]

The Issues in *McCloy*

Not only does *McCloy* involve a challenge under the same constitutional principle to sections of the same Act as in *Unions NSW*, a number of the issues argued and decided – or argued but *not* decided – in *Unions NSW* are relevant to the claim in *McCloy*. And, given the decision in *Unions NSW*, one might be tempted to conclude that what is sauce for the trade unions' goose is sauce for the property developers' gander. However, despite their apparent similarities, there are also a number of points of possible distinction between the two cases.

In light of the decision in *Unions NSW* it seems difficult to contemplate the High Court holding that the implied freedom of political communication cannot (*a priori* as a threshold matter, as Professor Twomey had argued prior to *Unions NSW*, and as the Solicitor-General for NSW had unsuccessfully argued in *Unions NSW*) apply to the sections of the *EFED Act* under challenge in *McCloy*. If the sections challenged in *Unions NSW* were potentially subject to the implied freedom it would now appear to be beyond doubt that, for all practical purposes, the sections challenged in *McCloy* are also subject to the implied freedom and the case will have to be decided on an application of the *Lange-Coleman* test rather than on the basis that the provisions under challenge are simply outside the scope of the implied freedom of political communication.

Is making a donation itself an instance of political communication?

In *Unions NSW* the plaintiffs had argued that the making and receiving of a political donation is itself an instance of political communication. The High Court, however, avoided deciding the issue, finding that it was possible to resolve the case without doing so. Interestingly, while a similar argument could have been raised on the facts in *McCloy*, the plaintiffs did not seek to advance their case on this basis and, indeed, during oral argument, a number of judges seemed quite hostile towards such a view, instead arguing a less direct burdening of political communication.

Burdening of political communication

In the absence of arguments that the making of political donations is itself an instance of political communication there are essentially three conceivable ways in which restrictions on political donations might indirectly burden political communication.

(a) Restrictions on donations burden political communication on the part of the donor

Absent an argument that a donation itself is not an instance of political communication, does a law restricting the making of donations nevertheless still effectively burden the donor's political communication? The argument of the defendant44 and a number of the interveners was no; in

their view, restrictions on making political donations do not impose any effective burden on a would-be donor's ability to engage in political communication for the simple reason that the would-be donor remains free to make his political views known to politicians and, indeed, to the general public.[45]

Simply put, on this view restrictions on political donations (whether a general cap on political donations, a restriction on donations in kind or, indeed, an outright ban on donations by property developers) do not prevent the donor from doing anything other than making a political donation (or from making whatever kind of political donation is prohibited). Contrary to this, however, the plaintiffs argued that such laws do effectively burden the donor's political communication; in their view, there is a nexus between political donations, political influence and political communication.[46] The plaintiffs argued that these laws target "a means by which members of the community may create for themselves an opportunity more effectively to communicate a message to a party or candidate."[47] As the plaintiffs put it:

> By becoming known to a candidate or party, a donor may increase the visibility of his or her message in the eyes of both the recipient of the donation and potentially subsequent persons with whom the recipient communicates. Participation of members of the community in the political funding process can thereby affect the content of political messages which parties and candidates then communicate. By targeting one of the means by which a member of the community may seek to become better known to political actors (i.e. by donations), the impugned provisions reduce the effectiveness of future communication from those community members to parties and candidates, and interfere with the processes by which parties and candidates determine the messages they will communicate.[48]

More crudely put, one reason why persons may choose to make political donations is to secure access to politicians in order to seek to influence the course of political debate and policy development – the more one donates the more influence with politicians and political parties one expects to have – and that laws restricting political donations place an effective burden on would-be donors exerting political influence – and thereby impose an effective burden on political communication – in this manner. As counsel for the plaintiffs stated in oral argument, "one effect of making political donations is that it may improve one's access to the candidate once the candidate becomes a member for the purpose of making representations to that member; we put that as a legitimate objective directed at the facilitation of political communication."[49] It must be said that of the three conceivable ways in which these laws might effectively burden political communication, the argument that they burden the donor's ability to engage in political communication is the most controversial.

(b) Restrictions on donations burden political communication on the part of the recipient

A second line of argument would be to argue that restrictions on donations burden the recipient's ability to engage in political communication – and, indeed, the defendant conceded as much.[50] It would also appear that the decision in Unions NSW in respect of the aggregation provision (that is, the provision which included an affiliated organisation's spending in the party's spending cap) lends itself to this interpretation; the High Court, in Unions NSW, noted the impact this provision had upon a political party's ability to engage in political communication.[51]

It would not seem too much of an extension to apply similar reasoning to conclude that restrictions on the ability to make political donations effectively burden the ability of the would-be recipients of those funds to engage in political communication; while still free to engage in political communication, in the absence of political donations prohibited by the legislation those who would have been the recipients of such donations must now do so with fewer resources available to them. In my view the argument that restrictions on political donations burden a recipient's ability to engage in political communication is the least controversial of the ways in which these kinds of laws can indirectly burden political communication.

(c) Restrictions on donations burden political communication generally

A third possible line of argument would be to seize upon the statement of the majority in Unions NSW that political communication "is not simply a two-way affair between electors and government or candidates"[52] and argue that political donations help to make political communication generally possible, without focusing specifically on whether restrictions on donations burden either the donor's or the recipient's ability to engage in political communication. In my view, however, this kind of approach would seem too imprecise for the High Court to adopt.

Legitimacy of legislative ends

Given what the High Court decided in *Unions NSW*, is there a legitimate purpose to the sections under challenge in *McCloy*, viz, a ban on political donations by developers, caps on donations and ban on certain types of donations in kind? Recall that in *Unions NSW* the High Court held that the two provisions under challenge served no legitimate purpose: in the High Court's view the ban on donors not on the electoral roll served no purpose other than its own achievement and the true purpose of the aggregation provisions was not a measure aimed at ensuring the efficacy and fairness of the general caps but rather was squarely aimed at reducing the amount which a political party affiliated with industrial organisations (viz, the ALP) may incur by way of electoral communication expenditure and likewise limit the amount able to be spent by an affiliated industrial organisation.

As in *Unions NSW*, the defendant in *McCloy* can and did point to a legitimate *general* purpose of the Act to reduce corruption and undue influence (or, at any rate, the *appearance* of corruption and undue influence). The important question, however, is whether there is some logical connexion between a specific provision of the Act and any legitimate *general* purpose of the Act as a whole. Do the three specific provisions subject to challenge in *McCloy* serve a legitimate purpose such as reducing corruption and undue influence (or their appearance)?

Caps

Does a cap on the amount an individual donor may donate serve any legitimate purpose other than its own achievement? The plaintiffs argued that it does not,[53] essentially claiming that, since there is no basis to infer that making a large donation necessarily entails a quid pro quo, the purpose of the caps cannot be to proscribe corrupt donations and that it must have some other purpose. The plaintiffs then argued that people can and do gain political influence by many means and it is not legitimate for the legislature to single out any of these – such as wealth – to

prevent people from exerting such influence.

Contrary to this, the defendant argued that the legitimate end of the caps is to reduce the *perception* if not the actuality of corruption and undue influence over the political process;[54] while it is true that large donations do not *necessarily* involve a quid pro quo, in the defendant's view large donations are still likely to "buy" influence which can be seen to create a threat to the integrity of the system of representative and responsible government and maintaining public confidence in the integrity of the system, is in the defendant's view, a legitimate end.

Indirect campaign contributions

Does the ban on non-monetary donations serve any legitimate purpose other than its own achievement? The plaintiffs contended that it does not, essentially arguing that its purpose cannot be to avoid the difficulty of valuing non-monetary donations (since non-monetary donations valued under $1000 are permitted and must necessarily be valued to determine whether they come in under the threshold) and nor can its purpose be to enhance transparency (since in the absence of the ban on in-kind donations these donations would be subject to the *EFED Act*'s disclosure requirements). The plaintiffs also argued that the purpose of the ban cannot be to bolster the effectiveness of the disclosure requirements or the caps since nothing in the Act provides any link between section 96E (which was enacted in 2008) and Division 2 of Part 6 (the disclosure requirements) or Division 2A of Part 6 (which contains the caps and which was enacted in 2010). Contrary to this the defendant argued that section 96E aids the disclosure requirements in Division 2 of Part 6 by enabling the expression of benefits in monetary terms, that it aids the efficacy of the caps in Division 2A of Part 6 by cutting off routes for circumvention where detection may be difficult, and that section 96E can therefore rationally be taken "to further the purpose of minimising the risk to the actual and perceived integrity of the State Parliament and the institutions of local government."[55]

Developer ban

Does the ban on donations by property developers[56] serve any legitimate purpose other than its own achievement? This is undoubtedly the most controversial of the three provisions under challenge and the plaintiffs argued strongly that it served no legitimate purpose.[57] The plaintiffs argued essentially that it was illegitimate to single out prohibited donors such as property developers in this way because the provision as drafted did not actually prevent corruption and was, instead, "an attempt to prevent socially undesirable persons from being seen to contaminate political parties and candidates with their influence".[58] The plaintiffs argued further that there is nothing intrinsic to property developers that makes them more prone to engage in corruption than anyone else who seeks to advance his own interests through participation in the political process and that any inference the State drew from past cases (or alleged cases) of corruption involving property developers was too generalised and therefore a law preventing *all* property developers from making donations was not legitimate.

Contrary to this, the defendant argued that property developers are sufficiently unique to warrant special regulation in light of the nature of the business activities they undertake and the nature of the public powers they may seek to influence in their self-interest.[59] That is, in light of what property developers do, the way planning decisions are made and a history of allegations of

corruption (whether proven or not) involving property developers outlined in ICAC and parliamentary committee reports, there are legitimate concerns about the actual and perceived susceptibility of members of State and local government to influence from property developers and it is legitimate for the Parliament to respond in the way it did.

Proportionality of means

While the plaintiffs in McCloy argued that the ends of the provisions under challenge were all illegitimate they also argued in the alternative that the means were disproportionate to achieving the stated end while the defendant unsurprisingly argued that they were proportionate.

Caps

The plaintiffs advanced several arguments as to why the caps were disproportionate to the stated ends.[60] The plaintiffs argued, inter alia, that if the end is to prevent actual instances of corruption the caps are disproportionate in that they prevent many things other than actual corruption and that, if the end is preventing the perception that wealthy donors can buy political influence, the caps are disproportionate in that disclosure and public scrutiny of all donations would be effective in achieving the stated end. In reply the defendant argued that no hypothetical provision advanced by the plaintiffs would be as effective as the caps in achieving the purpose of reducing the perception of undue or corrupt influence.[61]

Indirect campaign contributions

The plaintiffs argued that the ban on indirect campaign contributions was disproportionate to the stated end of bolstering the efficacy of the donation caps in that the law could instead have insisted on the provision of a reliable valuation as a condition to the liberty to make a non-pecuniary donation; in other words, with the stated end in mind it was not necessary to ban non-pecuniary donations when valuation and disclosure would suffice.[62] Contrary to this the defendant argued that the plaintiffs' proffered alternative is not an obvious and compelling means of achieving the same end since it would impose significant transaction costs, would raise issues as to what was sufficient evidence of a reliable valuation and would raise potentially complex definitional issues.[63]

Developer ban

The plaintiffs advanced a number of arguments as to why a total ban on political donations by property developers was disproportionate to the stated aims.[64] First, the plaintiffs argued that nowhere else in the world is there a law of this kind suggesting that the property development sector is inherently inclined to corruption by way of political donations; the complete absence of any such laws anywhere else in the world might suggest that the approach of New South Wales is not proportionate to the end of preventing actual or even perceived corruption and undue influence.

Secondly, they argued that limiting the prohibitions in Division 4A to making donations with some form of intention corruptly to solicit favour (as secret commissions legislation and the common law of bribery do) would have been a more proportionate means of achieving the stated end. And, thirdly, they argued that the way the law operates in practice, in part owing to the way

it defines "property developer" and "close associate," is that it catches too much activity including, for instance, a property developer wanting to use his company's resources to fund his own election campaign, the spouse of a property developer being unable to donate to a property developer's *own* electoral campaign, and a close associate of a property developer being unable to donate to support political causes wholly unrelated to the perceived dangers of undue influence from property developers.

In reply the defendant argued that the plaintiffs' proposed alternative of confining the ban to developer donations where there is some form of intention corruptly to solicit favour is not a viable alternative as the measures the plaintiffs refer to are dealing with the aftermath of the problem rather than attempting to prevent its occurrence. Moreover, in light of the scale of the problem it is open to the Parliament to adopt more extreme measures to address it both because of the reality of the problem and because of the damage that public recognition does to public confidence in the electoral or governmental system.[65] Furthermore, the defendant argued that a prohibition of the kind the plaintiffs suggested does not advance the regulatory end to the same extent as the provisions under challenge and therefore is not a true alternative.

Political donations and the implied freedom of political communication: some tentative conclusions

Although there are certain similarities between *McCloy* and *Unions NSW*, and one might be tempted to conclude that what is sauce for the trade unions' goose is sauce for the property developers' gander, it is far from certain that the plaintiffs in *McCloy* will succeed in any, let alone on all three, of their constitutional challenges. Of the three constitutional challenges in *McCloy* it would seem that the plaintiffs' greatest chance of success lies with the ban on donations by property developers; the caps and the restrictions on indirect campaign contributions would appear to be easier for the State to justify in terms of the ends they pursue and the means adopted in pursuit of those ends.

It seems unlikely that the High Court would hold that making a political donation is itself an act of political communication which will result in an important distinction between the approach of the High Court under the implied freedom of political communication and the United States Supreme Court under the First Amendment to the US Constitution when it comes to laws concerning political donations. As a result of such an approach the High Court will be required to decide upon the way (if any) in which laws restricting political donations *indirectly* burden political communication. Do they burden the donor's or the recipient's political communication? The less controversial approach, and one that would seem to be justified by the ratio in *Unions NSW* (not to mention one that was conceded by the defendant in *McCloy*) would seem to be the latter. To hold that laws which limit donations implicate the implied freedom because they prevent a donor from effectively "buying" access to a politician (as the plaintiffs had effectively sought to argue) may go beyond what the High Court is willing to decide.

The most challenging aspect of the case for the High Court would appear to be deciding the legitimacy of the ends, especially in light of the decision in *Monis* where an evenly divided High Court disagreed on whether the ends in that case were legitimate and the decision in *Unions NSW* where the Court held that certain provisions of the *EFED Act* served no legitimate purpose. Of course there have been personnel changes on the High Court since each of those

decisions was decided so it will be particularly interesting to see how the Court deals with this aspect of the case.

The legitimacy of the ban on donations by property developers will probably present the greatest difficulty for the High Court as cogent arguments can be mounted both in favour of and against the legitimacy of its end under the *Lange-Coleman* test. The legitimacy of the ends of the other two provisions, as well as the proportionality of their means in my view, would appear to present less difficulty for the High Court.

Endnotes

1. Prior to its amendment in 2008 the Act was known as the *Election Funding Act* 1981 (NSW).

2. (2013) 252 CLR 530.

3. High Court of Australia, S211/2014 (argued 10 and 11 June 2015). At the time this paper was delivered (August 2015) judgment in the matter was reserved.

4. The implied freedom of political communication was first held to exist in *Nationwide News v Wills* (1992) 177 CLR 1 and *Australian Capital Television v Commonwealth* (1992) 177 CLR 106. Since then it has undergone substantial reformulation by the High Court, with the current "test" to be applied deriving from the decision in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 as modified in *Coleman v Power* (2004) 220 CLR 1.

5. *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act* 2009 No 113 (NSW), Schedule 1, item 1.

6. *Election Funding and Disclosures Amendment Act* 2010 No 95 (NSW) Schedule 1, items 28-30.

7. *Election Funding and Disclosures Amendment Act* 2010 No 95 (NSW) Schedule 1, item 23.

8. In distinction to *Unions NSW*, however, it is worth noting that the plaintiffs in *McCloy* did not seek to argue the case on the basis of an implied freedom of association under the Commonwealth Constitution, most probably as a result of the decision in *Tajjour v State of New South Wales* (2014) 88 ALJR 860 where the High Court held that a freedom of association independent of the implied freedom of political communication is not to be implied into the Commonwealth Constitution.

9. (1992) 177 CLR 1.

10. (1992) 177 CLR 106.

11. Ibid. at 177-191.

12. (2001) 208 CLR 199 at [251]-[277], [337]-[348].

13. (2013) 249 CLR 92 [237]-[251]. Cf his remarks in *Wotton v Queensland* (2012) 246 CLR 1 at [39]-[40].

14. See, for example, Jeffrey Goldsworthy, "Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue", *Monash University Law Review,* 1997, vol

23(2), 362-374; Adrienne Stone, "Freedom of Political Communication, the Constitution and the Common Law", *Federal Law Review,* 1998, vol 26(2) 219-257; Adrienne Stone, "The Australian Free Speech Experiment and Scepticism about the UK Human Rights Act", Tom Campbell, K. D. Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights*, OUP, 2001 391-410. These are all referred to by Heydon J in *Monis v The Queen* (2013) 249 CLR 92 at [243] fn 221.

15. George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams' Australian Constitutional Law and Theory*, Federation Press, 6th ed., 2014, 1334.

16. Michael Sexton, "Flights of Fancy: The Implied Freedom of Political Communication 20 Years On", *Upholding the Australian Constitution*, vol 24, Proceedings of The Samuel Griffith Society, 2012, 17-36, 17.

17. (1997) 189 CLR 520.

18. (2004) 220 CLR 1.

19. Michael Sexton, "Flights of Fancy: The Implied Freedom of Political Communication 20 Years On", *Upholding the Australian Constitution*, vol 24, Proceedings of the Samuel Griffith Society, 2012, 17-36, 17.

20. (2013) 249 CLR 92.

21. Monis had been convicted of the offence of using a postal or similar service in a menacing, threatening or offensive manner pursuant to s 471.12 of the *Criminal Code (Cth)*.

22. See, for example, Helen Irving "Constitutional Interpretation: A Woman's Voice?" http://blogs.usyd.edu.au/womansconstitution/2013/03/constitutional_interpretation_1.html

23. For a critique of proportionality analysis, see Francisco J. Urbina, "A Critique of Proportionality", *American Journal of Jurisprudence*, 2012, vol 57(1), 49-79.

24. Anne Twomey, "The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws," *UNSW Law Journal*, 2012, vol 35(3), 625-647, 630.

25. *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

26. There were actually nine questions reserved for determination: see *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at [66] and [170]. For present purposes I have reduced these to four.

27. See, generally, Anne Twomey, "The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws," *UNSW Law Journal*, 2012, vol 35(3), 625-647, 630-631.

28. Ibid., 632.

29. Ibid., 645. The reference to *Stephens* is *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

30. *Unions NSW v State of New South Wales* (2013) 252 CLR 530, 535 (summary of argument, M. G. Sexton, SC).

31. Ibid., at [25] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

32. Ibid., at 535 (summary of argument, M. G. Sexton, SC); cf 539 (summary of argument, W. Sofronoff, QC) and 541 (summary of argument, S. G. E. McLeish, SC).

33. Ibid., at [34].

34. See, for example, *Buckley v Valeo* 424 US 1 (1976) at 21.

35. *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at 532 (summary of argument, B. W. Walker, SC).

36. Ibid. [30].

37. Ibid. [38].

38. Ibid. [61].

39. Ibid. [51].

40. Ibid. [51]-[60].

41. Ibid. [62].

42. Ibid. [64].

43. Ibid. [46].

44. Strictly speaking reference throughout this paper should be to the first defendant, that is, the State of New South Wales, rather than to the defendant. There were in fact two defendants in *McCloy*, viz, the State of New South Wales and the Independent Commission Against Corruption. For present purposes, however, we need only concern ourselves with the first defendant.

45. See, generally, *McCloy*, First Defendant's Submissions [29]-[32].

46. See, generally, *McCloy*, Plaintiffs' Reply [1]-[9].

47. *McCloy*, Plaintiffs' Reply [2].

48. *McCloy*, Plaintiffs' Reply [3].

49. *McCloy v State of New South Wales* [2015] HCATrans 141 (10 June 2015).

50. *McCloy*, First Defendant's Submissions [28], [65], and [95].

51. *Unions NSW v State of New South Wales* at [61].

52. Ibid. [30]. See also text accompanying (n37) above.

53. See, generally, *McCloy*, Plaintiffs' Submissions [88]-[102].

54. See, generally, *McCloy*, First Defendant's Submissions [67]-[80].

55. *McCloy*, First Defendant's Submissions [97]. See, generally, also ibid [96]-[100].

56. Although the ban on political donations by property developers was extended to include a ban on donations by tobacco, liquor and gambling industry business entities as well, it is worth noting that the case was argued on the basis that the plaintiffs had standing to challenge the ban on developer donations but not the ban on donations from other classes of prohibited donors.

57. See, generally, *McCloy*, Plaintiffs' Submissions [52]-[75].

58. *McCloy*, Plaintiffs' Submissions [65].

59. See, generally, *McCloy*, First Defendant's Submissions [33]-[54].

60. See, generally, *McCloy*, Plaintiffs' Submissions [103]-[112].

61. See, generally, *McCloy*, First Defendant's Submissions [81]-[90].

62. See, generally, *McCloy*, Plaintiffs' Submissions [125]-[129].

63. See, generally, *McCloy*, First Defendant's Submissions [101]-[104].

64. See, generally, *McCloy*, Plaintiffs' Submissions [76]-[87].

65. See, generally, *McCloy*, First Defendant's Submissions [55]-[64].

Chapter 4

Religious Freedom and the Law in Australia

Neil Foster

> Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.
>
> – *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 *ALJR* 785 at 787, per Mason ACJ and Brennan J.

> Religious faith is a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity.
>
> – *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 at [560] per Redlich JA.[1]

In this paper I want to discuss how the law protects freedom of religion in Australia. While as is well known there is no overarching "Bill of Rights" in operation in Australia, protection of this "fundamental right" takes place, even in a fragmented way, under a number of laws. The paper considers the protection provided by the Constitution of Australia, the impact of international treaties, the effect of the common law, domestic charters in specific States, and the "balancing" provisions of discrimination legislation.[2]

Protection of Religious Freedom under the Constitution of Australia

One of the key features of the Australian legal system is that we are a Federation, governed by a written Constitution. The Parliament of the Commonwealth of Australia is given certain specific fields in which it can legislate; the States hold the "residual" powers of legislation, although if the Commonwealth has passed a valid law it can override State law on that topic. This federal division of powers is an important background to considering how religious freedom is protected.

The Constitution of Australia contains a clear restriction on federal law-making powers, designed to protect religious freedom. This is section 116 of the Constitution:

> **116. Commonwealth not to legislate in respect of religion**
>
> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or **for prohibiting the free exercise of any religion**, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth. [emphasis added]

(Section 116 also deals with "establishment" issues, whether the Commonwealth can create or support a religious body, and religious tests. But for present purposes the focus is on the "free exercise"aspect.)

The provision is similar to, and was enacted in clear knowledge of, similar phrasing in the First Amendment to the Constitution of the United States of America. But it has become clear in later interpretation that the High Court of Australia, in the few cases where the provision has been considered, will not automatically follow the Supreme Court of the United States. There are only a half dozen High Court decisions dealing with the free exercise clause of section 116.

Krygger v Williams (1912) 15 CLR 366

The first of the High Court decisions on section 116 is tantalisingly brief. Mr Krygger was a Jehovah's Witness, apparently (see the Blackshield article at 80; I am not sure that it directly emerges in the report). As such Krygger objected to involvement in, and support for, military operations. The Commonwealth had passed a law requiring all men to report for military training under Part XII of the *Defence Act* 1903.

Krygger was convicted of failing to report for military training, and sentenced to be "committed to the custody of a sergeant-major for 64 hours" (being the amount of time per year he was supposed to report for training). He appealed to the High Court that the law was an interference with his free exercise of his religion.

It is important to understand that the legislation did contain provisions relating to "conscientious objection" to bearing arms – but those provisions said that while the person who was an objector was only to be given non-combatant roles (such as working behind the lines or in an ambulance), they still had to report for training.

The two judges of the High Court who heard the matter were dismissive and could hardly see the problem. They clearly regarded the matter as resolved by the provision for non-combatant status. But for Krygger it seems likely that the more important issue was that his personal involvement as a non-combatant would still be providing support for a war effort to which he fundamentally objected.

Still, there are some very broad statements which treat freedom of religion very lightly. Griffith CJ said at 369:

> To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.

Barton J was no more sympathetic:

> . . . the Defence Act is not a law prohibiting the free exercise of the appellant's religion, nor is there any attempt to show anything so absurd as that the appellant could not exercise his religion freely if he did the necessary drill. I think this objection is as thin as anything of the kind that has come before us. (at 372-373)

Judd v McKeon (1926) 38 CLR 380

This next decision does not primarily involve section 116 but has some interesting comments by Higgins J on the provision. The case was a prosecution for failing to vote at a Senate election. The legislation said that in order to escape liability the elector had to have a "valid and sufficient reason." The reason he offered was that he was a socialist, and that all the candidates were capitalists, and hence he preferred none of them!

It was not the first time in Australia, then, that someone faced this dilemma. But the majority of the High Court said that he just had to vote anyway, "valid and sufficient" reasons being things unconnected with the over-arching obligation to vote, such as family illnesses or natural disasters or the like.

Higgins J, however, disagreed. His Honour thought that a political reason could have been valid. And, in particular, his Honour thought that if the elector had a *religious* objection to voting, then section 116 would operate to excuse him from doing so (at 387). He then offered some comments about *Krygger*, which one might have thought should have precluded a section 116 argument here if the words used by the judges in that case were meant seriously (since, after all, one could argue, in the words of Griffiths CJ, that voting "had nothing to do with religion").

But Higgins J seems to suggest that he would not agree with all that was said in *Krygger*:

> The case of Krygger v. Williams under the Defence Act may be accepted in its entirety without this case being affected. There a youth was charged under sec. 135 with failing to render the personal service required of him, military service as a senior cadet, "without lawful excuse." The Act did not allow conscientious objection to such military service as a "lawful excuse." Such an excuse was excluded by the law; but the law had made provision for allotment of conscientious objectors to non-combatant duties (sec. 143 (3)). This was the limit of the "lawful excuse," the only excuse allowed by law. There is no such limit here in the words "valid and sufficient reason." The distinction is obvious, whatever view one may take of the fact that the two Judges in that case treated the defendant's conscientious objection to perform military duties – to attend drill, to serve as a cadet – as if it were a mere objection to fight. A man may of course assist the operations of a combatant force as much by doing its fatigue duty as by standing in the firing line. (at 389-390)

The last two sentences suggest that his Honour was not entirely persuaded by the reasoning in *Krygger*.

Provisions on compulsory voting still require a "valid and sufficient" reason for not doing so but, those like Jehovah's Witnesses who have a religious objection to voting, are regarded as having such a reason. On its website the Australian Electoral Commission comments:

> 41. Under s 245(14) of the Electoral Act or s 45(13A) of the Referendum Act the fact that an elector believes it to be a part of his or her religious duty to abstain from voting constitutes a valid and sufficient reason for not voting.[3]

Adelaide Company of Jehovah's Witnesses Inc v Commonwealth (1943) 67 CLR 116

This case is really the major Australian authority on freedom of religion under section 116; and, while it seems not to support a broad meaning of the phrase, on closer analysis I think it lays the ground for a sensible view. The case involved the Jehovah's Witnesses again, but this time on a much broader scale than in *Krygger,* which was just one member declining military training. Here

the denomination as a whole was under threat. The Court noted that the theology of the Jehovah's Witnesses involved the view that all organised political entities (up to and including the British Empire) were "organs of Satan," and that it was the duty of all members of the church to not participate in human wars. In addition they would refuse to take an oath of allegiance to the King.[4]

While these views were unpopular in peacetime, at the height of the Second World War, when many Australians were fighting and dying overseas for the British Empire, they were pretty explosive. So much so that under a general regulation-making power given by the *National Security Act* 1939 (Cth), regulations called the *National Security (Subversive Associations) Regulations* 1940 had been made, and under those regulations the Governor-General had declared the Jehovah's Witnesses to be a subversive association, and the Commonwealth had taken over its main meeting centre.

The regulations were struck down as invalid. But, importantly for purposes of this paper, the reason for their invalidity was not that they breached section 116, but that they went beyond either the regulation-making power, or else beyond the constitutional power involved, as being too far-reaching. In particular, one of the features that struck the judges concerned was that under the regulations organisations were prohibited from advocating "unlawful doctrines," which was defined to include "any doctrine or principle advocated by a declared body". Since the Jehovah's Witnesses were within a tradition that honoured the Bible, their doctrine included such subversive tenets as the Ten Commandments! Even Latham CJ, who would have supported most of the regulations, thought this part of the regulations went too far – see 144. But, overall, three out of the five justices ruled that the regulations were too broad and were, in effect, a disproportionate response to the danger posed by the Jehovah's Witnesses.

Hence, as noted above, section 116 was not the reason for invalidity. But in the course of their judgments their Honours made some very interesting comments on the section. Latham CJ, for instance, noted that:

- section 116 is a clear and general prohibition on all laws, and so is an important limit on law-making power (at 123);
- it must be read to operate on a broad definition of "religion," and to include a protection even for those of "no religion" (at 123); this will even include "non-theistic" religions such as some forms of Buddhism (at 124);
- it is an important feature of section 116 that it protects, not just the "majority" or "popular" religion, but provides protection of "minorities, and, in particular, of unpopular minorities" (at 124);
- the provision covers not only opinions but also actions in reliance on religious opinions:

  > The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion. (at 124)

- however, not all religions are good or helpful, and free exercise of religion must be balanced with other interests – his Honour cited some decisions from the United States and concludes that the test to be applied must be something like, does a law amount to an "undue" infringement of freedom of religion, taking into account other important interests

(at 128);

- still, Latham CJ was careful to point out that he did not agree with some of the United States cases. In particular, he noted that the sort of approach adopted in *Reynolds v United States* 98 US 145 (1879) (allowing a law against polygamy to override then-current Church of Latter Day Saints beliefs simply because it had a plausible public interest) seems too narrow a view of an important freedom:

> When the suggestion that religious beliefs should be superior to the law of the land is rejected as a matter of course, it may well be asked whether the very object of the constitutional protection of religious freedom is not to prevent the law of the land from interfering with either the holding of religious beliefs, or bona fide conduct in pursuance of such beliefs. (at 129)

- In this case, however, his Honour thought that the freedom of religion of the Jehovah's Witnesses had to give way to national security considerations – as otherwise this freedom would destroy all other freedoms:

> It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community. The Constitution protects religion within a community organized under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organized. (at 131)

In a world post-September 11, 2001, the balancing of religious freedom and national security continues to be debated. The issues may come back again as the Government considers preventing people from going to explosive areas of the Middle East to join in the "Islamic State" so-called "caliphate". Could it be argued that restriction of movement in this way affects the freedom of religion of those who think they are obliged to join Islamic State? Even if it were so argued, it seems likely that interests of national security would be held to override freedom of religion in this situation.

Other members of the High Court in the Jehovah's Witnesses case (who were more inclined to strike down the regulations as too broad in any event) gave less time to the section 116 issues, but effectively ruled in a similar way. Rich J (at 149) noted that freedom of religion was not absolute, and was subject to the restrictions "essential to the preservation of the community." Starke J would have resolved the case without reference to section 116. He agreed with Latham CJ that it was an important protection of "religious liberty or freedom," but again was not absolute and would have to give way to laws which were "reasonably necessary for the protection of the community and in the interests of social order" (at 154-155).

Williams J noted also that the right to freedom of religion had to give way in a situation of national defence; but it has to be said that his Honour was not very convincing when he suggested (at 160-161) that the activities of Jehovah's Witnesses in disseminating their doctrines would not be protected by section 116 "because in its popular sense such principles and doctrines would not be considered to be religion, but subversive activities carried on under the cloak of religion"! There is no suggestion that the Jehovah's Witnesses did not really believe these doctrines or hold them long before the Second World War broke out; it seems that these views

are contrary to those of the majority who recognise there is a real issue of interference with religious freedom.

Still, his Honour was prepared to invoke section 116 when considering the broad prohibition on "doctrines" which he and other members of the Court referred to in striking down the regulations as too broad:

> As the religion of Jehovah's Witnesses is a Christian religion, the declaration that the association is an unlawful body has the effect of making the advocacy of the principles and doctrines of the Christian religion unlawful and every church service held by believers in the birth of Christ an unlawful assembly. [Even] apart from s. 116 such a law could not possibly be justified by the exigencies and course of the war. But it is also prohibited by s. 116. (at 165)

Overall, then, while the case is one where section 116 did not operate on its own to protect the religious freedom of the Jehovah's Witnesses, the Court affirmed the importance of the section, and that very serious grounds must be provided before religious freedom can be overridden. Here, in the middle of a desperate and global war, it was judged that the teaching that governments were "tools of Satan" was just too subversive of the war effort. But the very fact that the offensive regulations were struck down on other grounds may indicate that the Court was not entirely happy with the overall policy.

Kruger v Commonwealth (the "Stolen Generations case") [1997] HCA 27; (1997) 190 CLR 1

It has to be said that this relatively recent decision of the High Court is one of the most unsatisfactory on section 116. I think this is partly because even the parties concerned saw section 116 as a "subsidiary" argument to others they were making. The action was an attempt to challenge the policies that led to Aboriginal children being removed from their parents, and it involved a number of very complex issues, including an attempt to create "implied rights" under the Constitution of freedom of movement and association, and issues to do with the impact of international law which had not been implemented domestically and how it could be taken into account.

Part of the argument, however, was that removing children from their families had an impact on the practice of their traditional religion, and hence it involved an interference with religious freedom under section 116. The section 116 claim failed, though the approaches taken by different members of the Court were varied.

Brennan CJ gave the argument very short consideration. He took the view that a law would only fall foul of section 116 if that were the law's main intention: "To attract invalidity under s 116, a law must have the purpose of achieving an object which s 116 forbids. None of the impugned laws has such a purpose" (at 40).

Perhaps the least that can be said about that quote is this: while there may be an argument that this is the appropriate view to take for "establishment" issues (which was what the cited *DOGS* case was about), it seems arguable that this is by no means an appropriate approach in free exercise claims. After all, even in Latham CJ's comments in the *Jehovah's Witnesses* case, it was recognised that this is an important right of citizens that should not be lightly discarded.

Dawson J took the view (based on the previous decision in *R v Bernasconi* [1915] HCA 13; (1915) 19 CLR 629 on section 80 of the Constitution) that section 116 is not applicable to laws governing territories made pursuant to section 122; and hence, since all the complaints were about the actions of territorial laws, section 116 was not relevant (at 60). However, he also said that he would have agreed with Gummow J that if section 116 did apply, it did not impact on the relevant laws (at 60-61).

Toohey J (at 85-86) thought that section 116 did apply to territorial laws; but he also thought that the purposes of the law in question needed to be considered:

> The question should therefore be asked: was a purpose of the Ordinance to prohibit the free exercise of the religion of the Aboriginals to whom the Ordinance was directed? It may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory, though this is something that could only be demonstrated by evidence. But I am unable to discern in the language of the Ordinance such a purpose. (at 86)

In contrast to Brennan CJ there is recognition that a law may have a number of "purposes". But, again, there is a sharp line drawn between "purpose" and "effect" so that an effect (however serious and however disparately felt by people of a particular religion) would not be enough to breach section 116.

Gaudron J said that section 122 was clearly subject to section 116 (at 123). Her Honour noted, however, that while section 116 was an important limit on Commonwealth legislative power, it could not be said to create a constitutional "right" which could be sued upon in damages for a citizen, partly because the provision did not govern the States (who are free to establish religions or impair religious freedom as they see fit) (see the comments at 125).

On the question as to whether a law needs to have the "purpose" of impairing freedom of religion, or not, her Honour took a slightly wider view of the matter than some other members of the Court: "s 116 was intended to extend to laws which **operate to prevent the free exercise** of religion, not merely those which, in terms, ban it" (at 131) [emphasis added].

Her Honour also stressed the need to interpret constitutional guarantees broadly so as not to allow Parliament to circumvent them by laws that appear to have innocent aims. With respect, though, her subsequent analysis of the issue is hard to follow. She stresses that the "purposes" of the legislation are crucial. She does, however, distinguish between the remarks cited from *DOGS* about "the purpose" of legislation, relating to "establishment", and points out that laws can have more than one purpose:

> In *Attorney-General (Vict); Ex rel Black*, Barwick CJ expressed the view, in relation to that part of s 116 which protects against laws "for establishing any religion", that for "[a] law to satisfy [that] description [it] must have that objective as its express and . . . single purpose." If that is correct, it is because of what is involved in the notion of "establishing [a] religion". Certainly, that notion involves something conceptually different from "imposing . . . religious observance", "prohibiting the free exercise of any religion" or requiring religious tests "as a qualification for . . . office or public trust under the Commonwealth", they being the other matters against which s 116 protects. Moreover, s 116 is not, in terms, directed to laws the **express and single purpose** of which offends one or other of its proscriptions. Rather, its terms are sufficiently wide to encompass **any law which has *a* proscribed**

> **purpose**. And the principles of construction to which reference has been made require that, save, perhaps, in its application to laws "for establishing [a] religion", s 116 be so interpreted lest it be robbed of its efficacy. (at 133) [emphasis added]

It seems that her Honour took the view that one of the purposes of the relevant legislation may indeed have been to interfere with freedom of religion:

> Indeed, in the absence of some overriding social or humanitarian need – and none is asserted – it might well be concluded that one purpose of the power conferred by s 16 of the Ordinance was to remove Aboriginal and half-caste children from their communities and, thus, prevent their participation in community practices. And if those practices included religious practices, **that purpose necessarily extended to prohibiting the free exercise of religion**. (at 133) [emphasis added]

But her Honour took the view that the Commonwealth had not provided enough information for the issue to be determined.

McHugh J agreed with Dawson J that section 116 was not applicable to laws made under section 122 – at 142. Gummow J took a fairly narrow "purpose" approach, and concluded that the purpose of the legislation was not to interfere with free exercise – at 160. Interestingly, his Honour cited the controversial *Smith* decision from the United States as apparently an indication of the approach he preferred – see n 629 at 160.[6]

His Honour did, however, concede that legislation which seemed to be directed to other matters might be a "concealed" attack on religion and in those possible circumstances might be subject to attack under section 116 – see 161. His Honour also took the view that section 116 was applicable to laws passed under section 122 – see 167.

