Upholding the Australian Constitution Volume Twenty-eight

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

Stamford Plaza, Adelaide SA — 12–14 August 2016

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Introduction

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The Samuel Griffith Society held its 28th Conference on the weekend of 12 to 14 August 2016, in the city of Adelaide, South Australia.

The Conference featured a splendid line-up of speakers and was the best-attended conference in the history of the Society.

During the weekend, participants had the very good fortune of hearing from the Chief Justice of the High Court of Australia, the Chief Justice of South Australia, a former Prime Minister, a former Deputy Premier and Attorney-General of Tasmania, a former Speaker of the Legislative Assembly of Victoria, a leading international commentator, experienced public servants, and some of the best academics, silks, and thinkers in the land.

The 2016 conference was divided into themes. One theme was the question of rights. Within the context of this discussion, the right to speak freely loomed large, which was a fitting tribute to Sir Samuel Griffith. During his time as a politician, Griffith recognised the importance of expressing his views on political questions of the day, and presenting them for scrutiny. At one point in the rebound of his political career, Griffith was accused of making disingenuous comments about the equitable distribution of property, in what was perceived by his critics as a blatant attempt on his part to attract the vote of the working class. The workers' newsletter, *Boomerang*, challenged Griffith to demonstrate the sincerity of his remarks by committing them to print and promised to publish them if he did. Griffith accepted the challenge.

True to its word, *Boomerang* printed a special Christmas edition that included Griffith's article, entitled "Wealth and Want". As Cliff Pannam, QC, has observed, this was a significant moment, and a modern parallel would be "if a Liberal Leader of the Opposition published an article advocating nationalisation of banks, airlines and insurance companies in a radical labour newspaper!": see Pannam, "The Radical Chief Justice" (1964) 37 *Australian Law Journal* 275.

The conservative press was splenetic in its denunciation of Griffith's ideas, but Griffith was undaunted by the criticism, and prepared a further article entitled "The Distribution of Wealth". Griffith went on to retake the premiership of Queensland. The episode demonstrates for us the importance of having both the freedom and the courage to speak freely on political matters in a civilised forum.

Another theme of the conference was the question of the Reserve Powers of the Crown, with parallels between the issues of today, and the time when Griffith was in active public service. The Cook Government, elected in 1913, had a one-seat majority in the House of Representatives, and a significant minority of seats in the Senate. A number of constitutional questions arose and the Governor-General, Sir Ronald Munro Ferguson, consulted Chief Justice Griffith on the exercise of his powers. It was not the first time, nor the last time, that Griffith was called upon to do so during his judicial career. It is as well for us to remind ourselves of the nature and content of the reserve powers, particularly in the context of recent election contests that have yielded majorities of very small number.

A separate theme of the conference concerned the function of the Parliament. As a member of the Queensland Parliament, Griffith coveted the position of Attorney-General, and pursued the incumbent Edward McDevitt to that end. In aid of demonstrating that he would be

the more able holder of that office, Griffith drafted, introduced, and then secured the passage of various pieces of legislation that would ordinarily fall within the purview of the Attorney. History is not short on politicians pursuing their ambitions, but Griffith, using the methods and processes of the Parliament, did so in a way that contributed to the public good. Some might wish to see a return of this function for the legislature but, for that to happen, we must first understand the Parliament and its officers.

Another theme of the conference concerned the application of judicial method, and we heard thought-provoking papers on statutory interpretation, and the constitutional principle of originalism. Naturally, any discussion about originalism requires a deep understanding of the judicial work of Sir Samuel Griffith during his tenure as the first Chief Justice of the High Court of Australia. The principle of originalism sits front and centre of academic debate about constitutional interpretation in the United States of America, and it will be a continuing subject of discussion at the conferences of the Society in the years ahead.

The success of the 2016 conference was due to the work of many generous and dedicated people. They included the speakers, most of whom travelled from interstate or overseas to speak at the conference, the chairs of the various sessions, the Honourable Ian Callinan, AC, and the other members of the Board of the Society, as well as John Roskam and the Institute of Public Affairs, and Ron Manners and the Mannkal Foundation.

As with previous years, there were a number of Mannkal Foundation Scholars who attended the conference: James Carpenter, Jake Fraser, Daniel Gerson, Dylan Gojak, Heath Harley-Bellemore, Julian Hasleby, Danica Lamb, James Ledger, Michael McIlwaine, Bayley Novakovic, Stephen Puttick, Katelin Taylor, Amy Thomasson, Herman Toh, Alexander Williams, and Quentin Wong. There also were a number of Sir Samuel Griffith Society Scholars and Sir Charles Court Scholars: Georgia Allen, Anthony D'Alfonso, William Flowers, David Furse-Roberts, Damian Leach, Stephanie Morton, Kyriaco Nikias, Sharni Cutajar, Cory Harding, Lewis Hutton, and Avraham Schigel. These scholarships, which allow bright and interested students to attend our conferences, are an important part of the Society and we are most grateful to our very generous donors.

The Society had a new year initiative in 2016: an essay competition named after Sir Samuel Griffith. The topic – "Is originalism a useful approach to constitutional interpretation in Australia in 2016?" – led to many thoughtful and interesting essays. In the end, Holly Gretton, a law student from the University of Western Australia, was judged the winner. The competition was organised by Benjamin Jellis, and we hope to have many more competitions in the years to come.

Finally, Stuart Wood, QC, who is the secretary of the Society, and his executive assistant, Shannon Lyon, worked tirelessly on behalf of the Society for the entirety of the year. They were integral to the successful running of the conference, as were John and Nancy Stone in the earlier years, and Senator Bob Day, AO, and his assistant, Joy Montgomery, in more recent years. Further, 2016 was the first time in seven years that the conference had not been convened by Julian Leeser. His contribution to the Society is fondly remembered and we wish him well in his future career as a member of the House of Representatives.

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

Giving and Taking Offence
[The Eighth Sir Harry Gibbs Memorial Oration]

The Honourable Robert French

It is a pleasure to be given this opportunity to honour Sir Harry Gibbs, your founding President and, in so doing, Sir Samuel Griffith, for whom your Society is named. There is no need to rehearse before this audience their life histories and contributions.

The story of Sir Samuel Griffith will be taken a little further afield in a few weeks. On 15 September 2016 I will visit Merthyr Tydfil in Wales, where he was born in 1845, and there present the Crown Court with a photographic montage honouring him and his birthplace. The montage will show the well-known photograph of Griffith presiding at the first sitting of the High Court in Melbourne in 1903, a reproduction of his handwritten Commission from the Governor-General, Lord Tennyson, and his oaths of office and allegiance. The response to the presentation has been enthusiastic and the event will be attended by the Lord Chief Justice of England and Wales.

This Society is one of only three, of which I am aware, named after a High Court Justice. The other two are the Isaacs Law Society at Canberra University and the Western Australian-based Piddington Society. It is named after the shortest serving High Court Justice in our history, Albert Piddington, who was appointed in February 1913 and resigned in April. His resignation followed criticism from the Melbourne and Sydney Bars based in part upon his pre-appointment assurance to William Morris Hughes, Attorney-General in the Fisher Government, that he was "in sympathy with supremacy of Commonwealth powers".[1] The Society, which does a number of useful things, has an informal motto reflecting the short judicial career of Albert Piddington – we are here for a good time not for a long time.