The upshot of *Kruger* seems to be that the majority of the Court took a reasonably narrow, "purposive" view of section 116, requiring a close examination of the purpose of relevant legislation to see if it had the purpose of impairing freedom of religion. Arguably this is something of a retreat from comments made by Latham CJ in the *Jehovah's Witnesses* case, where his Honour there said that the purpose of legislation was only one factor in determining whether it breached section 116 (see *Jehovah's Witnesses* at 132, though this passage itself was doubted by Gaudron J in *Kruger* at 132).[7]

Some members of the Court at least allowed that legislation could have more than one purpose, and Gaudron J demonstrated how even in this case it could have been concluded that one purpose at least of the relevant legislation was the impairment of free exercise of religion.

On the vexed question of whether section 116 governs the laws of the Territories made pursuant to section 122, Toohey, Gaudron and Gummow JJ are all clear that it does; Dawson and McHugh JJ that it does not; and Brennan CJ unfortunately does not offer a view (although the fact that his Honour explicitly found that the laws did not breach section 116 suggests that he may have been sympathetic to the view that it applied). So there is no clear majority on the point, which is presumably why a recent textbook states: "The court has not yet resolved the question whether s 116 applies to laws made under the territories power."[8]

On balance, however, I think that when presented with the issue the Court will hold that section 116 applies to the Territories. I am reinforced in this view because in recent years, in *Wurridjal v Commonwealth* (2009) 237 CLR 309, a majority of the Court overruled past decisions

holding that the right to "just terms compensation" under section 51(xxxi) did not apply to the Territories. So there seems to be a definite trend to apply what few constitutional "protections" that there are equally to the Territories as to other parts of the Commonwealth.

Cheedy on behalf of the Yindjibarndi People v State of Western Australia [2010] FCA 690 (2 July 2010); upheld on appeal [2011] FCAFC 100 (12 August 2011)

This case, a decision at the appellate level in the Federal Court, raised the question of whether provisions of the *Native Title Act* 1992 (Cth) which allow mining to take place on native title land in some circumstances without the consent of the local native title holders were contrary to section 116 because they would impair the exercise of religious obligations under traditional indigenous spiritual views – one of which was that those who come onto land must do so with the consent of the land-holders, and others of which obliged free access to the land to carry out certain ceremonies.

The trial judge, McKerracher J, in effect rejected the argument because he adopted the High Court's "purposive" approach in *Kruger*:

> [73] The "effect" or "result" of a statute is not the primary test for assessing whether that statute is consistent with s 116. Section 116 directs attention primarily to the purpose of the impugned law, rather than to its "effect" or "result". It may be that the effect of the law, in some circumstances, could assist in construing its purpose but the effect of the law is not the starting point.
>
> [74] There is no indication at all that the purpose of s 38 or s 39 NTA is "for" prohibiting the free exercise of religion.

His Honour also commented that difficult issues were raised, as the decision being complained of was that of a Tribunal making an order (rather than directly a piece of legislation), and part of the basis for the order was State law:

> [83] A further difficulty with the s 116 argument for the Yindjibarndi is that s 116 is directed at Commonwealth legislation. The complaint of the Yindjibarndi seems not to be against the enactment or content of s 38 or s 39 NTA, but rather against the decision made by the Tribunal. The Yindjibarndi contends that s 116 acts to modify the effect of s 38 and s 39 NTA by limiting the kinds of determinations the Tribunal may make to only those which do not impair religious freedom. Section 116 is directed to the making of Commonwealth laws, not with their administration or with executive acts done pursuant to those laws. Section 116 is not capable of regulating or invalidating the Tribunal's decision. The relevant enquiry is whether the Commonwealth may enact s 38 and s 39 NTA.
>
> [84] A law that authorises administrative acts or decisions which prohibit the free exercise of religion will only be a law *for* "prohibiting the free exercise of religion" and invalid pursuant to s 116 if the purposive content of the law is established.
>
> [85] Neither s 38 and s 39 NTA, nor the Tribunal's determinations, prohibit religious freedom because they do not prohibit anything. If any act did, it would be the grant of the MLAs the subject of the Tribunal proceedings. That grant is a separate administrative act and subject to separate considerations and controls. Any such grant would be made under the Mining Act which, being State legislation, is not subject to s 116 of the *Constitution*.

On appeal the Full Court of the Federal Court upheld the trial judge's findings:

> [92] Similarly, in the present case, there is nothing on the face of s 38 and s 39 to suggest that they have the **object of prohibiting** the free exercise of religion. Section 38 specifies the kind of determinations which the arbitral body may make. Section 39 sets out the

> mandatory criteria which must be addressed by the arbitral body in the course of its inquiry. Some of the mandatory considerations such as the freedom to carry out rites, ceremonies, and other activities of cultural significance in accordance with traditions, which appears in s 39(1)(a)(iv), demonstrate a concern by the legislature with the protection of religious freedom.
>
> [93] It follows from the application of the test for invalidity under s 116 of the Constitution explained in *Kruger* that the appellants' challenge to s 38 and s 39 on this basis cannot succeed. The primary judge was correct to so hold. [emphasis added]

The Full Court also noted the other problems identified by the judge:

> [96] …[W]e agree with the primary judge that the complaint of the appellants is essentially directed to the determinations of the Tribunal and the consequent grant by the State of the mining leases under State legislation. Section 116 applies to the making of laws by the Commonwealth. It does not apply to the determinations made by the Tribunal, to legislation enacted by State governments, or to actions of the State taken under State legislation. To the extent that the appellants complain about these matters, s 116 has no application.

In addition the Full Court noted that the Tribunal had made findings of fact on the proposed impairment of religious freedom, especially those concerning access to particular parts of the land to obtain ochre and other matters needed for religious ceremonies, which were to the effect that the mining companies in question were prepared to allow such access as was needed. So that in effect, as a matter of fact, there seemed to be no proven impairment of religious freedom.

Some other comments on Constitution, section 116

The above are the main decisions in which the free exercise clause of section 116 has been considered. But there are some comments on the provision in a couple of other cases worth mentioning. In ***Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association*** (1987) 17 FCR 373 at 388, Jackson J said:

> Assuming that the "purpose" of . . . a law is to be gathered from its "effect" or the "result" which it achieves, and that if the law has the effect proscribed by s 116, it would be impossible to deny that the "purpose" of it was otherwise (that is, to say that it was not a law "for prohibiting the free exercise of any religion"), it is necessary to see what effect the decisions in question have . . .

This was an interesting case involving a decision to deport a "radical" Muslim cleric, Sheikh El-Hilaly. The claim was made that in doing so the minister had acted contrary to section 116, presumably by interfering with the free exercise of religion either by the Sheikh or else by those who wished him to be their religious leader. In the end the Court concluded that the "purpose" of the minister's actions was not in any way to inhibit the free exercise of religion of anyone, and hence there was no contravention of section 116. Jackson J said at 389:

> Accepting, however, that there will be some disruption of worship occasioned by the decisions in question it does not seem to me that there is in terms of s 116 any prohibition

> of the free exercise of religion. Section 116 states in my view not merely the broad proposition that no religion shall be established, but also that no religion shall be prohibited. The term "prohibiting" in s 116 means what it says and appears to me to mean a proscription of the right to exercise without impediment by or under Commonwealth laws any religion which is the choice of the person in question.
>
> The Migration Act 1958 itself contains no such proscription. Nor in my view is it possible to regard the refusal of the appellant to permit a particular person who is a minister of a religion to remain in Australia a prohibition of the free exercise of that religion. It may be that circumstances such as repeatedly refusing to allow any overseas ministers of a religion to enter or remain in Australia might in a different case amount to such a prohibition, but this is not the position here.

I must say I think there are some interesting issues here, which are somewhat elided by the judgment. Would it matter, for example, whether the behaviour and views of the Imam concerned were solely "religious" in nature or "political"? Can one, indeed, draw a line there? It seems to me that whatever view one takes of the matter, the "free exercise" of the Imam's religion was being interfered with if his deportation was based on views expressed in sermons.

In many ways it might have been more honest to recognise this and to address directly the competing interests to be taken into account (such as whether it was against Australia's interests in national security to have someone in leadership in the Muslim community advocating violent jihad, which seems to have been an arguable view of what was being said).

In ***Halliday v Commonwealth of Australia*** [2000] FCA 950 (14 July 2000) an "ambit" claim was made challenging the constitutional validity of provisions introducing the GST, and a section 116 issue was said to arise because, according to the claim, it was contrary to Islam for a Muslim person to collect tax on behalf of the government – see [16]. The claim was rejected; interestingly, the Court referred to a similar decision in the United States where an Amish person claimed the right not to pass on collected taxes to the government, and where it was held that the community interest in revenue collection had to take primacy – see *United States v Lee* [1982] USSC 40; 455 US 252 (1982), noted at [20]. Sundberg J commented:

> [21] The GST laws (including the withholding provisions) do not prohibit the doing of acts in the practice of religion any more than did the military service law in *Krygger v Williams*. **At most they may require a person to do an act that his religion forbids. But that is not within s 116**. If the matter be approached by asking whether the law is a law "for prohibiting the free exercise of any religion", in the sense that it is **designed** to prohibit or has the purpose of prohibiting that free exercise, the answer must be in the negative. It is plainly a law of general application with respect to taxation. There is no hint of a legislative purpose to interfere with the free exercise of a Muslim's or anyone else's religion. Nor is it a law that has the result or effect of prohibiting the free exercise of any religion. A person professing the Muslim faith can avoid committing the sin of acting as a tax collector by ensuring that he deals only with suppliers who quote an ABN. On the view espoused in *Lee*, the **importance of maintaining a sound tax system is of such a high order** that religious belief in conflict with the withholding of GST tax is not protected by s 116. When Latham CJ asked whether freedom of religion has been *unduly* infringed by a law, he was in my view asking a similar question to that posed by *Lee*. There is no **undue interference** here. Especially is this so when a person can avoid acting as a tax collector by dealing only with suppliers who quote an ABN. I have canvassed the various "tests" that can be

> distilled from the cases. But the essential point, in my view, is that the withholding tax provisions do not prohibit the doing of any act in the practice of religion. The claim that the GST law offends s 116 has no prospect of success. [emphasis added]

While I do not disagree with his Honour's conclusion, the paragraph contains a "smorgasbord" of propositions, not all of which are consistent in my view with previous law or each other. The "undue" infringement discussion is a reasonable use of Latham CJ's decision in the *Jehovah's Witnesses* case. But is it really true that section 116 can *never* apply to a law because it requires someone to do something their religion forbids? (After all, that would have been a quick way of disposing of the issues in the *Jehovah's Witnesses* case; but it was not the way the Court approached it.)

The reference to whether a law is "designed" to prohibit a religion is a reference to the "purposive" test, which is, indeed, justified under *Kruger*. But then his Honour discussed the "importance" of the interest in tax collections, which is a "balancing" process. And then his Honour concludes that in any event a Muslim person could avoid the "tax collection" aspect altogether, so there is no real section 116 issue anyway!

With respect, there are some important issues, which it would have been better to have dealt with here. Simply being able to avoid the impact of a requirement by changing one's behaviour may not resolve the religious freedom issue. To take a more up-to-date example, suppose Federal anti-discrimination law were interpreted to mean that a person who baked wedding cakes, who refused to supply a cake in support of same sex marriage, was guilty of discrimination on the basis of sexual orientation? [9] Would it be a sufficient answer to a claim that this was an undue interference with free exercise of religion, to say that the person can avoid the problem by getting out of the wedding cake business?

See also ***Daniels v Deputy Commissioner of Taxation*** [2007] SASC 431 (7 December 2007), where the plaintiff claimed that the provisions of section 116 allowed him to decline to pay the proportion of his taxes which he calculated went to fund abortion. The Court not unnaturally declined to agree. Even apart from the complexities of administering a scheme where members of the public were allowed to take conscientious objection to the way their taxes were spent, it would seem be an unworkable system in principle.

Still, it seems clear that we have some way to go before the courts in Australia are really clear about how free exercise under section 116 should work. Given the limits of section 116 as a protection for religious freedom in Australia, are there other options? I want to flag three that may be possible: international obligations; common law protection; and domestic charters. I will also consider the important "indirect" protection provided by "balancing clauses" in anti-discrimination laws.

Protection of religious freedom other than through the Constitution, section 116

Protection under international conventions?

There are a number of important international treaties that protect religious freedom. Probably the most important one, which Australia has undertaken to be bound by, is the *International*

Covenant on Civil and Political Rights (the ICCPR), section 18 of which provides for a broad right of religious freedom. But under Australian law international treaties are not "incorporated" into our domestic law automatically; parliaments need to take a further step and pass implementing laws. Unless the Commonwealth or a State/Territory enacts specific legislation, the most that can be said (and this argument has been run in a couple of cases) is that, as a matter of judicial discretion in interpreting ambiguous legislation, the courts should presume that Parliament would intend to comply with international law (see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273). But, so far, no statute has been found to be sufficiently unclear in the area of religious freedom for this principle to be applied.

One case, however, where international obligations provided at least one reason for the decision was *Evans v NSW* [2008] FCAFC 130. In this decision a major ground for overturning restrictive NSW regulations that had prohibited the "annoying" of Catholic World Youth Day participants was that they interfered (without explicit parliamentary authority) with the fundamental common law right of freedom of speech. Branson & Stone JJ commented:

> 74 Freedom of speech and of the press has long enjoyed **special recognition at common law**. Blackstone described it as "essential to the nature of a free State": *Commentaries on the Laws of England*, Vol 4 at 151-152. . . .
>
> 76 In its 1988 decision in *Davis v Commonwealth* (1988) 166 CLR 79, the High Court applied a principle supporting freedom of expression to the process of constitutional characterisation of a Commonwealth law. . . . In their joint judgment Mason CJ, Deane and Gaudron JJ (Wilson, Dawson and Toohey JJ agreeing) said (at 100):
>
> > Here the framework of regulation . . . reaches far beyond the legitimate objects sought to be achieved and **impinges on freedom of expression** by enabling the Authority to regulate the use of common expressions and by making unauthorised use a criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power . . .
>
> 78 The present case is not about characterisation of a law for the purpose of assessing its validity under the Constitution of the Commonwealth. The judgments in *Davis* 166 CLR 79 however support the general proposition that **freedom of expression in Australia is a powerful consideration** favouring restraint in the construction of broad statutory power when the terms in which that power is conferred so allow. [emphases added]

The evidence in that case disclosed that Evans and other members of the public were planning to demonstrate against what they perceived to be bad policies and doctrines taught by the Roman Catholic Church. The challenged regulations would have restricted their right to do so by requiring them not to "annoy" participants. The Federal Court held that these regulations should be struck down on the principle that the head legislation enacted by the Parliament of New South Wales should not be interpreted, in the absence of express words, as allowing regulations to be made which interfered with this fundamental common law right. This principle, known somewhat obscurely as the "principle of legality," was also applied by some members of

the High Court in *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013) and in a related case concerning freedom of speech, *Monis v The Queen* [2013] HCA 4 (27 February 2013).

The Federal Court in *Evans,* however, also incidentally referred to the value of religious freedom, supporting this by reference to the general terms of section 116 of the Constitution, and to Article 18 of the Universal Declaration on Human Rights.

> 79 In the context of World Youth Day it is necessary to acknowledge that another important freedom generally accepted in Australian society is freedom of religious belief and expression. Section 116 of the Constitution bars the Commonwealth from making any law prohibiting the free exercise of any religion. This freedom is recognised in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights (ICCPR) which, in Art 18, provides:
>
> > 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> >
> > 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> >
> > 3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

International conventions can provide a model to encourage legislation and, as shall be shown in a moment, there is some local legislation that to some extent specifically adopts the ICCPR.

There was an attempt made to develop an argument along these lines in one of the cases noted previously. In *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2011] FCAFC 100 (12 August 2011) the applicants argued, in addition to their section 116 point, that the Court ought to interpret the native title legislation in accordance with the ICCPR to allow recognition of their freedom of religion. The trial judge and the Full Court rejected this claim. The legislation had no relevant "gaps" that the international obligations could fill. The Full Court said:

> [106] . . . neither logic nor the judgment in *Teoh* support the use of Australia's international obligations in the interpretation of the provisions under consideration in the absence of any ambiguity in the language of the provisions.
> [107] If a provision has a clear meaning then that meaning either reflects Australia's international obligations or it does not. There is no scope for the application of any canon of construction to establish the meaning. But where there is more than one possible meaning of the provision, the canon of construction favouring Australia's international obligations is available to identify the intended meaning. In other words, the canon of construction only has work to do where the provision is open to more than one interpretation. This is the reason for the reference in the judgment in *Teoh* to the use of the canon of construction for the purpose of resolution of ambiguity.

> [108] Thus, the primary judge was correct to hold that a statutory provision will be construed so as to conform with Australia's international obligations only in order to resolve ambiguity in the language of the provision.
> [109] As explained earlier in these reasons, there is no relevant ambiguity in s 38 and s 39 of the Act, and hence no occasion for resort to the international obligations contained in the ICCPR or the UN Declaration arose. The primary judge was correct to so determine.

A more recent decision where more positive reference was made to international religious freedom principles was *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26 (19 March 2014). The circumstances arose out of the fact that a number of congregations ("wards") of the LDS ("Mormon") church in the Brisbane area had previously been conducting church meetings in the Samoan language, for the benefit of members of the Samoan LDS community. A re-organisation of the church resources, including, it seems, a desire to make the church meetings more accessible to the broader community, [10] led to a decision that the previous Samoan services would from now on be conducted in English, and members of the church were forbidden from speaking at the front of the meetings, praying or singing in any language other than English.

This action was brought as a class action by a number of Samoan-speaking church members, against the leadership of the church, with the aim of restoring at least some of the Samoan meetings. The actions were brought under section 46PO of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), alleging unlawful discrimination by the Church against the applicants as members of the Church. Racial discrimination was alleged, pursuant to s 9 of the *Racial Discrimination Act* 1975 (Cth) ("RDA"). The claim was heard by a Federal Magistrate and failed, and this appeal to the Full Court of the Federal Court of Australia then ensued.

While the claim was one for racial discrimination, freedom of religion was one of the main issues at stake. Under section 9(1) of the RDA:

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

The definition of "human right or fundamental freedom" refers to article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, ("the RD Convention"), which in turn includes, in para (d)(vii), "The right to freedom of thought, conscience and religion". So the question came down to whether there had been denial of a religious freedom right on a racially discriminatory basis (although other rights, such a right to "nationality", including use of one's own language, and a right to freedom of expression, were also said to be engaged).

The Full Court noted that at some points the magistrate had identified the relevant right as a right to have public worship "provided" in the Samoan language, whereas in fact the claim was not simply that it was not "provided" from the front, but also that the congregation members were not able to "join in" with singing and other activities in Samoan. To this extent they ruled

that the magistrate had made an error. The relevant question was best framed as, whether there was a "right to worship publicly as a group in their native language"? [11]

Having identified the question, the Full Court went on to say that there was no such right established by the relevant international instruments. The relevant paragraph of the RD Convention referred to

(iii) The right to nationality;

…

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

…

As the Court said, it was not clear exactly how these three rights, or any alleged combination of them, gave rise to a right to public worship in a particular language:

> 54 The appellant did not explain precisely how it was that an alleged "right" to worship publicly as a group in one's native language existed separately and apart from these three nominated rights. The closest the appellant came to an explanation was senior counsel's statement that the asserted "right" was the expression of one or other or all of the three article 5 rights (ie, article 5(d)(iii), (vii) and (viii)). It was unclear precisely how this was put.

For those who are familiar with the popular movie, *The Castle*, the argument here sounds suspiciously like, "It's the vibe …!"[12] Nevertheless, the Full Court spent some time carefully examining the relevant instruments to see if, indeed, such a right could be found.

For our purposes there were some important features of this discussion. It was noted that, in accordance with the general principles of interpretation adopted by Australian courts, extrinsic material such as comments by United Nations bodies and decisions of other courts and tribunals around the world could be taken into account in determining the content of the fundamental rights and freedoms at stake. In particular, comments on the meaning of rights under the *International Covenant on Civil and Political Rights* (the ICCPR) could be taken into account, where those rights mirrored those referred to in article 5 of the RD Convention – see [62]. As well as article 18 of the ICCPR dealing with religious freedom, article 27 referred to minority rights. In particular, in addition to referring to the United Nations material, the jurisprudence of the European Court of Human Rights, on the application of analogous rights under the European Convention on Human Rights, was a valuable source of guidance on the issues – see [70].

In the end, however, the claim failed because the various instruments could not be read to find the claimed right; as the Court commented:

> 68 It may therefore be accepted that, as elaborated by article 18 of the ICCPR, the right to freedom of religion referred to in article 5(d) (vii) of CERD includes personal freedom, either individually or as a group, to engage in public worship. Article 27 of the ICCPR also recognises, in the case of a linguistic minority, a personal right to use the minority language amongst the minority group, in private and in public. The argument for the appellants at the hearing of the appeal was, in substance, that these rights merged into a right to worship publicly as a group in Samoan within the Church. For the reasons outlined below, this argument fails.

In effect, the ensuing discussion of the freedom of religion area adopted decisions of the ECHR which held that, while religious freedom was an important right and, indeed, while it extended as a right to religious organisations acting on behalf of their members, as well as to the individual members,[13] in essence members of a religious body did not enjoy religious freedom rights that could be asserted against their religious body. The Court made the point by the citation of a recent ECHR decision:

> 78 . . . [I]n the case of dissent from Church rulings, an individual's freedom of religion is protected by the right to leave the Church. Thus, in *Sindicatul "Pastorul cel Bun" v Romania* (2014) 58 EHHR 10 ("*Sindicatul 'Pastorul cel Bun' v Romania*"), the Grand Chamber, overturning a controversial and earlier decision, reiterated (at [136] to [137]) that:
>
> > The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members. **Were the organisational life of the community not protected by Article 9, all other aspects of the individual's freedom of religion would become vulnerable** . . .
> > In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones. **Similarly, Article 9 of the Convention does not guarantee any right to dissent within a religious body; in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his [or her] freedom to leave the community** (see *Mirolubovs and Others v Latvia*, no 798/05, § 80, 15 September 2009). [Emphasis added]

While conceding that in some cases it may be effectively "impossible" for a person to leave a religious community if they disagreed with the leadership, the Court held that there was no evidence that this was the case here. The religious freedom of the Samoan worshippers was protected by their ability to leave the congregations concerned and to gather in other places where they could worship in their own language. In effect, to grant a right to worship in their own language to a group within the churches, contrary to decisions that had been made by church leaders, would interfere with the freedom of the church leadership to lay down principles for the church. As they later commented in also rejecting an argument based on "minority rights" under article 27 of the ICCPR, at [102], it was important to recognise "the protection afforded by article 18 of the Covenant for the religious freedom of the Church on behalf of its adherents".

In the end, then, the Court rejected the claims of racial discrimination on the basis that there had been no interference with the "fundamental human rights" of the Samoan speakers, including no interference with their freedom of religion. Nevertheless, the case is very important as one of the first occasions where there has been an extended comment by an appellate court on the application of international religious freedom principles to Australian law.

(It should be noted that there was also some comment on the application of international religious freedom principles in the Victorian Court of Appeal decision of *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014). I have

previously written on this decision and suggested that on the whole it was wrong, and the use of international sources is not very impressive. The decision is considered below on other issues.)[14]

Common law protection of religious freedom?

If international law does not provide strong religious freedom protection, can it be found in the common law tradition? While the common law has a long tradition of protecting freedoms in general, there is not a strong tradition of religious freedom in the common law. In fact, the common law developed in a country (England) where there was an established church, the Church of England, and at various points in history there were legal disabilities imposed on those from other religions.

Ahdar and Leigh in their important discussion of the issues (see their book on the Further Reading list) are generally sceptical about such a common law right. The closest the common law comes, perhaps, is a series of cases where the courts have interpreted private testamentary gifts by testators that were clearly designed to favour a particular religion in such a way that beneficiaries who were not of that religion might be able to take the gift.[15] However, while one could argue that this approach supports the freedom of religion of the beneficiaries, it may be said that, at the same time, it undermines the freedom of religious choice made by the testator!

In Australia there was one attempt to invoke an implied religious freedom principle which effectively failed. In *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376 the Grace Bible Church was running a non-government school but had not received approval from the State educational authorities. They were convicted of an offence and fined. On appeal their argument was that the church had a religious objection to being required to have their curriculum approved by the State, and that, as Zelling J summarised it at 377: "there is an inalienable right to religious freedom and that that freedom cannot be abridged by any statute of the South Australian Parliament."

As might perhaps have been expected, their argument did not succeed. The judgments of the Supreme Court are interesting but all conclude that there is no general "inalienable" right of religious freedom for the sort of reasons already noted. Zelling J commented that section 116 clearly only applies to the Commonwealth, not to the States, and there was no general common law right of religious freedom which could be said to have been inherited by South Australia, referring to the laws concerning heresy and blasphemy. The comment from Rich J in the *Jehovah Witnesses* case at 149, where his Honour said "[i]t may be said that religious liberty and religious equality are now complete", was "not true in public law when Rich J wrote those words, nor is it true now" (Zelling J, at 379).

His Honour gave an interesting review of the early history of South Australia, noting that from an early time the State refused to fund religious bodies. But none of this history established a fetter on the power of the State Parliament.

The other members of the Full Court agreed, although Millhouse J said that he had been interested to read the comment of the High Court in the *Church of the New Faith* decision that I have used at the top of this paper.

A very interesting later South Australian decision touched on some of these issues. In *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, [1995] SASC 5532 (25 August 1995) there was an attempt to prevent a Commission of Inquiry examining the question whether certain religious beliefs which had been said to be "secret

women's business" of the Ngarrindjeri were genuine and long-standing beliefs, or whether, as alleged by some, they had been invented in recent years. (The beliefs had been involved in the question whether a particular bridge should be constructed.)[16]

Since the inquiry was set up by the State Government, section 116 was not directly relevant. An argument was made, however, that "freedom of religion" was an important common law principle, which the Court should not allow to be lightly overturned. In the end the members of the Full Court of the Supreme Court of South Australia agreed that simply making an enquiry into whether the beliefs were genuinely held, or not, did not of itself amount to an undue infringement of the freedom of religion of those who were said to hold the beliefs. Nevertheless, there were some interesting comments made about the importance of freedom of religion. Doyle CJ commented:

> I accept that **freedom of religion is one of the fundamental freedoms** which entitles Australians to call our society a free society. **I accept that statutes are presumed not to intend to affect this freedom**, although in the end the question is one of Parliamentary intention. But in my opinion it cannot be said that conduct of the sort in question here (the institution and conduct of a mere inquiry), to the extent that it affects freedom of religion is, as such, unlawful at common law. Nor, in my opinion, does this freedom so limit the powers of the executive government that this inquiry, which it considers appropriate in the public interest, is beyond the power of the executive government if or to the extent that it affects freedom of religion . . .
>
> For the purpose of these reasons I have assumed, without deciding, that the "women's business" the possible fabrication of which is the subject of inquiry, is an aspect of Aboriginal culture which is protected by the fundamental principle of freedom of religion. I likewise assume, without deciding, that **the inquiry will in fact intrude upon the freedom** of certain Ngarrindjeri people to hold and practise their religion, because of the practical compulsion to submit to scrutiny the substance of their beliefs and to disclose matters which they regard as secret. I stress that I have not decided either of these matters. (at 64 SASR 552-553) [emphasis added]

It seems to have been arguable that the conduct of the inquiry might have infringed upon a religious belief that information had to be kept secret, but even if so the strength of any common law presumption was not sufficient to override the specific power of the executive government to cause the issue to be inquired into. Debelle J agreed with the Chief Justice, but expanded on some issues:

> For the purposes of this action only, I am prepared to assume that the **freedom of religion is a fundamental freedom in our society**. Freedom of religion, the paradigm freedom of conscience, is the essence of a free society: *Church of the New Faith v The Commission of Payroll Tax (Victoria)* (1983) 154 CLR 120, per Mason ACJ and Brennan J at 130. But the freedom of religion like a number of other fundamental freedoms is **not absolute**. The freedom is not inalienable and may be regulated by statute: *Grace Bible Church v Reedman* (1984) 36 SASR 376. The extent to which this fundamental freedom renders other conduct unlawful at common law is open to serious question. Even if the holding of the Royal Commission constitutes an impairment of the freedom of religion, it is not clear whether as a matter of law it has the consequence that the impairment is unlawful or otherwise gives rise to any right which avails the plaintiff… (at 554-555)

The Royal Commissioner has the power to coerce witnesses: see s 11 of the Royal Commissions Act 1917. It may be a grave insult or at least an affront to a person who professes a particular belief to be required under pain of some penalty to attend and answer questions in respect of that belief. Compulsion to attend before a commission of inquiry and answer questions as to one's belief leads to justifiable concerns of a potential to interfere with the freedom to adopt and practise a religion of one's choice. The line between a mere inquiry and a step which impairs freedom of religion may be very fine and at times be very difficult to draw. But that is the kind of task which the courts are not uncommonly called upon to undertake. Having regard to the nature of the inquiry, I do not think there is any impairment of the free exercise of religion.

The inquiry stems from allegations that the women's business is a fabrication. Included in those who allege that the women's business is a fabrication are persons who say they are members of the Ngarrindjeri nation. The inquiry may, therefore, involve an examination of the beliefs of Ngarrindjeri women to determine the content of their belief. **That inquiry does not require an examination of the truth or falsity of the belief**. It is not concerned to establish whether the beliefs are consistent with that part of Aboriginal customary law and tradition which constitutes the religious beliefs of the Ngarrindjeri nation. It is not concerned to establish whether the belief is a rank heresy**. Instead, it is concerned with determining whether the asserted women's business has been recently manufactured by a group of Ngarrindjeri women**. One of the reasons for the inquiry is that a group of Ngarrindjeri women deny that the asserted women's business ever formed part of the religious beliefs of the Ngarrindjeri. The inquiry whether the asserted women's business forms part of the beliefs of Ngarrindjeri women will involve, among other things, an examination of the allegations as to fabrication, an examination of how long the belief as to the asserted women's business has existed and, if it is a recent held belief, when and how it came into existence. There may be difficulties in proving these matters, difficulties which are compounded because Aboriginal law and tradition is an oral tradition. But these are matters which are capable of being established by evidence of extrinsic facts. It is the limited nature of this inquiry which prevents it from being an impairment of the freedom of the Ngarrindjeri women to exercise their religious belief.

It is necessary to maintain a balance between the legitimate interests of those who seek to pursue a course of conduct and those who have a religious belief which seeks to prevent the desired course of conduct. If it is not possible to inquire whether the tenets of the asserted religious belief require that the conduct cease or to inquire whether the person who proclaims the belief genuinely believes it or to inquire whether it has been fabricated, those who are prevented from pursuing their legitimate interests are adversely affected without a proper opportunity of examining the case against them. As already mentioned, the freedom of religion is the paradigm freedom of conscience. No civilised society would seek to impose an improper restraint upon that freedom. Equally, no civilised society would wish to permit the freedom to be unfairly or improperly used as a means of preventing others from pursuing their legitimate interests. If an inquiry is constituted on the ground that the asserted belief is a fabrication, great care must be undertaken to ensure that there are proper grounds for the inquiry and that allegations of fabrication are not used as a cloak to hide the fact that the intention is to circumscribe the free exercise of that religion. The secret aspects of Aboriginal law and tradition deserve proper respect and care must be taken to ensure that there is no unlawful impairment of the freedom of Aboriginal people to practise their religion. But the nature of this particular inquiry and the manner in which it is being conducted do not impair the freedom of the Ngarrindjeri women to exercise their religious beliefs. (at 555-557) [emphasis added]

It is an interesting decision because it at least raises the possibility that a common law protection of free exercise is possible within the bounds of the "principle of legality," although it can be overridden if Parliament (or, perhaps, the Executive) chooses to do so.

To sum up on this question: we have seen it is unlikely that there is a common law freedom of religion principle. If there were, it would not operate as a constitutional constraint on law-making by parliaments, but it could function (as in the recent past the freedom of speech principle has functioned) as a "presumption" which would inform courts when interpreting legislation. The "principle of legality" means that a court, when reading an Act of Parliament, will assume unless there are clear words to the contrary that Parliament does not intend to infringe a fundamental common law right. So if it could be argued that "freedom of religion" is, or perhaps has now become, a fundamental common law right, as "the essence of a free society," then it may provide guidance for courts interpreting legislation.

Protection under specific charters of rights?

As most people are aware, Australia does not have a general Federal "Charter of Rights" (unlike the United States or even, today, the United Kingdom where the European Convention on Human Rights has to some extent been incorporated into local law). But individual jurisdictions have chosen to implement such charters, and both the State of Victoria (*Charter of Human Rights and Responsibilities Act* 2006 (Vic) section 14) and the Australian Capital Territory (*Human Rights Act* 2004 (ACT) section 14) have enacted general human rights instruments which contain explicit protections for religious freedom.

So far there have been few decisions considering these provisions.

A fascinating attempt to use section 14 of the Victorian Charter was made in *Valentine v Emergency Services Superannuation Board (General)* [2010] VCAT 2130 (29 July 2010), although ultimately unsuccessful. The pension of the widow of a former ambulance driver had been terminated on re-marriage sometime before 2008 when the Charter commenced. She was later told that the pension would be reinstated if she divorced her current husband or he died! She complained that, in effect, she was being penalised on the basis of her religion because her religious beliefs meant that she could not in all conscience seek a divorce.

The Tribunal ruled against her because all the relevant events had happened before the Charter commenced. But interesting comments were made at the end of the judgment:

> [102] An argument . . . may be made, namely the provision of a penalty for Mrs Valentine for living in lawful matrimony with Mr Valentine rather than 'in sin' is in violation of her religious beliefs based on the right protected by Section 14 of the Charter. The oral argument in this proceeding did not take me to authorities on the scope which this protected right has been accorded in international human rights jurisprudence. In light of the conclusions which I have reached as to the non-operation of Section 32 of the Charter for the purposes of this dispute it is inappropriate therefore for me to say too much, beyond noting that there does seem to be some plausibility to the contention that a legal interpretation which would impose a significant financial penalty upon a citizen who adhered to her religious beliefs relative to matrimony could be regarded as a coercion or a restraint in her freedom to have or adopt a religion or belief in practice.

While it did not directly involve the application of section 14, the decision in *Aitken v The State of Victoria, Department of Education & Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547 (18 October 2012) mentioned the provision in passing. In this case, parents of children at a State school objected to the fact that Scripture classes (special religious instruction) were offered at the school their children attended, but their children were "singled out" because they had withdrawn them from the class. The Tribunal found that there had been no adverse impact on the children, and hence that there was no breach of the Charter or the legislation on discrimination.

However, the Tribunal commented briefly on the accepted approach to applying the Charter in interpreting Victorian legislation:

> [97] The parties and the Commission submitted, that on current authority, the proper application of the Charter required first, ascertaining the ordinary meaning of the provision applying normal principles of statutory construction. Secondly, if on its ordinary construction the provision limits a right protected by the Charter, in this case those recognized by ss 14(1), 8(2) and (3), the next step is to determine whether the limitation of that right is demonstrably justified as a reasonable limit in accordance with s 7(2) of the Charter. Thirdly, if the limitation is not justifiable, an attempt had to be made to give the provision a meaning that is compatible with human rights and that is also consistent with the purpose of the provision. The respondent bore the onus of demonstrating that the limitation on the right was justifiable.

There is an interesting decision of Refshauge J in *R v AM* [2010] ACTSC 149 (15 November 2010) which considered some elements of section 14 of the ACT HRA. I will not go into it in detail, as the claim there related to freedom of "conscience" rather than of religion, but it is worth consulting to see how his Honour attempted to spell out when something may be a matter of "conscience". He concluded that there needs to be something of a well-thought out view rather than a mere opinion. In the circumstances the attempt by AM to use a right of "conscience" to avoid the consequences of breaching a domestic violence order failed, partly because there was no clearly articulated "conscience" issue involved.

Section 14 was mentioned, although in the end it was not necessary to apply it, in *Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn & ACT Heritage Council* (Administrative Review) [2012] ACAT 81 (21 December 2012). There the Roman Catholic Diocese was applying to revoke a heritage declaration over a parish church so that it could undertake a redevelopment. Three members of the parish, however, wanted to apply to be heard on the heritage proceedings because they wanted to support the declaration. The Tribunal noted that arguably their rights under section 14 might be relevant (especially the rights involving "worship . . . as a community"), but concluded that even without taking section 14 into account the parishioners all had a sufficient "interest" in the matter to be able to be heard.

There appears to have been no other substantive consideration of the Human Rights Act (ACT), section 14, although it was mentioned briefly in passing in *Buzzacott v R* [2005] ACTCA 7 (1 March 2005), where it seems that a possible claim based on freedom of religion was being used as an excuse for the theft of a bronze coat-of-arms from Parliament House and its installation at a "tent embassy" – but it was not given any detailed discussion.

There seems little doubt that, as time goes on, these Charter provisions will provide further examples of claims for religious freedom. In general they do not provide "direct" remedies, but they do provide an avenue whereby a court may declare that a breach of a right has occurred, and they certainly provide an "interpretative" framework, which may influence the way legislation is to be read.[17]

There is a very little-known provision in the Tasmanian Constitution, section 46 of the *Constitution Act* 1934 (Tas), which "guarantees to every citizen" "free profession and practice of religion . . . subject to public order and morality." The courts have apparently never considered the provision.

Anti-discrimination laws and "balancing provisions"

Finally, freedom of religion is also protected in two different ways under legislation that prohibits discrimination around Australia. The first is that in most jurisdictions – all except NSW and the Commonwealth – one of the grounds of unlawful discrimination is religious belief, so that it would be unlawful to sack someone, or deny them services, on grounds of their religious belief, where this was irrelevant to their employment or receiving the relevant services.