I mention Piddington because in the Inaugural Sir Samuel Walker Griffith Memorial Lecture delivered in 1984, Sir Harry Gibbs quoted Piddington's observation that one of the greatest services that Griffith performed was to raise the standard of argument in Australia. Sir Harry Gibbs also noted the description of Griffith's demeanour in court as "dignified and courteous".[2] That description applied equally to Sir Harry. It was my own perception in appearing before him. In the first of these Orations delivered to your Society in 2006, Dyson Heydon described him in his judicial role as "cool, mild-mannered, unpretentious and tactful . . . quiet, unflustered, and, above all, unfailingly polite".[3]

Would that we all were so. It is not an unusual feature of human nature that those of advancing years observe a general deterioration in the manners of the society from which they will, sooner rather than later, depart. The members of my generation are as prone to such gloomy diagnoses as their predecessors. That being said, it does seem that a significant portion of our public discourse is variously angry, aggrieved, abusive, impatient, strident, unctuously judgmental, disposed to attaching mindless labels to perceived adversaries, quick to give offence and quick to take it. Not all of these phenomena can be swept under a carpet of euphemisms about public debate such as "robust" and "vigorous". Some offensive expressive conduct can have real effects on lives, reputations, happiness and the general welfare and harmony of society. Some offensive expressive conduct can have a potential for violence – by incitement or provoked response – in old fashioned language it may lead to a breach of the peace. The limiting cases raise a fundamental

question – When, if at all, should offensive, expressive conduct by spoken or written words or otherwise, attract the intervention of law makers?

There are some whose default position is to respond to every perceived social evil with a call for governmental action. That tendency in Australian society was encapsulated in one of the first words to appear in the Dictionary of Strine, published in about 1965. The word was spelt "A-o-r-t-a", and defined as "the vessel through which courses the life-blood of Strine public opinion". A number of examples of its use were given which could be collected generically under the rubric "aorta do this and aorta do that". When it comes to offensive speech and conduct the law has had a long history of doing this and that – and it continues to do things.

The giving and taking of offence and the law's response to it is my topic. It was my topic in 2016 in delivering the Lord Birkenhead Lecture at Gray's Inn in London. Birkenhead, before he became Lord Chancellor and when he was merely F. E. Smith, KC, was notoriously offensive to judges. His witty put downs from the Bar Table to hapless judges are often deployed by desperate speakers at legal dinners – for example, "your Honour is right and I am wrong as your Honour usually is". Any account of his sayings, however, has to be qualified with the caveat that most were made up in his chambers after the event as things he would have said if he had thought of them.[4] As a politician, F. E. Smith made good his reputation for rudeness beginning with an unconventionally abrasive maiden speech in the House of Commons in 1906. He made his speech "as offensive to the government benches as he possibly could."[5] He was politically incorrect. In 1923 he told students at Glasgow University that there would always be wars, the motive of self-interest was the mainspring of human conduct and "the world continue[d] to offer glittering prizes to those who have stout hearts and sharp swords."[6]

Offensive speech and conduct have long attracted legal sanctions. Examples include insulting the dignity of the sovereign, blasphemy, scandalising the courts, defamation, obscenity and offensive language and communications generally. Today, negative speech directed to particular classes of persons in our society by reference to their inherent attributes, ancestry or religious beliefs, can contravene statute laws giving effect to human rights norms. The term, "hate speech", is frequently applied to that class of communication. The American Bar Association has defined "hate speech" as "speech that offends, threatens or insults groups based on race, color, religion, national origin, sexual orientation, disability or other traits."[7]

That definition attaches the strong negative connotation of the word "hate" to a range of conduct including conduct which, while it should be strongly condemned, may be informed by something less than "hatred" according to the ordinary meaning of that word. The appropriation of narrowly focused negative terms in order to market broadly defined behavioural norms can risk undercutting what it seeks to promote. It can detract from the moral clarity of the law. This is not a modern phenomenon.

At one time mere oral insults against the King of England were treated as a species of high treason, a capital offence, which William Blackstone equated to the *Crimen Laesae Majestatis* of the Romans. By the time Blackstone published his famous *Commentaries on the Laws of England* in the second half of the 18th century the position had moderated. Offensive words spoken about the King amounted only to a high misdemeanour and not high treason. Blackstone, in terms relevant to our times, said of such words:

> They may be spoken in heat, without any intention, or be mistaken, perverted or misremembered by the hearers; their meaning depends always on their connexion with other words and things; they may signify differently even according to the tone of voice, with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason.[8]

This observation tells us something about the slipperiness of the characterisation of speech as offensive or insulting for legal purposes. And even though Blackstone distinguished the spoken from the written word, there is much about the character of the latter that depends upon context, circumstances and readership which must be considered before treating it as offensive.

The law books of the 20th and 21st century are not replete with reports of cases of *Crimen Laesae Majestatis*. A successful appeal against a conviction for the offence appears from the report of a judgment of the Supreme Court of the Union of South Africa in 1935. Two persons published a pamphlet reflecting adversely on King George V and the amount which the English taxpayer was paying for his upkeep. They were convicted of having wrongfully and unlawfully printed and published certain scandalous and dishonouring words against "our Sovereign Lord, the King, whereby the Majesty of our said Sovereign Lord, King George V, was dishonoured and his dignity injured." Justice Davis wrote the judgment of the Supreme Court of South Africa allowing an appeal against the convictions.[9] The charge alleged only injury to the dignity of the King and did not mention his Union Government. It was therefore held to be defective for the essence of the offence was injury to the *majestas* of the state. The judgment ended with a cautionary passage:

> there is hardly any crime in which greater caution is to be enjoined upon the judge, so as on the one hand to preserve the maintenance of peace and good order, and on the other hand not to render anyone the unfortunate victim of political dissensions by excessive severity.[10]

Another important area attracting civil sanctions and, in some cases, criminal sanctions, for offensive speech is that of defamation. The Star Chamber took a particularly hard line in relation to libelling the nobility.[11] Holdsworth quotes the threatening injunction of the Star Chamber – "[l]et all men take heed how they complayne in words against any magistrate for they are Gods."[12] The common law of defamation in Australia today is substantially affected by statute law and considerably less protective of public figures, ennobled or otherwise, than it used to be. In the case of public figures in Australia, the common law cause of action in defamation is constrained by the implied constitutional freedom of political communication.

Ours is an age of statutes. There are many statutes which in one way or another impose sanctions upon offensive conduct, including speech. Their application generally requires a restrictive interpretation of the term "offensive". Its ordinary English meaning covers conduct which is vexing, annoying, displeasing, angering, exciting resentment or disgust. It is often found in statutes in the company of cognate terms like "insult" or "humiliate". The question whether expressive conduct is offensive or insulting or humiliating is not necessarily answered by asking its victim. He or she may take offence or feel insulted or humiliated too easily. So the law engages the services of the leading figure in the judge's small band of imaginary friends – the reasonable person.