The jurisdictions where it is currently unlawful to discriminate against someone on the grounds of their religious commitment are:

- Queensland – Anti-Discrimination Act 1991, section 7(i) "religious belief or religious activity";
- Tasmania – Anti-Discrimination Act 1998, section 16 (o) and (p): (o) "religious belief or affiliation;" (p) "religious activity";
- Victoria – Equal Opportunity Act 2010, section 6(n) "religious belief or activity";
- Western Australia – Equal Opportunity Act 1984 – Part IV of the Act deals with discrimination on the ground of "religious or political conviction" (see section 53);
- Australian Capital Territory – Discrimination Act 1991, section 7(i) "religious or political conviction";
- Northern Territory – Anti-Discrimination Act 1992, section 19(1)(m) "religious belief or activity";
- South Australia – no broad protection, but a specific provision in section 85T(1)(f) of the Equal Opportunity Act 1984 (SA) which prohibits discrimination in certain defined areas on the basis of "religious appearance or dress."

While there are not many decisions on these provisions,[18] there are two that go into the issues in some detail. In *McIntosh, Ahmad v TAFE Tasmania* [2003] TASADT 14 (10 November 2003) a claim for religious discrimination was made against the TAFE for refusing to provide a separate "prayer room" which the Muslim employee could use for prayer. The Tribunal concluded that there was no discrimination on the basis that any other member of staff who wanted a room set aside for their own purposes would also have been declined! The case noted that some accommodation had been made in rostering to allow the employee to attend a Mosque on Fridays.

The case of *Walsh v St Vincent de Paul Society Queensland (No 2)* [2008] QADT 32 also raised a question of discrimination on the basis of religion. Here a lady who was in charge of a local St Vincent de Paul branch was told that she had to step down as she was not a Roman Catholic. There was an attempt to apply the provision of the Queensland legislation which allowed a

"religious body" to be exempt from the Act in terms of appointment of priests and ministers, training of such, and appointment of people to carry out "religious observances".[19]

In the end the Tribunal found that the provision did not apply because the St Vincent de Paul Society was not a "religious body"! This somewhat surprising conclusion was expressed as follows:

> On my reading of the constitution documents, the Society is not a religious body. It is a Society of lay faithful, **closely associated with the Catholic Church**, and one of its objectives (perhaps its **primary objective) is a spiritual one**, involving **members bearing witness to Christ** by helping others on a personal basis and in doing so endeavouring to bring grace to those they help and earn grace themselves for their common salvation. **That is not enough**, in my opinion, to make the Society a religious body within the meaning of the exemption contained in sub-sections 109 (a), (b) or (c).
>
> Likewise, and despite the particulars which have been provided of the functions of the president relied upon, and the religious observances and practices said to be relevant, it does not seem to me that the fact that a conference president performs some functions (such as leading prayers) and has some duties (among a long list of duties), some with spiritual aspects and some with practical aspects, means that what happens at conference meetings, or what the president does in the discharge of his or her duties, involves "religious observance or practice". [emphasis added]

While most people would see "Vinnies" as providing services to the poor rather than religious services, it does seem a bit odd that an organisation which can be described as it is in para [76] is not "religious".[20]

Second, and related to this, all jurisdictions whose laws prohibit discrimination on various grounds have included provisions that are designed to "balance" religious freedom with the right not to be discriminated against. So that, for example, while there is a general prohibition on employment decisions being made on the basis of gender, all jurisdictions allow ***churches or other religious organisations*** to decide only to appoint male clergy, because that is seen by some religious groups as a key part of their teachings.[21] Agree with these teachings or not, the law takes the view that it reasonably preserves the religious freedom of believers in these groups, and the groups as a whole, to allow their religious freedom to be exercised in this way.[22]

Interestingly, as well as these general provisions covering religious bodies, there is one that seems to be unique to Queensland governing access to "sacred sites". Section 48 of the *Anti-Discrimination Act* 1991 (Qld) provides:

> **48 Sites of cultural or religious significance**
> A person may restrict access to land or a building of cultural or religious significance by people who are not of a particular sex, age, race or religion if the restriction –
> (a) is in accordance with the culture concerned or the doctrine of the religion concerned; and
> (b) is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion.

While this provision applies to a "person" generally, presumably it will mostly be used by those in charge of religious groups (an LDS official restricting access to a temple, for example).

But one can certainly imagine it being invoked by an elder from an indigenous clan wanting to keep, say, female tourists away from a site sacred to men.

In most jurisdictions, however, there is a major "gap" in discrimination legislation "balancing provisions" (as I prefer to call them), which is that few recognise that individual members of the public, as well as religious organisations and what we might call "religious professionals", have religious freedom rights that may be impaired by uniform application of discrimination laws.[23]

So, for example, if you run a business and want to apply Christian principles in your business, it may not always be possible to do so, depending on the type of issue that comes up. In NSW, an early decision under the *Anti-Discrimination Act* 1977 in *Burke v Tralaggan* [1986] EOC 92-161 held that a Christian couple who refused to allow an unmarried couple to rent a flat they owned, on moral grounds, had unlawfully discriminated on the ground of "marital status" under section 48 of the Act. (An interesting article by Moens comments on this case.)

Suppose, instead of renting out a flat, you offer accommodation in your own house to casual visitors, in a "bed and breakfast" situation. Do you as an individual have the right under the law, on the basis of religious convictions about sexual behaviour, to decline to accept a booking for a double bed from a gay couple, or from an unmarried couple?

An issue of this sort came up in the United Kingdom, in *Bull v Hall* [2013] UKSC 73 (27 November 2013). The Bulls ran a boarding house. They had refused, on grounds of their religious views, to give double bed accommodation to a same sex couple. The Supreme Court upheld the decisions of lower courts fining them for breaching a regulation prohibiting discrimination on grounds of sexual orientation. There was a slight difference of opinion within the Court – three members found that this was "direct" discrimination, whereas two members held that it was "indirect" discrimination (in my view a better opinion, since the ground of their refusal was expressed to be that the couple were not married, not that they were homosexual). But even those who held it was indirect discrimination took the view that it could not be justified.

It is interesting to note that it may *not* be unlawful to do this in New South Wales. Under section 48 and section 49ZQ of the *Anti-Discrimination Act* 1977 (NSW), which deal with provision of accommodation, there is an exemption that applies where the accommodation in question is one in which the provider also resides, and where less than six beds are provided. So it seems that the New South Wales Parliament has explicitly decided not to require someone who offers accommodation in what is in effect their own house, to comply with the discrimination law in this area. Section 23(3)(a) of the *Sex Discrimination Act* 1984 (Cth) contains a similar exemption, although interestingly it only applies where there are no more than three beds provided. (Since the Commonwealth provision will override the State where there is a clash, the "3 bed" rule is the one that will have to be applied.)

It is somewhat ironical that, so far as I can discover, the only major provision in anti-discrimination legislation designed to provide protection for religious freedom for general citizens (in contrast to religious organisations or "professionals") is contained in the law of Victoria.[24] The irony lies in the way that the scope of this provision has been so narrowly interpreted in a recent decision of the Victorian Court of Appeal.

The current provision is section 84 of the *Equal Opportunity Act* 2010 (Vic):

Religious beliefs or principles

84. Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

The former Victorian Act contained a similar provision, section 77 of the *Equal Opportunity Act* 1995 (Vic):

> 77. Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

This provision was subject to a very narrow reading in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014). There a Christian camping organisation, and its representative, Mr Rowe, were sued for sexual orientation discrimination when Mr Rowe indicated that the organisation would not accept a booking for a program which would be run for same-sex attracted young people and present homosexuality as a normal and ordinary part of life.

I have discussed the *Christian Youth Camps* decision in some detail previously.[25] But let me summarise briefly the ways in which the Court of Appeal here provided a very narrow reading of the apparently generous provisions of former section 77 of the 1995 Act, which will also affect future readings of section 84 of the 2010 Act. I will also note the dissenting view of Redlich JA, which may provide guidance in the future should the majority view not remain authoritative. (His Honour's views may also provide guidance in other jurisdictions, where appellate courts at least will need to decide whether or not the *CYC v Cobaw* decision is "clearly wrong" or not, if it is applicable to similar provisions elsewhere.)

On the question of the **necessity** of the relevant action for compliance with beliefs, Maxwell P ruled that Mr Rowe could not rely on section 77 as it was not "necessary" for him to apply sexual standards of morality from his religious beliefs to other persons. The rule that sex should only be between a heterosexual married couple was a rule of "private morality" and even on its own terms did not have to be applied to others – see [330]. This ignored the fact that Mr Rowe was being asked to support a message of the "normality" of homosexual activity with which he fundamentally disagreed. As Redlich JA in dissent noted:

> [567] . . . What enlivened the applicants' obligation to refuse Cobaw the use of the facility was the disclosure of a particular proposed use of the facility for the purpose of discussing and encouraging views repugnant to the religious beliefs of the Christian Brethren. The purpose included raising community awareness as to those views. It was the facilitation of purposes antithetical to their beliefs which compelled them to refuse the facility for that purpose. To the applicants, acceptance of the booking would have made them morally complicit in the message that was to be conveyed at the forum and within the community.

Neave JA discussed the meaning of the phrase, "necessary . . . to comply", and concluded that, while there was a subjective, honesty, element in the criterion, it also required some

objective consideration. She summed up the requirement as "what a reasonable person would consider necessary . . . to comply with his genuine religious belief ", at [425]. This seems to be correct, so long as "reasonable" means "a reasonable person who belongs to the particular religion".

Redlich JA seems to have adopted a similar criterion:

> [520] . . . the word "necessary", in its application under s 77 to religiously motivated action, must mean action which a person of faith undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs and principles.

Does the new wording of section 84, "reasonably necessary . . . to comply," imply that the previous wording of section 77 was a purely subjective criterion? No, Neave JA concluded at [427]. The implication is that the change in section 84 was simply clarifying something that was already present in section 77. On this question Redlich JA seems to have taken a slightly different view. At [531]-[532] his Honour suggested that the contrast with the later provision supported a more "subjective" interpretation of the earlier one. On the other hand, he went on to comment that even if the provision required a showing of "reasonable necessity": "[533] This test of necessity still falls short of the more demanding, and narrower, view of the Tribunal."

In other words, the narrow approach of the Tribunal would still be inappropriate under the reformulated section 84.[26]

Another aspect of the question of "necessary to comply" concerned the content of the religious beliefs. How was this to be determined? And was it sufficient if an action was "motivated" by belief, or did it have to be "required".

Maxwell P again took a narrow view of these questions. He accepted the reasoning of Judge Hampel in the Tribunal. Hampel J had adopted the submission of a theological expert that "doctrines" of the Christian faith were to be confined to matters dealt with in the historic Creeds, none of which mentioned sexual relationships – see [276]-[277].

His Honour then went on to consider what result would have followed were he to accept that views about the exclusivity of sexual relationships to marriage, and the nature of marriage as between a man and a woman, were in fact "doctrines". He noted that these views functioned as moral guidelines for those within the church, and that no doctrine of Scripture required interference with those outside the church who chose to behave otherwise – see [284]. Hence, in his Honour's view, a refusal of accommodation cannot have been "required" by Christian doctrine. On this point he held that "conforms to" doctrine must mean that there is "no alternative" but to act in this way – [287]. In relation to Mr Rowe his Honour commented at [331]: "The very notion of compliance suggests that there is a rule, or a prohibition, which the religious believer must obey."

Neave J at [435] also distinguished between some behaviour being "motivated by . . . religious beliefs" and being "necessary". Redlich JA, in contrast to the majority, ruled that it was not necessary or appropriate for the court to make a decision about the "centrality" or "fundamental" nature of religious beliefs.[27] Nor was it necessary to show that the beliefs "compelled" the believer to do the act in question.[28]

In what spheres of life is religion allowed to matter?

In the analysis offered by Neave JA at [429] what was at stake was said to be "protecting the right of individuals to hold religious beliefs and express them in worship *and other related activities* and protecting the rights of other members of a pluralist society to be free from discrimination" [emphasis added]. I have added the emphasis to highlight words of some concern. There is an unfortunate tendency in some commentary on religious freedom to see it merely as dealing with what goes on in church meetings. This description of religious freedom as relating to "worship and other related activities," where "worship" is no doubt intended to mean "church meetings," gives a very narrow scope to religious freedom.

That this is, indeed, what her Honour intended can be seen in the next paragraph, where she purported to rely on European jurisprudence to say:

> [430] . . . Where the act claimed to be discriminatory arises out of a commercial activity, it is less likely to be regarded as an interference with the right to hold or manifest a religious belief than where the act prevents a person from manifesting their beliefs *in the context of worship or other religious ceremony*. That is because a person engaged in commercial activities can continue to manifest their beliefs in the *religious sphere*. [emphasis added]

As I pointed out previously, there were some European and UK decisions which came very close to holding the very harsh view that the right to freedom of religion in the employment context, for example, could be perfectly well protected by the fact that an employee whose religious freedom was impaired could leave and find another job. But those views have now substantially been rejected by the decision of the European Court of Human Rights in *Eweida v The United Kingdom* [2013] ECHR 37 (15 January 2013) at [83] where the court accepted that a person who was sacked for their religious beliefs had, indeed, experienced a restriction on their religious freedom.

The narrow view, then, that somehow religious freedom protection does not apply in the commercial sphere, or only in a very attenuated way, does not receive support from current European jurisprudence. More importantly, it received no support from the wording of section 77. There were no words excepting "commercial activity" from the requirement to protect an action seen as necessary to comply with religious beliefs.

In effect, as Redlich JA noted in his dissenting judgment on this point in *CYC v Cobaw*, Neave JA was endeavouring to conduct the "balancing" process involved herself. But in fact that balancing process had already been conducted by Parliament, which had placed section 77 in its then-applicable form, into the legislation. As Redlich JA noted:

> [474] The exemptions in ss 75, 76 and 77 of the Act protect aspects of what may be described as the 'right to religious freedom.' Where the legislature, in carving out an exemption from what would otherwise be discriminatory conduct, has struck a balance between two competing human rights, the task for the Court is not then one of determining how the balance should be struck. The Court must faithfully construe and apply the provisions without preconception or predisposition as to their scope so as to give effect to the legislative intent.

And later:

> [515] When, as is so obviously the case with s 77, Parliament adopts a compromise in

> which it balances the principal objectives of the Act with competing objectives, a court will be left with the text as the only safe guide to the more specific purpose.[29] Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.[30]

Redlich JA, contrary to the other members of the Court of Appeal, concluded that Mr Rowe *could* make out a defence under section 77. He said that the Tribunal had given an unjustifiably narrow reading of religious freedom, wrongly subordinating the provisions in sections 75 and 77 to "non-discrimination" rights. Instead, Parliament's language had to be read as it stood. There was to be no presumption that religious freedom only applied in a "non-commercial" sphere. Indeed, the other provisions of the 1995 Act showed clearly that the non-discrimination obligations were intended to apply in the workplace and the marketplace. Hence the limits on those obligations drawn by sections 75 and 77 were clearly also operational in those areas.

His Honour concludes a very illuminating discussion on these issues as follows:

> [572] Section 77 excuses an act of discrimination in the marketplace when it is known that to perform the act will facilitate a purpose that is fundamentally inconsistent with the person's belief or principles. The application of the exemption does not depend upon CYC having advertised that it was a religious organisation or provided some means of forewarning that particular uses of their facility would be refused. The absence of such steps could not give rise to the inference that their religious principle or belief did not necessitate the refusal of the request. As adherents to the faith of the Christian Brethren the applicants' beliefs dictated their response upon being informed of the intended use of their facility. Once the applicants were invested with knowledge of the purposes of the WayOut forum and the matters which, as Ms Hackney acknowledged, would inevitably be discussed, the applicants were bound by their principles and beliefs to refuse the use of their facility for that purpose.

It is greatly to be regretted that the majority did not approve these comments. An application for special leave to appeal to the High Court of Australia against the decision was refused.[31]

It is perhaps worth noticing at this point the odd fact that the whole *CYC* decision very rarely refers to the fairly similar NSW litigation in *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010).[32] While that case, like *CYC*, involved a "religious organisation," comments also had to be made on the issues concerning the content of doctrine and its relevance to behaviour.

In particular, one of the issues in that case was whether a belief, that marriage between a man and a woman was the ideal way for a child to be raised, could be justified as being a "doctrine" of the Wesley Mission. After an initial Tribunal finding to the contrary, the Court of Appeal directed a new hearing, noting that there was a need to consider "all relevant doctrines" of the body concerned.[33]

On referral to the Tribunal, it held that the word, "doctrine", was broad enough to encompass not just formal doctrinal pronouncements such as the Nicene Creed, but effectively whatever was commonly taught or advocated by a body, and included moral as well as religious principles.[34] It may be that the Victorian Court of Appeal considered that this final decision,

being one of an administrative tribunal, not a superior court, was not binding; but it seems unusual that it was not even noted. Certainly some comments of the NSW Court of Appeal were relevant and, in accordance with the High Court's directions to intermediate appellate courts in Australia,[35] should have been taken into account unless regarded as "plainly" wrong. This seems to imply that a future appellate court in Australia which is not in either Victoria or NSW will have to choose between these two competing readings of similar legislation, and courts in those States will be required to take differing approaches. All that can be said with confidence is that these issues are still matters of some uncertainty.

The future of religious freedom in Australia

A great deal more could be said about all these matters, but hopefully this will provide a useful overview of religious freedom protection in Australia. On the whole our history has been fairly free from serious religious conflicts, and it is be hoped that we can continue to enjoy the freedom to live in accordance with our fundamental beliefs, while respecting the rights of others.

Nevertheless, it seems clear that issues of religious freedom will emerge, especially (if examples from other parts of the Western world are taken into account), in connection with anti-discrimination laws relating to sexual orientation, and the possible recognition of same sex marriage. It would seem to be wise to increase the domestic protection for religious freedom by legislation that recognizes the strength of this important human right. One option would be to improve and clarify the balancing clauses now contained in Federal and State-based discrimination legislation, to recognise the legitimate religious freedom interests of believers better. Another possibility would be more general religious freedom legislation applying across the Commonwealth by enactment of broad protection based on the external affairs power and specific religious freedom treaties.

In the current atmosphere positions supporting increased religious freedom laws are not popular.[36] It will no doubt require continued public support from various actors to demonstrate the case for such changes. Hopefully those lawyers who themselves are convinced of the importance of religious freedom can have the courage to speak out and lead proposals for reform.

Further reading

- R. Ahdar & I. Leigh, Religious Freedom and the Liberal State, 2nd ed., OUP, 2013.
- Australian Human Rights Commission, Freedom of religion and belief in 21st century Australia, Research Report, Canberra, 2011.
- Tony Blackshield, "Religion and Australian constitutional law" in Peter Radan, Denise Meyerson and Rosalind F. Croucher, Law and religion: God, the state and the common law, London; New York, Routledge, 2005, 75-106.
- G. Blake, "God, Caesar and Human Rights: Freedom of Religion in Australia in the 21st Century" (2009) 31 Aust Bar Review 279.
- Alex Bruce, "Do Sacred Cows Make the Best Hamburgers?: The Legal Regulation of Religious Slaughter of Animals" [2011] UNSWLawJl 16; (2011) 34(1) University of New South Wales Law Journal 351.
- Sir J. Dingemans et al, The Protections for Religious Rights: Law and Practice, OUP, 2013,

esp ch 4, "Comparative Perspectives", Part A "Australia" by P. Babie (140-159).

- C. Evans & S. Evans, Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act, LexisNexis Butterworths, 2008.
- Neil J. Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation," Magna Carta and Freedom of Religion or Belief Conference, St Hugh's College, Oxford, June 2015, at http://works.bepress.com/neil_foster/95
- Anthony Gray, "Section 116 of the Australian Constitution and Dress Restrictions" [2011] DeakinLawRw 15; (2011) 16(2) Deakin Law Review 293
- Justice Susan Kenny, "The right to freedom of religion" (FCA) [1999] FedJSchol 2 available at http://www.austlii.edu.au/au/journals/FedJSchol/1999/2.html
- G. Moens, "The Action-Belief Dichotomy and Freedom of Religion" (1989) 12 Sydney Law Review 195-217.
- C.L. Pannam, "Travelling s 116 with a US Road Map" (1963) 4 Melb Uni L Rev 41 (a classic early discussion of the issues).

Endnotes

1. As the paper will note, his Honour was in dissent from the majority decision in this case. But since the purpose of these introductory quotes is to set out principles that will unfold in the paper, rather than to provide an authoritative statement of the law, I maintain that I am at liberty to use this quote at this point!

2. An earlier version of this paper was presented at the 2015 Annual Conference of the J Reuben Clark Law Society, held at the University of Notre Dame, Sydney. Those interested in another review of this area may like to consult the recent Australian Law Reform Commission Interim Report, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (IR 127), 3 August 2015, ch 4. The Commission is calling for responses to this Interim Report by 21 September 2015.

3. See http://www.aec.gov.au/about_aec/Publications/Backgrounders/compulsory-voting.htm (accessed 7 May 2015).

4. See the summary at pp 117-118, esp point 9.

5. *Attorney-General (Vict); Ex rel Black v The Commonwealth* [1981] HCA 2; (1981) 146 CLR 559 at 579, 615-616, 653. The case was sponsored by an organization called "Defence of Government Schools", and hence often goes by the acronym "DOGS".

6. As those interested in religious freedom issues in the US will know, the general approach of the US courts to religious freedom issues in recent years is to read the right very narrowly, so that if there is a "neutral" (i.e. not clearly anti-religious) reason for a law, it will not breach the First Amendment, following the decision in *Employment Division v Smith* 494 US 872 (1990).

7. See the comment of Gray (2011) at 316, with which I agree: "The test in *Kruger* for invalidity pursuant to [s 116], that the law be passed with the purpose of restricting religious freedom, is with respect too narrow".

8. Clarke, Keyzer & Stellios, *Hanks Australian Constitutional Law: Materials and Commentary* (9th

ed, Australia, LexisNexis Butterworths, 2013) at 1174, [10.4.6].

9. Those interested in these issues will know that such cases have arisen elsewhere. The most recent seems to have been the decision of the Oregon Bureau of Labor and Industries to issue a penalty of $135,000 against a small cake-making business, Sweet Cakes by Melissa, for declining to make a cake celebrating a same-sex wedding- see V. Richardson, "Oregon panel proposes $135K hit against bakers in gay-wedding cake dispute", *Washington Times*, April 24, 2015. An earlier decision in *Colorado* to a similar effect is currently being appealed.

10. It was also noted, at [19] that, "many of the Samoan youth who attended these wards were unable to speak the Samoan language".

11. See para [50].

12. See the first minute of the clip at http://www.youtube.com/watch?v=wJuXIq7OazQ.

13. See para [76], citing Julian Rivers, "Religious Liberty as a Collective Right" (2001) 4 *Law and Religion: Current Legal Issues* 227. For more recent work by Professor Rivers on the rights of religious organisations, see *The law of organized religions: between establishment and secularism* (Oxford : Oxford University Press, 2010).

14. See Neil J. Foster (2014) "Christian Youth Camp liable for declining booking from homosexual support group" at: http://works.bepress.com/neil_foster/78 .

15. See Ahdar & Leigh, 2nd ed at 130.

16. Those interested in constitutional issues will note that this was part of the well-known "Hindmarsh Island Bridge" litigation, different aspects of which were considered in *Kartinyeri v Commonwealth* [1998] HCA 22; (1998) 195 CLR 337.

17. For further comment on these provisions, see ch 5 of the Evans text, and the discussion in Evans & Evans (2008).

18. For comment on some, see C. Evans, *Legal Protection of Religious Freedom in Australia*, Sydney, Federation Press, 2012, at 144-147.

19. The relevant provision was s 109 of the Qld ADA, which was virtually identical to s 37 of the Commonwealth SDA (although since the Commonwealth does not have a prohibition on religious discrimination, s 37 itself is not directly relevant – it relates to sex discrimination.)

20. This decision seems similar to, and perhaps something of a precursor to, the later decision in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014), where CYC were held not to be "a body established for religious purposes" under s 75 of the *Equal Opportunity Act* 1995 (Vic). See my note, above n 14, for comment on this issue.

21. See, for example, s 37 of the *Sex Discrimination Act* 1984 (Cth).

22. For more detailed consideration of "balancing clauses" in discrimination legislation, and their role in preserving religious freedom, see Neil J. Foster, "Freedom of Religion and

Balancing Clauses in Discrimination Legislation", *Magna Carta and Freedom of Religion or Belief Conference*, St Hugh's College, Oxford. Jun. 2015, at http://works.bepress.com/neil_foster/95 .

23. There is a narrow group of organisations outside those formally classified as "religious organisations" which are able to rely on balancing provisions in the religious area, namely "educational institutions" conducting religiously-based schools. See, for example, *Discrimination Act* 1991 (ACT) ss 33, 44 and 46; ADA 1992 (NT), s 30(2); EOA 1984 (SA) s 34(3). In NSW there are a number of broad exceptions under the legislation applying to "private educational authorities", which would seem generally to exempt all non-government schools, including most religious schools. But since most religious schools would be run by groups that most members of the public would call "religious", these provisions may not add very much to the protection for religious organisations.

24. There is a provision in s 52(d) of the *Anti-Discrimination Act* 1998 (Tas) which allows a "person" to discriminate "on the ground of religious belief or affiliation or religious activity" insofar as it is in relation to an "act that –
(i) is carried out in accordance with the doctrine of a particular religion; and
(ii) is necessary to avoid offending the religious sensitivities of any person of that religion."
This provision, then, only applies as an exemption to discrimination on the basis of religion, and so is substantially narrower than the Victorian provision discussed in the text. So far as I am aware there are no reported decisions dealing with the Tasmanian provision.

25. See above, n 14.

26. There was some discussion of the differences between the 1995 and the 2010 legislation in the application for special leave to appeal to the High Court: see *Christian Youth Camps Limited v Cobaw Community Health Services Limited and Ors* [2014] HCATrans 289 (12 December 2014). Counsel for CYC noted that the provisions were very similar, but in the end the High Court refused leave, and one ground seemed to be the fact that it was a question of the interpretation of the old Act. For a review of the Special Leave application, see Neil J Foster, (2014) "High Court of Australia declines leave to appeal CYC v Cobaw", at: http://works.bepress.com/neil_foster/89 .

27. See [525]: "Neither human rights law nor the terms of the exemption required a secular tribunal to attempt to assess theological propriety."

28. See [520]. It would be sufficient that it be an action that the person "undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs and principles".

29. *Kelly v The Queen* (2004) 218 CLR 216, 235 [48] (Gleeson CJ, Hayne and Heydon JJ).

30. *Nicholls v The Queen* (2005) 219 CLR 196, 207 [8] (Gleeson CJ).

31. See above, n 26.

32. And see the final stage of the litigation in *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010). The one and only reference to the litigation in the *Cobaw* appeal is to be found in a very brief footnote, n 141, to the judgment of Maxwell P, on the fairly technical question of what "established" means.

33. See the CA decision, per Allsop P at [9].

34. *OW & OV v Wesley Mission*, 2010 [ADT], [32]-[33].

35. See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107 at [135] – while the comment relates directly to "uniform national legislation", it would seem to apply here where legislation in most States, while not completely uniform, usually includes some defence relating to "doctrine".

36. Compare the popular outcry in the United States when the State of Indiana attempted to introduce a fairly standard version of religious freedom legislation previously adopted by many other States.

Chapter 5

The Courts and the Marriage Debate

Mark Fowler

The national discussion on same sex marriage has recently turned to the implications for religious freedom.[1] In July 2015, Australian Human Rights Commissioner Tim Wilson claimed:

> The question of religious freedom has not been taken seriously. It is treated as an afterthought. We cannot allow a situation where the law is telling people they have to act against their conscience and beliefs.[2]

In this paper, I aim to consider various ramifications of the proposal that the *Marriage Act* 1961 (Cth) be amended to permit marriage to be between persons of the same sex across various areas of Australian law, including solemnisation and dissenting ministers within religious institutions, solemnisation and celebrants (adopting, for the purposes of illustration, Bill Shorten's proposed private member's legislation), anti-discrimination law and the supply of services, the charitable endorsement of religious institutions and government grants. I will also consider certain of the philosophical and historical threads unique to the Western tradition that I consider to be relevant, including the independence of the church from the state, freedom of speech, the development of the freedom of individual conscience and liberal autonomy.

Finally, I place the discussion within the philosophical discourse concerning the prevalence of the right over visions of the common good and consider whether Aristotelian theory may also make a contribution.

Solemnisation

Freedom to act in accordance with one's conscience (including as informed, or burdened, by religious conviction) is at the root of the post-Enlightenment vision of the modern liberal state. At the centre of this debate is the distinction between the holding of a belief privately and the right to manifest that belief in public through actions. In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*,[3] the Chief Justice of the High Court of Australia, Sir John Latham, made clear that the protections to religious freedom contained in section 116 of the Constitution extend not only to belief, but also to manifestation of belief, saying, "the section goes far beyond protecting liberty of opinion. It protects also, acts done in pursuit of religious belief as part of a religion."[4] Here there is prospect that, to some degree, liberal autonomy and freedom of religion might find themselves common bedfellows.

In 2013, the High Court unanimously held that there was no constitutional impediment to Parliament legislating to provide for same sex marriage.[5] There is an argument that that aspect of the High Court's decision was *obiter dictum*, a matter to be addressed later. In those Western jurisdictions that have permitted same sex marriage, exemptions for religious ministers from the requirement to perform same sex weddings have generally been allowed. If these exemptions are given in recognition of principles of religious freedom and liberal autonomy, we may question the rationale for limiting any exemption solely to marriage celebrants in the employ of a religious

institution with whom they find consistency with their own convictions on the question of marriage.

The Shorten Proposal as an Illustration

It is helpful for the purposes of illustration to consider one of the current proposals for amending the definition of marriage. I adopt the *Marriage Amendment (Marriage Equality) Bill* 2015 (Cth) introduced by Bill Shorten as a private member's Bill (the "Shorten Bill").[6] Section 47 of the *Marriage Act* 1961 (Cth) provides:

> **Ministers of religion not bound to solemnise marriage etc.**
> Nothing in this Part:
> (a) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage; or
> (b) prevents such an authorised celebrant from making it a condition of his or her solemnising a marriage that:
> (i) longer notice of intention to marry than that required by this Act is given; or
> (ii) requirements additional to those provided by this Act are observed.
> Section 5 of the *Marriage Act* 1961 (Cth) defines "minister of religion" as follows:
> "minister of religion" means:
> (a) a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation; or
> (b) in relation to a religious body or a religious organisation in respect of which paragraph (a) is not applicable, a person nominated by:
> (i) The head, or the governing authority, in a State or Territory, of that body or organisation; or
> (ii) Such other person or authority acting on behalf of that body or organisation as is prescribed;
> to be an authorised celebrant for the purposes of this Act.

The Shorten Bill proposes to alter the definition of marriage at section 5 of the *Marriage Act* 1961 (Cth) to be "the union of two people to the exclusion of all others, voluntarily entered into for life." [7] The Bill leaves unaffected the existing exemption granted to "a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation."[8]

Objecting ministers within a religious body without a position on same sex marriage

A comparison with existing jurisdictions serves to illustrate certain concerns with such an approach. With regard to New Zealand, Ahdar has argued that the exemption granted to any "celebrant who is a minister of religion recognised by a religious body enumerated in Schedule 1" [9] fails to exempt those religious ministers "whose more heterogeneous denomination is divided on gay marriage who may not be able to point to any authoritative ruling, precept, custom or teaching that states that only heterosexual marriage is acceptable." [10]

Arguably, this same issue would apply to the Shorten Bill. A dissenting minister must be able to claim that they have authority to solemnise weddings in accordance with the "rites or customs of the body or organisation". Where, on a change of the legal definition of marriage to include same sex couples, the rites or customs are to be determined by canons which are read within the wider context of the legal system in which they are placed, references to "marriage"

within those canons could reasonably be read, in the absence of any official resolution to the contrary, to include same sex marriage. A minister who wished to decline the solemnisation of same sex weddings would then need to argue the absurd proposition that they hold "authority to solemnise marriages in accordance with the rites or customs of the body or organisation", but that they are under no obligation to perform a same sex wedding ceremony, even though their canons permit such a ceremony. As a result, it is entirely conceivable that those ministers who hold a traditional view of marriage within such a denomination may seek to have that view adopted by the denomination in order to enliven the benefit of the exemption, giving rise to the potential for divisive internal debate.

Dissenting ministers within a religious body supporting same sex marriage

Concern not only arises for those ministers whose institution has not reached a position on same sex marriage. In New Zealand, the tying of belief to the associated denomination has the consequence that any conservative minister serving within a religious institution that has permitted same sex marriages to be performed by clergy would not be protected by the exemption. For many, this may necessitate a change in denomination, with potential implications being contested congregational property rights and social upheaval for congregants.

As noted above, under the Shorten Bill a dissenting minister of religion within a religious body would need to satisfy the test that they be "a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation."[11] To rely on the exemption, a minister must accept the rites and customs of the organisation concerning the solemnisation of same sex marriage. For many traditional ministers within a religious body that permits same sex marriage, this may amount to an acceptance contrary to conscience. This would be the case regardless of whether the religious body's precepts require the altered doctrine to be accepted by the minister. The alternative then is to conclude that religious freedom protections should be based upon either (a) the rites or customs of the affiliated religious denomination, or (b) the genuine religious conviction of the individual. Whether a minister may perform a same sex marriage ceremony would then continue to be an internal matter for each religious body, but whether any denomination has permitted such would not concern the religious minister (at least for the purposes of the performance of wedding ceremonies), whose eligibility for the exemption would be defined against his or her own conviction.

Celebrants

Furthermore, in the United Kingdom and in New Zealand, and also under the Shorten Bill, religious celebrants, registrars or commissioners are not granted an exemption, despite the fact that such celebrants may have a religious conviction that would preclude them from solemnising a same sex marriage. The answer to this complaint in New Zealand (which answer is similar to that given in the United Kingdom) has been that independent celebrants, in contrast to ministers of religion, are appointed by the Government "to perform a public function, not to promote their own religious or personal beliefs" [12] and should therefore extend the policy of the state.

The case of Lillian Ladele, a registrar in the United Kingdom who objected to a requirement that she register civil partnerships, is salient to this discussion. In 2013 the European

Court of Human Rights (ECHR) held that the London Borough of Islington had not breached Ms Ladele's religious freedom rights by requiring that she register civil partnerships as an expression of its policy of protecting equal opportunities for persons of differing sexual orientation. Religious freedom is protected pursuant to Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"), which provides:

> freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The ECHR recognised that Ms Ladele's contention that she had been discriminated against on the basis of her religion was relevant to the anti-discrimination protection of Article 14, and that "the local authority's requirement . . . had a particularly detrimental impact on her because of her religious beliefs." [13] Notwithstanding this, the matter to be determined was "whether the policy pursued a legitimate aim and was proportionate." The ECHR held that the Convention allows state parties a "wide margin of appreciation" permitting states to reach their own determination as to what comprises a legitimate aim and what comprises the appropriate balance between competing rights, and in this case the determination by, first, the local authority, the UK Employment Appeal Tribunal and, then, the UK Court of Appeal, did not exceed that permissible margin. In their comment on the matter, given before it had reached the ECHR, Ahdar and Leigh observed: "It is hard to avoid the conclusion that the higher courts allowed an employer in effect to prioritize one stream of equality law (sexual orientation) over another (religion or belief) rather than to hold the two in balance."[14]

In light of the ECHR ruling, and as a means to preserve the religious freedom of registrars, David Burrowes, a Conservative member of Parliament, introduced an amendment during the second reading of the *Marriage (Same Sex Couples) Act* 2013 in the House of Commons which would have permitted registrars to refuse to solemnise same sex marriages where they had a conscientious objection based on a "sincerely-held religious or other belief." The amendment required that registration authorities ensured that "there is a sufficient number of relevant marriage registrars for its area to carry out the functions of relevant marriage registrars." The amendment was not pressed, with opponents arguing the same case as made in New Zealand, namely, that servants of the state cannot opt out of state policies. Such findings are not irrelevant to Australia, to the extent that Australian courts may have regard to the decisions of international bodies, courts and tribunals in their consideration of fundamental rights and freedoms.[15]

Judicial Treatment of Same Sex Marriage

Australia

As noted above, in 2013 the High Court of Australia unanimously held that there was no constitutional impediment to Parliament legislating to provide for same sex marriage,[16] avoiding the risk of the later accusations of judicial activism levelled by the minority justices on the Supreme Court of the United States on the basis that the decision removed the question over the legislating of same sex marriage from the democratic process (as further outlined below).

Although the substance of the criticisms outlined by the minority dissenting judges of the United States Supreme Court did not apply to the High Court's decision, the High Court has not escaped criticisms of judicial activism on other grounds. Anne Twomey has said the High Court ruling that there was no constitutional impediment to Parliament legislating to provide for same sex marriage was handed down "in an activist manner, going beyond the arguments initiated by the parties and what was necessary to decide the case and developing a new approach to constitutional interpretation." [17]

The Court held that, in order to determine whether the ACT law providing for same sex marriage was inconsistent with the Commonwealth Constitution and the *Marriage Act* 1961 (Cth), it was necessary to decide whether section 51(xxi) permits the Commonwealth Parliament to enact "a law with respect to same sex marriage because the ACT Act would probably operate concurrently with the Marriage Act if the federal Parliament had no power to make a national law providing for same sex marriage." [18] None of the Commonwealth, the ACT nor Australian Marriage Equality, as amicus curiae, argued that such a determination was necessary. Indeed, as Twomey has noted:

> It is hard to see how this could be the case, given that the court had earlier stated that the object of the ACT Act was to "provide for marriage equality for same sex couples not for some form of legally recognised relationship which is relevantly different from the relationship of marriage which the federal laws provide for and recognise" (at [3]). If this is so, then how could an ACT law establishing the status of "marriage" for same sex couples, operate concurrently with the Marriage Act 1961 (Cth), if both the Constitution and the Marriage Act defined marriage exclusively as unions of people of the opposite sex and the Commonwealth law covered the field of "marriage"?[19]

If Twomey's arguments are accepted, this may lead to the conclusion that the High Court's determination on the constitutional sanction of same sex marriage is *obiter dictum*, influential, however, non-binding. Parkinson and Aroney have maintained that, in making its decision without reference to the submissions of a contradictor on the point of whether the Commonwealth can enact a law with respect to same sex marriage, "it is at least arguable that the Court failed to adhere to the standards of legal reasoning that it justifiably expects of lower courts."[20] They provide a lengthy analysis of the consequences of the new definition of marriage and suggest alternative arguments contrary to the High Court's reasoning that may have been posed by a hypothetical contradictor on the basis of existing authority.

European Court of Human Rights

Notwithstanding the legalisation of same sex marriage within other jurisdictions, concerns have been expressed over attempts to remove even the existing limited legislated exemptions for religious ministers.[21] In the United Kingdom, it is illegal for a member of the Anglican clergy to solemnise a same sex marriage.[22] This prohibition is an offshoot of the status of the Anglican Church as the established church of England, and was enacted to reflect the doctrine of the Church at the time of enactment. A month after its introduction into law one couple declared their intention to take the Anglican Church to court to force it to perform their marriage within an Anglican parish.[23] They have indicated that, ultimately, the determination may be made by the ECHR.

It is difficult to anticipate the outcome if such an application were to proceed to the ECHR. In 2010, the ECHR upheld the application of the doctrine of the "margin of appreciation" to Austria's refusal to marry a same sex couple, finding that there was no right to same sex marriage under the European human rights charters. Interestingly, in doing so, the Court held:

> The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.[24]

It appears, then, that the Court left open the option to recognise a right to same sex marriage when a majority of European states had enacted legislation for same sex marriage.[25] As the Court did not consider the interplay of the right to same sex marriage with the right to religious freedom, it is not known how it would respond to an application that the Anglican Church's inability to offer same sex marriages breached Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which Article protects the "enjoyment of the rights and freedoms set forth in [the] Convention . . . without discrimination."

United States

The concern with social change embarked upon by judicial fiat is that it has the potential to be deeply divisive, even more so where such change is made to a foundational historical social institution in respect of which deeply felt religious and personal convictions are held. These concerns were expressed by several justices of the United States Supreme Court in their dissenting opinions in *Obergefell v Hodges*.[26] In that decision, the five judge majority held that the United States Constitution grants same sex couples the right to marry, with the effect that any State that does not include same sex couples within their definition of marriage is acting unlawfully. They did so on four primary grounds: (1) "individual autonomy"; (2) that such "safeguards children and families"; (3) that marriage gives access to "an expanding list of governmental rights, benefits and responsibilities"; and (4) that the right to marry "supports a two-person union unlike any other in its importance to the committed individuals."

All the dissenting justices highlighted their concerns for American democracy. Justice Antonin Scalia went so far as to pronounce that "[a] system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."[27] Justice Scalia remarked that "to allow the policy question of same sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation."[28]

The Chief Justice of the Supreme Court, John Roberts, saw a parallel with the still contentious 1973 decision legalising abortion, writing:

> By deciding this question under the Constitution, the Court removes it from the realm of

> democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue [abortion], "The political process was moving . . ., not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."[29]

As a consequence of the Supreme Court's decision, each State will now need to give consideration to the scope of recognition given to the First Amendment's protection of religious freedom. As Chief Justice Roberts pointed out:

> Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is – unlike the right imagined by the majority – actually spelled out in the Constitution. Amdt. 1.
> Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations.[30]

Supply of Services and Discrimination Law

International experience to date

Chief Justice Roberts' comments lead us to consider the religious convictions of those various other individuals, in addition to celebrants, who may be called upon to supply services to same sex marriages. In these we might include caterers, photographers, musicians, florists, operators or hirers of reception halls, wedding planners or advisory services and operators of bridal or honeymoon suites. Our attention should also be directed to other service providers engaged in areas not directly related to a wedding ceremony, such as fertility treatment, student accommodation and marriage or relationship counselling, programs, courses and retreats.

Whilst we have argued that the sanctity of liberal autonomy is a central protection offered to the individual within the modern state, Michael Sandel warns that basing religious freedom on a voluntarist conception of the liberal ideal is not a strong foundation for religious freedom as "it confuses the pursuit of preferences with the exercise of duties and so forgets the special concern of religious liberty with the claims of conscientiously encumbered selves."[31] In his discussion of the Supreme Court's treatment of conscientious objection to military service, Sandel writes:

> The point of the exemption, according to the Court, is to prevent persons bound by moral duties they cannot renounce from having either to violate those duties or violate the law. This aim is consistent with Madison's and Jefferson's concern for the predicament of persons claimed by dictates of conscience they are not at liberty to choose. As the Court wrote, "the painful dilemma of the sincere conscientious objector arises precisely because

> he feels himself bound in conscience not to compromise his beliefs or affiliations."[32]

In his dissenting opinion, Chief Justice Roberts wrote:

> [h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage – when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples…. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.[33]

The Supreme Court may soon have an opportunity to consider Chief Justice Roberts' concerns, with a Colorado baker who refused to supply a wedding cake to a same sex couple currently in the Colorado Court of Appeals. The same sex couple in that matter have flagged their intention to consider taking the matter to the Supreme Court if the baker's free speech assertions are upheld.[34]

A selection of existing disputes involving service providers within the United States serves to illustrate the propensity of the issue towards litigation:

1. In Washington State, Barronelle Stutzmann was successfully sued in the Benton County Superior Court for declining a request to provide flowers for a gay wedding.
2. In Vermont, Catholic innkeepers were sued after declining to host a wedding reception.
3. In New Mexico, a photographer was found guilty of unlawful discrimination and had costs awarded against her for declining to photograph a "commitment ceremony".[35]
4. In Illinois, the owners of a bed and breakfast face a lawsuit for refusing to host a civil union ceremony.

These concerns are not limited to the United States. In 2013 the Supreme Court of the United Kingdom ruled that the refusal to offer double bed accommodation to a same sex couple breached a regulation prohibiting discrimination on the grounds of sexual orientation.[36] In a decision that was subsequently overturned, a tribunal of the United Kingdom ruled that a Catholic adoption agency which had refused to place children with same sex couples breached the regulations governing adoption services.[37] It is to be noted that these religious freedom concerns extend not only to corporate providers or the operators of small businesses, but also to employees within businesses who are asked to facilitate the supply of services.

The question of the religious freedom rights of entities that operate in the commercial sphere is a key facet of this discussion. The issue concerns the weight accorded to rights of associational freedom, the value of pluralism in belief and expression within the market, and the permitted reach (and integrity) of religious conviction within our society. Noting the recent example of the Catholic Church's withdrawal from adoption services in Boston, the potential for market failure or distortions, and resulting delays in services arising from increased pressure on existing agencies may also be relevant. In the American context, Lupu and Tuttle have noted that "[i]f religious organizations withdraw as providers of such services, the social costs might be considerable. In non-profit markets for social services, we have little confidence that other providers will expand, or new providers will enter, to pick up the slack."[38]

The decision in 2014 of the US Supreme Court in *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al* ("*Hobby Lobby"* case) may signal a new approach to religious freedom in the commercial space in the United States, where the Court held that closely

held corporations can assert religious freedom rights, proclaiming "[f]urthering their religious freedom also 'furthers individual religious freedom' ."[39] There is reason to believe that these issues might also be particularly pertinent to Australia, where, for historical reasons, faith-based organisations have a particular predominance in the charitable services market.[40]

Prospects for Australia?

So what weight does Australian law place upon the exercise of religious freedom in the context of the supply of goods and services? All Australian jurisdictions that prevent discrimination have enacted provisions that endeavour to "balance" religious freedom with the right to freedom from discrimination. Foster, however, concludes that "the only major provision in anti-discrimination legislation designed to provide protection for religious freedom for general citizens (as opposed to religious organisations or 'professionals') is contained in the law of Victoria."[41] Even this provision has been construed very narrowly. The Victorian Court of Appeal, in 2014, ruled that a Christian Youth Camp had breached Victorian law by refusing to take a booking from a group of same sex attracted individuals.[42] Central to that decision was Justice Maxwell's determination that, owing to the commercial nature of the operations undertaken by Christian Youth Camps, it could not rely upon the exemption:

> The conduct in issue here was an act of refusal in the ordinary course of the conduct of a secular accommodation business. It is not, in my view, conduct of a kind which Parliament intended would attract the attention of s 75(2). Put simply, CYC has chosen voluntarily to enter the market for accommodation services, and participates in that market in an avowedly commercial way. In all relevant respects, CYC's activities are indistinguishable from those of the other participants in that market. In those circumstances, the fact that CYC was a religious body could not justify its being exempt from the prohibitions on discrimination to which all other such accommodation providers are subject. That step – of moving from the field of religious activity to the field of secular activity – has the consequence, in my opinion, that in relation to decisions made in the course of the secular undertaking, questions of doctrinal conformity and offence to religious sensitivities simply do not arise.[43]

The decision highlights the need to review the balancing provisions in both Commonwealth and State discrimination legislation to ensure sufficient protections are provided not only to religious institutions but also businesses and individuals. In the absence of such a review, and on the reasoning of the Court in *Christian Youth Camps v Cobaw*, the freedom of persons of religious conscience to refrain from the provision of services to same sex couples will not be recognised at law outside of Victoria, and even in Victoria that freedom is severely limited.

Writing on anti-discrimination law, albeit in the context of multiculturalism, Parkinson emphasises the importance of the religious freedom of minority communities to social cohesion:

> At the heart of the matter is whether majorities, as expressed through their parliamentary representatives, will allow to minorities the freedom to be different – the freedom to build their own communities through schools, charitable organisations and other groupings, and the freedom to uphold their own moral values. The freedom to discriminate between right and wrong, according to the precepts of the religion, is fundamental to the cohesiveness of religious communities . . . .

> Arguably, the health of a society depends upon the health of its mediating structures – those institutions or organisations which stand between the family and the state and which provide care and support for those in need. Participating in religious activities is one way in which people develop social networks . . . . A healthy multiculturalism allows minority communities the freedom to be different – the freedom to have different beliefs, the freedom to have different moral standards, the freedom to believe in absolute truths, the freedom to debate with others. On that freedom to be different and for different communities to have different values, the health of our society depends.[44]

Multiculturalism and pluralism within Australia have arguably taken on a unique local form, stemming in part from our continuing character as a society continually welcoming and seeking to integrate new migrant communities. For many members of these communities, their religious identity often assumes an important place in their own efforts towards integration. These factors add their own dynamics to the discussion, and also weight to the argument that religious freedom protections require heightened attention in Australia.

Charitable endorsements

I now wish to turn to consider the possible effect of legislating for same sex marriage on the existing regime for the endorsement of charitable institutions within Australia. The common law requires that charities conform to public policy.[45] This requirement has found various expressions across other common law jurisdictions.

United States

In *Obergefell v Hodges*,[46] Chief Justice Roberts in dissent stated that the tax exempt status of religious institutions in the United States that opposed same sex marriage "would be in question," based on the reasoning of the Court in *Bob Jones University v United States*.[47] In doing so, he referred to the following exchange between Justice Alito and the Solicitor General for the United States Department of Justice appearing as amicus curiae during the proceedings:

> JUSTICE ALITO: Well, in the Bob Jones case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?
> SOLICITOR GENERAL VERRILLI: You know, I -- I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I -- I don't deny that. I don't deny that, Justice Alito. It is -- it is going to be an issue.

In the *Bob Jones University* decision the Supreme Court held that a university that refused to enrol persons in an interracial marriage failed to meet the requirement under the Internal Revenue Code that "an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy" (basing such in part on the seminal House of Lords' decision in *Pemsel's case*)[48] and the requirement at common law that the "purpose of a charitable trust may not be illegal or violate established public policy."[49] Whilst there are distinctions in the law of charities between the United States and Australia, both jurisdictions have adopted the decision of the House of Lords in *Pemsel's case* and, *prima facie*, I cannot point to any distinction that is material to the question of whether an institution's position on same sex marriage would

be considered to be relevant to a determination of whether it continues to meet the test that charitable institutions conform with public policy.

New Zealand

In 2013 the New Zealand Charity Board deregistered Family First New Zealand, an entity established to promote a traditional view of marriage. One of the stated grounds, amongst others, for that deregistration was characterised by Justice Collins as follows: "Family First's perspective about the concept of a family did not have a self-evident benefit to the public. In this sense, the Charities Board said Family First's view about the role of families was 'controversial'. " In so ruling the Charities Board rejected Family First's arguments that New Zealand's international obligations and domestic law favoured its definition of the "natural family".

On 30 June 2015, the High Court of New Zealand upheld Family First's appeal and ordered the Charities Board to reconsider its decision. Justice Collins, however, clarified that in so doing he had not reached a determination on whether the activities of Family First were for the public benefit:

> [87] In this respect, I believe there is force to the submissions of Mr McKenzie QC, counsel for Family First. He argued that Family First's purposes of advocating its conception of the traditional family is analogous to organisations that have advocated for the "mental and moral improvement" of society.
> [88] In recognising the strength of Mr McKenzie's submission, I am not suggesting the Charities Board must accept Family First's purposes are for the benefit of the public when it reconsiders Family First's case.
> [89] I am saying, however, that the analogical analysis which the Charities Board must undertake should be informed by examining whether Family First's activities are objectively directed at promoting the moral improvement of society. This exercise should not be conflated with a subjective assessment of the merits of Family First's views. Members of the Charities Board may personally disagree with the views of Family First, but at the same time recognise there is a legitimate analogy between its role and those organisations that have been recognised as charities. Such an approach would be consistent with the obligation on members of the Charities Board to act with honesty, integrity and in good faith.[50]

The case concerns the separate requirement at law that a charity be for the public benefit, as opposed to the requirement that a charity's purposes conform to public policy, and illustrates the continuing uncertainty in relation to the question of whether an entity that holds a traditional view of marriage can fulfil the requirements imposed upon charities.

Canada

In *Everywoman's Health Centre Society (1988) v The Queen*, Decary JA stated the public policy test as requiring conformity to "definite and somehow officially declared and implemented public policy." [51] In *Canada Trust Co. v. Ontario Human Rights Commission* [52] a trust settled to provide scholarships to persons who were needy, white, of British parentage or nationality and Protestant was held to be contrary to public policy. Tarnopolsky JA based his decision on the principle that "public trusts which discriminate on the basis of distinctions that are contrary to public policy must now be void." [53] Robins JA agreed:

> To perpetrate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not, in my opinion, be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and respect.[54]

It was perhaps this context which in 2005 led then Leader of the Opposition, Stephen Harper, to seek amendments to Bill C-38, which proposed the legalisation of same sex marriage. His position was that such amendments were necessary to ensure religious institutions will not have their charitable status revoked on the basis of their position on same sex marriage. Harper offered the following:

> Parliament can ensure that no religious body will have its charitable status challenged because of its beliefs or practices regarding them. Parliament could ensure that beliefs and practices regarding marriage will not affect the eligibility of a church, synagogue, temple or religious organization to receive federal funds, for example, federal funds for seniors' housing or for immigration projects run by a church. Parliament could ensure that the Canadian Human Rights Act or the Broadcasting Act are not interpreted in a way that would prevent the expression of religious beliefs regarding marriage.[55]

The proposed amendments concerning charitable status were not adopted by the then Government.

Australia

The common law requirement that a charity's purposes not be contrary to public policy was retained on the introduction of the *Charities Act* 2013 (Cth) by section 11(a).[56] That subsection provides:

> In this Act:
> disqualifying purpose means:
> (a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or
> Example: Public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security.
> Note: Activities are not contrary to public policy merely because they are contrary to government policy.

For the purposes of the current analysis, a helpful place to start is the public information guidance on "Advocacy by Charities" [57] recently released by the Australian Charities and Not-for-profits Commission (ACNC). After restating the contents of section 11(a) it provides the following:

> Example – unlikely to be contrary to public policy
>
> A charity with a charitable purpose of promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia has a long-running campaign promoting a Bill of Rights as a way of achieving this purpose. This is contrary to government policy, but upholds public policy such as the rule of law and a constitutional

system of government. Therefore it is not an activity that demonstrates a disqualifying purpose.

An organisation that shows a pattern of engaging in or promoting activities that are contrary to public policy may demonstrate an unlawful purpose.

Example – likely to be contrary to public policy

A charity with the charitable purpose of advancing culture encourages new and emerging writers. In doing so, the charity regularly publishes material by new writers advocating anarchy and the end of democratic government. Such a pattern of conduct may demonstrate a purpose of promoting activities that are contrary to public policy.

Whilst the statements provided are reflective of the ACNC's position, the *Charities Act* 2013 (Cth), in so far as it purports to effect an enshrinement of the common law, requires the law to be interpreted against existing common law principles. Having analysed the foregoing Canadian cases, Dal Pont concludes that, at common law, "it is conceivable that associations that, pursuant to their objects, deny entry to persons in contravention of anti-discrimination legislation may forfeit charitable status on public policy grounds."[58] This proposition would be particularly pertinent to those religious charities that provide commercial services, akin to the plaintiff in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*,[59] previously analysed.

To demonstrate the salience of a charity's position on same sex marriage to charitable status, under the separate subheading of "unlawful activity," the ACNC guidance also contains the following statement:

Example – likely to be unlawful purposes

A charity that has a charitable purpose of advancing social or public welfare by providing aged care and accommodation routinely refuses to provide these services to same-sex couples. Such a refusal amounts to unlawful discrimination, and a regular pattern of this behaviour or activity may disclose a purpose of engaging in unlawful activities.

The relevance to the status of anti-discrimination law in the supply of services, as outlined above, is clear. Indeed, to adopt the Court's reasoning in Christian Youth Camps v Cobaw, the statutory exemption (as it then stood) for religious bodies will either not be available, or will be strictly limited, where they enter the commercial sphere.

In light of the foregoing, we conclude that there are sufficient reasons to consider that an Australian charity's position on the question of same sex marriage may be relevant to a determination of whether it meets the requirement of a charity at law. Similar concerns arise for the separate but equally important issue of Commonwealth grants (including to religious schools and faith-based service providers).[60]

The Independence of the Church, Freedom of Speech and Education

From this more concise legal analysis, let us now turn to consider some of the historical and philosophical dimensions of the discussion. We start with the historical principles of the independence of the church and its right to determine its own teachings. Both have made significant contributions to our modern conception of the rule of law, to constitutional checks on governmental power and to freedom of speech.

Various authors contend that the separation of church and state that arose during the early medieval period (following the reforms heralded by Pope Gregory VII's *Dictatus Papae* of 1075) was an early form of the checks and balances that limit absolute power and abuses against human dignity in the Western tradition, including the rule of law. As noted by Tierney, "[t]he very existence of two power structures competing for men's allegiance instead of only one compelling human obedience greatly enhanced the possibilities for human freedom." [61] In early church and natural law incitements to defy unjust laws, we see a linking between individual agency and accountability to a higher authority, grounded in the conception of free will.

One concern held by various religious authorities is the impact that legalisation of same sex marriage may have on their ability to teach a traditional view of marriage within schools.[62] A letter released to all parishioners by the Australian Catholic Bishops Conference in June 2015 provided the following comment:

> Parents in Canada and several European countries have been required to leave their children in sex-education classes that teach the goodness of homosexual activity and its equality with heterosexual marital activity; for example, David and Tanya Parker objected to their kindergarten son being taught about same-sex marriage after it was legalised by the Massachusetts Supreme Court, leading to David being handcuffed and arrested for trying to pull his son out of class for that lesson. They were told they had no right to do so.[63]

The eight hundredth anniversary of the Magna Carta recently garnered the attention of the nation, with the document being celebrated as a founding stone for our modern constitutional protections and freedoms. It is interesting to note that the first clause of the 1215 Magna Carta states, "*quod Anglicana ecclesia libera sit"* ("the English Church shall be free"). In its historical context, this clause was directed at preserving the Church's rights to determine appointments to bishoprics, and hence the right to determine doctrine independently. The analogy to modern day discrimination law was not lost on Chief Justice Roberts of the United States Supreme Court when, in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012), he observed:

> Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of *Magna Carta*. There, King John agreed that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired." The King in particular accepted the "freedom of elections," a right "thought to be of the greatest necessity and importance to the English church." J. Holt, Magna Carta App. IV, p. 317, cl. 1 (1965).[64]

In that decision the US Supreme Court unanimously upheld the right of a religious school to determine appointments to its staff as a fundamental expression of the right to religious freedom. The ability to proclaim truth is central to the continuing survival of truth within the conscience of the members of a community. O'Donovan has observed that, "the conscience of the individual members of a community is a repository of the moral understanding which shaped it, and may serve to perpetuate it in a crisis of collapsing morale or institution." [65] Where a religious body operates an institution for the education of children, any removal of the ability to

determine and teach doctrine in accordance with its teaching would be a restriction on these historically hard won liberties, which arguably are characteristic of the Western legal tradition.

The history of the endeavours of the established church to enforce religious observance in the English tradition is well documented. Indeed, the modern (as opposed to medieval) conception of separation of church and state was adopted as an attempt to preserve the conscience of religious minorities against state efforts to enforce religious uniformity. Liberalism brought with it an allowance for individual and collective dissent that was not permitted under certain pre-Enlightenment societies, such as those gripped by the Inquisition.

To allow too close a relation between church and state is to risk the eventualities of the Inquisition, where the church lost sight of her role as respecter of individual conscience. The church, where it is too close to the state, as in a unitary structure, runs the risk of losing its own independent voice. Equally so, it is also in danger of succumbing to the temptation to use the secular arm to extend its spiritual mandates by force – witness for example the Tudor persecutions of Puritans and non-conformist minorities or the support of the Crown by the Clergy in pre-revolutionary France.

There is a stark danger in permitting the state to endorse the form of morality that its citizens are to hold. Instead, I consider that the state's preferred role is to create the space for varying religious frameworks and visions of the good life to present their versions of morality and allow for the individual to weigh and choose what they consider to be truth. Given this historical context, it would be a profound irony if the state were now to undermine these hard won protections by prohibiting religious institutions from collective free speech and freedom of association through attempts to enforce a state-endorsed uniformity on a religious minority. To overlook the contribution that these deep historical and philosophical themes have made to our collective freedom smacks of wilful historical amnesia and flies in the face of the centrality of modern liberties.

Freedom of Religion

I will now consider the interplay of a legislated same sex marriage with existing protections for religious freedom within Australia at two levels. Firstly, the restriction on laws of the Commonwealth imposed under section 116 of the Constitution of Australia. Secondly, the extent to which the common law protects religious freedom.

Section 116 of the Constitution of Australia

Mason ACJ and Brennan J summarised the centrality of the freedom of religion in *Church of the New Faith v Commissioner for Pay-Roll Tax*[66] where they held:

> Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.[67]

Despite such profound sentiments, the position is by no means clear that section 116 would give sufficient protections to religious objectors. Section 116 is a restriction on the legislative power of the Commonwealth and does not extend to the Australian States.

Compared to the United States (on whose First Amendment section 116 is based), there is a relative paucity of judicial treatment of this protection. In 1943 Latham CJ held, after conducting a survey of religious freedom cases in the United States prior to 1900, that section 116 is intended to operate as a limitation upon the legislative authority of Parliament and that the appropriate test would be whether a law is an "undue infringement on religion."[68] In making that determination, his Honour said that the purpose of legislation was to be considered as only one of the applicable factors when considering a purported breach of section 116.

In 1997, however, the High Court in *Kruger v Commonwealth (*the "Stolen Generations Case")[69] offered several variations of a "purposive" test for section 116, all of which required an examination of the purpose of relevant legislation to see if it had the purpose of impairing freedom of religion, rather than regard to the effect of legislation on the free exercise of religion (they differed on the question of whether it had to be *the* purpose or one of a number of purposes).

Would section 116 then operate to protect a person holding a conscientious objection to the provision of services to a same sex wedding? Unless the requirement to supply services could be said to be imposed by the Commonwealth, I consider it unlikely that section 116 would apply. Even if this could be substantiated, it would appear on existing authorities that the defendant would need to establish that the purpose of the legislation was to limit her religious freedom, this would require the Court to accept that the legislation permitting same sex marriage has as a purpose the limiting of religious freedom. There are therefore significant concerns regarding the ability of section 116 to protect the religious freedom of such a person.

Common law right of religious freedom?

It might also be asked to what extent is there is a common law protection for religious freedom? The weight of Australian authority has held that, to the extent such a protection exists, the doctrine of parliamentary sovereignty will permit Parliament to infringe upon such common law freedom, where there is a clear intention in legislation to do so. The Supreme Court of South Australia has held that there is no inalienable right to religious freedom at common law.[70] In a separate case involving the lawfulness of a Commission of Inquiry established to consider the "secret women's business" claims of Ngarrindjeri women and whether such were relevant to the construction of the Hindmarsh Island Bridge, Chief Justice Doyle held that: "I accept that freedom of religion is one of the fundamental freedoms which entitles Australians to call our society a free society. I accept that statutes are presumed not to intend to affect this freedom, although in the end the question is one of Parliamentary intention."[71]

On the basis of this case, Neil Foster concluded that:

> [I]t is unlikely that there is a common law freedom of religion principle. If there were, it would not operate as a constitutional constraint on law-making by parliaments, but it could function (as in the recent past the freedom of speech principle has functioned) as a "presumption" which would inform courts when interpreting legislation. The "principle of legality" means that a court, when reading an Act of Parliament, will assume unless there

> are clear words to the contrary that Parliament does not intend to infringe a fundamental common law right. So if it could be argued that "freedom of religion" is, or perhaps has now become, a fundamental common law right, as "the essence of a free society", then it may provide guidance for courts interpreting legislation.[72]

If it was thought that such is an insufficient protection, it might be noted that in the United States, responding to the concern that the Supreme Court had failed to protect religious freedom sufficiently in its 1990 determination, that "neutral generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[73] Congress then introduced a legislative right to religious freedom in the *Religious Freedom Restoration Act* 1993 (RFRA).[74]

Right vs the Good

Finally, the debate over same sex marriage is often conducted in terms of rights, principally the right to equality (or to freedom from discrimination), the right to religious freedom and the rights of children to be reared by their biological parents. To that end, the discussion enlivens the philosophical debate over the preference to be given to rights as opposed to common visions of the good within a society. These eventualities lead us to give at least some consideration to philosophical approaches to the good life, and so we turn to the ancients.

Aristotle held that to be a good "X" is to excel at what it is to be a good "X". His teleological world-view is reflected in the following quotes from *Politics*: "What is most choiceworthy for each individual is always the highest it is possible for him to attain."[75] This ideal is to be realized by both the individual and by their community: "that way of life is best, both separately for each individual and in common for city-states, which is equipped with virtue."[76]

The fundamental importance of the individual's ability to act on their own reasoning towards the pursuit of their estimation of the virtuous life is a central feature of the Western tradition; as described by Lupu and Tuttle, "a proper respect for the freedom to define, for religious purposes, the content of a virtuous life is essential to a free society."[77] To preclude the citizenry from hearing a world-view that may inform their deliberations as to the vision of the good life strikes at this tenet of modern democracy. To preclude an individual from undertaking such actions as they consider necessary to attain to their own conception of excellence is also to strike at this teleological ideal. To preclude certain persons from that pursuit or to limit the options offered for their consideration of that enterprise is to undermine the virtue of society as a whole.

There is something to be celebrated in an "X" attaining to its unique expression of excellence. After visiting Seaworld recently, I was happy to declare to my slightly bemused wife that I was a converted Aristotelian. The joy of the world champion jet-ski riders performing their crowd-gasping acrobatics, and the seemingly tangible elation of the dolphins in performing their dynamic leaps were both acts in which the crowd were united in awe. Was I right to read in this a common recognition of the virtue of a creature attaining to its own form of excellence?

I know someone of means who recently semi-retired to run a small florist shop. If she happened to be a person of religious conviction, should she be precluded from enjoying her own unique form of excellence in bringing happiness to others by offering that form of beauty? The same might be said for the baker who carries a sense of the worthiness of their vocation and who

delights in the quality of their work, and the joy this brings to others. A fundamental role of governance in our society is to enable individuals to attain to their unique expression of the good, for the common benefit of the whole.

A further question is that of community cohesion. John Rawls summarised the essential issue at stake as follows: "the problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines?"[78] For him this is a problem for political justice, not a problem about the highest good. O'Donovan, however, emphasises the central challenge for all political authority where he said: "The task of any theory of authority is to explain how the good can and must present itself to us in this alienated and alienating form, and yet without ceasing to be our good, that to which our action is oriented."[79]

In a post-modern society whose deconstructionist tendencies assume self-interest as the sole motivator, the *a priori* assumption is that the churches are only endeavouring to maintain their privileged position, a vestige of a now forsaken Christendom. Any concept that the church may have an independent vision of the good for a society is not independently assessed. Human rights are, however, in danger of failing and becoming only an expression of power if one cannot embrace the substantive question of the good and what comprises human flourishing. It is this vision to which religious institutions purport, by their own terms, to make a contribution.

Conclusion

So, in conclusion, we have endeavoured to place the current discussion on the legislating of a right to same sex marriage within Australia within the context of international experience to date, and have drawn attention to various unique attributes of our Western tradition that are relevant. We have also noted the need to account for religious freedom and have raised concerns that the current state of Australian law (particularly anti-discrimination law) fails to protect the right of individuals and corporations to act on conscience. In discussing the independence of the church, freedom of speech and education we have argued that there are unique historical and philosophical currents within the Western tradition that were born in the contest between church and state. Included in these are the rule of law, freedom of speech, the sanctity of individual conscience and the independence of the church expressed through its ability to determine doctrine by control over appointments of staff. We must ensure that we do not overlook the historical lessons, contributions made and protections won to expressions of the sacred in our polity (both by individuals and institutions) within the current discussion over same sex marriage.

Bibliography

Adelaide Company of Jehovah's Witnesses v The Commonweath (1943) 67 CLR 116.

Anti Discrimination Act 1998 (Tas).

Bob Jones University v United States; Goldsboro Christian Schools Inc v United States 103 S. Ct. 2017 (1983) 461 U.S. 574, 76 L.Ed.2d 157.

Bull and another v Hall and another [2013] UKSC 73 (27 November 2013).

Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al, 573 U.S. (10th Cir, 2014).

Canada Trust Co. v Ontario Human Rights Commission (1990) 69 DLR (4th) 321.

Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales 2009 UKFTT 376 (GRC) (01 June 2009).

Charities Act 2013 (Cth).

Christian Youth Camps Ltd v Cobaw Community Health Services Ltd [2014] VSCA 75.

Church of the New Faith v Commissioner for Pay Roll Tax (1983) 57 ALJR 785.

City of Bourne v Flores 521 U.S. 507, 514 (1997).

Commissioner for Special Purposes of Income Tax v Pemsel [1891] AC 531.

The Commonwealth v Australian Capital Territory (2013) 250 CLR 441.

Elane Photography v Willock, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct. Dec 16, 2009).

Employment Div., Dept of Human Resources of Ore v Smith 494 U.S. 872 (1990).

Everywoman's Health Centre Society (1988) v The Queen (1991) 92 DTC 6001.

Grace Bible Church Inc v Reedman (1984) 36 SASR 376.

Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission (2012) 565 U.S.

Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia [2014] FCAFC 26 (19 March 2014).

Kruger v The Commonwealth of Australia (1997) 190 CLR 1.

Marriage Act 1955 (NZ).

Marriage Act 1961 (Cth).

Marriage Amendment (Marriage Equality) Bill 2015.

Obergefell v Hodges, U.S. LEXIS 4250 (6th Cir, 2015).

R (Williamson and Others) v Secretary of State for Education and Employment [2002] EWCA Civ 1926.

Re Family First New Zealand [2015] NZHC 1493 [30 June 2015].

Religious Freedom Restoration Act 1993 42 U.S.C. S2000bb et seq.

Schalk and Kopf v Australia [2010] ECHR 1996.

Ahdar, Rex, "Solemnisation of Same-sex Marriage and Religious Freedom" (2014) 16(3) *Ecclesiastical Law Journal* 283.

Ahdar, Rex and Ian Leigh, *Religious Freedom in the Liberal State*, OUP, Oxford, 2nd ed, 2013.

Aroney, Nicholas and Patrick Parkinson, "The Territory of Marriage: Constitutional Law, Marriage Law and Family Policy in the ACT Same Sex Marriage Case" (2014) 28(2) *Australian Journal of Family Law* 160.

Bishops Commission for Family Youth and Life, "Don't Mess with Marriage: A Pastoral Letter from the Catholic Bishops of Australia to all Australians on the 'Same-Sex Marriage' Debate," Paper presented at the Australian Catholic Bishops Conference, Canberra, 2015.

Brennan, Frank, "The US Supreme Court's Gay Marriage Overreach", *Eureka Street.com.au* (Online), 2015 http://www.eurekastreet.com.au/article.aspx?aeid=45190#.Vd5Wzvmqqko. Commission, Australian Charities and Not-for-profits, *Advocacy by Charities* http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_char_purp/ACNC/Reg/Advocacy.aspx.

Foster, Neil "Religious Freedom in Australia", Paper presented at the 2015 Asia Pacific JRCLS Conference, Sydney, 29-31 May 2015. For revised version, see "Religious Freedom and the Law in Australia", *Upholding the Australian Constitution*, vol 27, The Samuel Griffith Society, 2017, 77-143.

House of Representatives, "Departmental Report for the Government Administration Committee: Marriage (Definition of Marriage) Amendment Bill" (Ministry of Justice (NZ), 13 February 2013) http://www.parliament.nz/en-nz/pb/sc/documents/advice/50SCGA_ADV_00DBHOH_BILL11528_1_A318744/departmental-report-ministry-of-justice.

Judd, Stephen, Anne Robinson and Felicity Errington, *Driven by Purpose: Charities that Make the Difference*, Australia Hammond Press, 2nd ed, 2014.

Kelly, Paul, "The Same-Sex Marriage Debate and the Right to Religious Belief", *Opinion, The Australian* (Online), 2015 http://www.theaustralian.com.au/opinion/columnists/the-same-sex-marriage-debate-and-the-right-to-religious-belief/story-e6frg74x-1227437429587.

Lupu, Ira C and Robert W Tuttle, "Same-Sex Family Equality And Religious Freedom" (2010) 5(2) *Northwestern Journal of Law and Social Policy* 274.

O'Donovan, Oliver, *The Desire of the Nations, Rediscovering the Roots of Political Theology*, Cambridge University Press, 1996.

O'Neill, Brendan, "The New Dark Ages, Where the Perfectly Normal are Branded Bigots", *Opinion, The Australian* (Online), 19 August 2015 http://ww.w.theaustralian.com.au/opinion/columnists/the-new-dark-ages-where-the-perfectly-normal-are-branded-bigots/story-fnhulnf5-1227488996781.

Osborn, Katy, "Colorado Baker Appeals Ruling Over Same-Sex Wedding Cake", *Time Magazine* (Online), 7 July 2015 http://time.com/3948644/marriage-equality-wedding-cake/

Parkinson, Patrick, "Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different" (2007) 81 *Australian Law Journal*.

Rawls, John, *Political Liberalism*, Columbia University Press, 1993.

Sandel, Michael J, "Religious Liberty-Freedom of Conscience or Freedom of Choice?" (1989) 597(3) *Utah Law Review*.

The Yorkshire Post, "Catholic Adoption Society Wins Ruling on Gay Parents", *The Yorkshire Post* (Online), 17 March 2010 http://www.yorkshirepost.co.uk/news/main-topics/local-stories/catholic-adoption-society-wins-ruling-on-gay-parents-1-2567726.

Tierney, Brian, *The Crisis of Church and State 1050-1300*, University of Toronto Press, 1988.

Twomey, Anne, "Same-Sex Marriage and Constitutional Interpretation" (2014) 88(9) *Australian Law Journal* 613.

Walker, Peter, "Gay dads' Barrie and Tony Drewitt-Barlow to take church marriage fight to Europe", *Essex Chronicle* (Online), 26 March 2014 http://www.essexchronicle.co.uk/Danbury-gay-dads-Tony-Barrie-Drewitt-Barlow/story-20854368-detail/story.html.

Wilson, Tim "Equality for all Couples Won't Destroy Society", *Opinion, The Australian* (Online), 2011, <http://www.theaustralian.com.au/opinion/equality-for-all-couples-wont-destroy-society/story-e6frg6zo-1226099617082>.

Endnotes

1. See, for example, Tim Wilson, "Equality for all Couples Won't Destroy Society", *Opinion, The Australian* (Online), 2011 http://www.theaustralian.com.au/opinion/equality-for-all-couples-wont-destroy-society/story-e6frg6zo-1226099617082>; Brendan O'Neill, "The New Dark Ages, Where the Perfectly Normal are Branded Bigots", *Opinion, The Australian* (Online), 19 August 2015 http://www.theaustralian.com.au/opinion/columnists/the-new-dark-ages-where-the-perfectly-normal-are-branded-bigots/story-fnhulnf5-1227488996781; Paul Kelly, "The Same-Sex Marriage Debate and the Right to Religious Belief", *Opinion, The Australian* (Online), 2015http://www.theaustralian.com.au/opinion/columnists/the-same-sex-marriage-debate-and-the-right-to-religious-belief/story-e6frg74x-1227437429587; Frank Brennan, "The US Supreme Court's Gay Marriage Overreach" *Eureka Street.com.au* (Online), 2015 http://www.eurekastreet.com.au/article.aspx?aeid=45190#.Vd5Wzvmqqko.

2. Wilson, above n 1.

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

4. Ibid., 124 [5] (Latham CJ). See also *Employment Div., Dept. of Human Resources of Ore v Smith* 494 U.S. 872 (1990), 877 cited in *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al,* 573 U.S. (10th Cir, 2014) where the United States Supreme Court expressed similar sentiments that the "exercise of religion" involves "not only belief and profession but the performance of (or abstention from) physical acts" that are "engaged in for religious reasons".

5. *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

6. *No., 2015 Marriage Amendment (Marriage Equality)* Bill 2015 (Cth).

7. Ibid., Sch 1, item 1.

8. *Marriage Act* 1961 (Cth) s 5.

9. *Marriage Act* 1955 (NZ).

10. Rex Ahdar, "Solemnisation of Same-sex Marriage and Religious Freedom" (2014) 16(3) *Ecclesiastical Law Journal* 283, 286.

11. *Marriage Act* 1961 (Cth) s 5.

12. Ahdar, above n 11, 285 citing House of Representatives, "Departmental Report for the Government Administration Committee: Marriage (Definition of Marriage) Amendment Bill" (Ministry of Justice (NZ), 13 February 2013) <http://www.parliament.nz/en-nz/pb/sc/documents/advice/50SCGA_ADV_00DBHOH_BILL11528_1_A318744/departmental-report-ministry-of-justice> [50].

13. *R(Williamson and Others) v Secretary of State for Education and Employment* [2002] EWCA Civ 1926, 37.

14. Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, OUP Oxford, 2nd ed., 2013, 10, 356.

15. See for example, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75 and *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26 (19 March 2014).