The reasonable person played a part in a leading Australian decision on offensive behaviour with some interesting historical resonances. It involved the former Governor-General of Australia, Sir John Kerr, whose dismissal of the Prime Minister, Gough Whitlam, more than 40 years ago, was the subject of a presentation and discussion in this conference. Long before his appointment as Governor-General, when he was a judge of the Supreme Court of the Australian Capital Territory in 1966, Justice Kerr wrote a judgment on the subject of offensive behaviour.[13] A student at the Australian National University, Desmond Ball, protesting against Australia's involvement in the Vietnam war, climbed on to a statue of King George V outside Parliament House in Canberra. He wore on his head a placard which read, "I will not fight in Vietnam". He refused to remove the placard or climb down from the statue. Unlike the detractors of King George V in South Africa in 1935, he was not charged with *Crimen Laesae Majestatis*, but with the rather more pedestrian misdemeanour of behaving in an offensive manner in a public place contrary to section 17 of the *Police Offences Ordinance* 1930–1961 (ACT).

There was little evidence that anybody had actually been offended by this behaviour. Justice Kerr called in aid "the reasonable person" in its gendered manifestation as the "reasonable man". To be offensive, he concluded, the behaviour must be "calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable man."[14]

He defined the reasonable man as one "reasonably tolerant and understanding, and reasonably contemporary in his [or her] reactions."[15] Justice Kerr's decision in *Ball v McIntyre*, which allowed an appeal against Ball's summary conviction, set the threshold of the imputed emotional response required for conviction of offensive behaviour at a fairly high level. It defined a legal standard which acted as a warning to judges to proceed with caution before making a finding that a legal prohibition on offensive behaviour had been breached. That kind of interpretive approach has been reflected in many later decisions which have cited Justice Kerr's judgment.

The allegedly offensive student, Desmond Ball, became a renowned scholar in strategic studies both nationally and internationally, a Professor at the Australian National University and the recipient of many honours, including appointment as an Officer of the Order of Australia. He was invited by the United States Government to provide advice on strategic studies, including the uncontrollability of limited nuclear exchanges. President Carter said of him, "[Desmond] Ball's counsel and cautionary advice, based on deep research, made a great difference to our collective goal of avoiding nuclear war."[16] Apologists for the dismissal might say that John Kerr saved Australia. Admirers of Desmond Ball might say that he saved the world. It is, however, beyond controversy that both of them together contributed substantially to the development of the law relating to offensive behaviour in Australia.

There have long been debates about the proper limits of societal interference with speech in general and offensive speech in particular. John Stuart Mill said that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[17] That statement, of course, raises the question – what is meant by harm? There are many "harms" which can be defined depending upon value judgments and not requiring proof of physical injury or material loss.

A wider approach has been proposed by Professor Joel Feinberg, who suggests that the prevention of offensive conduct is properly the state's business.[18] His approach has been criticised on the basis that it may extend the heavy handed reach of the criminal law and increase a

potentially oppressive discretion allowed to law enforcement officers and sanction an illiberal lack of acceptance or toleration of other ways of life.[19]

The difficulty of the question about the proper occasion for state intervention against offensive speech is demonstrated in the area of religious vilification. Saying offensive things about religion has long been hazardous. In 1676, when convicting John Taylor of blasphemy for insulting remarks about Jesus Christ, Chief Justice Hale described the offence as:

> a crime against the laws, State and Government, and therefore punishable in this Court. For to say religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved . . . Christianity is parcel of the laws of England and therefore to reproach the Christian religion is to speak in subversion of the law.[20]

Those remarks reflected as much of a concern for the protection of the social order as they did a concern for the protection of the Christian religion. Eventually, however, freedom of expression was seen as limiting the scope of the offence of blasphemy. Lord Chief Justice Coleridge said in 1883:

> I now lay it down as law, that if the decencies of controversy are observed even the fundamentals of religion may be attacked without the writer being guilty of blasphemy.[21]

The House of Lords adopted that position in 1917[22] and thereafter the common law offence of blasphemy seemed to fall away – until 1977. In that year the publication, in a newspaper, of a poem and cartoon depicting indecent acts on the body of Christ led to the editor and publisher being convicted by a jury of a blasphemous act. The House of Lords upheld the conviction in the case of *Whitehouse v Lemon*.[23] Lord Scarman described the rationale for the law of blasphemy in terms of the social order. He accepted that on that basis there was a logical case for extending the offence to protect the religious beliefs and feelings of non-Christians saying:

> In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt.[24]

However, despite the logical case, the common law could not stretch that far. Its limited scope was demonstrated by the decision, in 1990, that Salman Rushdie's book, *The Satanic Verses*, did not involve the offence of blasphemy against the teachings of Islam.[25] The common law offence did not cover offensive language about religions other than Christianity. In the event, the offence of blasphemy was abolished in the United Kingdom in 2008.[26]

Although blasphemy was a common law offence in the Australian colonies before federation there were not many prosecutions after the Commonwealth came into existence. In 1997, the then Archbishop of Melbourne, now Cardinal George Pell, applied for an injunction to restrain the National Gallery of Victoria from exhibiting a photograph showing a crucifix immersed in urine. The application was refused by Justice Harper of the Supreme Court of Victoria.[27] He accepted that the photograph was "offensive, scurrilous and insulting at least to a very large number of Christians" but quoted Lord Scarman from *Whitehouse v Lemon* and added:

> a plural society such as contemporary Australia operates best where the law need not bother with blasphemous libel because respect across religions and cultures is such that, coupled with an appropriate capacity to absorb the criticisms or even jibes of others, deep offence is neither intended nor taken.[28]

To amount to a blasphemous libel the matter complained of had to raise the risk of a breach of the peace. That approach, of course, could invite consideration of the particular sensitivities of the offended party or group.

State laws against religious vilification are found in Queensland, Tasmania and Victoria. They do not depend upon any apprehension of a breach of the peace. Their enactment raises the question – what is their purpose – the protection of civil tranquillity, people's religious sensibilities, communal civility or some combination of all of them? We can say that people are entitled to have their dignity respected and protected. But do we have to respect their beliefs. A short glib answer is that beliefs are not people – beliefs do not have rights and are not entitled to respect. But for some people their religious beliefs are an important part of their identity. Can one then say – I mock the belief, but respect the believer? The point was made in a 2006 judgment of the Court of Appeal of Victoria,[29] written by Justice Geoffrey Nettle, now a member of the High Court, about an alleged breach of the *Racial and Religious Tolerance Act* 2006 (Vic) involving comments about Islam by a body called "Catch the Fire Ministries". Justice Nettle observed that hatred of a religious belief might, but does not necessarily, result in hatred of the believers. It was essential, he said, "to keep the distinction between the hatred of beliefs and the hatred of their adherents steadily in view."[30]

Debates about laws affecting offensive speech or conduct tend to focus on the tension between such laws and freedom of speech and expressive action recognised by the common law and by international human rights norms. Neither the written nor the unwritten law can resolve those tensions with precision. Generally speaking, however, the courts endeavour to interpret laws affecting freedom of expression so as to protect that freedom from unnecessary burdens.

I mentioned earlier that in Australia there is an implied freedom of political communication which began its life with a law giving statutory protection against insult to the dignity of the Industrial Relations Commission of Australia. In or about 1992 the *Australian* newspaper published an article highly critical of the Commission. It said, among other things:

> The right to work has been taken away from ordinary Australian workers. Their work is regulated by a mass of official controls, imposed by a vast bureaucracy in the ministry of labour and enforced by a corrupt and compliant 'judiciary' in the official Soviet-style Arbitration Commission.[31]

The newspaper was prosecuted for a breach of section 299 of the *Industrial Relations Act* 1988 (Cth), which provided that:

> (1) A person shall not:
> . . .
> (d) by writing or speech use words calculated:
> . . .
> (11)
> (ii)to bring a member of the [Industrial Relations] Commission or the Commission into disrepute.