16. *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

17. Anne Twomey, "Same-Sex Marriage and Constitutional Interpretation" (2014) 88(9) *Australian Law Journal* 613, 613.

18. Above n 17, 454.

19. Above n 18, 613-4.

20. Nicholas Aroney and Patrick Parkinson, "The Territory of Marriage: Constitutional Law, Marriage Law and Family Policy in the ACT Same Sex Marriage Case" (2014) 28(2) *Australian Journal of Family Law* 160.

21. Ahdar, above n 11, provides a comprehensive analysis of the United Kingdom, Canada and New Zealand.

22. Ahdar, above n 11, s 1(4).

23. Peter Walker, "Gay dads' Barrie and Tony Drewitt-Barlow to take church marriage fight to

Europe", *Essex Chronicle* (Online), 26 March 2014 <http://www.essexchronicle.co.uk/Danbury-gay-dads-Tony-Barrie-Drewitt-Barlow/story-20854368-detail/story.html>.

24. *Schalk and Kopf v Austria* [2010] ECHR 1996, 105.

25. Ibid.

26. *Obergefell v Hodges,* U.S. LEXIS 4250 (6th Cir, 2015).

27. Ibid., 99.

28. *Obergefell v Hodges,* U.S. LEXIS 4250 (6th Cir, 2015) 101.

29. Ibid., 89-90.

30. *Obergefell v Hodges,* U.S. LEXIS 4250 (6th Cir, 2015) 90.

31. Michael J Sandel, "Religious Liberty- Freedom of Conscience or Freedom of Choice?" (1989) 597(3) *Utah Law Review* , 614-615.

32. Ibid., 614.

33. *Obergefell v Hodges,* U.S. LEXIS 4250 (6th Cir, 2015) 92.

34. Katy Osborn, "Colorado Baker Appeals Ruling Over Same-Sex Wedding Cake", *Time Magazine* (Online), 7 July 2015 <http://time.com/3948644/marriage-equality-wedding-cake/>.

35. See *Elane Photography v. Willock*, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct. Dec. 16, 2009).

36. *Bull and another v Hall and another* [2013] UKSC 73 (27 November 2013).

37. *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales 2009* UKFTT 376 (GRC) (01 June 2009) available at http://www.charity.tribunals.gov.uk/decisions.htm. An English judge later reversed and remanded this decision. See *The Yorkshire Post*, "Catholic Adoption Society Wins Ruling on Gay Parents", *The Yorkshire Post* (Online), 17 March 2010 <http://www.yorkshirepost.co.uk/news/main-topics/local-stories/catholic-adoption-society-wins-ruling-on-gay-parents-1-2567726>.

38. Ira C Lupu and Robert W Tuttle, "Same-Sex Family Equality And Religious Freedom" (2010) 5(2) *Northwestern Journal of Law and Social Policy* 274, 298.

39. *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al,* 573 U.S. (10th Cir, 2014) Hobby Lobby 21.

40. Stephen Judd, Anne Robinson and Felicity Errington, *Driven by Purpose: Charities that Make the Difference* (Australia Hammond Press, 2nd ed, 2014).

41. A more limited exception exists in Tasmania: *Anti-Discrimination Act* 1998 (Tas) s 52(d).

42. *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75.

43. Ibid., 269.

44. Patrick Parkinson, "Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different" (2007) 81 *Australian Law Journal* 964-5.

45. *Everywoman's Health Centre Society (1988) v The Queen* (1991) 92 DTC 6001 at 6008 per Decary JA, Federal Court of Appeal.

46. *Obergefell v Hodges,* U.S. LEXIS 4250 (6th Cir, 2015).

47. *Bob Jones University v United States; Goldsboro Christian Schools Inc v United States* 103 S. Ct. 2017 (1983) 461 U.S. 574, 76 L.Ed.2d 157.

48. *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

49. *Bob Jones University v United States; Goldsboro Christian Schools Inc v United States* 103 S. Ct. 2017 (1983) 461 U.S. 574, 76 L.Ed.2d 157, 574.

50. *Re Family First New Zealand* [2015] NZHC 1493 [30 June 2015], 87-89 (Collins J).

51. *Everywoman's Health Centre Society (1988) v The Queen* (1991) 92 DTC 6001, 6008 (Federal Court of Appeal).

52. *Canada Trust Co. v Ontario Human Rights Commission* (1990) 69 DLR (4th) 321.

53. Ibid., 352-3.

54. Ibid., 345.

55. Ahdar, above n 11, 289 citing 38th Parliament, 1st Session, HC Deb, 1605, 15 February 2005.

56. *Charities Act* 2013 (Cth) s 11(a).

57. Available at Australian Charities and Not-for-profits Commission, *Advocacy by Charities* <http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_char_purp/ACNC/Reg/Advocacy.aspx>.

58. Gino Dal Pont, *Charity Law in Australia and New Zealand,* Oxford University Press, 1999, 33.

59. *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75.

60. The Commonwealth Grants Rules and Guidelines made by the Minister under s 105C of the *Public Governance, Performance and Accountability Act* 2013 (Cth) would need to be considered in that context.

61. Brian Tierney, *The Crisis of Church and State 1050-1300*, University of Toronto Press, 1988,

1-2, 12.

62. Bishops Commission for Family Youth and Life, "Don't Mess with Marriage: A Pastoral Letter from the Catholic Bishops of Australia to all Australians on the 'Same-Sex Marriage' Debate" (Paper presented at the Australian Catholic Bishops Conference, Canberra, 2015).

63. Ibid.

64. *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012) 565 U.S. ___.

65. Oliver O'Donovan, *The Desire of the Nations, Rediscovering the Roots of Political Theology*, Cambridge University Press, 1996, 80.

66. *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785.

67. Ibid., 787.

68. *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116 [10] (Latham CJ).

69. *Kruger v The Commonwealth of Australia* (1997) 190 CLR 1.

70. *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376.

71. *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, 552.

72. Neil Foster, "Religious Freedom and the Law in Australia", *Upholding the Australian Constitution*, Vol 27, The Samuel Griffith Society, 2017, 118.

73. *Employment Div., Dept. of Human Resources of Ore v Smith* 494 U.S. 872 (1990). Quote from *City of Bourne v Flores* 521 U.S. 507, 514 (1997) .

74. *Religious Freedom Restoration Act 1993* 42 U.S.C. §2000bb et seq.

75. Pol. VII.14.1333a29–30; cf. EN X.7.1177b33–4.

76. Pol. VII.1.1323b40–1324a1.

77. Lupu and Tuttle, above n 39, 306.

78. John Rawls, *Political Liberalism*, Columbia University Press, 1993, xxvi-xxvii.

79. O'Donovan, above n 67, 31.

Chapter 6

Judicial Appointments
Need for a Policy

James Allan

Let me start by mentioning appearances. If you are concerned solely with appearances then what lies underneath can be pretty much irrelevant. No, the concern on this level is with the look of the thing, which to a large extent is the sort of thinking that undergirds and underpins affirmative action-type thinking.

I refer to that class of concerns that are aimed at achieving some sort of pre-determined diversity ratio or balance that reflects wider statistical realities such as the percentage of women on a top court or, maybe, the ratio of some other minority amongst the ranks of university professors. That sort of thing. Of course, which statistical realities fire the indignation of these promoters and defenders of affirmative action can appear quite arbitrary.

For instance, well over half of Americans are Protestants – and, if you include Mormons and Jehovah's Witnesses and a few other such groupings, then it nears two-thirds – and yet not a single judge on the Supreme Court of the United States is currently a Protestant. There are six Catholics and three Jews. Yet this is basically of no concern whatsoever to virtually all of those who would be, and are, indignant at other statistical misalignments based on skin pigmentation or the type of reproductive organs, *attributes wholly outside the control of the future judge or professor* I should stress (well, give or take the odd Caitlyn Jenner).

Bear that in mind because the focus in this paper will be on some real live persons being considered for various important positions in society where the desired qualities and attributes for doing the job well might be thought to extend beyond what sort of reproductive organs someone brings to the job, or how much pigmentation his or her skin happens to contain. That is my theme, "The Need for a Judicial Appointments Policy". This topic, by the way, was given to me by the organisers. Plainly it is ambiguous, as well as being vague. So let me begin with a few clarifications.

Firstly, my comments will be premised on the assumption that a right-of-centre political party really does exist in this country, and I mean in deed as well as in name. So whether you take the suggestions that I am going to make about judicial appointments on the plane of fact or on the plane of fiction might depend on whether you think this assumption is plausible. And let's be honest. There are grounds for doubting it. For instance, all of us have observed a Liberal Party that spent much time before the last election trumpeting its commitment to free speech in the tradition of John Stuart Mill; one that gave endless assurances that the section 18C hate speech provision of the *Racial Discrimination Act* 1975 (Cth) would be significantly altered, if not wholly repealed, and yet – to use the words of Prime Minister Tony Abbott taken from a different context – the voters were dudded. A supposedly Liberal Party retreated and collapsed on this aspect of free speech in a way that would have made the French in the Second World War proud; it opted for the interests of "Team Australia" (whatever that means) over the interests of all those

who voted for it at the 2013 election in part or in whole because of this explicit hate speech repeal promise. Does that in our current Caesar government seem ambitiously liberal?

Or, moving to a different example, take the three dozen odd Liberal members of the parliamentary party who, we are told, recently made it clear that they think their consciences are better than those of the voters. Not for them a plebiscite on same-sex marriage. No, they are happy to run an election campaign knowing full well that next to none of their voters imagines this issue would be decided as a matter of MPs' consciences and then, once these same MPs were ensconced and enjoying those myriad and surprisingly generous perks, do a 180-degree turn on the issue.

Notice that this "My Kingdom for a Conscience Vote" position lines up extremely well, alas, with the Julian Burnside and George Williams-type thinking that supports a bill of rights. The core effect of a bill of rights is its anti-democratic transfer of power from the voters and their elected representatives to a handful of unelected ex-lawyer judges who, as it happens, resolve their disputes by voting. The awfulness of this was recently on display in the United States with the *Obergefell* case where, in my view, the five majority Justices just made up what amounts to a new entitlement; they did not interpret the Constitution of the United States in a way that protected what had originally been locked in and ratified by the voters; they simply legislated from the bench.

Well, that exact same sort of "end run around the voters" is on display when a political party at best obfuscates before an election and then moves to a conscience vote after that election. At least since the beginning of the democratic era it is hard to see how MPs who take that sort of line can easily class themselves as liberals, and I include the John Stuart Mill tradition of liberalism given that Mill, after all, was a utilitarian through and through and utilitarianism has a deep-seated commitment to democracy and to letting the numbers count on big ticket contested social issues. Or, to be a tad more forgiving of these "my conscience, not yours" MPs, their ambitions to be liberal should be made of sterner stuff. And, for what it is worth, if what these 30-odd Coalition MPs are implicitly telling me is that it is the consciences of George Brandis and Malcolm Turnbull and Josh Frydenburg *et al.* that will be on the ballot paper next election – *not* the policies of the Liberal-National Party – then were I them I would not lie awake expecting my Senate vote. In fact, I suspect I would rather spoil my ballot than vote for such an exiguous offering. And, anyway, conscience is most reliably displayed through actions when one has something personal to lose – say, resigning from Cabinet (with all its perks and privileges) because you are disgusted at the Government's U-turn on section 18C. In that sense I have not noticed all that many Coalition consciences in evidence since this new government came into office. Okay, I have not noticed any.

I suppose another way to make this first clarification is to say that although I am going to be making suggestions about a judicial appointments policy in this talk, in a deep sense what might be needed by the Liberal Party of Australia is a candidate selection policy – some set of procedures that might help it select, you know, *liberals* (as opposed to what a good few of the party's elected MPs now appear to me to be – which can be described in a host of ways, none of them involving the word "liberal").

Here is a **second** clarification. My focus in what follows will *not* be on the general question of how any democratic common law country's government – be it of the right or of the left –

ought to appoint judges. That question is certainly topical. Indeed, it is at the centre of the debate currently raging between those, on the one hand, who like the status quo procedure for appointing superior court judges – the current one here in Australia, for example, under which the elected government of the day (after varying amounts of consultation) can appoint to the judiciary anyone it thinks worthy and desirable – and, on the other hand, those who want some sort of judicial appointments commission along the lines of what one sees in the United Kingdom.

I am wholly with the former camp, in favour of the status quo and against the UK's Blairite innovation. Indeed, I have written about this at length in dry academic pieces.[1] The idea of a coterie of current judges, ex-judges and top lawyers appointing their successors as it were – and I would say that that, in effect, is precisely what such judicial appointments commissions do deliver, an incestuous procedure by which the legal fraternity picks the judges, when the legal fraternity holds, say, seven of the 15 commission posts – well, that is a pretty awful prospect for a myriad of reasons, the most obvious being its anti-democratic features (though in my view it is precisely those anti-democratic features that constitute its appeal to so many proponents, including to the upper echelons of what now appears to be a left-leaning legal fraternity – though for PC reasons its leaders might well *balk* at the use of the word "fraternity"). Yet that debate between proponents of some sort of judicial appointments commission and supporters of a system under which the choice of a future judge lies with the elected government of the day is *not* what I will be discussing in a moment. My comments will have to do with how a Coalition government – or, at least, how some hypothetical right-of-centre government in Australia – ought to go about appointing top judges under the existing status quo set-up, which is a quite different topic. You can think of what follows as confidential advice to Mr Brandis and Mr Abbott, advice that is being leaked to The Samuel Griffith Society.

My **third** and final clarification has to do with viewpoint. I am called to the Bar of Upper Canada and, for those who do not know their Canadian geography all that well, that means Ontario. I am not called to any Bar in any Australian jurisdiction. So, at least in one sense, what follows is advice to the Coalition from the vantage of the Visiting Martian, or outside observer; it is the offering of a few suggestions to guide whom they appoint to the High Court of Australia and maybe the Federal Court. The self-interest behind such advice is no more immediate than what flows from wanting to live in a country whose judges interpret its Constitution in a defensible manner.

A Judicial Appointments Policy for George and Tony

My comments will fall under three broad headings:

- Why is one needed?
- What are the two main (and arguably *only*) things that matter in deciding who to appoint?
- Are there any peripheral or ancillary considerations that might be worth considering on occasion?

That is it. Satisfy those three queries and nothing else matters – not whether the candidates for high judicial office are men or women, not whether they are white or black, not their religion, not whom their current spouse might be, nor anything else that might fire the indignation and ire of defenders and promoters of affirmative action considerations playing a role in such appointments to high judicial office.

Let us take each of these three headings in turn.

Why is a judicial appointments policy needed?

The answer here is simple and straightforward. Too many recent Coalition appointments to the High Court of Australia could have been better, in some cases much better. I put that in those kindly terms that good manners and the present situation require. And notice that this criticism is more aimed at the former Howard Government than the Abbott incarnation (2013-15). Can you imagine being a right of centre political party and appointing someone to the High Court of Australia and that appointee then going on to decide with the majority in both *Roach* (2007) and *Rowe* (2010)? To call the people who appointed such a Justice incompetent is to be Mandelaesque in one's charitable outlook. Don't forget, these are two recent cases, one about whether and when prisoners can vote and the other about the closing of the voting rolls, that are two of the worst decisions in recent times – at least if you dislike the rather massive increase in judicial power they signal (via a made-up new proportionality-type test amongst other things) and if you agree with the approach to constitutional interpretation I will defend below.[2] The majority judgments exemplify the unanchored, "living Constitution", "judges know best", "judges simply give themselves more over-seeing power" interpretive approach that ought to gall and disgust most right-of-centre voters, and one assumes most right-of-centre politicians (and arguably *all* elected politicians). And yet we find a Howard Government appointee to the High Court in the majority in both instances. What criteria were used in making that judicial selection? That is not really a rhetorical question because I simply do not have a clue. And please note that in the big case pertaining to the State of Victoria's *Charter of Rights and [No] Responsibilities* – and don't we all just love how Ted Baillieu reneged on his clear promise to repeal at least the worst aspects of that Blair-like innovation, reinforcing my point above about the need for a Liberal Party candidate selection policy – well, in that *Momcilovic* case (2011) the same Howard High Court appointee went off the rails there, too, in my respectful opinion. So did another Howard Government High Court appointee from late in that Government's tenure.

As for the Abbott Government, the two High Court picks from early in 2015 hardly appear to have given us a Heydon or a Callinan, or even a Gleeson (though Gleeson, I lament to say, was also in the majority in that awful *Roach* case). One might well be able to defend the claim that Justices Nettle and Gordon are better picks than those made by the Howard Government in its dying years. But, personally, I would prefer to be aiming at a standard a tad higher than that.

For what it is worth, this failure by right-of-centre governments when it comes to judicial appointments is not restricted to Australia. You can see it in New Zealand; you can see it in the United Kingdom; you can definitely see it in Canada (though up there the government has the excuse – and I mean this literally – that there is almost no one to appoint with interpretively conservative views and also the further excuse that the top court there has grown so big for its boots that the nine Justices simply gave themselves the power to invalidate one of Prime Minister Harper's Supreme Court appointments, which is rather incredible, I know – but the latest pick in Canada seems okay).

What about the United States? Well, at least the Republicans now realise the crucial importance of whom it is they put on the top court, something that was seemingly not true a few decades ago. (For example, think President Reagan's pick of Justice Kennedy, the deciding vote

in the recent *Obergefell* same-sex marriage case; to be fair, President Reagan's then first choice of Robert Bork was axed by the Senate.) But even with all the care that the Republicans now take in choosing who to nominate for the Supreme Court, I am quite sure that more than a few of them have been disappointed by recently chosen Chief Justice Roberts in the two health care federalism cases. (He was a George W. pick.)

At core the situation is this. Once appointed, top judges have a tendency to move leftwards politically and interpretively. There is no such obverse tendency for any appointees in any of the common law countries I have mentioned to move to the right. In fact, I cannot think of a single example of that sort of rightwards drift, though there may be an instance or two out there. But, if there is, it is dwarfed by examples of top judges getting on to the court and to some extent or other moving left – to the sunny uplands on which judges can do justice though the heavens may fall, comfortable in the knowledge the heavens will never fall on them personally; to a place where top judges think they know better than elected politicians and where they feel sure that judicial moral antennae vibrate at a more Godly frequency than those of mere legislators; to a place where the content of the Constitution is not locked in but shifts according to the judges' ability to perceive "implied" features no one intended be there and which no one had been able to see for the previous 9 or 10 decades or more; to a place where judges feel wholly comfortable in telling all the rest of us what counts as a "reasonable" and "proportionate" legislative response, as if they have any basis whatsoever for feeling that way.

If all this judicial hubris strikes you as bad public policy, bad for democracy and bad even for the judges themselves, then you are in my camp (which is not a camp very many legal academics occupy and not very many Bar Association presidents either).

At any rate, my point is that there clearly is a problem and that a good right-of-centre government will have some sort of judicial appointments policy in its back pocket.

Let me now trace out the core features of such a policy in the next two sections.

The Two Key Things that Matter in Deciding Who to Appoint

I can be quite brief here. There are only two main criteria. By far the most important criterion that a right-of-centre government needs to consider is the potential appointee's approach to constitutional interpretation. Let me be clear. I lived for 11 years in New Zealand and, rather like jurisdictions with no written constitution, of which New Zealand is today the clearest example given the UK's move into the European Union (which somewhat undercuts but does not wholly obliterate the UK's credentials as a member of the "unwritten constitution" club). So I would be happy to have no written constitution at all and to have a form of parliamentary sovereignty in play – an admission that would quite literally cause heart failure in a good many Bar Association presidents, Law Council head honchos, all the Human Rights Commissioners, and so on and so forth. Well, if it actually did cause such heart failure I suppose the effects would not be all bad. (And notice that, with parliamentary sovereignty in the background, the worry about who to appoint to the top courts diminishes.)

But, if we are going to have a written constitution, then the question is why? Well, the only sensible answer is the Madisonian one, that we want to take some things off the democratic table; we want to lock certain things in – perhaps federalism or bicameralism or a set of checks and balances or even a list of vague and amorphous moral entitlements that finesse disagreement

which we might call a bill of rights. But the point is that if you are going to go down the written constitution route, and you are going to lock certain things in, then this only has legitimacy for people in the future if the people doing the locking in are seen as having been warranted in doing this. So, if there is a process by which the founders actually took steps that make the final document look legitimate, then it is that past legitimacy that generates the document's authority. And so the job of interpretation of that document should concern itself with seeking the original intentions and meanings of those framers and ratifiers who possessed this authority and legitimacy (because that is what provides the main reason for any of us to obey the document today).

Michael Kirby has called this sort of interpretative approach "ancestor worship".[3] I do not say this often, but Kirby is right. It *is* a form of ancestor worship. Indeed, you might think that *all* interpreting of a written constitution is ancestor worship and that to escape it you need to move to New Zealand, where each generation enjoys parliamentary sovereignty with nothing legally or constitutionally off the democratic table.

That is not quite correct, however, as all interpreting of written constitutions is either ancestor worship or the worship of top judges. You see, there are only two interpretive choices on the table, broadly speaking. You either interpret the document by searching for the most likely historical meaning tied to what those who made it meant or intended, because you think these people were legitimate and authoritative law-makers. Or, you adopt an approach to interpretation that shuns ancestor worship. But once you shun the intentions of the framers and ratifiers,4 and hence move into a world where the written constitution is understood to be metaphorically "living" and the goal has shifted to finding or discovering "changing social mores and values" or "the most moral meaning" and it is still a fact that you and I and 99.999 percent of the population are just as locked in as we were under "ancestor worship" interpretation. It is just that now we are locked in by the preferences, beliefs and values of the seven or nine people who at the moment happen to be our top judges – or, rather, by the preferences of the majority of this small handful of unelected ex-lawyers, as they also must resolve their disagreements by voting, as I mentioned above.

So pick your poison. With a written constitution citizens will certainly be locked in either way. Your choice is between the poison of being locked in by the original intentions or original meaning at the time of adoption (which, by the way, suggests a stable, unchanging set of things being taken off the table, with further inflation requiring a constitutional amendment) OR the poison of being locked in by the ever-changing preferences and values of seven or nine point-of-application interpreters, a committee of unelected ex-lawyers (which is a fluid, dynamic thing, of course, with what is being taken off the democratic table wholly dependent upon what some half-dozen top judges happen to believe is proportionate, most moral, most in keeping with changing social values, call it what you will). Kiwis and pre-EU Brits might dislike and forswear both poisons. But Australians, Canadians, Americans and everyone who lives under a written constitution has to pick between these two. Or, rather, the top judges will pick for us.

For my money the former poison is much to be preferred, not least because it results in a world where top judges do not consult their own political and moral sensibilities to keep the Constitution "alive" and "in pace with changing social values" and "as moral as it can be" but rather they must look for the historical fact-of-the-matter as to what was being locked in back

then. Sometimes no one can really know, as the evidence will be be too scanty or unclear. But be abundantly clear about this. Originalism leaves more on the democratic table; originalism does not allow the judges continually to inflate the scope of their overseeing power.

Put bluntly, originalist interpretation ought to appeal a good deal more to right-of-centre political parties than the only other alternative on offer. Such parties, therefore, ought to appoint judges with such interpretive outlooks. It is all about democracy in a way, and about limiting the input of unelected ex-lawyer judges at the point-of-application, or rather their limiting themselves. (In that sense, this sort of originalist interpretive approach used to be more widely popular in left-of-centre political parties, back when more of the members of such parties preferred all social policy-making to be done by the elected legislature.)

The second criterion for appointment I mentioned above, one that in fact is tangentially related to the first, is the potential judge's attitude to federalism. Things are so far gone on this front in this country that I only raise this in passing. But note that if some version or other of originalism had been consistently adopted by our High Court since the 1920 *Engineers'* case then we would not have a world's near-worst vertical fiscal imbalance; we would not have seen the Commonwealth and High Court together take away the States' income tax powers for all practical purposes; we would not have seen the High Court sanction a reading of our Constitution under which the fact a treaty has been signed provides the basis for the Commonwealth to prevent the Tasmanian Government from building a hydro-electric dam; we would not have seen the idiocy of a Coalition government centralising labour relations powers in the hands of Canberra in the naïve belief that, once centralised, a future Labor government would not use such newfound centralised power (condoned as it was by the High Court in the WorkChoices case using a simply awful interpretive theory) to take us back to the 1980s or 1970s in terms of workplace relations. And the list goes on.

So a candidate's attitude to federalism is an ancillary concern to bear in mind, one that is second to that candidate's attitude to how a constitution ought to be interpreted which is the foremost concern in my view. Of course, in some ways the two concerns are related.

And that is it as far as the two things that really matter when picking top judges is concerned. You will notice that I have not listed such things as: To whom is the candidate married? What sort of reproductive organs does the candidate have? What is the candidate's skin colour? Is the candidate from "our" political party?

Do any other peripheral or ancillary considerations matter?

I am tempted here just to say, "No, nothing else matters". But I will resist that temptation and say this: Take a look at the track record of our High Court and you will see that in terms of over-riding the elected legislatures its record is better ("better" as in it does this less frequently and less virulently) than all its cousin common law top courts save for New Zealand's. This is a least-bad claim, and one causally related to the lack of a bill of rights. But, all the same, in a comparative sense, the record on this front is good, indeed very good. Be clear. Former Justice Kirby would have been, and would still be today, the most interpretively conservative judge on the Supreme Court of Canada on public law issues outside the realm of federalist disputes.

But the High Court's track record, when it comes to federalism, is at the same time far worse than Canada's and the US's top courts' records. Our top court is the most favour-the-

centre court going. So, given that track record, and partly out of despair with nowhere else left to turn, I would also consider factoring in a geographical consideration, a "can we put onto the High Court judges from outside Sydney and Melbourne"? And I mean five or six of them at the same time. Who knows? Maybe we can get some less-centralising decisions from Tasmanians? However, this consideration must only come into play for those who already have passed the "originalist approach to interpretation" and the "attitude to federalism" criteria. But pass those and tell me you are from South Australia and I might be tempted to put you to the top of the list. Heaven knows that former Commonwealth solicitors-general and most of those appointed from the Sydney and Melbourne bars seem to me not to have had a federalist bone in their bodies.

Of course, this is a counsel of desperation. It is one that ought never to override the search for an originalist approach to constitutional interpretation. But such is the state of Australia's federalism, a state in large part caused by the High Court, that it is worth a shot, I suppose. Take these last comments I have made as a loose sort of guideline in how I think George Brandis and Tony Abbott ought to go about looking for people to appoint to our top courts. And remember that you will never find perfect. Or, put differently, "you can't have everything in life" . . . well, not unless you are an MP claiming his or her expenses.

Endnotes

1. See, for example, my "Appointing Judges in New Zealand: If It Were Done When 'tis Done then 'twere Well It Were Done Openly and Directly" in P. Russell and K. Malleson, *Appointing Judges in an Age of Judicial Power*, University of Toronto Press, 2006, 103-121; and my "Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky" in Campbell, Ewing and Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays*, Oxford University Press, 2011, 108 from page 122.

2. For my lengthy dissection of these two voting rights-type cases, see my "The Three 'R's of Recent Australian Judicial Activism: *Roach*, *Rowe* and (no) Riginalism", (2012) 36 *Melbourne University Law Review*, 743-782.

3. See Michael Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" (2000) 24 *Melbourne University Law Review* 1.

4. Or, for other originalists, the public meaning at the time of adoption.

Chapter 7

The Rocky Road of Federal-State Relationships

J. C. Bannon

In June 2015, the 800th Anniversary of the Magna Carta was commemorated in many parts of the world, including Australia. Its power as an historical event and its symbolic significance has endured. It is seen as marking a profound change in power relationships and sources of authority, and the first real charter of liberty. A realistic historical analysis of its various manifestations forces the conclusion that it was lucky to survive. King John got the Pope to rule that it was made under duress and declare it invalid very quickly. But it was periodically revived. It lived on, to influence not only feudal relationships, but the Enlightenment, the American and French revolutions, and constitution-makers such as the Australians in the 1890s.

This power resides in the ideas and mythology created around it, which are untouched by historical de-bunking. This is the fate of all great founding documents including the Constitution of the Commonwealth of Australia. More than one hundred years on, it is valued and very resistant to change, for many reasons, not least that it is ultimately only the citizens of Australia who can change it and they will not do so lightly. It has merged with the mythology of a nation finally reaching maturity at Anzac Cove in 1915. This is the background against which the current fundamental look at our federal arrangements is being held.

Since 1901 there have been constantly changing relationships between the former self-governing colonies of Australia and the federation they created which produced a central government and States. Envisaged as "minimalist," the Constitution defined the role of the Commonwealth Government and spelt out the heads of power the colonies would surrender to it, leaving all residual power under State authority. Its interpretation and intergovernmental disputes over the exercise of power were to be resolved by the High Court which could make a final determination, and not the imperial Privy Council as some wished. And, further, where a matter lay within the power of both the Commonwealth and State governments, then the Commonwealth law would prevail.

Changes in this minimalist version were hastened by rulings of the High Court, by judges appointed solely by the Commonwealth Government and not the States or the Parliament, and by the need to manage great national events like the First and Second World Wars and the Depression. This almost invariably increased Commonwealth power. Such crises saw the Commonwealth take more of the revenue-raising powers into its hand – and after the crisis was over they were not returned. The Commonwealth power to make special grants to the States was increasingly used, until Special Purpose Payments (SPPs) became a substantial source of revenue to fund State programs but under terms and conditions laid down by the Commonwealth.

The increasing vertical fiscal imbalance (VFI) put more constraints on State autonomy and, with the SPPs and the reliance on the Commonwealth Grants Commission to distribute the general allocation from the Commonwealth fairly created more tension and difficulty. On a personal note, I became involved with Commonwealth/State relations at the time of the Whitlam

Government, when the Commonwealth Government seized the whole agenda and attempted to by-pass the recalcitrant States, with very mixed results.

Later, as Premier of a State, I was involved under Fraser, Hawke and Keating with numerous Premiers' Conferences, Loan Councils, ministerial meetings, national summits (think "wage/price freeze," price/income, tax, employment) and group initiatives such as the Economic Planning Advisory Council.

By the late 1980s, the inadequacies of the post-Second World War system of annual Premiers' Conferences and Loan Council meetings became very apparent. A routine pattern developed where the premiers would give exit press conferences outlining their demands of the Commonwealth (most of which were not debated at the conference for the want of time); the financial offer of the Commonwealth, on a take it or leave it basis, was slipped under the hotel door and nervous Treasury officials made a rapid analysis. The respective premiers then phoned the Prime Minister to complain and arrange a meeting prior to the conference convening to make bi-lateral deals at the expense of their colleagues. Angry words were exchanged for the benefit of the media, and the conference retreated behind closed doors to hammer out the final deal. This chaotic procedure eventually could no longer be "worked" and finally broke down in 1990.

The result was the Special Premiers' Conferences initiated by the Hawke Government which started a new process leading to creation of the Council of Australian Governments (COAG) in 1992 and new procedures which are still with us today. (Ironically, the process helped bring Prime Minister Hawke down in 1991, when Paul Keating effectively used the allegation in the Labor Caucus that Bob Hawke was surrendering control of the economy to the States.)

Sometimes successful, sometimes neglected, and then revived, it is fair to say a lot of improvements have taken place post-COAG, but there remains a basic dysfunction. Overlaps, duplication, buck-passing of responsibility and general political competition between levels of government became more pronounced. States found that they carried responsibility to deliver services, but did not have the means to do so. Lack of respect and trust between the three tiers of government did not help.

In August 2014 the then Prime Minister, Tony Abbott, announced the start of a process of reform of the federation which would again attempt to overcome the problems. The Government would initiate a process of reform that would attempt to reduce or, if appropriate, eliminate overlap between State and Commonwealth responsibility. A Reform of Federation white paper would be produced using a collaborative process. It would be prepared in conjunction with a paper on taxation and financial reform. The terms of reference specified that clear lines of responsibility should be drawn where possible. The emphasis was on making the federation more understandable and accountable to citizens, and not just an obscure and tiresome wrangle between levels of government. It would focus on the outcomes for clients of government and not on the bureaucratic processes.

There were a number of refreshing elements in this. Firstly, the Prime Minister, Tony Abbott, indicated an openness to re-allocation of functions. As he said in the terms of reference, "the Commonwealth has become for various reasons, increasingly involved in matters that have been traditionally functions of the States. The States have become increasingly reliant on revenue collected by the Commonwealth to deliver services in the areas they are responsible for . . . " The

question of whether it was for the Commonwealth to relinquish its direct involvement in some programs or to take them over fully and any other options would all be on the table.

Secondly, he acknowledged that consensus was necessary for any major reforms to be implemented. COAG would be central to the process. A Steering Committee was established comprising heads of Premiers' and Chief Ministers' departments and the Chief Executive Officer of the Australian Local Government Association (ALGA) to oversee development of the white paper. COAG would be actively involved at all stages.

Thirdly, financial issues would be treated separately which has allowed a more uncluttered and "in principle" exercise to take place with federation reform proposals, freeing it from the familiar "where's the money coming from?" question that usually stops policy discussion in its tracks. This vital question is, however, being vigorously pursued through the taxation and finance study, and the two exercises will be brought together as an active plan at the end of the process.

The Prime Minister also established an Expert Advisory Panel to monitor the process, provide an independent assessment of papers produced by the Secretariat, provide ideas and input to the issues papers and the Green Paper and act as an advocate for change within the community and organisations. I am a member, together with Professor Greg Craven, Professor Doug McTaggart, Jennifer Westacott, Cheryl Edwardes and Alan Stockdale. All of us have been long involved in Commonwealth/State issues, as practitioners and commentators, some as Cabinet ministers, some as senior public servants, as consultants and senior academics and administrators, in the private sector as well as the public.

Since then a number of community round table discussions have taken place in all States and territories and their outcomes incorporated into the drafting of the policy documents. Five issues papers were released between September 2014 and February 2015. The key topics examined in depth cover health; education and training from pre-school to universities; vocational employment training; and housing and homelessness. Other topics may be added – this will be driven mainly by COAG and its priorities. The Green Paper draft was ready for the Leaders Retreat in July. Its publication and community discussion will follow shortly.

Will the effort be worthwhile?

Strong arguments can be put for and against this process succeeding in producing real change, but on balance it could be argued that the next year provides a window of opportunity that has not been open for some time – and a major effort should be made.

I have to confess to finding a depressing level of cynicism about the whole exercise, with low expectations that anything can be achieved. "Here we go again" is a common refrain. The negativity of academics in particular, and the continuing failure of the media to grasp the concepts and realistically look at what has been done so far is very disappointing.

It is easy to argue negatively. A few of the arguments against include:

1. The difficulty of making fundamental changes, and the resistance to constitutional change by the electorate.

2. The different requirements and priorities of the stakeholders.

3. The lack of respect and trust which has existed between governments, leading to suspicion

of any proposals; and within government departments, with vested interest in survival.

4. Political volatility leading to uncertainty of tenure of leaders and/or governments which undermines commitments. This particularly affects the durability of agreements. A lot of harm has been done by the introduction or announcement of "reform" or even "revolutionary" programs that are aborted or terminated.

5. A lack of bi-partisanship.

There are strong counters to these arguments.

1. From the beginning the process of reform was on the basis of doing things under the current Constitution. No changes or referendums are necessary to give effect to the quite radical re-ordering of powers and responsibilities.

2. The issues are common to all jurisdictions and, while one size cannot fit all, the white paper will be able to take account of some specifics within the national context. Bi-lateral pilot programs can be undertaken in some areas.

3. The close involvement of premiers and chief ministers and their offices and departments has already dispelled a lot of suspicion. Everyone has a vested interest in reforms both functional and fiscal.

4. We are currently in a comparatively "election-free" zone where most governments can focus on the issues well into next year without distraction. The Commonwealth and Western Australian governments go to the polls in 2016, but South Australia and Tasmania are less than halfway through their terms, the NSW Government has just been re-elected, and Victoria and Queensland are at the start of their terms. (This proved critical to major progress made in the early 1990s.) The leaders sitting round the Prime Minister's table should become very familiar with each other over this period. They have already developed a sense of collegiality on the process as demonstrated by the ready acceptance of the Prime Minister's proposal for a Premiers' Retreat and its subsequent success. It was a surprisingly constructive and dynamic meeting, positive, with no political point scoring. But problems can strike anywhere, anytime in politics so the occasion must be grasped as quickly as possible.

5. Another factor favouring a sustainable consensus is that State and Territory governments are now evenly divided between the two major parties. The attitude and response of the Federal Opposition is most important, and has not yet been tested. They will reasonably wait until they have more detailed information. It is hoped that the Labor Government leaders in Victoria, Queensland, South Australia and the ACT will be able to provide assurances of the integrity of the process.

The key considerations

1. **Political Feasibility**. There needs to be a consensus of Commonwealth and States on revenue and, including local government, a willingness to act and provide resources.

2. **A Results Focus**: for citizens. Not just a bureaucratic fix-up.

3. **A Leadership Role for the Commonwealth**, even in those areas where it is not directly or only marginally involved.

4. **Greater autonomy for States**. The Commonwealth, States, territories and local government must not be played off against each other. Very secure relationships with the States are needed. The watchwords are "durable" and "sustainable."

5. **The "National Interest".**This is shared by all levels of government, and is not the prerogative of the Commonwealth.

6. **Coordination, planning, local planning.** "[I]deally, co-design and service planning in a number of programs should take place at the local or regional levels involving local government, the community and private sectors." A single point of reference is desirable.

7. **Reliable data for accountability**. Timely collection of information and like for like comparison.

8. **Align incentives to outcomes** (not delivery) for improvement.

Chapter 8

Competitive Federalism
A Reassessment

Scott Ryan

Our federal culture has never had the anti-statism of the United States. Federalism in Australia has usually been seen by most as a pragmatic necessity rather than a means to control leviathan.

Our federal roots do not have the same fear of faction that motivated Hamilton, Jay and Madison as they wrote the most detailed argument for the proposed Constitution of the United States in *The Federalist* essays. Similarly, the Australian federation has never had the distributed power of the United States, nor the demographic dynamism that has dramatically reshaped its centres of democratic authority.

When the United States Constitution was written in Philadelphia in 1787, the most important centres of power were Pennsylvania and Virginia; New York had yet to rise and eclipse them. In the time that the Constitution of Australia has been in place, New York itself has been eclipsed as the dominant centre of democratic power: firstly, by the rise of the west led by California; and, more recently, challenged by the south, as typified by Texas and Florida.