Counsel for the *Australian* newspaper submitted that there was to be implied into the Constitution a guarantee in favour of the people of Australia that the Parliament has no power to make a law which impairs their capacity to perform the functions and responsibilities entrusted to them by the Constitution. The High Court held the section invalid. Three members held that it infringed an implied freedom of political communication derived from the text and structure of the Constitution relating to representative democracy and election of parliamentary representatives by the people.[32]

The existence of the implied freedom was also successfully argued on behalf of Australian Capital Television in a companion case challenging restrictions on the broadcasting of political advertisements for a period prior to election day.[33]

Unlike the First Amendment guarantee in the Constitution of the United States, the implied freedom is not an individual right. It is a limitation on the legislative power of the Commonwealth and also of the States and Territories of Australia. It also limits the application of the common law of defamation in relation to public figures. It was elaborated in a number of defamation cases involving politicians[34] culminating in the decision of the High Court in *Lange v Australian Broadcasting Corporation*,[35] which concerned a defamation action brought by a former Prime Minister of New Zealand, David Lange, against the Australian Broadcasting Corporation. The test for validity adopted by the Court in *Lange*, modified in a later case, *Coleman v Power*,[36] involved two questions:

1. Does the challenged law in its terms, operation or effect, effectively burden freedom of communication about government or political matters?
2. If the law effectively burdens that freedom, is the law nevertheless 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?

As can be seen, the application of those tests to laws affecting offensive speech and expressive conduct necessarily requires evaluative judgments.

The difficulty of applying evaluative judgments reflected in a legal standard rather than a precise legal rule was demonstrated in the decision of the High Court in 2013 in *Monis v The Queen*.[37] The appellant had been charged with using a postal service in a way that reasonable persons would regard as being, in all the circumstances, offensive, contrary to section 471.12 of the *Criminal Code* (Cth). The charges related to derogatory letters he had sent to parents and relatives of soldiers who had been killed on active duty in Afghanistan. He and a co-accused argued that the charges should be quashed on the basis that section 471.12 was invalid in its application to "offensive" communications because it infringed the implied constitutional freedom of political communication. The case came on appeal to the High Court, which could only sit six Justices because the seventh was about to retire. In the event, the Court was evenly divided. Justices Hayne and Heydon and I held that, in its application to offensive communications, the section under which the appellants were charged was invalid as impermissibly burdening the implied freedom of political communication.[38] Justices Crennan, Kiefel and Bell held that, if interpreted as referring to high level offensiveness, the section went no further than was reasonably necessary to achieve its purpose of preventing the misuse of

postal services to effect an intrusion of seriously offensive material into a person's home or workplace and did not impose too great a burden on the implied freedom and was therefore valid.[39]

The Court being evenly divided, the appeal was dismissed. The question before the Court did not involve the moral quality of Monis's conduct. That spoke for itself. The Court was rather concerned with the scope and validity of the law under which he was charged. As we are all sadly aware, Monis was later to take hostages in a cafe in Sydney. Tragically, two innocent young people were killed in that awful event.

Before closing I will make an appropriately spare reference to the substantial controversy in recent times in Australia concerning the prohibition of offensive behaviour directed to people because of their race, colour, or national or ethnic origin. The prohibition is to be found in section 18C of the *Racial Discrimination Act* 1975 (Cth), which provides in sub-s (1):

> It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
> (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

It is subject to some good faith defences in section 18D, which it is not necessary to go into here.

Section 18C was introduced into the *Racial Discrimination Act* by the *Racial Hatred Act* 1995 (Cth). The purpose of the amendment as explained by the Attorney-General of the day in the Second Reading Speech was "to close a gap in the legal protection available to the victims of extreme racist behaviour".[40] The Attorney-General advanced a social order justification for the provision:

> In this bill, free speech has been balanced against the rights of Australians to live free of fear and racial harassment. Surely the promotion of racial hatred and its inevitable link to violence is as damaging to our community as issuing a misleading prospectus, or breaching the Trade Practices Act.[41]

There has been debate about whether, as a matter of public policy, the section goes too far in its application to conduct likely to offend and whether, having regard to the relevant provisions of the Convention for the Elimination of all Forms of Racial Discrimination, it is supported by the external affairs power and whether or not it impermissibly infringes the implied freedom of political communication.

I can make no comment on the merits or demerits of those questions. Section 18C may yet come before the High Court although, if it does come, it will be after my retirement. I will therefore offer you an anodyne statement of the blindingly obvious. The debate about section 18C illustrates the way in which prohibitions on offensive speech and expressive conduct can sometimes lie at the interface of hotly contested and differing views about the proper limits of legislative intervention. Those differences tend to be rooted in different views about the kinds of harm seen as flowing from particular kinds of offensive speech.

In conclusion, there is no generally accepted human right not to be offended. Even if there were, the law alone cannot protect us from being offended. Nor can the law alone prevent the

social disharmony which some kinds of offensive expression can cause. It cannot protect the dignity of people if our culture does not respect them. In limiting cases the law has intervened and does intervene. The identification of those limits depends upon societal and political attitudes to the proper province of the law. These can vary from place to place and from time to time. Regardless of the existence and extent of legal rules, we must accept that for a society to work and especially for a culturally and ethnically diverse society to work, there must be an ethic of respect for the dignity of all its members.

There are some old fashioned ideas of courtesy and good manners, of which Sir Harry Gibbs was an exemplar, which can be quite helpful in that respect. They are powerful instruments of the art of getting along together in full participation in a free and democratic society. To borrow from Lord Birkenhead's politically incorrect metaphor, we will be well served in this area by stout hearts and sharp swords – not real weapons but a steely determination to exemplify the great civic virtue of doing unto others, as we would have them do unto us.

Endnotes

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Chapter 1

Hatred: A Defence

Brendan O'Neill

I come from a country where you can be arrested for expressing Christian beliefs.

As you can probably tell from my accent, I am not talking about Saudi Arabia, or North Korea, or the Islamic State. I am talking about Britain. In 2016, in Britain, birthplace of the modern idea of liberty, the police might knock on your door if you say certain Christian things.

I know this sounds shocking, so let me give you a few examples. In 2014, a Christian street preacher was arrested in Dundee, in Scotland, for saying homosexuality is a sin. A member of the public phoned the police. The police turned up, arrested the preacher and locked him up overnight before his appearance in court the next day. He was charged with breaching the peace. A few months later, the charges were dropped.

In 2011, a Christian street preacher in Manchester was arrested for quoting the following passage from the Book of the Revelation:

> But for the cowardly, unbelieving, sinners, abominable, murderers, sexually immoral, sorcerers, idolaters, and all liars, their part is in the lake that burns with fire and sulphur, which is the second death.

Some members of the public complained that these words were homophobic and had caused them "alarm and distress." So the preacher was arrested and put in a police cell, alone, for 19 hours. Nineteen hours. In Britain, in 2016, you can be put in a cell for 19 hours for reading from the Bible.