Yet during this time New South Wales and Victoria have remained demographically dominant in Australia, as have their capitals, Sydney and Melbourne.

Similarly, the largest handful of cities in the United States has never been as dominant as have our capital cities, even within the less populous States. New York City, Los Angeles, Dallas and Miami not only are not the capitals of their respective States, but their populations historically dominate them less so than our mainland capitals, with the possible exception of Brisbane, dominate their respective States.

Australia's federation has always had a different flavour than the document which inspired the authors of its Constitution.

Why is all this relevant? Because there have been fewer forces for competition in our federation, with fewer strong and competitive actors. These forces in the United States have acted as forces for federalism, and for a more competitive federalism.

Yet, despite these important differences, those of us who retain a passion for federalism and the dispersal of power have usually supported competition between States as a primary reason for supporting a federal structure, not simply in terms of economic measures and competing economic policy regimes, but also as a democratic measure, to reflect the priorities and wishes of different communities.

We often also utilise the argument of States as "policy laboratories," where policies can be trialled and costs and benefits ascertained and borne locally, before measures are adopted more widely or discarded.

So, as the Federation white paper process is underway, we have again turned to the idea of competitive federalism as a guiding principle for reform, particularly competition between States. But we face substantial challenges in doing this.

In this paper I plan to outline what I consider to be significant constitutional barriers to this traditional view of competitive federalism and float another perspective.

Competitive Federalism

What do I mean by competitive federalism?

At the second conference of The Samuel Griffith Society, in a paper, "Making Federalism Flourish," Professor Wolfgang Kasper outlined comprehensive criteria for application of competitive federalism.[1] I shall rely on Kasper's paper in describing the traditional view of competitive federalism, particularly as it could apply to Australia.

Professor Kasper expanded on this work on several other occasions as well, but the tests remain essentially similar.[2] I cannot do complete justice to all his work on this, but I do wish to cover the tests he outlined in various works.

He outlined **four principles** for a competitive federal regime: subsidiarity; a rule of origin; fiscal equivalence; and exclusivity.

Subsidiarity, while I dislike the term with is European Union overtones, means, in this case, simply that tasks of collective action should be carried out at the lowest possible level of government administration.

The **rule of origin** is the principle of complete mutual recognition between different States. That is, if a good or service meets the standards of one State, then it is automatically acceptable in others.

It is the latter two, **fiscal equivalence** and exclusivity, which pose the real challenge for Australia's constitutional arrangements.

Fiscal equivalence requires that each level of government must finance its assigned and chosen tasks with taxes, fees and borrowings for which they are directly responsible.[3]

Exclusivity requires that the areas of collective action are assigned "exclusively, clearly and explicitly to one level of government."[4]

Do our constitutional arrangements meet these tests?

I suggest that our constitutional arrangements erect substantial barriers to the meeting of these arrangements.

First, the test of fiscal equivalence. I do not think I need to go into a long or detailed explanation that, whether by accident or otherwise, our financial arrangements characterised by extraordinary levels of vertical fiscal imbalance simply fail this test. Similarly, the extent of horizontal fiscal equalisation has reached heights never imagined even a decade ago with respect to one State, Western Australia.

Second, and more critically, exclusivity is not provided by our Constitution. A little federal theory is relevant here, as Australia's federation has often been mischaracterised.

For many years, the dominant view of federalism was what is described as "coordinate" federalism. This can be summed up by the phrase often commonly used, the levels of government being "sovereign within their own sphere". This is simply explained as the situation where governments are clearly assigned powers and authority to act independently within defined domains or spheres of influence. For many years, this was the typical view of the operation of a

federation, and particularly our federation, as outlined by Gordon Greenwood, Geoffrey Sawer and K. C. Wheare.[5]

But this simply is not true of Australia's constitutional arrangements. Not only are most of the powers granted to the Commonwealth concurrent in nature, thereby granting the Commonwealth the ability to increase the ambit of its activity within these ennumerated areas, I will not surprise anyone by observing that the method of interpretation of these has seen a constant expansion of Commonwealth activity, and a larger overlap of activities with the States as the Commonwealth has exercised the full powers available to it, both via explicit constitutional authority and High Court interpretation.

Even when the Commonwealth is not exercising these concurrent powers this overlap is not addressed, as political debate about whether to do so creates uncertainty and fails to meet the test of exclusivity outlined above.

But I also want to suggest that there are three specific Commonwealth powers that are highly expansionary in nature, and particularly when considered in combination. These powers effectively give the Commonwealth the means to legislate on virtually any matter it sees fit.

The expansive powers

First, ***the corporations power***. Since the *WorkChoices* case, the power of the Commonwealth to legislate with respect to constitutional corporations has been clear. Just considering the integral role corporations play in our economic life illustrates the scope of this power. I can do no better than quote the President of The Samuel Griffith Society in the *WorkChoices* case to illustrate the impact this may have on the authority of the States. As Justice Callinan outlined in dissent: "The reach of the corporations power, as validated by the majority, has the capacity to obliterate powers of the State hitherto unquestioned." [6]

Justice Kirby further outlined that the States had "correctly in my view, pointed to the potential of the Commonwealth's argument, if upheld, radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of States' principal governmental activities." [7]

One of the lessons I have learnt both from my studies and my relatively short period in public life is that the Commonwealth eventually utilises the powers available to it. Political demands for a central authority to act inevitably grow – after all, it is easier for vested interests to capture one authority than six.

We do not yet know the full capacity of this power and how it may be applied in unknown ways to regulate the activities of corporations and those who interact with them.

Second, the expansionary nature of ***the external affairs power*** has been detailed at length on many occasions, so I do not need to convince this readership of the devastating potential of this power to expand the legal competence of the Commonwealth – if not competence in the common meaning of that term.

To use a recent instance in public debate, there are proponents of utilising it to extend not only into areas of responsibility of State parliaments but also into areas that have never been subject to government activity, namely the raising of children, by banning the simple smacking of one's child.[8]

I think it can safely be asserted that if the Commonwealth wielded its ratification pen to the fullest degree possible, it could find a legitimate international instrument on just about any matter it wished. And if it turned its hand to legislating the most intimate of activities, how we discipline our own children within reason, then there is little this power cannot be used to regulate.

Finally, we must turn to ***the financial power*** of the Commonwealth and the uses of tied grants.

This cannot be discussed without reference to Alfred Deakin, whom I have long considered to be Australia's Alexander Hamilton. He may not have been the "father of federation" or the prime author of the Constitution but, as Hamilton was to the new United States, Alfred Deakin was the dominant force in the nation that was brought into being once the Constitution took effect, and the decades that followed would have been immeasurably different without his influence.

Deakin's famous statement in 1902 about the financial power of the Commonwealth is oft-quoted precisely because of its insight into the impact of the constitutional arrangements that were instituted:

> 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.[9]

While I am aware that the author of one address to the 1997 Conference of The Samuel Griffith Society objected to too great a foresight being attributed to Deakin in this regard,[10] I am persuaded by another paper in 1998 by Alan Wood in which he described the Constitution as a "permissive framework" for the Commonwealth to act as it has, and Deakin has been proved right.[11]

Section 96 is effectively limitless in application, and while the States are so dependent upon Commonwealth financial support, it has been used for everything from roads to public transport, schools funding, to fund and regulate the conduct within State-owned public hospitals and now, with some degree of irony, for school chaplains.

Importantly, this is the route by which the Commonwealth can avoid the consequences of the *Pape* and *Williams* cases, assuming the State governments agree. The truth is that in the overwhelming number of cases, the State governments do eventually agree to take the Commonwealth silver.

The *Williams* case does at least theoretically place a limit on the Commonwealth's ability to appropriate and spend money at its own initiative. Yet the impact of that on Commonwealth activity has not been great – as yet, if, indeed, it ever will be. I note Anne Twomey's work in this regard, but I have not seen it reflected in the activity of the Parliament, or in wider public debate.

Maybe the Commonwealth considers the second *Williams* case as nothing more than a nightmare that has receded as morning has broken.

These powers are not only expansionary in themselves, they can also be used in conjunction with existing enumerated powers vested in the Commonwealth to attack State discretion and activity directly. The external affairs power was used directly to attack the Kennett Government's changes to industrial relations enacted following a landslide victory in 1992.

Various conventions of the International Labour Organization and the existing power regarding arbitration were utilised by the Keating Government to support enactment of the *Industrial Relations Reform Act* 1993 and override the provisions for private sector workers and for public sector employees as well.

This was such a successful attack on the previously large State-regulated labour market that the Kennett Government handed all industrial relations powers to Canberra.

The impact on political culture

Lack of constitutional constraint on the Commonwealth also has a dramatic impact on political culture. If there are few or no limits on Commonwealth activity then there are no limits on issues that "demand" the attention of the Commonwealth Government no matter where responsibility has historically lain, nor where local majorities may wish responsibility to reside.

This further undermines the principle of exclusivity I outlined above. I have spoken elsewhere on how important political constraints have been in our past.[12] When bank nationalisation was ruled unconstitutional in the late 1940s, it had the effect of removing that as a realistic and responsible policy measure from day-to-day political debate.

This stands in stark contrast to the nationalisation debates that occurred in the United Kingdom at the same time – the lack of a constraint on such measures saw significant expansion of government in the United Kingdom over many years.

Similarly, the constant failure of measures to grant the Commonwealth power over prices limited the political potency of specific promises to act in that regard. With the operation of the corporations power today, there is no such constraint.

Constitutional constraints upon the Commonwealth are not only legally important in maintaining exclusivity and protecting subsidiarity, they are important measures in limiting political demands of central action. Yet in Australia they are weaker than they have ever been.

This undermines the ability of States to compete directly, lest the losers from economic measures that free up consumers, businesses and resources demand action be taken at a national level.

Political debate in Canberra is no longer subject to any limits on the Commonwealth's ability to legislate or act. And there will never be a time when the Labor Party and the Greens, united in their centralism, seek to limit the house on the hill from debating issues as allegedly "national" ones.

I hasten to add that the Liberal Party is far from sinless in this regard. I will only add a personal defence in that I am usually on the losing side of such debates on the limited occasions they occur.

Can we construct a different view of competitive federalism?

So, given that these constitutional arrangements and barriers are not likely to be addressed via referendum in the near future, is another view of competitive federalism possible? I will only briefly discuss this with reference to two fields of public policy, as it is rightly the subject of another paper.

Competitive federalism is often seen through the prism of competition between States, but I think we should take a step back and look at it from the perspective of the consumer, the citizen.

At the beginning I outlined some of the demographic differences between our federation and that of the United States. One of the consequences of a much more centralised population, with fewer dominant cities, is less population mobility. I do not simply mean that in absolute terms, either, but in practical terms.

Owing to the more evenly dispersed population and consequent economic activity despite the closer physical proximity and the greater discretion in many policy fields available to States including, for example, taxes and school education, it is more feasible for a citizen of New Jersey to move between his or her home State and the neighbouring States of New York or Connecticut to choose a different policy regime or to take advantage of opportunities that arise, or even avoid costs, than it is for Australians to move between Melbourne, Sydney and Brisbane.

Indeed, the last decade has heard public lamentations of the unwillingness of Australians to move west, where there were shortages of labour during the greatest mining boom since the Victorian gold rush that turned my home town, Melbourne, whose 180th birthday is today, into a major metropolis and driving force of the nation in a matter of a few short decades.

The explosion in economic activity initially in the west and then in the south of the United States led to profound population shifts that we have not seen to a similar degree in Australia. Australia's population is simply not as mobile, for personal as much as other factors. A model of competitive federalism that assumes a high level of population mobility will not work as well here.

Yet the concept of "vertical competition," where there is some degree of competition provided by different levels of government in key areas of public activity, can ensure that the citizen does benefit from the public sector being subject to competition. This concept of vertical competition in Australia has been outlined previously by authors such as Professor J. J. Pincus.[13]

I will provide one brief public policy example of how this works in action, and how vertical competition and Commonwealth involvement delivers real, meaningful competition for consumers, in this case, parents.

This relates to school education. Australia has a highly competitive school system – and by competitive I refer to the opportunity of parents to choose different schools. Most parents can choose between the free, public, secular education system, the Catholic school system or independent schools with varying ranges of fees.

For all but the most expensive independent schools, this is a direct result of Commonwealth involvement. Without going into the history of school funding in Australia, the explosion in low-fee independent, usually Christian, schools, and the maintenance and subsequent expansion of the Catholic schools, has only occurred because the Commonwealth supports them financially when parents choose them for their children.

The history of the States, owners and funders of the State school systems, was similar to any monopoly provider – they did not show any inclination to fund their competitors or to open their systems to competitive influences. They have no interest in a more competitive market in schools.

If the Commonwealth were to withdraw from school funding, and this matter was solely left to State parliaments and electorates, there would likely be less choice and less competition.

Conclusion

Federalism is not intended to be a "clean" system of government, providing simplistic answers to questions. Inherent in a federal system is a degree of "messiness" in addressing questions of public policy. Inherent is a degree of competition, both horizontal across State jurisdictions, and vertically between jurisdictional levels. Compounding demographic and population factors, Australia's constitutional arrangements militate against competition.

From the time of the Financial Agreement and the Loan Council, through to the debates today about GST distribution, measures have been taken, and not just initiated by Commonwealth power grabs, to reduce the competitive pressures and, indeed, differences between States.

Menzies referred to the "curse of uniformity," and it is one we still hear in the modern demand for "harmonisation". We often hear of the desire for cooperative federalism, particularly from the Left, which I prefer to describe as cartel federalism.

This simplistic call to reduce the variations between, and autonomy of, the States to act independently creates seemingly simple solutions. It also undermines one of the key rationales for a federation.

I might add that the failure of the Liberal side of politics to argue the case, aggressively, for a limited central authority, and to act on that argument when given the opportunity, is one of the reasons that these appeals for "cooperation" or "harmonisation" have a degree of resonance.

In outlining the barriers to the traditional view of competitive federalism above, I hasten to say I would like to address them. I do not, however, think that constitutional amendment is particularly realistic, at least in the short or even medium term.

Furthermore, in addressing the political culture, it is not a popular thing to say inside any government, including the current one, that something is not a problem for the Commonwealth to fix, let alone for government to act upon at all.

So in considering the path forward in the short term, I keep in mind the purpose of federalism is not only to limit the power of temporary majorities, particularly national ones overriding local ones, it is also to provide choice to Australia's citizens. In the modern era this should include choice in the provision of public services that are dominated by the public sector.

In the end federalism is about the citizen having greater autonomy, not simply one level of government in a particular constitutional arrangement.

Endnotes

1. Wolfgang Kasper., "Making Federalism Flourish," *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, 2nd Conference, 1993; available at:

http://samuelgriffith.org.au/docs/vol2/v2chap7.pdf.

2. See Wolfgang Kasper, *Competitive federalism: promoting freedom and prosperity*, IPA Federalism Project Issues Paper No. 3, Institute of Public Affairs, Melbourne 1995; and *Competitive Federalism: may the best state win*, in Geoffrey de Q Walker (et al), *Restoring the True Republic*, Centre for Independent Studies, Sydney, 1993.

3. Kasper, *Competitive Federalism*, 1995, 39.

4. Ibid., 37.

5. Gordon Greenwood, *The Future of Australian Federalism,* University of Queensland Press, 1946; Geoffrey Sawer, *Modern Federalism,* CA Watts & Co, 1969; K. C. Wheare, *Federal Government*, Oxford University Press, 1946.

6. Justice Callinan, Workchoices Case – *New South Wales & Ors v Commonwealth* [2006] HCA 52 at 794, quoted in Stewart, A. & Williams, G., *Work Choices, what the High Court said,* The Federation Press, Sydney, 2007.

7. Justice Kirby, WorkChoices Case, *op.cit.,* at 539.

8. *"United Nations wants Australia to ban smacking, prosecute offending parents",* published on www.news.com.au, December 12, 2013; see: http://www.news.com.au/lifestyle/parenting/united-nations-wants-australia-to-ban-smacking-prosecute-offending-parents/story-fnet085v-1226780993923; and *"Parents urged to stop smacking kids as Australian Research Alliance for Children and Youth releases national plan",* published on www.news.com.au, November 17, 2013; see: http://www.news.com.au/national/parents-urged-to-stop-smacking-kids-as-australian-research-alliance-for-children-and-youth-releases-national-plan/story-fncynjr2-1226762071662.

9. Alfred Deakin, *Letter to Morning Post,* 1 April 1902, quoted in L. F. Crisp, *Australian National Government*, Longman, 1965, 83 (unsourced).

10. Bhagan Grewal, "Economic Integration and Federalism: Two Views from the High Court of Australia," *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, 9th Conference, The Samuel Griffith Society, 1997; available at: http://samuelgriffith.org.au/docs/vol9/v9chap6.pdf.

11. Alan Wood, "Beneath Deakin's Chariot Wheels: The Decline of Australia's Federation", *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, 10th Conference, The Samuel Griffith Society, 1998; available at: http://www.samuelgriffith.org.au/papers/html/volume10/v10chap10.htm.

12. *The Federalist Papers*, IPA Great Books of Liberty sessions address to the Institute of Public Affairs, 24 September 2009, available at: http://scottryan.com.au/media/media-speech/liberty-sessions-the-federalist-papers-transcript.

13. J. J. Pincus, "Commonwealth-State relations, the case for competitive federalism", Papers on Parliament No. 53, Parliament of Australia, 2010; available at: http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/pops/~/link.aspx?_id=9E988B12F96D40D2BBF6A3F7B0A9B0F9&_z=z.

Chapter 9

Australian Colossus
Sir Henry Parkes, 1815-1896

Jane Reynolds

Henry Parkes never stood in the city of Canberra. It is a city that incorporates many commemorations of him – Parkes is now a suburb, there is "Parkes Way" and "Parkes Place", he is immortalised in both the provisional and the New and Permanent Parliament House. Parkes in New South Wales became a town in 1873 for completely different reasons, long before Canberra's efforts. He is even represented in Tom Roberts' "Big Picture" though Parkes had been dead for five years by the time of the opening of the First Parliament of the Commonwealth in Melbourne in May 1901 and even longer by the completion of the portrait.

History shows that Australia's political game of Federation is more akin to a rugby league "State of Origin" clash, or one of the numerous intra-state "derbies" in Australian Rules football – Carlton versus Collingwood, Adelaide versus Port, West Coast v Fremantle, and now Sydney versus Greater Western Sydney. And, in keeping with the AFL/Federation tradition, Tasmania does not even rate a mention.

If you have ever tried to explain Australian Rules football to a foreign visitor, you have already lived the strategies, complexities, uncertainties, inconsistencies, passions – sheer hatred sometimes – loyalties and personalities inherent in our Federation culture; in choosing Griffith over Deakin, Forrest or Inglis Clark.

And when decisions of others do not accord with ours, they, like those of an umpire, are just plain wrong. Any Federation discussion is founded on a precarious "field of play."

Any Federation discussion also needs to recognise the many people who dedicated their careers to ensure we have a better understanding of this pivotal period of Australia's political history; we must continue to use their work to tell the Federation story, to challenge it and to develop it further.

In the year 2015 that recognises the bicentenary of the birth of Sir Henry Parkes, this address seeks to commemorate him and to provide a better understanding of Parkes the man, his motives and his legacy in the context of Australia's greatest peacetime achievement – Federation.

Parkes – Father of Federation

"Henry Parkes – Australia's Father of Federation": it is a cliché; a trite, stereotyped expression that has lost all meaning or impact.

To his contemporaries who bestowed this "title" upon Parkes, to be called the "Father" of the Federation movement was an indescribable honour from people who had fought for (and against) the cause of Federation beside him and in his footsteps after him. They knew first-hand the complexities, failings, mistakes and personal circumstances of his life. They also knew his ambition and drive even if they did not know what drove him. They made this choice.

Today we would call him a "high maintenance individual"; he was "manic depressive", which would account for the enormous "highs" and "lows" of his behaviour. There was nothing simple or small about Parkes. He was a larger than life character, the likes of whom we do not see in Australian politics today (arguably there was no "like" character in the NSW Parliament of the second half of the nineteenth century either).

He deserves far more than to be relegated to mere cliché and, if we are prepared to "listen", we stand to benefit greatly from the experiences and example of his life.

Parkes – the record

If being a cliché has a value, it is that Australians are occasionally aware of the "Parkes" name and even his moniker, "The Father of Federation." Few know of his work to introduce secular education in New South Wales, the major advances in rolling out the railway network and the many, many other policy achievements in the name of the people of New South Wales. Even fewer know that, even 126 years after he last held the stage, he remains the longest-serving premier of New South Wales.

In March 1853, Parkes stood for his first election – he lost. It would be his first and last unsuccessful campaign for a seat in Parliament until 1895. He did lose elections for particular seats from time to time during this period. Elections in New South Wales at this time were held over a number of days which enabled a candidate who lost a seat in one electorate to nominate for and possibly win in another electorate. Parkes represented the electorate of Tenterfield for some years (1882-84) following defeat in East Sydney.

He was first elected to represent the seat of East Sydney in 1854. In all, he successfully stood for election on 27 occasions (although there were reasons other than electoral defeat that forced him to leave Parliament). He was a fixture of the NSW Parliament for more than 41 years. He represented nine electorates, a reality of the electoral system of the day. During his time in the Legislative Assembly he served on 227 parliamentary committees. During those 41 years, he was premier for 11 years, 9 months and 13 days.

Unlike many of his contemporaries, he could ill-afford the loss of income which membership of Parliament entailed. In 1858, Parkes declared bankruptcy with estimated debts in today's money of around $20 million. It would be the first of three bankruptcies in his life.

He did not derive an income from parliamentary work until 1866 when he became Colonial Secretary in the government of Sir James Martin.

What drives such a man? Deakin writes of his "life of struggle" but even his elegance in writing does not capture the immense scale of such a life as Parkes's (see Appendix 1).

Parkes's early years

Henry was born on 27 May 1815 in the Moat Cottage, Canley, on the estate of Stoneleigh in Warwickshire, England. He was the seventh and youngest child of Martha and Thomas Parkes. Thomas, a tenant farmer, was at least the third generation of Parkes on the Stoneleigh estate.

Stoneleigh was and remains an idyllic little English village just outside Coventry. Each day Parkes and his siblings walked some four miles to and from the Stoneleigh Parish School. Life was considered "comfortable" in the context of the times.

When Parkes was born Thomas was about to make what would prove to be a fateful decision. He decided to move to a larger house and increase the amount of rented land that he farmed, quadrupling his rent. This decision was made on the back of what we now know were inflated prices caused by interrupted trade with Europe during the war between the United Kingdom and Napoleonic France.

What Thomas did not know was that the war was about to end and, with it, the inflated prices he needed to pay the rent. By 1822, the Parkes family was forced from Stoneleigh. Parkes subsequently wrote: "From the time my father left Stoneleigh, I might date the commence[ment] of suffering and hardship which soon resulted in bleak and lasting destitution."

Parkes was seven years old; the Parkes family separated, forced to seek work to survive. Parkes stayed with his father, travelling to work wherever they could find it. During the next few years, Thomas Parkes had various jobs, making ropes in a factory, breaking rocks to build roads, making and carrying bricks, and farm labouring during harvest season.

The family eventually found their respective ways to Birmingham. Thomas, owing to actions of a conniving relative, was jailed for his debts. Martha and her children managed to eke out sufficient income to maintain a home in Moseley Street.

Martha secured an apprenticeship for Parkes with an ivory turner. He also attended lectures at the Birmingham Mechanics' Institute, his first formal education since Stoneleigh. Any additional knowledge he gained afterwards was from his independent reading. Indeed, it fuelled his lifelong love of books and learning. This made their loss through bankruptcies in later life all the more painful.

Birmingham at this time was the heart of the political reform movement that brought about the Great Reform Act of 1832, the starting point of extending suffrage in England. It exposed young Parkes to much broader possibilities; it showed him that individuals like Thomas Attwood could make a difference in the lives of others and inspired in him an energy and a vision that fuelled his drive for social reform and good government for his entire life.

In Birmingham, Parkes also met the woman who became his wife of nearly 52 years. He married Clarinda Varney at the Old Church in Edgbaston on 11 July 1836.

Within two years they left Birmingham for London in search of better opportunities. Without success, they decided to leave everything they knew and everyone they loved for the promise offered by life in the colony of New South Wales. They arrived in Sydney on 25 July 1839.

1839 – it would be 15 years before he was elected to the New South Wales Legislative Assembly and 27 years before he was paid for his parliamentary work.

Lacking any formal education, through poverty, the imprisonment of his father and forced separation of his family, the deaths of his first two children with Clarinda and recurring financial hardship, this is the man who ultimately became a great Australian politician and statesman.

Federation

Is Parkes really the "Father of Federation"? Yes or No? For many, there is no place for nuance in providing an answer. Popular folklore has it that Parkes visited Queensland to discuss the Federation question. He dropped into Tenterfield to thank the people for their support in making him their local member. He also had in his possession a report on the defences of the Australian

colonies undertaken by Major-General Bevan Edwards.

On 24 October 1889, at a banquet held in his honour, he gave a speech. That speech is now known as the Tenterfield oration. In it he called "for the creation on this Australian continent of an Australian Government." It led quickly to the Federation Conference in Melbourne in February 1890 at which the delegates agreed to convene in Sydney in March 1891 at a Convention to draft a constitution for a federated Australia. They were successful.

The diary of events presented above is fanciful; while accurate as the facts stand, it is a simplistic representation and provides no insight into the motivations and events that actually occurred, the large cast and changes in public positions on the Federation issue, the animosities, jealousies, manipulations and "party" manoeuvres.

Returning to 1891; it is 9 April, the Convention has successfully drafted a Constitution and it has been agreed that it will be presented to the legislatures of the colonies for consideration. Everyone is waiting on Parkes, the premier of the senior colony, to take the lead. According to John Bannon:

> The Commonwealth Bill establishing federation, which had been adopted by the 1891 Convention, was now before all of the colonial parliaments. Anxious to avoid a recurrence of the problems caused by New South Wales's failure to join the Federal Council (which continued to meet throughout this period), it was agreed that others would move only after the senior colony had considered it. Parkes was expected to pursue the matter vigorously, but seemed unable or unwilling to do so.[1]

Parkes was, however, faced with significant political upheaval on two fronts in Sydney which demanded his immediate attention; one took the form of "the arch-plotter against Federation, Mr. George Houston Reid"; the other, a fundamental and permanent shift in the structure of NSW politics – the formation of the Labour Party.

The Legislative Assembly of New South Wales was dissolved for an election in June 1891. The new Labour Party elected to the Legislative Assembly at this time was born principally of the Great Maritime Strike of 1890, its members having decided that social and industrial change would be best pursued through a combination of industrial action and direct parliamentary representation. In their first election, they won 35 seats, approximately 23 percent of the Assembly; Parkes's forces, the Free Traders, won 36 percent and the Protectionists, 33 percent. In a legislature largely unfamiliar with formally structured parties, the new Labor Party now held the balance of power (NSW Elections results, 1891 election).

Formalisation of party structures started as early as the 1885 election. The general acceptance mid-century of free trade by all parliamentary representatives was breaking down, leading to formation of parties: "As they developed, the new parties substituted loyalty to principle for loyalty to a personal leader and produced party organisations designed to tie both party members and leaders to pre-arranged platforms".[2]

22 October 1891 was the last day Parkes would be premier. Unbeknownst to him, it would be his last opportunity to advance the Federation cause in an official capacity. He was 76 years of age. George Dibbs, a man who supported a protectionist trade policy, would take over in his third term as premier until 2 August 1894 when he was followed by Mr George Houstoun Reid at the head of a Free Trade ministry.

For the record on Federation

Parkes considered the words of William Charles Wentworth in 28 July 1853 as the starting point of the Federation discussion, followed by Edward Deas-Thomson on 20 October 1856 and a committee of the Legislative Assembly of Victoria presided over by Gavan Duffy in 1857.[3]

He further stated in a letter of 30 October 1889 to the Premier of Victoria, Duncan Gillies:

> For more than twenty years I have had the question of Australian federation almost constantly before me; and I cannot be accused of indifference to it at any time, merely because I had become convinced from earlier examination, while others were adopting the scheme of the present Federal Council at a later period, that no such body would ever answer the great objects of Federation Government.[4]

Stephen Dando-Collins cites Parkes's "earliest proposition for Federation" as 1867: "I think that time has come when these colonies should be united by some federal bond of connection".[5]

The New South Wales parliamentary records indicate that Parkes was a member of a committee that considered the Federation of the Australian Colonies in 1860. We know that he gave the speech at Tenterfield on 24 October 1889, followed by the "Crimson Thread" speech at the banquet in Melbourne on 6 February 1890. There were many others.

The first record I have identified referring to Parkes specifically as the "Father of Federation" is the commemoration magazine for the Inaugural Federation Day, 1 January 1901. It included an article written by Robert Garran. It stated simply: "Sir Henry Parkes G.C.M.G. The Father of Federation".[6]

There are other references. In 1901 Sir Charles Dilke wrote:

> Sir Henry Parkes, who had been the real author of the Federal Council movement, stood aloof from it for many years and crushed it. Some of us thought his action had retarded the cause of Federation in Australia. We may now, in looking back, admit that Sir Henry Parkes' conception of a grander movement, more rapidly attaining to maturity, has been justified by the event.[7]

And Edmund Barton's first biographer recorded that:

> Parkes' interest in the Federal union of the Australian colonies commenced very early in his political career. He was the first public man to make Federation a question of practical politics in every Australian colony, and even in New Zealand. His success in calling together the first National Australasian Convention [Sydney, 1891] earned him the title of "The Father of the Australian Federation".[8]

And J. A. La Nauze, eminent historian of the making of the Constitution, has contended that:

> Not to beat around the bush, let us name the undoubted Fathers, and dismiss the undoubted non-qualifiers. We must first include Parkes. There can be various explanations of his actions in 1889, but the more closely one examines the events of that year, the more certain it is that there would have been no 1891 Constitution but for his initiative, and his refusal to accept rebuffs. He was no technical Constitution-maker, but his Resolutions of

> 1890 and 1891 set the process of gestation going. The name "Commonwealth" was his; and more significant (though the matter is very complicated in detail) Section 92, with its ominous phrase "absolutely free", has its origin in his second Resolution of 1891.[9]

But there are others. The view of Sir Frederic Eggleston, for example:

> Holman of New South Wales was a man who, in my imperfect knowledge, reminds me of Watt. His constructive achievements were substantial, his popular appeal was great, and he was one of the few men who, by sheer eloquence, could sway elections. Sir Samuel Griffith was a man of similar type; Sir Henry Parkes, a demagogue, without any constructive side, gets the credit of being a pioneer of Federation, though his influence on its form was almost negligible.[10]

Dr A. W. Martin believed that it is something that can be re-considered:

> Can we, all the same, call [Parkes] the "Father of Australian federation"? What I have been saying today has certainly to be taken into account when considering this question – but perhaps we should withhold a final judgement until we have been through the decade of centenary celebrations of things federal which appears, in 1990, still to be before us.[11]

Lessons of history – politics, human nature, and Federation

Were Parkes's actions in the New South Wales Parliament of 1891 right, wrong, or at least reasonable?

As Parkes explained his position in the extract from his memoirs set out in Appendix 2, how could he have done anything else? He faced a political situation in which the dynamics of the New South Wales Parliament had fundamentally changed. A significant third force, the Labour Party, had arrived; its strength was such that, if dissatisfied, it could hand the keys of government to the Opposition. He also recognised the "popular" support the people of New South Wales had clearly indicated, at the elections, that priority should be given to these issues. He chose to do so.

He also faced a (now) dissenting member of the Government siding with the Opposition for what appears to be motivated by political strategy alone. He wrote:

> Of course, wherever an element of (political) weakness exists, there will appear men of political cunning and tortuous courses to use it for wrong purposes. It may be to their own advantage, or to the advantage of any cause in which they profess to believe, but it may serve to gratify their ill-will in some direction, or their simple love of confusion.[12]

Politicians are politicians and Parkes was one of the best of them; they are actors governed by rules and incentives by which they pursue popular support – votes – in the quest for or maintenance of power – Government. Always have. Do now. Always will.

Is it reasonable to expect political leaders to take actions which they believe are not in the interests of their jurisdiction for the sake of a "higher goal" for which they are not accountable? Human nature compels us all to act "in our best interests." It is more a question of what we believe our interests to be in a given set of circumstances.

Federation – political compromise

But to analyse, criticise or synthesise (if I may use the term), a complex political organism seems beyond the functions of a body with many voices and conflicting wills, and in which the most competent and the most incompetent have equal weight in a general vote.[13]

Parkes was talking about the New South Wales Legislative Assembly. But his observation applies to any discussion of Australia's Federation arrangements. Achieving Federation in 1901 brought together six separate jurisdictions each with their own incentives and pressures, in a compromise to achieve a goal they ultimately believed was in their own individual best interests. Why?

Australia's Federation remains a compromise and now consists of nine jurisdictions: six Original States, two self-governing territories and the Commonwealth. The events of the 19th century culminating in 1901 stand as evidence that hard political decisions by those with competing interests can be made and need to be pursued however impossible they may appear.

Mistakes were made, or were they?

When is something "a mistake" or a "broken promise"; or, alternately, "something that doesn't go to plan" or "changed when additional information becomes available or unforeseen events occur"?

Who leads?

Parkes reasonably questioned the lack of action on the part of the other colonies in approving the draft 1891 Constitution: "In the other colonies no better progress has been made; in most of them nothing whatever has been done."[14]

Parkes potentially could have garnered additional support within his own jurisdiction had he been able to argue that New South Wales was at risk of losing its "senior colony" status on the Federation issue. Similarly, from the perspective of the other colonies, it was reasonable to wait.

The Commonwealth Bill establishing federation, which had been adopted by the 1891 Convention, was now before all the colonial parliaments. Anxious to avoid a recurrence of the problems caused by New South Wales's failure to join the Federal Council, it was agreed that others would move only after the senior colony had considered it. Parkes was expected to pursue the matter vigorously, but seemed unable or unwilling to do so.[15]

Parkes was not to know this "agreement" had been made by others.

Personal characteristics and circumstance?

Doris Kearns Goodwin sheds instructive light on this question in her acclaimed study of Abraham Lincoln's presidency of the United States:

> Throughout the nadir of Lincoln's depression, Speed stayed at his friend's side. In a conversation both men would remember as long as they lived, Speed warned Lincoln that if he did not rally, he would almost certainly die. Lincoln replied that he was more than willing to die, but that he had "done nothing to make any human being remember that he had lived, and that to connect his name with the events transpiring in his day and generation and so impress himself upon them as to link his name with something that would redound to the interest of his fellow man was what he desired to live for."[16]

Parkes himself wrote:

> My great object throughout my life will be so to impress my name and my character and my influence on this country that I may be remembered when I am dead and in my grave.[17]

Many have judged Henry Parkes's behaviour as choosing to focus on his ambition and his vanity. Ambition of itself is something that should not be derided; the better question concerns "what that ambition seeks to achieve?"

In many ways, Henry Parkes is Australia's Abraham Lincoln – to the benefit of us all they spent their lives driven by the ambition to be "judged" by their peers as "worthy." Of Parkes's vanity, remember Deakin's description:

- ". . . the commanding figure of Henry Parkes, than whom no actor ever more carefully posed for effect".
- ". . . always in his mind's eye his own portrait as that of a great man …"
- ". . . because there was in him the substance of the man he dressed himself to appear."

Deakin was correct up to a point. But consider also Parkes's own perspective:

> The spirit of my later boyhood was so cowed by the sneers and taunts of those who daily gazed upon my destitution that I scarcely dared to look a happy boy in the face.[18]

The experiences of childhood shape who we become in life. Parkes, for whom lack of money was a constant companion through life, was surrounded by contemporaries who had never experienced such things. Surely we can understand that what we may see as "vanity" is actually the "cowed boy" desperate to maintain the illusion to cover his self-consciousness; to be worthy in the eyes of others.

Ironically, it was this very background that made him the success he was in colonial politics, his ability to appeal to the hearts and minds of the people and a sincere desire to improve their lives.

The role of "the people" in Federation

Parkes closes his Federation account in 1892 lamenting the lack of political action to advance the 1891 draft Constitution and calling on the people to continue the fight:

> Let the Australian people, from sea to sea – East and West, North and South, take heed of this, and if the question is too big for their Parliaments, let them take it into their own hands.
> Let it never be forgotten that it is not the approval of the few men who form Parliament of the day, but the ratification by the people who constitute the nation, either through their representatives or by their direct voice, which is required.[19]

Robert Garran, who served as the Secretary of the Attorney-General's Department for 32 years, concluded *The Coming Commonwealth*:

> But though the Constitution is much, it must not be supposed to be everything. It is, in itself, merely the means to an end; merely the dead mechanical framework of national unity. The life and soul of the union must be breathed into it by the people themselves. When a Constitution has been framed and adopted, the work of Australian union will have been begun, not finished. The nation will be a nation, not of clauses and sub-clauses, but of men and women; and the destiny of Australia will rest with the Australian people rather than the Australian Constitution. The work now in hand – the making of a Constitution – is great and important; but it is the beginning not the end.[20]

While reproducing the "miracle" of Federation, as Deakin put it, remains elusive, the two things we know are most likely to result in "failure" are the exclusion of the people of Australia from the debate and the lack of advocates to continue to prosecute the case to the Australian people on a consistent basis. Broad understanding and momentum are the only keys that will unlock Federation reform for the present generation and beyond, whether the focus is taxation, Commonwealth-State relations, indigenous recognition or the many other national debates Australia needs to have.

We should take heed of the lessons of history as our governments undertake a further Review of the Australian Federation lest we again recreate the factors of 1891, again losing all momentum presently generated.

The value of history?

With luck and help from living friends, the dead can teach us to speak a new political language. They can instruct us in unorthodox ways of thinking, different feelings about life's meaning; the dead can even suggest new ways of resolving current public problems, . . . When the dead manage to teach us to think again, to act differently, . . . they live on powerfully, into the present. They become living legends. They prove that the past is continuous; they show that yesterday is today, always present, an ingredient of the future.[21]

But legacies, however great, need constant care and attention. We need to value the achievements of our legends enough such that they continue to be "living" for us. We need constantly to remind ourselves of our leaders, of their achievements and, just as importantly, of the barriers that they overcame and the environment in which they achieved. We need to choose to take their memory and inspirations with us.

Appendix 1 - Deakin on Parkes

First and foremost of course in every eye was the commanding figure of Sir Henry Parkes, than whom no actor ever more carefully posed for effect. His huge figure, slow step, deliberate glance and carefully brushed-out aureole of white hair combined to present the spectator with a picturesque whole which was not detracted from on closer acquaintance. His voice, without being musical and in spite of a slight woolliness of tone and rather affected depth, was pleasant and capable of reaching and controlling a large audience. His studied attitudes expressed either distinguished humility or imperious command. His manner was invariably dignified, his speech slow and his pronunciation precise, offending only by the occasional omission or misplacing of aspirates. He was fluent but not voluble, his pauses skilfully varied, and in times of excitement he employed a whole gamut of tones ranging from a shrill falsetto to deep resounding chest notes. He had always in his mind's eye his own portrait as that of a great man, and constantly adjusted himself to it. A far-away expression of the eyes, intended to convey his remoteness from the earthly sphere, and often associated with melancholy treble cadences of voice in which he implied a vast and inexpressible weariness, constituted his favourite and at last his almost invariable exterior. Movements, gestures, inflexions, attitudes harmonised, nor simply because they were intentionally adopted but because there was in him the substance of the man he dressed himself to appear. The real strength and depth of his capacity were such that it was always a problem with Parkes as with Disraeli where the actor posture-maker and would-be sphinx ended or where the actual man underneath began. He had both by nature and by act the manner of a sage and a statesman.

His abilities were solid though general, as [were] his reading and his knowledge. Fond of books, a steady reader and a constant writer, his education had been gained in the world and among men. A careful student of all with whom he came in contact, he was amiable, persuasive and friendly by disposition. A life of struggle had found him self-reliant and left him hardened into resolute masterfulness. Apart from his exterior, he was a born leader of men, dwelling by preference of natural choice upon the larger and bolder aspects of things. He had therefore the aptitude of statecraft of a high order, adding to it the tastes of the man of letters, the lover of poetry and the arts, of rare editions and bric-à-brac, of autographs and memorials of the past. His nature, forged on the anvil of necessity, was egotistic though not stern and his career was that of the aspirant who looks to ends and is not too punctilious as to means. He was jealous of equals, bitter with rivals and remorseless with enemies – vain beyond all measure, without strong attachment to colleagues and with strong animal passions – weak in discussion of detail, unfitted for the minor tasks of administration, apt to be stilted in set speeches, and involved in debate, he yet was well qualified for the Premiership by great and genuine oratorical ability. A doughty parliamentary warrior neither giving nor asking quarter, he struck straight home at his adversaries with trenchant power. He was a careful framer of phrases and of insulting epithets which he sought to elaborate so that they would stick and sting. He confessed that he passed many of the weary hours in which he sat unmoved upon the front bench of the Assembly in mentally summing up his associates and opponents, fitting to each some appropriate descriptive epigram which he treasured in his memory for timely use. One lean long swarthy hungry-looking enemy he stigmatised as a "withered" tarantula. An academic radical from Victoria, possessed by what he regarded as impractical enthusiasms, was more mildly entitled "professor of Democracy."

Dibbs consisted of "a weedy nature and a sprawling mind." He had a copious flood of sometimes coarse vituperation which he was prepared to pour upon any who crossed his path at critical times, and lighter touches of genuine and happy humour emitted under pleasanter circumstances. At times his irony was of the grimmest and most merciless. Very many admired and not a few weaker men loved him; he brooked no rivals near his throne but all found his personality attractive and submitted more nor less to his domination. It was not a rich, not a versatile personality, but it was massive, durable and imposing, resting upon elementary qualities of human nature elevated by a strong mind. He was cast in the mould of a great man and though he suffered from numerous pettinesses, spites and failings, he was in himself a full-blooded, large-brained, self-educated Titan whose natural field was found in Parliament and whose resources of character and intellect enabled him in his later years to overshadow all his contemporaries, to exercise an immense influence on his own colony and achieve a great reputation outside it.[22]

Appendix 2 - The political vicissitudes of Sir Henry Parkes, 1891-92

The President declared the Convention dissolved on April 9, 1891. More than fourteen months have passed away since that date, and no step worthy of Government or people has been taken by the Australian Parliaments to bring under consideration the labours of the body which they themselves created for this high duty. Let us endeavour to discover the cause of this strange negligence. There is no evidence that the interest in the question among the people has in any degree abated. The thinking portion of the populations, in the churches, in official circles, in the public press, have grown warmer in support from closer acquaintance with the project of union. Why, then, this delay?

I will take the case of New South Wales. The Government, which I had the honour to lead, lost no time in convening Parliament. The financial year is from January 1 until December 31, and Parliament met on May 19, forty days after the rising of the Convention, and when there were seven months and twelve days, covered by constitutional provision for the public service, in which to transact the business of the country. We had two chief reasons for calling Parliament together thus early: (1) To allow ample time for the consideration of the draft Bill of the Convention, and (2) to ensure the passing into law of a Bill to establish a system of local self-government for the country districts. Other important business was announced, but these were the principal measures of urgency. It seems to me impossible for any man to deny that the conduct of the Government was prompt, open, and straightforward. …

On the same day, when the Address in reply was moved in the Assembly, I gave notice of a motion for the consideration of the draft Federal Constitution, which would have brought on a regular debate on the work of the Convention, and afforded every opportunity for members to propose amendments. But this did not suit the arch-plotter against federation, Mr. George Houston Reid, who had made up his mind not to allow, so far as he had power, an open and unprejudiced discussion of the momentous question. In the previous Session Mr. Reid, after endeavouring to elicit opposition, and failing in his endeavours, had voted for the delegates to the Convention: but he made no secret afterwards, first, of his cynical doubts, and then of his open hostility. His position would have been trying to a sensitive nature. He nominally belonged to the Ministerial side; he talked bitterly against the Protectionists on the Opposition benches; he professed to be anxious for a Local Government Bill - indeed he had lately threatened the Government in a noisy public meeting if they did not produce a measure of that kind. But he could not restrain himself sufficiently to wait for my motion, which he knew would be the first business. I was the leader of the House, and I had been the duly elected President of the Convention; even if it had not been my rightful place, common courtesy would have allowed me this particular business, which I was prepared to do the first moment possible. But Mr. Reid calculated that, if he took a course which would embarrass the Government, he was sure of the assistance of the Protectionist opposition. So Mr. Reid moved an amendment on the Address. He knew that if his amendment were carried, Ministers would either resign or advise a dissolution. But neither his anxiety for the Local Government Bill, nor his sense of duty, was powerful enough to hold him back. He had brooded over his amendment for days past, had exhibited it to admirers male and female, and had dreamed of the laurels of victory. In making his motion, Mr. Reid was fluent, as he always is – fluent as a water-spout after a heavy rain; but his speech was barren of thought, and where not vituperative, simply dull: Mr. Reid was mistaken in his

calculations; a large number of the Opposition, knowing well the sentiments of their constituents, voted against him, and his amendment was lost by 67 votes against 35. What was Mr. Reid's next act? The Opposition, thinking that they saw an advantage in the excitement of the moment, took the extreme course of voting against the Address itself, which of course, if successful, would have been the severest vote of censure, and Mr. Reid, mastering his intense anxiety for the Local Government Bill, joined in that purely factious vote.

After these wasted two days at the opening of the Session, Ministers met in Cabinet to consider the prospect rather than the situation. The Triennial Parliament had only a little over eight months of its life to run out. The heat and temper displayed in the last division which sought to expunge from the records the Address in reply to the Governor's Speech, and other evidence within our knowledge, satisfied us that the tactics of our opponents would be to prevent us from doing useful work, to demoralise us, and then force us to the country, – that, if any pretext could be twisted to serve the purpose, the picture would be drawn before the eyes of the electors, that we had consumed our time in the "fad" of federation (a favourite term of our opponents), and had neglected the legislation so urgently required for the advancement of New South Wales. Two nights had already been spent in debating federation, and it appeared to us, under the altered state of circumstances, unwise to bring on another debate, until some progress were made with the urgent business which belonged exclusively to the colony. The Cabinet came to a decision in accordance with this reasoning. The leader of the Opposition, Mr. Dibbs, now came to the front with a direct motion of want of confidence. No one could complain of this as a party move, but the case was different with Mr. Reid; he, according to his own profession, was a Free-trader of Free-traders; had personally concurred in the formation of the Government, having first been invited to join it; he now walked boldly over, with one or two other disunionist Free-traders, to swell the solid vote of the Protectionists. In that division the two sides were equal, the Speaker giving his casting vote against the motion. This lost to that Parliament all chance of dealing with the cause of Australian union. A few days afterwards the Assembly was dissolved.

East Sydney, Mr. Reid's constituency, returns four members. In the general election, Mr. Reid, who hitherto had always been first or second, was now left last on the poll, with a respectable distance between him and the third man. All the Ministers, with one exception, were returned at the head of the poll. Many circumstances, but chiefly the advent of the Labour party, contributed to confuse the issue of the elections. But in no part of the colony, where the case was clearly put, was the feeling less strong and enthusiastic in favour of federation. I spoke on the subject in various parts of the country – in Sydney, in St. Leonard's, at Lithgow, at Goulburn, at Wagga, at Albury, at Deniliquin, at Jerilderie, at Nerandera, and at other places; and while I received unstinted marks of approval, I met with no feeling of dissent.

The new Parliament met in July, and Mr. Dibbs was at once prepared to try his fortunes with another motion of want of confidence. I believe my colleagues shared my own feeling, that, with the new element in the House, we had an unknown region before us, and that we were not over-anxious to win on Mr. Dibbs's motion. To me it seemed that it might be well to let him and his friends try their hands with our new masters. But the bulk of the Labour members decided to support the Ministry, and the division gave us a decisive majority. The Labour party behaved honourably enough. They had been elected to obtain legislation for their fellow-workers, and they

would not have been honest men if they had not pressed for the introduction of the measures to which they were pledged. So far as we were concerned, we needed no pressure, as most of the Bills so loudly called for were already prepared in our hands. With the Labour force in our majority, we had to choose between proceeding with the legislation, which both we and they believed to be necessary for the well-being of the masses, and giving up office with a large majority in our favour. It was unreasonable to expect the Labour members to agree to our setting aside all provincial matters – I use the term for the purpose of distinction – all provincial matters, however important, for the great national question of federation. We decided to place federation third in our programme of Parliamentary measures, and so it stood when we had to retire from office. In reality, it was morally impossible for us to deal with federation between May 19 and October 22, when we ceased to be Government.

Henry Parkes, *Fifty Years in the Making of Australian History*, Vol 2, 1971 [1982], New York, Books for Libraries Press, 370-77.

Endnotes

1. John Bannon, *Supreme Federalist: The Political Life of Sir John Downer*, 2009, 128-9.
2. A. W. Martin, 1990:10.
3. Parkes 1892:332-33.
4. Henry Parkes, *Fifty Years in the Making of Australian History*, Vol II, 1892, 339.
5. S. Dando-Collins, *Sir Henry Parkes: The Australian Colossus*, "Notable Quotes", 2013.
6. R. R. Garran, Souvenir of the Inauguration of the Australian Commonwealth, 1901, 2.
7. Charles W. Dilke, Preface to John A. Cockburn, *Australian Federation*, 1901, 5.
8. John Reynolds, *Edmund Barton*, 1948, Appendix, 201.
9. J. A. La Nauze, reproduced in Helen Irving and Stuart Macintyre, *No Ordinary Act: Essays on Federation and the Constitution*, 2001, 89.
10. F. W. Eggleston, *Reflections of an Australian Liberal*, 1953, 11.
11. A. W. Martin, "Parkes and the 1890 Conference", 1990.
12. Henry Parkes, *Fifty Years*, Vol II, 378-79.
13. ibid., 378-79.
14. Henry Parkes, *Fifty Years*, Vol II, 377.
15. John Bannon, *Supreme Federalist*,128-9.
16. Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln*, 2005, 99.

17. Henry Parkes, Political nomination speech, Hyde Park, Sydney, 1856.

18. Henry Parkes, "Letter to Lord Leigh", 1844.

19. Henry Parkes, *Fifty Years*, Vol II, 380.

20. R. R. Garran, *The Coming Commonwealth*, 1897, 185.

21. G. Allen, Chair, Political and Constitutional Reform Select Committee, House of Commons, Remembering Tom Paine, London, 28 January 2013.

22. Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause*, 1944, 24-6.

References

G. Allen, Chair of the Political and Constitutional Reform Select Committee, House of Commons, London (2013) "Remembering Tom Paine", January 28, reproduced by Keane, J. (2013) Democracy Field Notes https://theconversation.com/remembering-tom-paine-7123, Accessed 25 August 2015.

John Bannon, *Supreme Federalist: The Political Life of Sir John Downer*, Wakefield Press, Kent Town, South Australia, 2009.

J. A. Cockburn, *Australian Federation*, Horace Marshall & Son, London, Temple House, 1901.

S. Dando-Collins, *Sir Henry Parkes: The Australian Colossus*, North Sydney, Random House Australia, 2013.

Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause*, Melbourne, Robertson & Mullens, 1944.

F. W. Eggleston, *Reflections of an Australian Liberal*, F. W. Cheshire, Melbourne, 1953.

R. R. Garran, *The Coming Commonwealth*, Sydney, Angus & Robertson, 1897.

Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln*, New York, Penguin Group, 2005.

J. A. La Nauze, republished in Helen Irving & Stuart MacIntyre, *No Ordinary Act: Essays on Federation and the Constitution*, Melbourne University Press, 2001.

A. W. Martin, "Parkes and the 1890 Conference", Papers on Parliament No. 9, July 1990, Department of the Senate, Parliament House, https://www.aph.gov.au/binaries/senate/pubs/pops/pop09/pop9.pdf, accessed 25 August 2015.

NSW Elections Results, 1891 Election, https://www.parliament.nsw.gov.au/resources/nswelectionsanalysis/1891/Home.htm, Accessed 27 August 2015.

New South Wales Parliament, Member records, Henry Parkes, http://www.parliament.nsw.gov.au/Prod/Parlment/Members.nsf/70835c61d528320dca2573d2001e93cd/67aac72f2f1dccb4ca256cb5008395aa!OpenDocument, accessed 27 August 2015 Parkes, H (1892) Fifty Years in the Making of Australian History, republished by Books for Libraries Press, 1971 Freeport, New York, Volumes I & II.

(1890) Federal Government of Australasia, Turner and Henderson, Sydney.

Henry Parkes, Letter to Lord Leigh, http://foundation1901.org.au/the-lord-leigh-letter/, Accessed 26 August 2015.

John Reynolds, *Edmund Barton*, Sydney, Angus & Robertson, 1948.

Chapter 10

Aboriginal Recognition and the Constitution of Western Australian

Michael Mischin

The issue of recognising the original Aboriginal people of Western Australia in the State's Constitution has gained increasing momentum during the past few years. In many respects it has been overshadowed in the campaigns to achieve such recognition in the Commonwealth Constitution.

It is has nevertheless attracted considerable debate. This paper does not propose to go into the merits or otherwise of such recognition, or the arguments for and against it, or the form that it should take. The questions of whether and how such recognition should be effected are for each jurisdiction in turn, and have yet to be determined in some, including the Commonwealth. Nor does it propose to recount in any depth the history of the issue in Western Australia, which can be traced back several decades.

Although it is not so much a "federal" constitutional issue of the type commonly discussed and debated by The Samuel Griffith Society, it does fit with the theme of constitutional change to accommodate recognition of Indigenous peoples, and this will serve to inform how Western Australia has approached the matter.

Western Australia's approach is marked in a few curiosities – they may well have also been experienced by our sister jurisdictions – and they shall be mentioned here because they gave the author pause for reflection as to what approach to take and how to balance three roles – that of first Law Officer of the State; that of representative of the Government; and that of a parliamentarian – in a pragmatic way that would also reflect principle and not set undesirable precedents in the future.

Background

But first, a context.

There is a private member's bill before the Parliament of Western Australia. It seeks to recognise Aboriginal people in the Constitution of Western Australia.[1] It passed the Legislative Assembly on 19 August 2015 and was introduced into and read a second time in the Legislative Council on 20 August. It is expected to be given some priority when Parliament resumes on 8 September. Although one cannot presume to say what Parliament will do, one is on safe ground in predicting that it will pass all stages and become law well before the end of 2015 because, although it is a private member's bill introduced by a member of the Opposition, it has the support of the Government, and the Government has facilitated its debate and passage.

History

The present bill had its genesis over a year ago. On 11 June 2014 the ALP member for Kimberley, Ms Josie Farrer, MLA, a Gidja woman, introduced and gave the second reading speech on her private member's bill, the *Constitution Amendment (Recognition of Aboriginal People) Bill* 2014, an earlier version of the current bill.[2]

The bill proposed to insert two paragraphs into the preamble of the WA *Constitution Act* 1889. The first updated the historical narrative in the preamble to record creation of the Western Australian Parliament and Western Australia subsequently attaining Statehood as a part of the Commonwealth. The second indicated the resolve of the Houses of the Parliament of Western Australia "to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land" and that Parliament[3] "seeks to effect a reconciliation with the Aboriginal peoples of Western Australia."[4]

When this bill came on for debate in the Legislative Assembly on 12 November 2014, the Premier of Western Australia, the Honorable Colin Barnett, MLA, indicated that the WA Government was prepared, in principle, to support legislation amending the Constitution of Western Australia to recognise Aboriginal people, and that the State Government was "prepared to work in a genuinely bipartisan way" toward that end.[5]

Given that a constitutional amendment was being proposed, the Premier expressed the need to exercise caution. In particular, he alluded to the legal and constitutional uncertainties that might arise and which required that the Parliament and the Government be fully informed about the possible impact of the proposal. The Premier referred, for example, to possible implications for Native Title, and other land titles including pastoral leases, as well as to the fact that the bill did not, unlike some other State constitutions which already recognised Aboriginal people, propose a "no-effect" or non-justiciability clause.

Upon resumption of debate on 19 November 2014, the Leader of the National Party in the Legislative Assembly, the Honourable Terry Redman, suggested that, because of the various legal issues and uncertainties and the importance of the bill, there be established "a bipartisan select committee [to] consider the bill, its language and all the things that are issues". He indicated that he had consulted with the Premier, the Deputy Premier, the Leader of the Opposition and the Member for the Kimberley. In particular, because of the need to obtain constitutional law advice, which is often most readily available from the Government's legal advisers, he suggested "that the Attorney General chair the committee."[6]

In that spirit, when debate resumed on 26 November 2014, the Premier proposed that a joint select committee should be formed, chaired by the Attorney General. It is unusual for a minister to be a member of a parliamentary committee, let alone to chair one. The advantage in this case was that it was hoped that it would facilitate the bi-partisan approach to the issue, while also satisfying the Government's need, on behalf of the State, to discharge its obligation of due diligence. As the Premier put it: "it would be desirable for the Attorney General to chair the committee. I say that because, apart from his own legal skills, the Attorney General would have the capacity to draw on government advice," including from the Solicitor-General, which would normally not be available to a parliamentary committee.[7]

In addition, the Premier indicated that following the committee's report, which might include recommendations about the content of the bill and its wording, it would be considered by Cabinet as would the drafting of a bill. To reaffirm the bi-partisan approach to the issue, the Premier also advised that when any bill emerging from the committee's work was introduced into Parliament, it would be introduced by the member for Kimberley.

That same day the Legislative Assembly passed a motion to establish a joint select committee "to consider and report on the appropriate wording to recognise Aboriginal people in

the Constitution of Western Australia."[8] The Legislative Council agreed to that motion on 2 December 2014, including appointing the Attorney General to the committee. The Legislative Council recognised that the committee would consist of "members of the Labor Party, the Liberal Party [and] the National Party," the three major parliamentary parties. It was also recognised and accepted that while the two Greens and the single member of the Shooters and Fishers Party would not be represented on the committee, they would have every opportunity to make submissions to and appear before the committee.[9]

The committee, as established, comprised the Attorney General [the author] (Lib) as chair; Ms Farrer (ALP) as deputy chair; and Hon Jacqui Boydell MLC (NP), Mr Murray Cowper MLA (Lib), Ms Wendy Duncan MLA (NP), Hon Dr Sally Talbot MLC (ALP) and Mr Ben Wyatt MLA (ALP) as members. It engaged the services of Mr Adam Sharpe of Counsel, a barrister with public law experience, to assist the committee in its enquiries and for the research and preparation of its report. It also obtained comprehensive legal opinions from an independent barrister, Mr Peter Quinlan, SC, on a variety of constitutional law issues. His opinions are annexed to the committee's report.

Importantly, because the Attorney General chaired the committee, members of the committee were able to be informed about the views of the Government's legal advisers, including the Solicitor-General and a senior legal officer from the State Solicitor's Office. Indeed, one of the first hearings was with those gentlemen, to give the committee the opportunity to be apprised of some of the issues that might need to be addressed during the committee's deliberations. Before settling its report, Mr Quinlan's opinions were provided to both the Solicitor-General and the legal officer from the State Solicitor's Office for consideration and comment. All this assisted in ensuring that the committee's report addressed all matters of foreseeable concern to the Government in a satisfactory manner.

But apart from the Attorney General's role as first law officer and being able to draw directly on government resources to assist the committee's work, there was also the political dimension. As a member of a Government committed to recognition as a matter of policy, he could ensure that any relevant issues that may affect that objective were properly anticipated and explored and resolved, with government assistance, rather than at arm's length and dissociated from the committee's work. Nevertheless, this needed to be done in a manner that would not set precedents and compromise the position of governments in the future in their dealings with Parliament and its committees.

The committee's report, *Towards a True and Lasting Reconciliation – Report into the Appropriate Wording to Recognise Aboriginal People in the Constitution of Western Australia,* was tabled in both houses of the Parliament on the date it was due, 26 March 2015.[10]

Scope and work

The committee was assigned by Parliament a relatively short time in which to discharge its responsibility. One could be reasonably confident that an extension would have been readily granted if it was required. The committee, however, was aided by the considerable literature in existence and work that had been done by others in respect of the issue generally, and specifically in relation to the Commonwealth Constitution, the constitutions of other States of the Federation, and internationally.[11] The committee's ability to fulfil its remit was assisted by the

relatively narrow terms of reference which did not require consideration of the merits of *whether* recognition ought to be made, but simply *how* it ought to be done.[12]

The committee recognised that such an issue raises many competing considerations. On the one hand, it is viewed as a desirable, if not necessary, step towards "reconciliation" between the non-Aboriginal and Aboriginal peoples of the State; on the other, there are concerns that recognition may give greater recognition to one segment of the community over others and so work to aggravate, rather than to heal, relationships between the descendants of our pre-colonial inhabitants and their fellow citizens. Further, there is the legitimate concern that recognition, if not addressed with care in the statutes such as constitutions which found our body politic and define our sovereignty, may give rise to unintended and presently unforeseen consequences.

The committee's report examined and weighed each of those issues and had due regard to them.[13]

The committee had the benefit of a range of submissions from a range of sources: government, academic, legal, and from interest and advocacy groups. The experiences of other jurisdictions were also invaluable. While it did not have the time to conduct public hearings, and these were unnecessary in light of the narrow terms of reference, it was assisted by the work that had been done by Ms Farrer and the consultation that she had performed in the preparation of her bill.

Indeed, although the committee was not set up to consider her bill as such, it did form a convenient starting point and touchstone. Ultimately, the committee recommended largely what was proposed by the Farrer bill and the words she had advanced; namely, that the Western Australian "Parliament resolves to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal peoples of Western Australia". The committee was attracted to her formula because it was simply framed, comparatively modest in its scope, and among the least contentious in terms of its content of the many alternative formulations the committee examined; had been the subject of significant consultation; and appeared to have the greatest level of current support among advocates of constitutional recognition.

With one grammatical qualification – changing the reference from Aboriginal "peoples" and First "Peoples" to Aboriginal "people" and First "People"[14] – that recommendation has been adopted by the *Constitution Amendment (Recognition of Aboriginal People) Bill* 2015 currently before the Parliament. (A copy of the current Preamble, displaying the proposed changes, is reproduced as an Appendix to this paper.)

Which constitution?

One curious issue that needed to be considered was, "what is the WA constitution?" Western Australia has the dubious distinction of having two Constitution Acts – the *Constitution Act* 1889 and the *Constitution Acts Amendments Act* 1899. Indeed, the committee noted that the "Constitution of Western Australia," in one sense, comprises at least those, and the Commonwealth Constitution, and the *Australia Act* 1986 (UK) and *Australia Act* 1986 (Cth). The 1889 Act is, however, the foundational constitutional document for Western Australia, as it was the legal document by which Western Australia was granted self-government, and so it did not take much reflection to be satisfied that that ought to be the location for any amendment.

Textual locations

Where a provision is located within a statute or constitution has both symbolic and legal significance. As to symbolism, the opening words of a constitution can and – subject to the character of the instrument and what it is intended to achieve – should be powerfully evocative. Two preeminent examples are the Commonwealth Constitution's opening three words, "WHEREAS the people," and the United States Constitution's "We the people".

We can contrast these with the more prosaic words of Western Australia's Constitution:

"Whereas by the 32nd section of the Imperial Act . . .".

As to the legal significance of a provision's particular textual location, principles of statutory and constitutional interpretation include the admonition that in ascertaining the scope, meaning and consequences of legal texts – that is, of words, phrases, sentences and paragraphs – their context is important and can be decisive.[15]

In this context the committee had three options about where to place the "appropriate words": namely, as part of the Constitution's Preamble; within the body of the WA Constitution; or in a schedule to the Constitution. For symbolic and legal reasons, the committee recommended placement in the Preamble.

The Preamble was the most logical. In the first place, it would fit with the historical narrative, such as it is, already in the Preamble, and (significantly when it comes to the question of its legal effect) be coloured by its context as a historical statement rather than a matter of substantive legal effect, as one might expect from a section in the body of the Act. Second, it was not readily apparent where such a statement might fit within the corpus of the statute without requiring some explanation and without raising the issue of what substantive effect Parliament intended it may have. Lastly, it likewise avoided the perception that it was being hidden away as an afterthought in a schedule.

Critical to all these considerations as to placement was what the potential legal effect of inserting the proposed recognition in one part of the Constitution Act or another. The legal advice to the committee that insertion in the Preamble would have no legal effect – which shall be touched on shortly – combined with the modest nature of the statement, confirmed the committee's view that inclusion in the Preamble as originally proposed was appropriate.

Preamble

Adding a new paragraph to the Preamble indicating that the Parliament of Western Australia seeks to effect a reconciliation with the Aboriginal People of Western Australia obviously maximises its symbolic effect as an aspirational statement.

In addition, the committee addressed a second location question. Where, within the Preamble, should this new paragraph be placed? Its recommendation that this paragraph be placed at the end of the Preamble was influenced by the importance of historical chronology and narrative.

As importantly, the committee grappled with several legal questions arising out of these contextual decisions.

The first concerned the question of whether a Preamble, as opposed to provisions in the body of a Constitution, has or can have any substantive or interpretative legal effects. It is

generally considered that preambles do not have a substantive legal operation and do not create, alter or remove legal rights, powers or duties. As with all generalisations there is always the possibility of exceptions. Indeed, there are examples within Australian and constitutional law elsewhere where preambles have been judicially held to have a substantive legal operation.[16] Likewise, examples exist where preambles have been judicially considered to have some relevance in the interpretation of constitutions and statutes.[17]

Accordingly, the committee was most concerned to ensure that should the question arise for consideration in future, it would be plain that it was Parliament's intention that the amendment would have no substantive or interpretive effect. This, it considered, could be effected by virtue of the committee's report, in the bill's second reading speeches and debates, and the bill's explanatory memoranda.

This conclusion obviously had an effect on the committee's consideration about whether to include in the Preamble or elsewhere a further provision expressly indicating that the new preambular provision did not have any such legal effect or operation – a "no-effect clause". As a matter of principle such a clause is undesirable if it can be avoided. The enactment of a provision acknowledging a matter of historical significance as a foundation for an aspirational statement loses its impact if it is immediately qualified by another statement announcing that the former should be thought to mean anything! Nevertheless, it was also important that there be no substantive unintended legal consequences flowing from the proposed amendment.

The committee also recognised that there could be debate about the legal efficacy of a "no-effect" clause. It concluded that such a clause was not necessary and that Parliament's intentions could be made plain through the alternative avenues mentioned.[18]

An amendment to the Preamble of the *Constitution Act* 1889 was most likely to affect the interpretation and operation of that Act, rather than any other statute law of the State, and based on the advice available to the committee, the proposal would have no such effect. That being so, the prospect of it having any impact – let alone a decisive one – on the interpretation of other Western Australian legislation and on State executive and administrative power appears to be negligible.

This comfort was reinforced by the language and limited character of the proposed amendment, from which it could be difficult to infer any legal limitation on parliamentary sovereignty. Furthermore, for reasons to be referred to, if any unforeseen consequences were to emerge, the committee considered that Parliament could remedy the position through further amending the Constitution.

Amendment and State legislative power

The committee also had to grapple with the possibility that a Court might take a different and opposite view to the committee and the WA Parliament regarding the legal operation of the proposed amendment. This required consideration of two interrelated questions: first, whether the words to be inserted might in some way limit State legislative power; and, second, if they did so, whether the proposed constitutional amendment might itself be unconstitutional.

On the first question, the amendment's location, the nature, character, and effect of preambles and the WA Parliament's intentions suggest that there would be no such limitation.

Because of the possibility of an affirmative answer, however, a deeper constitutional law problem needed to be addressed.

The Western Australian Parliament's principal source of State legislative power is provided by section 2 of the *Constitution Act* 1889 (WA). Section 2 is entrenched by section 73(2) (e), however. This latter provision stipulates that any "Bill that . . . expressly or impliedly in any way affects" section 2 must be passed by absolute majorities of both Houses of the Parliament and be approved at a State referendum. All of this involves intricate manner and form issues, questions about section 6 of the *Australia Act* 1986 (Cth), and the High Court's decision in the *Marquet* case.[19] Despite the scope of section 73(2) (e), the better view is that the proposed amendment, because of its contextual location and non-justiciable character, does not fall within it.

This conclusion has at least two important legal consequences. The first is that the Preamble can be amended by the WA Parliament exercising its normal legislative procedures and powers. This recognises that the WA Constitution, despite its nomenclature, is an ordinary, albeit a primary and important, statute. It also recognises that the WA Constitution falls within the general rule, enunciated by the Judicial Committee of the Privy Council in the McCawley case,20 that State constitutions can, subject to valid and binding manner and form restrictions, be amended by State legislation. Second, as a matter of constitutional law, the proposed amendment does not require to be put to and approved by a referendum. The representative character of State parliaments is a further, albeit policy, reason why a referendum need not be held.

This, again, offered comfort to the committee. If the proposed amendment could be said to affect the State's legislative power, it needed to be passed by an absolute majority followed by a referendum of electors approving the bill. By not adopting that process, it would be plain that Parliament's intention was that it have no such effect upon Parliament's power, and failure to adopt that process would result in it having no such effect.

Entrenchment

A further interesting legal question is also prompted by the existence of section 73(2) in the WA Constitution. That is, whether, as a matter of law, the proposed amendments could be entrenched. There are in a system of representative or parliamentary democracy several important policy reasons not to entrench.[21] Whether a past or current Parliament can bind future parliaments again raises manner and form conundrums. In particular, section 6 of the *Australia Act* 1986 (Cth) and the *Marquet* case require careful consideration.

In the committee's view, section 6 would not confer upon a provision entrenching the proposed amendment validity or binding authority.[22] There are other sources, including the Privy Council's decision in *Bribery Commissioner v Ranasinghe*[23] characterising constitutions as having intrinsic efficacy, which might assist some form of entrenchment. That would, however, detract from the Western Australian Constitution's democratic legitimacy and State Parliament's ability to amend. Interestingly, at least the recognition provision in section 1A of the Victorian *Constitution Act* 1975, which is in the body of the Constitution and contains a non-justiciability clause, requires a three-fifths majority in each chamber of the Victorian Parliament to repeal, alter or vary section 1A. The validity and legal efficacy of this entrenchment has not, as yet, been judicially tested.[24]

Conclusion

The Joint Select Committee's Report is to be recommended to anyone, including Attorneys-General, interested in the legal and constitutional law issues that surround the debate about constitutional recognition of Aboriginal people. It succinctly addresses a plethora of questions with which lawyers take an intellectual delight. It exposes and evaluates the multi-faceted sides and layers of each issue. In addition, the Report has a practical dimension. It applies the legal position and its variance to the prevalent practical and policy topics about amending constitutions.

For this reason, the debates and developments in Western Australia will not become irrelevant or obsolete when the Western Australian Parliament enacts the 2015 bill. As discussion and possibly drafting proceeds in relation to the Commonwealth Constitution, themes relating, for example, to that Constitution's preamble will inevitably demand careful scrutiny.

The committee's report and the manner in which it approached the issues may offer a worthy contribution to that exercise.

Appendix

Constitution Act 1889
An Act to confer a Constitution on Western Australia, and to grant a Civil list to Her Majesty.

Preamble
Whereas by the 32nd section of the Imperial Act passed in the session holden in the 13th and 14th years of the Reign of Her present Majesty, intituled " *An Act for the better Government of Her Majesty's Australian Colonies*", it was among other things enacted that, notwithstanding anything thereinbefore contained, it should be lawful for the Governor and Legislative Council of Western Australia, from time to time, by any Act or Acts, to alter the provisions or laws for the time being in force under the said Act or otherwise concerning the election of the elective members of such Legislative Council, and the qualification of electors and elective members, or to establish in the said Colony, instead of the Legislative Council, a Council and a House of Representatives, or other separate Legislative Houses, to consist of such members to be appointed or elected by such persons and in such manner as by such Act or Acts should be determined, and to vest in such Council and House of Representatives, or other separate Legislative Houses, the powers and functions of the Legislative Council for which the same might be substituted; and whereas it is expedient that the powers vested by the said Act in the said Governor and Legislative Council should now be exercised, and that a Legislative Council and a Legislative Assembly should be substituted for the present Legislative Council, with the powers and functions hereinafter ~~contained:~~ contained;

And whereas the Legislature of the Colony, as previously constituted, was replaced through this Act with a Parliament, to consist of the Queen, the Legislative Council and the Legislative Assembly with the members of both Houses chosen by the people, and, as constituted, continued as the Parliament of the Colony until Western Australia's accession as an Original State of the Commonwealth of Australia in 1901 and thereafter has been the Parliament of the State;

And whereas the Parliament resolves to acknowledge the Aboriginal people as the First People of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal people of Western Australia:

Be it therefore enacted by His Excellency the Governor of Western Australia and its Dependencies, by and with the advice and consent of the Legislative Council thereof, as follows: —

Endnotes

1. Constitution Amendment (Recognition of Aboriginal People) Bill 2015. WA Parliament website: http://www.parliament.wa.gov.au/Parliament/Bills.nsf/08CEDFB61948DAEB48257E67000A0DA4/$File/Bill138-1.pdf.

2. WA Parliamentary Hansard, Legislative Assembly, 11 June 2014, 3699.

3. Joint Select Committee on Aboriginal Constitutional Recognition Report, *Towards a True and Lasting Reconciliation: Report into the Appropriate Wording to Recognise Aboriginal People in the Constitution of Western Australia* (Report No. 1), March 2015. http://www.parliament.wa.gov.au/parliament/commit.nsf/(Report+Lookup+by+Com+ID)/DC46B0A198420E6848257E140009FAC5/$file/FINAL+-+Web+Version+-+20150326.pdf, ("Report"), page x. Section 2(2) of the *Constitution Act* 1889 (WA) states that: "The Parliament of Western Australia consists of the Queen and the Legislative Council and the Legislative Assembly."

4. Constitution Amendment (Recognition of Aboriginal People) Bill 2014, clause 4(2).

5. WA Parliamentary Hansard, Legislative Assembly, 12 November 2014, 8084.

6. WA Parliamentary Hansard, Legislative Assembly, 19 November 2014, 8421.

7. WA Parliamentary Hansard, Legislative Assembly, 26 November 2014, 8813.

8. Report, 7.

9. WA Parliamentary Hansard, Legislative Council, 2 December 2014, 9086.

10. Report, *op cit*.

11. Report, 9-25.

12. Report, 7.

13. Report, 15-16.

14. The 2014 Bill and the committee recommendation referred to "First Peoples", which was inconsistent with the title of that Bill. The 2015 Bill, with Ms Farrer's concurrence, resolved that conflict by referring to "First People". Amendments made to the constitutions of other Australian States speak of both "Peoples" and "People". Even minor textual differences can have legal significance. In the context of proposed amendments, especially to preambles, that may not, however, be as relevant and, in any case, it all seems a matter of preferred style rather than substance.

15. See, generally, Jonathan Crowe, "The Role of Contexual Meaning in Judicial Interpretation," (2013) 41 *Federal Law Review* 417. Four obvious examples concerning the Commonwealth Constitution may suffice. First, debates over the list of section 51 Commonwealth legislative powers, including section 51(xxxi)'s just terms limitation on acquisition: *Commonwealth v Tasmania* ("Tasmanian Dam Case") (1983) 158 CLR 1, 282 (Deane J); *Theophanous v Commonwealth* (2006) 225 CLR 101, 112-113 (Gleeson CJ). Second,

section 92 which – both within itself and within its surrounding provisions, such as sections 90, 91 and 93 through to 97 – expressly alludes to fiscal or monetary matters: *Buck v Bavone* (1976) 135 CLR 110, 132 (Murphy J). Third, section 122 which, in the Territorial Senators cases, was famously juxtaposed or contextualised with the fairly distant section 7: *Western Australia v Commonwealth* ("First Territorial Senators Case") (1975) 134 CLR 201; *Queensland v Commonwealth* ("Second Territorial Senators Case") (1977) 139 CLR 585. Fourth, the now somewhat, but not completely, discarded "federal balance" interpretative doctrine: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* ("Tasmanian Dam Case") (1983) 158 CLR 1; *New South Wales v Commonwealth* ("Work Choices Case") (2006) 229 CLR 1.

16. Report, paragraph 4.73, 44.

17. Report, paragraph 4.73 (referring to *Leeth v Commonwealth* (1992) 174 CLR 455, 475 (Brennan J); 486 (Deane & Toohey JJ)) 44.