In 2014, a Baptist church in Norfolk put up a poster suggesting that if you do not believe in God then you will go to hell. The poster said, "If you think there is no God, you had better be right," and underneath there was a picture of flames, the implication being that if you do not believe then you will burn for eternity.

Passers-by complained about the poster to the police. The police registered the poster as a "hate incident." They launched an investigation. They decided, in their graciousness, in their infinite wisdom, that there was not a case to pursue, but they did visit the church to have a word with the pastor and suggest he take the poster down. He took it down.

So you do not have to look to some foreign tyranny to see agents of the state forbidding Christians from expressing certain core beliefs. Just look at Britain. It is happening there.

And then, perhaps the most notorious case of all: in May 2014, a 78-year-old pastor in Northern Ireland was arrested for saying the following during a sermon: "Islam is heathen, Islam is Satanic, Islam is a doctrine spawned in hell."

Now, you might find those comments offensive; many people do. They are not Christian beliefs, as such, though it is a Christian belief that Christianity is the true religion and the others are wrong or misguided.

Yet, for saying those things about Islam, for giving a strongly worded sermon, the Northern Irish pastor was arrested and charged with making "grossly offensive remarks." Yes, it is potentially a crime in Britain to be "grossly offensive." The pastor faced up to six months in jail.

This year, 2016, two years after his sermon, having spent two years in legal limbo awaiting trial, awaiting his fate, he was found not guilty. The judge said something really striking. He said the pastor's comments were "offensive" but not "grossly offensive." So, in the United Kingdom, judges now get to decide how offensive a person is allowed to be, and whether his level of offensiveness deserves a prison sentence or just a telling off.

These are just some recent examples of people being arrested in Britain for what they have said and, in essence, for what they believe. This is the important thing to remember: all those people genuinely, deeply, profoundly believed what they were saying.

We might disagree with them that homosexuality is a sin and that non-believers burn in hell and that Islam is "satanic." I certainly do. But they believe those things with every fibre of their being. They were arrested for what they think; they were arrested for their moral convictions. In Britain. In 2016.

You do not have to look at the history books, you do not have to look all the way back to the Inquisition, to see the authorities harassing or punishing people for their convictions. It is happening right now, not just in the East but in the West, too.

I see my role here as a kind of canary in the mine, coming to warn you of the dangers of making offensiveness or hatefulness a criminal offence. To warn you of the dangers of allowing the state or the law to determine what people may think and say.

I know Australia is moving down this road, with the use of section 18C of the *Racial Discrimination Act*, to punish those judged to be racially offensive. But you are not as far down the road as Europe is, and I want to tell you to stop, now, and to scrap every piece of legislation that impedes in any way what people may say.

Let me tell you how bad things have become in Europe.

In almost every European country today, there is someone who is in prison or doing some kind of community service or paying off a fine simply for something that he or she said. In Scotland, birthplace of some of the best things about the Enlightenment, a man was sent to jail for the crime of singing an offensive song. The man is a 24-year-old fan of the largely Protestant football team, Rangers. He was prosecuted for singing, "The Billy Boys", an anti-Catholic song that Rangers fans have been singing for years.

Under Scotland's Orwellian *Offensive Behaviour at Football Act* – yes, Scotland actually has an Act of Parliament governing offensive behaviour at the football – he was sentenced to four months in jail for, in essence, songcrimes. We have had thoughtcrime and speechcrime; but even Orwell did not imagine that one day we would have songcrimes.

In Sweden, viewed by many as the capital of chilled-out liberalism, a man was recently released from a six-month prison sentence for producing offensive art. His name is Dan Parks. He is a painter. He does paintings which he says are designed to challenge political correctness (PC) and the stiff, nervous authorities. And they can certainly be described as racist works. For this, he was sent to jail for six months and his artworks were destroyed by the state. Europe once burnt corrupting books; now it incinerates offensive art.

In France, which still presents itself as the guardian of the rights of man, three people are paying off fines imposed on them for making homophobic comments on Twitter. These three

individuals became the first in French history to be found guilty of anti-gay hate crimes – not for attacking anyone or damaging property, but for expressing themselves on the internet.

In Germany, a 74-year-old woman had a fine imposed on her by the courts for the crime of carrying an offensive placard. She was on a march against immigration when she held up a sign that said, "The arrogant Turks and Muslims are threatening Europe." For this, for these unpleasant views, she was fined one thousand Euros.

In Hungary, a historian was found guilty of breaching public order when he described the far-right party, Jobbik, as "neo-fascist." He was fined – for expressing a political opinion, for saying something.

And on it goes. Across Europe, from Britain to Hungary, Scandinavia to the Mediterranean, people are being arrested and convicted for expressing themselves. Not for action, but for speech; not for behaviour, but for thought.

During the past decade there have been numerous cases like this. A pastor in Sweden was given a one-month suspended prison sentence for describing homosexuality as a tumour on society; the former French actress, Brigitte Bardot, was fined 30,000 Euros for describing certain Islamic practices as "barbaric;" the French novelist, Michel Houellebecq, was taken to court for "inciting religious hatred" after he called Islam "stupid." Yes, that can land you in court in France. It is positively medieval, a return to the blasphemy laws of old. It is now a risky business in Europe both to express certain religious beliefs and also to criticise religion.

All of this is a result of the spread of hate-speech laws in recent decades.

Thirty or forty years ago, there was a striking shift in the approach of Western states to censorship. They shifted from trying to control immoral things, like sexual literature or "depraved" art, towards controlling "hateful" ideas. They went from policing political beliefs, for example, by clamping down on communist groups and communist literature, to policing what they call "hatred."

This has opened up a whole new empire of censorship, a terrifying new form of thought control. For these strictures against hatred allow the state to police not just ideology and art but emotion and belief. Hatred is, after all, just a feeling. They allow the state to punish those whom it judges to be too hot-headed, too offensive. They make Orwell's nightmare a reality; they make thought crime a real thing.

Such an outlook has taken hold in Australia, tragically, though not to the same extent as in Europe. Just this week, we have the utterly perverse situation where the Race Commissioner of the Australian Human Rights Commission is encouraging people to complain about Bill Leak's Indigenous dad cartoon, so that something might be done about it. A human rights commissioner whipping up a mob against press freedom – it is surreal.

We have also had the Andrew Bolt case, the outrageous use of section 18C of the *Racial Discrimination Act* to punish a journalist for expressing an opinion.

Other section 18C cases have included complaints against an Indigenous prisoner for calling a guard "white trash;" against the comedian, King Billy Cokebottle, for allegedly mocking Indigenous culture; against the Bible Believers Church for whipping up hatred of Jews – and so on.

Australia is veering towards the European trend for punishing offensive or hateful remarks, and I am here to say to you: Please, stop. Now.

Why? Because there are two major problems with today's policing of so-called hatred. The first, and most serious, is that people are being punished for their moral, religious and political views. Supporters of hate-speech legislation claim they only want to stop the expression of vile, racist, anti-Semitic or misogynistic ideas, so what is your problem, they ask?

But, in reality, religious thought and political ideas are also being swept up in this moral crusade against hate speech, and are punished alongside plain old-fashioned racism.

So, as I have said, Christians are arrested and fined for saying homosexuality is a sin – that is, for their beliefs. Liberal critics of Islam have been arrested for saying Islamic values are not suited to modern Europe – that is, for their political views.

We must always remember that one man's "hate speech" is another man's deeply held, seriously considered moral belief. What the state and mainstream observers, and some of us, consider to be "hateful" might to someone else be an important religious or political ideal.

To my mind, arresting someone for saying, "homosexuality is a sin," is just as bad, exactly as bad, as it would be to arrest someone for saying, "Malcolm Turnbull is a good prime minister." Both views are wrong, but there are people out there who truly hold them, strange as that might seem.

Those Christians believe homosexuality is a sin just as seriously as other people believe Turnbull is a good prime minister. And there should be as much outrage over their arrest as there would be if fans, or critics, of Turnbull were to be arrested. We should be as shocked by the arrest of eccentric pastors as we would be by the arrest of mainstream political writers or activists.

And the second problem with the state's crusade against hatred is that it actually makes it more difficult for us to challenge actual hatred. It does not only punish moral beliefs by rebranding them "hatred;" it also makes it harder for us to stand up to what we can all agree is real hatred.

Hate-speech legislation disarms us – us ordinary, non-hateful, anti-racist citizens. It prevents us from being able to see and challenge backward ideas.

Censorship is the worst tool for tackling bigotry. All censorship does is push bigotry underground, where it can grow and spread and gain in influence, unchecked by rational, liberal thought.

France demonstrates this well. Twenty-five years ago France outlawed Holocaust denial. And now it has a very serious problem, the most serious problem in Europe probably, with Holocaust denial and anti-Semitism. These things are not unrelated. In banning Holocaust denial, France removed this ideology from the democratic public realm where it might be challenged, where it might be raged against with facts and possibly defeated.

It also unwittingly turned Holocaust denial into something exotic, into something edgy, into an attractive outlook for those who already felt isolated from mainstream French society. And so some sections of French society, particularly the poor, cut-off immigrant sections, embraced Holocaust denial as a self-conscious affront to the mainstream, and they were never publicly held to account or confronted or argued down because Holocaust denial has been forbidden from the public realm and effectively shielded from public discussion. Censoring genuine hate speech makes hate speech worse. Banning Holocaust denial exacerbates the problem of Holocaust denial.

Hate-speech legislation is not only an attack on the speaker – it is also an attack on the rest of us, the audience. It undermines our right, and our responsibility, as citizens, to expose and confront bigotry; to use the tools of freedom and reason to challenge those who say genuinely racist things.

This is why freedom of speech is so important. First, because it allows individuals to express themselves; and, secondly, because it allows the rest of us to listen and to think and to speak back.

Freedom of speech is the most important of all freedoms because it keeps citizens alert; it makes society a more vibrant and thoughtful and engaged place. It trusts people to hear and consider all ideas, and to use our reason to consider these ideas. It actively invites us to be engaged, responsible citizens.

Censorship, by contrast, makes us lazy and childish and stupid. It turns us into infants who do not have to worry about what is right and wrong because that has already been decided for us by our good, gracious rulers and betters. It weakens our moral muscles; it retires our moral judgment. It encourages passivity, thoughtlessness, obedience – all of which are anathema to a healthy democratic society.

This is why you must challenge every use of section 18C of the *Racial Discrimination Act*, not just against Andrew Bolt but also against actual racists and anti-Semites – because otherwise you will end up in the same boat as Europe.

My view is this.

There should be no legislation at all pertaining to freedom of speech. And I include in that human rights legislation that claims to grant us freedom of speech. I am against this, too, because it turns freedom of speech into a gift that the authorities give to us, and which, logically, they might just as easily take away.

Indeed, human rights law actually qualifies freedom of speech. So Article 10 of the European Convention on Human Rights gives us freedom of speech but also says that it can be restrained in the following circumstances:

> In the interests of national security, territorial integrity or public safety; in the prevention of disorder or crime; in the protection of health or morals; in the protection of the reputations of others; in preventing the disclosure of information received in confidence; or in maintaining the authority and impartiality of the judiciary.

So it gives us the freedom to speak in one breath, and then dilutes it to the point of destroying it in the next.

We should insist that freedom of speech is not something that officialdom gives to us. It is something that we have. It is not a gift of government, but a central part of everyday human life. It is not something given to individuals – it is the means through which we become individuals.

It is the means through which we develop our intellectual muscles, train our minds, become aware and alive and part of the moral world.

It is in the exercise of freedom of speech that we become free, and become fully human in fact. No one can give us our humanness; we do it, we realise it, ourselves. There should be no laws restricting freedom of speech and, likewise, there should be no laws granting freedom of speech. Governments should say nothing whatsoever about freedom of speech. Leave it to us.

Freedom of speech is not a human right. It is far more important than that. And we should use it. And right now, we should use it to challenge every single curb on free expression, whether that expression is good and interesting or wicked and hateful.

Freedom of speech is either enjoyed by everyone or by no one.

Chapter 2

Prior v QUT & Ors [2016]

John Roskam and Morgan Begg

In November 2016, the Federal Circuit Court of Australia threw out an application by Cynthia Prior to sue four students at Queensland University of Technology (QUT) under section 18C of the *Racial Discrimination Act* 1975 (RDA) for comments made on a Facebook group after one of those students, Alex Wood, was ejected from an indigenous-only computer lab. Prior's application to sue two employees of QUT and the University itself for breaching section 9 of the RDA, for failing to respond to her concerns about the comments and allegedly failing to take action related to the Facebook comments was withdrawn in March 2017.

It is often said of freedom of speech cases that "the process is the punishment" – regardless of whether the QUT students are found to have breached section 18C, the draining experience of litigation, lawyers and court dates is its own penalty.

This article is about that process. It is about how section 18C of the RDA operates in the real world. It provides an account of a three-and-a-half-year legal saga over a series of innocuous social media comments. While the case against the students was dismissed, their experience tells us a great deal about the dangers of anti-discrimination law in Australia – how it magnifies personal slights and perceived grievances into high stakes legal battles, and how they turn over what ought to be resolved in the realm of political debate to the courts.

The incident

Around lunch-time on 28 May 2013, a 20-year-old engineering student, Alex Wood, and two fellow students were searching for computer terminals to conduct their studies at the Gardens Point campus of the Queensland University of Technology. Having failed to locate available computers at labs Wood usually used, they recalled that two new buildings – P Block and Y Block – had recently been constructed at that campus and were thought to house computer labs.

Wood and the other students entered the Y Block building and located what they thought to be a computer lab for the general use of QUT students. The students attempted to log on and begin their study.

Unbeknownst to the students, the computer lab was housed within a facility of the Oodgeroo Unit, a university program that offers academic, cultural and personal support to Aboriginal and Torres Strait Islanders at QUT. Another student in the lab saw Wood and the others enter the lab, and told Naomi Franks, the Learning Support Officer of the Oodgeroo Unit, something to the effect that "there are some people in the computer lab and I don't think they're indigenous". Cynthia Prior, an Administration Officer of the Oodgeroo Unit, was present to hear what the student told Franks, and was told by Franks to resolve the situation.

What happened next was contested. Prior told the Federal Circuit Court that she approached the students, asked whether they were Indigenous, and informed them, "Ah, this is . . . an Indigenous space for Indigenous students at QUT". However, she "didn't ask them to leave

because [she] didn't want to embarrass them in a black space." She advised the students that there were computers in other buildings that they could use.