18. Report, 48-51.

19. Generally, Report, 35-37; *Attorney-General (WA) v Marquet* [2003] HCA 67; 217 CLR 545; 202 ALR 233; 78 ALJR 105 (13 November 2003).

20. *McCawley v R* [1920] AC 691.

21. Report, 33-34.

22. Report, 34 paragraph 4.35.

23. *Bribery Commissioner v Ranasinghe* [1965] AC 172.

24. Report, 65 (Appendix Four), reproducing section 1A of the *Constitution Act* 1975 (Vic).

Chapter 11

Competing Proposals for Recognition
An Evaluation

Julian Leeser

Saturday 27 May 2017 will mark the 50th anniversary of the successful referendum to alter the Constitution to give the Commonwealth power to make laws about Aborigines and count them in the census. While the 1967 referendum removed barriers to Commonwealth power in relation to Aborigines it also incidentally removed all references to Aborigines in the Constitution.

Two decades later, in 1988, the question of constitutional recognition of Aboriginal and Torres Strait Islanders was considered by the 1988 Constitutional Commission. While the Constitutional Commission rejected the recognition of indigenous[1] peoples in the Constitution, the debate has not gone away.

This paper will attempt to do three things: firstly, to examine the history of indigenous recognition since 1988; secondly, to look at where the debate is now; and then, thirdly, to examine where those of us who wish to uphold the Constitution might engage in discussions about this issue. The fact that The Samuel Griffith Society has produced a range of different papers on a range of different topics indicates that there is, at least within our organisation of constitutional conservatives, lively debate about this issue.

History

In the mid-1980s the Hawke Government established the Australian Constitutional Commission under Sir Maurice Byers, the former Solicitor-General of the Commonwealth. That Commission reported in 1988. It rejected constitutional recognition of indigenous people on the basis of "the difficulty of reaching an agreement on an appropriate form of words".[2]

Agitation for indigenous recognition nevertheless continued throughout the 1990s through organisations like the Aboriginal and Torres Strait Islander Commission, the Council for Aboriginal Reconciliation and the Constitutional Centenary Foundation.

The indigenous recognition debate was caught up with other political, legal and constitutional debates in the 1990s like that arising from the *Mabo*[3] decision of the High Court, the Human Rights Commission's *Bringing Them Home* report, the activism of the High Court when Sir Anthony Mason was the Chief Justice, and the republic debate. It was in the context of these debates that The Samuel Griffith Society was formed.

These events unhelpfully coloured discussions about indigenous recognition. Particular decisions of the Mason Court rightly made constitutional conservatives nervous as a consequence of its activist approach. The high point of this activism came in a speech in 1992 entitled, "A Government of Laws and Not of Men",[4] by then High Court Justice John Toohey. In this address his Honour argued that, if the Parliament did not create a bill of rights, the Court might, over time, imply one at any rate.

Toohey's speech and the jurisprudence of the High Court in the 1990s effectively put Australians on notice that any language added to the Constitution needs to be carefully considered to ensure that it does not create unintended consequences or grant unexpected additional rights. The more symbolic and imprecise the proposed constitutional amendment, the greater the potential for creative and unintended judicial interpretations will be.

The present discussion about indigenous recognition seems to have forgotten these essential facts.

Conservative support for recognition: the 1998 Constitutional Commission

In 1998, the Howard Government established a partly appointed, partly elected Constitutional Convention to determine whether Australia should become a republic and, if so, what model might be presented to the Australian people. I was the youngest elected delegate to that Convention.

The Convention established a number of working parties to deal with the republican model and related matters which would need to be addressed if Australia became a republic. I participated in a working party established to examine recognition of indigenous people in the Preamble to the Constitution. It was the only working party to contain both monarchists and republicans. Members of the working party included indigenous delegates, Lois (later Lowitja) O'Donoghue, Neville Bonner and Gatjil Djerrkura as well as several monarchists including Dame Leonie Kramer and myself as well as Peter Grogan from the Australian Republican Movement.

A number of constitutional monarchists adopted the cause of indigenous recognition at the Convention. Dame Leonie Kramer said: "I want to appeal for you all to agree unanimously, as we did the other day, to the inclusion of Aboriginal and Torres Strait Islanders in the Preamble." [5]

One of the more trenchant conservative monarchists at the Convention was Brigadier Alf Garland. Garland said:

> I personally believe that the rights of aboriginals ought to be included in the Constitution. Indeed, over many years of service, I have had many aboriginals and many individuals from the Torres Strait Island serve with me and for me and I can say without a shadow of a doubt they have been magnificent soldiers and, what is more, even greater Australians. I do not believe any preamble will cover the sorts of things that the Aboriginal community wants. Most certainly put it into the Constitution but do not let us worry about putting it into the Preamble. Let us make it a Section of the Constitution and then there can be no doubt about exactly what we are talking about.[6]

Another former President of the RSL, Major-General William "Digger" James, also supported recognition. He said:

> Aboriginal and Torres Strait Islanders served in World War I, World War II, Korea and Vietnam, indeed, in every campaign of this century. Their services recognized in the Army as being normal, ordinary, equal people. That is what we are talking about. I think our Constitution should be written to deal with all of its people, with all Australians and not to suggest any other way[7]

Another monarchist, the former Lord Mayor of Sydney, Doug Sutherland, said:

> when our Constitution was adopted one hundred years ago our knowledge of the history of this great land was far diminished from that which it is today. We had no idea, for example, that this continent had been occupied for something like 50,000 years. I think it would be remiss of us if we did not pick up in the Preamble the recognition of that fact and the prior occupancy of the indigenous people.[8]

South Australian Monarchist and Catholic Priest Father John Fleming moved:

> That this Convention resolves that in the failure of a republican model at a referendum, another referendum be put to the Australian people that would add to the Preamble a clause recognizing Aboriginal and Torres Strait Islanders, as the original inhabitants of Australia who enjoy, equally with other Australians, fundamental human rights and that there be wide community consultations at ATSIC and other relevant bodies to reach an agreement on the form of words of proposed constitutional change before it is put to the people.[9]

Father Frank Brennan refers to my own role in this debate in his book, *No Small Change: The Road to Recognition for Indigenous Australians*. Brennan points out that I argued:

> I think there is broad based support in this place for the fact that recognition of indigenous people is long-overdue in our Constitution. . . . I think we have to take positive steps at this Convention and show that on certain issues, we as an Australians community can unite. I believe that on recognition of indigenous people in the Constitution that we can unite.[10]

It should be said that my own contribution to this debate was not without caution. While I supported the notion of indigenous recognition, I acknowledged that it was unsafe to say that "the High Court will never [use] the Preamble [to interpret the Constitution]… We cannot predict what the High Court will do in fifty, sixty or one hundred years' time." I went on to point out some of the issues the High Court had raised in the *Leeth*[11] and *Kruger*[12] cases to which I will return later in this paper.[13]

Frank Brennan also noted that I moved there be a separate question put to the Australian people to recognise indigenous people at the same time as the republic question be put. On this point I was ruled out of order by Convention Chairman, Ian Sinclair.[14]

It was at that point in the proceedings that Sir David Smith sprung to his feet and said:

> Mr Chairman, I appeal to you. Is there no way that this Convention can support what we have just heard from my friend Councillor Julian Leeser, without it being ruled out on a technicality? Please, this is not the place for a technicality on this issue.[15]

Sir David Smith, in what must have been a first in his life, was also ruled out of order.

What this history demonstrates is that constitutional conservatives have a track record of supporting some idea of indigenous recognition.

John Howard's Preamble

In March 1999 John Howard proposed that a new preamble be inserted into the Constitution and put as a separate referendum question to coincide with the republic referendum. Howard produced a preamble with the poet, Les Murray, which contained a range of symbolic aspirational

and historical statements. There was widespread criticism of the Howard-Murray Preamble both because of the substance of the sentiments and the lack of consultation in its design. Later John Howard consulted Senator Aden Ridgeway, an Aboriginal senator representing the Australian Democrats from NSW. The final preamble proposal contained the following words:

> With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good. We the Australian people commit ourselves to this Constitution:
>
> proud that our national identity has been forged by Australians from many ancestries; never forgetting the sacrifices of all who defended our country and our liberty in time of war; upholding freedom, tolerance, individual dignity and the rule of law; **honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with the lands and for their ancient and continuing cultures which enrich the life of our country;** recognizing the nation-building contribution of generations of immigrants; mindful of our responsibility to protect our unique natural environment; supportive of achievement as well as equality of opportunity for all; and valuing independence as dearly as the national spirit which binds us together in both adversity and success. [Emphasis added]

There was little debate on the Preamble and the fact that it was largely drafted by three people meant that it lacked popular legitimacy.

The official "No" case for the republic referendum took no position on the Preamble while the official "Yes" case encouraged Australians to vote "yes" to both the republic and the Preamble. Despite this, the Preamble attracted the support of only 39.34 percent of Australians and a majority in none of the States – one of the largest losses for any referendum question since Federation.

John Howard's Last Election

During the 2007 election campaign, prompted by correspondence he had been having with indigenous leader Noel Pearson, John Howard again proposed a new constitutional preamble:

> I believe we must find room in our national life to formally recognise the special status of Aboriginal and Torres Strait Islanders as the first people of our nation. We must recognise the distinctiveness of Indigenous identity and culture and the right of Indigenous people to preserve that heritage. The crisis of indigenous social and cultural disintegration requires a stronger affirmation of indigenous identity and culture as a source of dignity, self-esteem and pride. I announce that if re-elected, I will put to the Australian people within eighteen months, a referendum to formally recognise Indigenous Australians in our Constitution – their history, as the first inhabitants of our country, their unique heritage of culture and languages, and their special (though not separate) place within a reconciled, but not indivisible nation. My goal is to see a new Statement of Reconciliation incorporated into the Preamble of the Australian Constitution.[16]

John Howard lost the 2007election but, in *Lazarus Rising*, he indicates the background to that speech and his continued desire for indigenous recognition in the Preamble – a point he has continued to make since the publication of that book.

Kevin Rudd to Tony Abbott

At the 2007 election Kevin Rudd became prime minister. One of the first acts of the Rudd Government was the apology to the stolen generation.[17] On 23 July 2008 Kevin Rudd and the Leader of the Opposition, Brendan Nelson, committed Labor and the Coalition to the constitutional recognition of indigenous Australians.[18]

During the 2010 election campaign, the Indigenous Affairs Minister, Jenny Macklin, now serving under Prime Minister Julia Gillard, announced a bipartisan panel would be established following the election. The 2010 election resulted in a hung parliament and, as part of the negotiations with the Greens and Independents, the parties agreed to "hold a referendum during the 43rd parliament or at the next election on indigenous recognition".[19]

The Gillard Government established the Expert Panel under the co-chairmanship of Patrick Dodson and Mark Leibler. The Expert Panel reported in January 2012 and made the following recommendations:

1 That section 25 be repealed.

2 That section 51(xxvi) be repealed.

3 That a new "section 51A" be inserted, along the following lines:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;
Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;
Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;
Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples; the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples. The Panel further recommends that the repeal of section 51(xxvi) and the insertion of the new 'section 51A' be proposed together.

4 That a new 'section 116A' be inserted, along the following lines:

Section 116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

5 That a new "section 127A" be inserted, along the following lines:

Section 127A Recognition of languages

(1) The national language of the Commonwealth of Australia is English.
(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

On the 22 September 2012, Jenny Macklin announced that the Gillard Government had decided to postpone the vote on recognition on indigenous people before the 2013 election saying: "I think we also have to acknowledge that there isn't community awareness for the change of the Constitution."[20]

The Government instead proposed to introduce an Act of Recognition into the Parliament before the end of 2012 to mirror the recommendations of the Expert Panel. The Act of Recognition came up for debate in the Commonwealth Parliament on 13 February 2013.

Prime Minister Tony Abbott was Leader of the Opposition at the time of the Act of Recognition. Abbott has had a long interest in indigenous policy. For years he volunteered at indigenous programs in Sydney, as well as spending a week each year as teacher's aide in Cape York. As prime minister he has spent a week each year running the country from a remote indigenous community. In his speech on the Act of Recognition Tony Abbott used highly emotive language to describe the history of indigenous/non-indigenous relations:

> We have acknowledged that pre-1788, this land was as aboriginal then as it is Australian now and, until we have acknowledged that, we will be an incomplete nation and a torn people. . . . In short, we need to atone for the omissions and for the hardness of heart of our forebears to enable us all to embrace the future as a united people. . . . I believe that we are equal to the task of completing our Constitution rather than changing it. . . . As the Prime Minister said: we shouldn't feel guilty about our past but we should be determined to rise up against that which now makes us embarrassed.[21]

In December 2014, Abbott, now prime minister, at an address to the Recognise Annual Gala Dinner in Sydney, avowed that he was "prepared to sweat blood" for indigenous recognition.[22]

The State of the Debate in August 2015

It is fair to say that the debate on indigenous recognition has stalled. After election of the Abbott Government the Parliament established a Joint Select Committee on the Recognition of Aboriginal and Torres Strait Islander Peoples with Western Australian Liberal, Ken Wyatt, MP, as the chair. That committee reported in June 2015.[23]

It did not, however, reach a consensus on key questions. Rather than choosing a model for a referendum and setting a timetable, the committee recommended that "the referendum on constitutional recognition be held when it has the highest chance of success".

It did not set a timetable and its views are quite tentatively expressed. The committee recommended:

- The repeal of section 25 of the Constitution; and
- The repeal of the "race" power and the retention of a person's power so that the Commonwealth might legislate for Aboriginal and Torres Strait Islander peoples.

Then it recommended three options, either:

- An Aboriginal and Torres Strait Islander power with recitals;
- A racial non-discrimination clause under Section 116A;
- A non-discrimination clause under Section 80A.

Having not come to any particular conclusion, it recommended that a series of conventions be held. The first set of conventions would comprise Aboriginal and Torres Strait Islander delegates. This would be followed by a national convention of both indigenous and non-indigenous people.

On 6 July 2015 indigenous leaders held a significant meeting with the Prime Minister, Tony Abbot, and the Leader of the Opposition, Bill Shorten. The joint media release committed to a referendum:

- when such a referendum has the best chance of success;
- in the next term of parliament;
- not in conjunction with an election.

They also agreed:

- to establish a series of community conferences across the country for everyone to have a say on recognition;
- for the joint select committee to produce a document outlining the issues for consultation; and
- to establish a Referendum Council that is broadly reflective of the Australian people to progress a range of issues around constitutional change including how a question might be settled, timing and constitutional issues.

All the indigenous leaders also sent Abbott and Shorten a message, however. This referendum would not be about symbolic issues. It needed to be about substantive issues or it would not get indigenous support.[24]

And there is no point having a referendum unless indigenous people support what is proposed.

There are some similarities here with the 1999 republic referendum. In that referendum campaign republicans were split between minimalist republicans – who only wanted symbolic change – and maximalist republicans who wanted sweeping changes to our system of government.

Consideration of Preamble Proposal

In the context of future consultation I want to bed the idea that indigenous recognition can be achieved safely in the Preamble to the Constitution because the Preamble has no legal effect. This proposal has been advocated by John Howard, Tony Abbott and even Gary Johns This idea is mistaken. The Preamble has legal effect.

Over the years, the Preamble has been used as an interpretive device and as a source of Commonwealth power and prohibitions respectively. Even the framers of the Constitution thought that the Preamble would be used as an interpretive provision. In the *Annotated Constitution of the Australian Commonwealth*,[25] lawyers Sir John Quick and R. R. Garran anticipated that sections of the Preamble might be "of valuable service" and have "effect in the courts of the Commonwealth," particularly to help resolve any ambiguities in the text of the Constitution itself. But words and phrases that might have appeared settled in 1901 may in time be "obscured by the raising of unexpected issues and by the conflict of newly emerging opinions".

Section 116 of the Constitution, for example, was introduced because the framers were concerned that the words "humbly relying on the blessing of Almighty God" in the Preamble might lead to the establishment of a particular religion in Australia. In 2001, the historian, Mark McKenna, and lawyers Amelia Simpson and George Williams wrote that "at least some of the framers believed that some of the Preamble might affect the scope of federal legislative power and that it might play a role in constitutional interpretation in other areas not subject to a provision such as Section 116".[26] They noted that the Preamble has not been used a great deal in interpretation and posit two reasons. First, because the "Preamble offers rather slim pickings for judges seeking interpretive assistance". Second, they noted that:

> from the time of the *Engineers Case* in 1920, the court rejected the use of the debates in the interpretation of the Constitution. The court only revised its approach and permitted reference to the convention debates on a limited basis in 1988 in its unanimous decision in *Cole v Whitfield*. The court has yet to set out any like statement of approach to the Preamble.[27]

The late Professor George Winterton also urged caution in relation to recognising Aboriginal people in the Preamble to the Constitution:

> care should be taken to avoid inclusion of any provision which may have legal consequences, especially because some of those consequences are likely to be unintended and indeed unwelcome. Thus many of the proposed new constitutional Preambles include recognition of aboriginal dispossession but, while not denying its general truth, it is suggested that such a provision would be unwise … it could have unintended legal consequences deleterious to Aboriginal rights.[28]

There are serious constitutional dangers in putting words into the Preamble to the Constitution. It can easily become the repository of language that can affect the entire document. Writing in 1996, two (then junior) barristers considered the Preamble. Their observations should be treated with great weight, not only on account of the force of their argument, but also because one of them, Mark Leeming, is now a Judge of Appeal in New South Wales, while the other, Stephen Gageler, is now a Justice of the High Court. Leeming and Gageler demonstrate that:[29]

1. in two cases (*Sharkey*[30] and *Leeth*) Justices of the High Court have relied on the words of the Preamble as "sources of Commonwealth power and prohibitions respectively";[31]
2. the Preamble "is undoubtedly used to interpret and develop constitutional law. How precisely it will be used by the High Court cannot be predicted;"[32]
3. the "tendency of Justices of the High Court to rely on the words of the Preamble in matters of constitutional interpretation means that extreme care should be taken in considering what words might replace the present Preamble;"[33]
4. a "new Preamble to the Constitution … as a source of constitutional law might be anticipated to be greater than one composed a century ago;"[34]
5. "the effect of the inclusion of broad statements of contemporary values as has been repeatedly urged by numerous non-specialist commentators would be highly uncertain."[35]

Gageler and Leeming also discuss the use of the Preamble in a number of cases and noted that in "the cornerstone of modern constitutional jurisprudence", the *Engineers' case*, the language of the Preamble – particularly its reference to the unity of the Australian people under the Crown – played no small part in the reasoning of the majority.

The observations made by these and other commentators indicate how the Preamble has been used, and that it must be treated carefully and with caution before any words are added to it. In the 1999 referendum on the Preamble, John Howard was presumably given advice that he needed a non-interpretive clause for his Preamble. For the very reason that the Preamble can have legal effect, part of Howard's proposal involved a new section 125A, which stated:

> The Preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law interpreting the Commonwealth or any part of the Commonwealth.

This indicates that John Howard knew that the Preamble could have legal force. But a clause such as this substantially undermines the purported symbolic effect of any preamble. It is the equivalent of saying, "Australians believe X—only joking."

I am very much opposed to the idea of using the Preamble to the Constitution as a place for symbolism. It is clearly dangerous and any attempt to use the Preamble to insert symbolic material should be resisted by anyone who rejoices in the name, "constitutional conservative".

Even Abbott's formulation of "Aboriginal heritage, British foundation, and multicultural character" could have unintended consequences if inserted into the Constitution. Consider:

- How would our multicultural character affect laws that sought to ban certain terrorist groups or established English literacy tests for university admissions?
- If certain immigrant groups are disproportionately denied access to Australia's refugee program, does that undermine Australia's multicultural character?
- Does the multicultural character require quotas for certain groups in certain areas?
- What does the reference to indigenous heritage mean for land law protections?

All of these questions may in time be raised if such symbolic language is put into the Preamble. It could have far-reaching, unintended effects, despite being intended to have none. Further, introduction of symbolic language that is not intended to have any effect on the interpretation of the Constitution is not in keeping with the spirit of the Constitution our framers designed. The Constitution is a practical, working document and the only changes made to the Constitution should be practical ones. On this point, there is unexpected potential for indigenous leaders and constitutional conservatives to agree.

Proposed package of reforms

Finally, I want to consider a four-point package of constitutional reforms that are consistent with the values of The Samuel Griffith Society. That package comprises:

(i) the Australian Declaration of Recognition;
(ii) repeal of section 25 of the Constitution;
(iii) codification of section 51(xxvi), the races power; and
(iv) creation of a consultative body to improve indigenous public policy-making.

Let me say The Samuel Griffith Society is not the "always say no to amending the Constitution" society. For instance, the aims of the Society include:

To restore the authority of Parliament as against the Executive.
To defend the independence of the Judiciary.
To foster and support any reforms of Australia's constitutional arrangements which would help achieve these objectives.

We should also remember the support of many constitutional conservatives at the 1998 Constitutional Convention for indigenous recognition.

In that context it is worth considering a package of reforms that members of our Society might consider supporting.

First, any package of reforms worth considering must be consistent with Australia's constitutional architecture. It should not affect the Crown, the Federation, the sovereignty of Parliament, or create a bill of rights.

Secondly, it should enhance national unity and the centrality of indigenous people in the broader Australian story.

Thirdly, it should remove spent provisions and codify 114 years of well-established constitutional practice.

Finally, it should aim to create better public policy by mandating that Aboriginal and Torres Strait Islander people, as the only people about whom that Parliament can make specific laws, be consulted about those laws.

Such a package should contain four elements:

Australian Declaration of Recognition

First, the package offers a non-constitutional 300-word Australian Declaration of Recognition, an idea proposed jointly by Damien Freeman and myself. The Australian Declaration of Recognition is a 300-word document that would have no legal status and would not appear in the Constitution of Australia.

The Australian Declaration of Recognition would have similar status to the Australian Flag or the National Anthem and we have suggested using similar mechanisms to adopt the Declaration.

Like the Flag, the Declaration would be designed by Australians through a public competition, and not by politicians and bureaucrats. When the Australian National Flag competition was held in 1901, the prize money for the winning design was shared by five people including a fourteen-year-old schoolboy from Melbourne, an apprentice optician from Sydney, an architect from Melbourne, an artist from Perth, and a ship's officer from New Zealand. We think a similarly diverse group of Australians would submit Declarations of Recognition on this occasion.

Australian electors will vote for the Declaration in a preferential ballot with a choice of up to five declarations. They will be asked to indicate, in order of preference, their views about the best option. This was the same method used to choose *Advance Australia Fair* as the National Anthem in 1977.

The Declaration of Recognition would have similar cultural status to the National Anthem or, in an American context, the Declaration of Independence or the Gettysburg Address, in that it would be used at civic, school, cultural, religious, and even sporting ceremonies. In that sense, over time, it would be imprinted on the hearts and minds of all Australians.

The Declaration need not refer solely to indigenous issues but it might also refer to other aspects of our history and values to which all Australians should subscribe. It could be a very useful document to inculcate Australian values in new migrants and school children.

The Declaration has the advantage of avoiding unintended legal consequences and allows for more Australians to have a role in the design and content of any statement of recognition. We also wanted to give Australians the ability to use soaring language unconstrained by the need to second guess the High Court and we hope the Australian Declaration of Recognition will do this.

The Declaration would be a popular and well known document. By contrast, putting a sentence in the Preamble to the Australian Constitution – a document fewer than 50 percent of Australians know we have and fewer than 20 percent of Australians have ever read and constrained by legal technicalities – seems to be a complete waste of the political capital needed to achieve success in a referendum.

Machinery Provisions

Secondly, the package would remove spent provisions and codify existing constitutional practice.

The Constitution, section 25

One of the proposals for constitutional reform is repeal of section 25. Section 25 was described by Sir Edmund Barton as a "machinery clause". Section 24 of the Constitution provides for the number of seats in the House of Representatives from each State to be determined by reference to the population of each State. At the time of Federation, Queensland and Western Australia had large indigenous populations who did not have the right to vote. The other colonies were concerned that Queensland and Western Australia would use their disenfranchised indigenous populations to claim more seats. Hence section 25 was placed in the Constitution as an encouragement to those States to enfranchise their indigenous populations if they wished to have a greater say in the new Commonwealth Parliament. Today, section 25 is a spent machinery provision and a referendum on indigenous recognition might provide an opportunity to repeal it. Section 25 was a machinery provision designed to address a public policy problem at the time of Federation.

The race power

Section 51(xxvi) of the Constitution – the race power – gives the Commonwealth Parliament the power to make laws for the people of any race for whom the Parliament deems special laws to be necessary. Until 1967, this excluded the power to make laws for "the aboriginal race in any State", but, since the 1967 referendum, it has included them. This so-called race power is an anachronism from a bygone era. The race power was never used by the Commonwealth Parliament before 1967. Since 1967, it has only ever been used to make laws relating to indigenous affairs (for example, protection of Aboriginal heritage sites, the *Hindmarsh Island Bridge Act*, and Native Title).

This race power should be removed and replaced with a plenary power to make laws with respect to Aboriginal and Torres Strait Islander peoples. Doing so would ensure that Parliament retains the power that it needs, whilst removing the idea of "race" from the Constitution.

Some people argue that the race power could be removed and not replaced. But this is not possible. Without a replacement power, the ability to amend legislation like the Native Title Act is put into doubt. Not replacing the race power would also remove the Commonwealth's power to make laws with respect to Aboriginal and Torres Strait Islander people – which was the achievement of 1967.

Other people worry that this power may be needed for counter-terrorism purposes. None of the existing counter-terrorism laws relies on the race power. In the event that the Commonwealth's power in this area was lacking, a reference of power could be obtained from the States. State governments of all political persuasions have been very cooperative in referring powers in this regard. As federalists we should not be worried about the Commonwealth needing to share power with the States.

This amendment to the race power would merely codify existing Australian constitutional practice.

Indigenous consultative body

The fourth part of the package is a suggestion of Noel Pearson developed with constitutional conservatives (Greg Craven, Anne Twomey, Damien Freeman and myself) for an indigenous consultative body in the Constitution. Pearson's proposal involves the kind of machinery clause that belongs in the Constitution. It also avoids the endlessly uncertain proposals for a racial discrimination clause that is effectively a "one-clause bill of rights". Pearson's proposal introduces a machinery provision as an alternative to a racial non-discrimination clause.

By engaging with constitutional conservatives, Noel Pearson has come to see that the Constitution is a practical and pragmatic charter of government. His proposal grapples with the issues presented by constitutional conservatives about judicial activism. At the same time indigenous Australians are telling the broader community that recognition is not about symbolism alone. It is also about ensuring that the failed policies of the past do not happen again.

Pearson wanted to devise a proposal that went with the grain of the Constitution, rather than against it; one that responded to objections of constitutional conservatives while delivering the practical change that indigenous people have been seeking.

He proposes a consultative body that simply provides advice. It cannot veto the Parliament, but instead provides greater input into the policy-making process, which should lead to policy improvement and greater "buy in" from indigenous people throughout Australia.

His proposal involves a machinery provision that is in keeping with the practical nature of the Constitution. The drafting of the provision can be based on similar sections of the Constitution. The insertion of this kind of modest machinery provision is an entirely different proposition from inserting uncertain symbolic language into the Preamble, or inserting a broad and ambiguous one-clause bill of rights. Some people have asked: "Why are indigenous people special; why do they need a particular body to advise about them?" There are two answers to that reasonable question.

First, indigenous people are special because they are the indigenous people of Australia and we are always going to need to make laws about indigenous matters: for example, amendments to native title legislation and protection of cultural heritage. The Commonwealth already has the power to make laws specifically about indigenous people.

Second, because indigenous people were here first, they are the only class of citizen about whom Parliament makes special laws. In the same way that you should have the right to be consulted if your local council is going to make laws about what sort of building can be built next door to you, similarly it is important that if the Parliament is going to make laws about indigenous people, indigenous people should be consulted about those laws.

There is nothing incongruent about articulating that rule in the Constitution.

The Constitution is where rules for Parliament are set out. The difficulty is in balancing the requirement for Parliament to consult indigenous people with the need to preserve the sovereignty of Parliament. Professor Anne Twomey has drafted provisions based on Noel Pearson's proposal that support, rather than undermine, parliamentary sovereignty.[36]

Others have suggested that it will be too hard for legislators to identify who is or is not indigenous, and that this is too complex an issue. I disagree. There is an established common law and legislative definition of what it means to be an indigenous Australian: the test requires self-identification, descent and acceptance by the community. That working definition is well-established. It is certainly not beyond the wit of Australian society to determine what it means to be indigenous. We do so for native title law, and our law and policy-makers are well equipped to deal with such issues in collaboration with indigenous people.

In my view, the proposal for an advisory body has real merit and sits most comfortably with the nature of the Constitution. It is the kind of machinery clause that Griffith, Barton and their colleagues might have drafted had they turned their minds to it. A machinery clause like this can sensibly sit in the Constitution, where it can have its intended practical effect.

Conclusion

The indigenous recognition debate has reached an impasse. This provides an opportunity for constitutional conservatives to shape the future of the debate. The four proposals listed above provide a modest way of achieving constitutional recognition without the downsides of unintended consequences of symbolic or historical statements in the Preamble or a one-clause bill of rights.

Endnotes

1. In this paper I often refer to Aboriginal and Torres Strait Islander peoples as indigenous as a short hand way of referring to them.

2. Commonwealth of Australia, *Final Report of the Constitutional Commission*, 1998, pp. 109–10.

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

4. John Toohey, "A Government of Laws, and not of Men", (1993) 4 *Public Law Review,* 158–74, 170.

5. Leonie Kramer in Constitutional Convention *Transcript of Proceedings* 9 February 1998, 497.

6. Alf Garland in Constitutional Convention *Transcript of Proceedings* 9 February 1998, 493.

7. W. B. "Digger" James in Constitutional Convention *Transcript of Proceedings* 9 February 1998, 494.

8. Doug Sutherland, in Constitutional Convention *Transcript of Proceedings* 9 February 1998, 495.

9. John Fleming in Constitutional Convention *Transcript of Proceedings* 11 February 1998, 809.

10. Frank Brennan, *No Small Change: The Road to Recognition for Indigenous Australians* (2015); see the discussion at 195-197.

11. *Leeth v Commonwealth* (1992) 174 CLR 455 475 per Brennan J and 486 Per Deane and Toohey JJ.

12. *Kruger v Commonwealth* (1997) 190 CLR 1.

13. Julian Leeser in Constitutional Convention *Transcript of Proceedings* 9 February 1998, 496-497.

14. Julian Leeser in Constitutional Convention *Transcript of Proceedings* 11 February 1998, 810.

15. Sir David Smith in Constitutional Convention *Transcript of Proceedings* 11 February 1998, 811.

16. John Howard, "The right time: Constitutional recognition of indigenous Australians", speech delivered at the Sydney Institute, 16 October 2007.

17. Commonwealth*, Parliamentary Debates*, House of Representatives, 13 February 2008, 172.

18. Natasha Robinson, "Rudd Revives Push to Recognise Indigenous Rights in Constitution", *The Australian*, 23 July 2008.

19. Australian Labor-Party Australian Greens Agreement 1 September 2010.

20. Quoted in Simon Cullens, "Referendum on Indigenous Recognition Postponed*", ABC On Line* 22 September 2012.

21. Tony Abbott Commonwealth Parliamentary Debates *Hansard* (House of Representatives) 13 February 2013, 1123.

22. Michael Gordon, "Tony Abbott Vows to Sweat Blood for Indigenous Referendum", *The Age,* 11 December 2014.

23. Joint Select Committee on the Recognition of Aboriginal and Torres Strait Islander Peoples , *Final Report,* June 2015. See esp xiii-xvi.

24. Natasha Robinson, "Indigenous Recognition 'Must Be Real': Aboriginal Leaders" *The Australian,* 6 July 2015.

25. John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth,* 1901, 284.

26. Mark McKenna, Amelia Simpson and George Williams, "First Words: The Preamble to the Australian Constitution", (1994) 24 2 UNSWLJ 382-400, 387

27. Ibid., 392.

28. George Winterton, "A New Constitutional Preamble",(1997) 7 Public Law Review 186, 187–88.

29. Stephen Gageler and Mark Leeming, "An Australian republic: Is a referendum enough?"(1996) *7 Public Law Review* 143, esp. 145–7.

30. *R v Sharkey* (1949) 79 CLR 121 at 135-136, 163-164.

31. Ibid., 145-146.

32. Ibid., 146.

33. Ibid., 146-147.

34. Ibid., 147.

35. Id.

36. Anne Twomey, "Putting Words to the Tune of Indigenous Constitutional Recognition" *The Conversation,* 19 May 2015.

Contributors

Professor **James Allan**, a Canadian by birth, was educated at W.A. Porter Collegiate, Scarborough, Ontario, and at the Queen's University, Kingston, Ontario, the London School of Economics and Political Science, and the University of Hong Kong. After working at the Bar in Toronto and in London, he has since taught in New Zealand, Hong Kong, Canada and the United States before appointment as Garrick Professor of Law at the University of Queensland in 2004.

The Honourable Dr **John Bannon,** AO, was a member of the House of Assembly in South Australia from 1977 to 1993. During this period he was Leader of the Labor Party from 1979 until 1992 (Leader of the Opposition, 1979-1982; Premier and Treasurer, 1982-1992). Master of St Mark's College, University of Adelaide, 2000-07, he wrote a biography of Sir John Downer, *Supreme Federalist* (2009). He died late in 2016.

Nicholas Cowdery, AM, QC, BA LLB (Sydney), Hon D Laws (Wollongong), FAAL, was the Director of Public Prosecutions for New South Wales from 1994 to 2011. Prior to that he had been a public defender in Papua New Guinea (1971-1975) and a Barrister in private practice in Sydney (1975-1994), taking silk in 1987. He served as an Associate (Acting) Judge of the District Court of NSW for periods in 1988, 1989 and 1990. He was appointed AM in 2003. He was inaugural Co-Chair of the Human Rights Institute of the International Bar Association (1995-2000) and President of the International Association of Prosecutors (1999-2005). He is the author of *Getting Justice Wrong: Myths, Media and Crime* (Allen & Unwin, 2001). Since 2011 he has been an Adjunct Professor of Law and a Visiting Professorial Fellow, teaching at the Universities of Sydney, of New South Wales and of Wollongong and publishing in the area of criminal justice. He is a consultant to international prosecuting agencies for various projects. For 2015 he has been Chairman of the Magna Carta Committee of the Rule of Law Institute of Australia.

Professor **James Dalziel** is Dean of Education at Morling College where he is also Professor of Divinity. Previously at the University of Sydney in the Institute for Teaching and Learning, he recently edited *Learning Design: Conceptualizing a Framework for Teaching and Learning online* (Routledge, 2016).

Neil Foster, an Associate Professor of Law in Newcastle Law School at the University of Newcastle, NSW, Australia holds degrees from the University of New South Wales, the Australian College of Theology, Moore College and the University of Newcastle. He teaches and researches in the areas of *Torts*, *Workplace Health and Safety Law*. Since 2013 he has been teaching a new elective course in *Law and Religion*. A member of the editorial board of the *Torts Law Journal*, he was a co-author of the 6th and 7th editions of the Luntz & Hambly Torts text, sole author of a 2014 Supplement to that book on *Defamation and Wrongful Interference with Goods*, and responsible for a new chapter in the 10th edition of *Fleming's Law of Torts*. He is the author of *Workplace Health and Safety Law in Australia* (LexisNexis Butterworths, 2012), and an e-book published by Matthias Media, *Pressure Points* (2014) dealing with potential clashes between the Christian faith and recent

laws. He has published a number of articles on torts and WHS law, and is developing a research interest in Law & Religion. He blogs on law and religion issues at https://lawandreligionaustralia.wordpress.com.

Mark Fowler is chair of *CLEAR International Australia Ltd*. He is a Director at Neumann & Turnour Lawyers, Brisbane, a member of the Queensland Law Society Human Rights Working Group and is currently undertaking doctoral research on religious freedom and tax frameworks.

Julian Leeser was elected to the House of Representatives as member for Berowra at the elections of July 2016. He was, for several years, Conference Convenor for The Samuel Griffith Society. Educated at Cranbrook, he took degrees in Arts and Law at the University of New South Wales. He was an elected Australians for a Constitutional Monarchy delegate to the 1998 Constitutional Convention and, subsequently, a member of the No Case Committee for the Republic referendum. In addition to a year as Associate to Justice Callinan of the High Court of Australia, he has been an adviser to the federal Minister for Employment and Workplace Relations (the Honourable Tony Abbott, MP) and the federal Attorney-General (the Honourable Phillip Ruddock,MP). He was subsequently Executive Director of the Menzies Research Centre; he was on the staff of the Australian Catholic University immediately prior to entering the House of Representatives.

The Honourable **Michael Mischin,** MLC, was Attorney-General of Western Australia from 2012 until 2017. He was educated at Scarborough Senior High School and the University of Western Australia. A Senior State Prosecutor prior to election to the Legislative Council in 2008, he was very active in parliamentary committees before appointment to the ministry.

John O'Sullivan, CBE, editor of *Quadrant*, 2015-17, and now international editor, was born in Liverpool in 1942 and educated at St Mary's College, Crosby, and the University of London. He has had a range of editorial posts on both sides of the Atlantic. During the late 1980s he was a special adviser to the UK Prime Minister, Margaret Thatcher. He presently lives in Budapest where he established the Danube Institute. His book, *The President, the Pope, and the Prime Minister*, was published in 2006.

Jane Reynolds is a director of Foundation 1901, an important objective of which is to promote knowledge of Sir Henry Parkes.

Senator **Scott Ryan**, elected to the Senate in 2007, was appointed Special Minister of State in 2016 and Minister Assisting the Prime Minister for Cabinet in January 2017. Born in Brisbane, Queensland, he grew up in Essendon, Victoria. He was educated at St Kevin's and took a degree in Arts at the University of Melbourne. Whilst at university he was President of the Melbourne University Liberal Club and a member of the Australian Liberal Students' Federation. He has worked in corporate affairs, as a speech writer and political adviser and, prior to entering the Senate in 2008, was a Research Fellow at the Institute of Public Affairs.

Dr **David Tomkins**, who lectures in the Law School at the University of Newcastle, New South Wales, has degrees in commerce (accounting) and law (Oxon). He has worked for two judges in the Compensation Court and Dust Diseases Tribunal in New South Wales. He has worked for various research and public policy institutes in Germany, the United States and New Zealand.