Wood recalls it differently. In his recollection, Ms Prior's conduct was "aggressive and unpleasant", and that Prior "demanded" he and his fellow students leave.

Wood eventually found another place to study. Approximately 45 minutes later, he posted onto an unofficial Facebook group for QUT students, *QUT Stalker Space*: "Just got kicked out of the unsigned indigenous computer room. QUT stopping segregation with segregation . . .?"

What followed was a debate between those students extolling the virtues of indigenous "safe spaces", and those who saw that as an inappropriate program for the University to operate.

One of the latter was an engineering student, Jackson Powell. He wrote a series of satirical and sarcastic comments over the course of the next 30 minutes. In one comment he said: "I support the idea of an alcoholic's room consisting of a beerpong table, cocktail bar and eight large bean bag chairs. Purely for study." In another comment, he posted a link to an image of a machine sorting beans or lollies into separate piles according to their colour.

The comments that later made Powell subject of Prior's section 18C complaint are, in context, obviously sarcastic. He first posted: "I wonder where the white supremacist computer lab is". In response to a post that mentioned the Ku Klux Klan, Powell wrote, "it's white supremacist, get it right. We don't like to affiliate with those hill-billies". After another student proposed "a room strictly for white males," Powell responded, "today's your lucky day, join the white supremacist group and we'll take care of your every need".

Another student, Chris Lee, was alleged to have written, "Whatever, im pierce (sic) I've got so much casual racism I need to let out of my system," in another comment thread that appeared on *QUT Stalker Space*. And an account bearing the name "Calum Thwaites" posted a comment: "ITT Niggers". (The acronym ITT is internet lingo meaning "in this thread.")

Positively matching Lee and Thwaites to their comments has, however, been a fraught process. Thwaites, an education student at QUT at the time, argued that a different person falsely using his name made the comment. When evidence for this was brought to the attention of Prior's solicitors in December 2015, it was apparently ignored and the case against Thwaites proceeded. Prior's legal team was unable to identify the person commenting under the name "Chris Lee". Nor was any direct evidence provided to the Federal Circuit Court that such a comment existed. For his part, Alex Wood's first post was the only public comment he made about the incident.

Wood, Thwaites and Powell all deny knowing one another (or any other students originally listed in the complaint), and deny having had any interactions with each other (or any other students originally listed in the complaint) aside from comments made on this Facebook comment thread.

QUT responds

The comment thread set QUT's student bureaucracy into overdrive. Within hours, a student familiar to the Oodgeroo Unit approached Franks and Prior and informed them of the comments. With the help of another student, Prior took screenshots of the comments, printed them off, scanned the print outs and attached them in an e-mail to Professor Anita Lee Hong, the Director of the Oodgeroo Unit. That e-mail, sent at 2:37 pm, advised Lee Hong of the comments that she described as "racist and derogatory", made clear that she was upset about the

comments, notified Lee Hong she would be making a formal complaint to the University, and that she "would like the matter taken further and those students who participated and 'liked' this conversation to be reprimanded in some way."

Prior and Franks also approached Mary Kelly, the Director of Equity at QUT. Her office was next door to the Oodgeroo Unit facilities at the Garden Points Campus. Kelly said she would ask the students to take down the comments.

Kelly ultimately sent e-mails to Alex Wood, Calum Thwaites and another student, Anthony Canning, who had also participated in the comment thread. The e-mail to Wood, sent at 5:21 pm on the day of the incident, told him that the comment allegedly fell "below the standards outlined in the Student Code of Conduct". It asked that he remove the entire thread of comments. She sent similar e-mails to Thwaites and Canning asking them to remove their comments. Only Thwaites responded later that evening, writing that he "did not post any such comment", and providing evidence that his Facebook profile was not a member of the *QUT Stalker Space* page.

The final piece of correspondence on the evening of 28 May was an e-mail from Kelly to Prior and Franks, requesting the two Oodgeroo Unit staffers to see her the following morning to determine if they could identify the students involved in the incident by looking at student photographs kept by the University.

Prior and Franks visited Kelly's office the next morning. They were not able to determine whether the students posting the comments on Facebook were the same as the students who had accompanied Wood the previous day.

Kelly found Canning's telephone number and called the student. Answering the call, Canning responded that he had thought the page was private and that he would delete his comment immediately. Kelly informed Prior and Franks in an e-mail sent at 10:52 am that, among other things, "the most offensive posts . . . have been removed from the Stalkerspace page":

> the name of the student who administers the Stalkerspace page – not a student – and will continue to try and get the whole post removed through that channel, as the person who started the string – Alex Wood – has not yet responded to my email, and does not have a listed phone number.

Wood attempted to log onto Facebook and remove his post. Wood responded to Kelly's e-mail at 2:13 pm, where he said:

> Yes it is deleted. I didn't mean to spark such a debate, Stalkerspace seems to be a place where sarcasm and humour reign supreme. The intention of the post was never to have racist overtones.

In other words, 24 hours after the original post, the offending Facebook comment thread had been deleted, and each identified student had expressed regret at their participation in their conversation about "QUT stopping segregation with segregation".

Escalation

Prior interpreted Kelly's previous e-mail as "very bad news", however. She felt the situation had "slipped completely beyond her control" and that she was at risk of "imminent but unpredictable physical or verbal assault". Prior e-mailed Lee Hong asking to leave work. In response, Lee Hong

instructed Prior that any absence would have to be on sick leave. Prior left work immediately.

The day after leaving work abruptly, Prior sent an e-mail to Kelly informing her that Prior "left campus yesterday due to this stress", referring to the saga as a "workplace safety issue" and saying she did "not feel safe attending my workplace at present." Prior added that, until she had been informed that the "matter had been dealt with effectively", she would not return. Prior also added that she wished to "lodge a formal complaint against the students involved once the university had identified them."

Prior alleges that Kelly's and Lee Hong's failure to respond to her safety concerns, and their failure to respond to Prior's formal complaint against the students, was, itself, a violation of the *Racial Discrimination Act*. Section 9(1) of the RDA makes unlawful a distinction, exclusion, restriction or preference based on a person's race, colour, descent or national or ethnic origin, and that the conduct had the purpose and effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of a human right or fundamental freedom in the political, economic, social, cultural or other field of public life.

In other words, under section 9(1) of the RDA, a university with a dedicated Indigenous-only computer lab, from which non-indigenous students could be excluded, that specifically provided employment to Indigenous people, faces a claim that they had unlawfully discriminated against one of those Indigenous workers.

June 2013 to May 2014

Early in June 2013, QUT began taking action to reinforce support for the Oodgeroo Unit. The Vice-Chancellor released a statement in response to the initial incident which was published on the student gateway on the QUT website. He also incorporated an explanation of the importance of the Oodgeroo Unit into his Campus Briefings, an annual address to hundreds of staff members. Prior characterised this response as bureaucratic.

Kelly organised with faculty heads to send official letters to Messrs Wood, Canning and Thwaites, to invite them to discuss the incident, and to bring to their attention the Student Code of Conduct. On 17 June 2013, the head of the engineering faculty, Professor Martin Betts, allegedly sent one such letter to each of Wood and Canning. The letters were not identical: Wood's letter did not refer to a breach in the Student Code of Conduct, because the University did not believe he had actually breached the code, but nonetheless aimed to make him aware his comments could have consequences. A letter similar to that which Canning received was sent by the head of the education faculty, Professor Ann Farrell, to Thwaites on 20 June 2013.

Yet the students assert that no such letter was received, and no proof of response was submitted to the court. The only piece of correspondence referring to the letters being sent occurs in an e-mail from Professor Betts on 18 June 2013, where he says equivocally, "letters sent yesterday I believe".

At a return-to-work meeting on 1 August 2013, Prior requested, among other things, a security guard to patrol the Oodgeroo Unit at least once per day. Lee Hong refused this. Prior said she would seek temporary work in a different position. Lee Hong offered Prior a place at the University's Caboolture Campus. Ms Prior refused this due to her "caring responsibilities" and the travel required, and alleged that Lee Hong was or should have been aware of this, and that, because of Lee Hong's conduct at the meeting, her condition was worsened and she became unfit

for work. Prior obtained legal representation and filed an internal complaint to the University in December 2013.

The complaints go to the Australian Human Rights Commission

On 27 May 2014 – almost a full year since Wood was evicted from the Oodgeroo Unit computer lab – Prior advised QUT that she would be taking the issue to the Australian Human Rights Commission. Prior lodged complaints against QUT, Lee Hong and Kelly for breaching section 9 of the RDA, and complaints against seven QUT students for breaching section 18C of the RDA.

Prior was clearly aggrieved by her experience with the students and her experience with the University. But these complaints were clearly vexatious. All issues had been resolved. The students had been removed from the Oodgeroo Unit computer lab. The Facebook thread and posts had been taken down. The students had been counselled by the University and had expressed remorse and understanding for any offence they may have caused.

A close reading of the course of events makes it hard not to conclude that the complaints under the RDA were a workplace disagreement between Prior and Lee Hong being waged through anti-discrimination law. The policy question is this: did the existence of section 18C and section 9 of the RDA help relieve those tensions or exacerbate them?

What can be concluded is that the Australian Human Rights Commission, once it received Prior's complaints, clearly exacerbated those tensions. There are four primary failings of the law and of the Commission.

The first failure was simple: the Commission should have immediately rejected Prior's complaint. This is also a failure of the law. The Commission's statutory regime stacks the process in favour of those making complaints. When a person makes a complaint to the AHRC, they do so under section 46P of the *Australian Human Rights Commission Act* 1986 (Cth). It provides that the Commission *must* refer the complaint to the AHRC president (section 46PD), who in turn *must inquire* into the complaint (section 46PF(1)). According to the statute, only after making enquiries and attempting to conciliate a complaint can the Commission "terminate" a complaint, including for being "trivial, vexatious, misconceived or lacking in substance".

On the facts, Prior's complaint was either trivial, vexatious, misconceived or lacking in substance. But the Commission can only persuade the parties to agree to a settlement or "terminate" the complaint, which means that it can advance to the federal courts. In the former, the party making a frivolous complaint is potentially able to profit from making the complaint by settling for a monetary sum to discontinue the complaint. In the latter, complainants who are determined to take a complaint to court face little in the way of obstacles. In each scenario, there is no aspect of the legislation which discourages frivolous complaints, and this is why several QUT students were involved in Federal Circuit Court proceedings for more than a year for an event that happened in May.

Since the QUT judgment, AHRC president Gillian Triggs has argued that the commission needs more power to rule out vexatious complaints. Yet this is a rhetorical sleight of hand. In fact, such powers that she proposes would have done nothing for the QUT case. As she told the *7:30 Report* after the ruling, the case had a "level of substance" and deserved to proceed. In other words, in the view of the AHRC president, what is clearly trivial and vexatious on the face of it, is

in fact a significant discriminatory harm which needs either to be conciliated or adjudicated in court.

The second major failure of the Australian Human Rights Commission is that the students were not informed of the complaint that Prior had made against them. Correspondence filed with the court in 2016 between Anthony Morris, QC, (counsel for Powell and Thwaites) and Dan Williams of Minter Ellison (representing QUT) possibly explains why this occurred. In that correspondence, Williams wrote that on 2 June 2014, less than a week after the complaint was lodged with the Commission, the solicitors who were at the time representing Prior wrote to the AHRC and "requested that no action be taken by the AHRC to serve the complaint on the [student] respondents". The letter is also alleged to have requested the Commission not to "list the complaint for conciliation until such time as settlement discussions between [Prior] and [QUT] had taken place."

Those settlement discussions did, indeed, take place during the next 12 months. Those discussions did not produce a satisfactory outcome for Prior. Those discussions also did not include the students at any time. If the Commission acquiesced in Prior's request not to inform the students of the complaint, then the Commission was evidently still complying with that request more than 12 months later.

In late June 2015, the Commission asked Ms Prior to "advise whether she still wished to pursue her complaint against the student respondents", something Ms Prior confirmed the next day. A "conciliation conference" between Prior and the students was booked by the Commission for 3 August 2015. Yet it was not until 28 July – less than a week before that conference was scheduled to take place – that the Commission e-mailed a letter to the Queensland University of Technology informing the students of the conciliation. That letter was forwarded by QUT to the students' university student e-mail accounts.

This was the Australian Human Rights Commission's third significant failure: having been the subject of a section 18C complaint for 14 months, the students were given notice of just six days that they were to appear before the Commission.

A conciliation conference is an informal dispute resolution process run by the AHRC to "assist the parties to consider different options to resolve the complaint and provide information about possible terms of settlement." A template Conciliation Conference Agenda obtained by the Institute of Public Affairs under the *Freedom of Information Act* in May 2016 reveals that the AHRC does not manage the process, but instead it appears to be led by the parties. But it grinds to a halt if one party is making unreasonable demands and shows an unwillingness to compromise.

With such late notice, only two of the seven students originally listed on the complaint were even able to attend. Jackson Powell and two other students were abroad at the time, and Powell himself was not aware of the complaint or the conference until after it took place. Alex Wood read the e-mail on 31 July 2015, and was told that attendance was "strictly optional". By the time he learned of the conciliation conference he already had work commitments. He had "no idea that the conference would actually conclude that day" and did not attend. Calum Thwaites and Anthony Canning attended.

The conciliation process began and finished on the same day. With only two of the original seven students present, Triggs' delegate to the conciliation, Adam Dunkel, was "satisfied that there [was] no reasonable prospect of the matter being settled by conciliation." On 25 August

2015, the Commission informed QUT of this decision, and QUT again forwarded that notification to the students.

This is the fourth significant failure of the Commission. It is not clear how this conclusion was reached when most of the students listed on the complaint were not actually present to participate in the conciliation process. This is what passes for alternative dispute resolution at the Australian Human Rights Commission.

The Federal Circuit Court ends the circus

When the complaint was terminated, Prior was permitted to make an application to the federal courts to have the complaint heard by a court. Three of the students reportedly paid Prior $5,000 to be removed from proceedings. As Hedley Thomas reported in *The Australian* in February 2016, the students settled "as they could not afford the legal costs to defend themselves in the case" and they "did not want to be unfairly linked to racism, which would damage their reputations and job prospects." It is no wonder that Liberal Democratic Senator David Leyonhjelm labelled the whole case "an attempt at legal blackmail."

The other students spent nearly a year in the Federal Circuit Court system before the case was dismissed in November 2016. The court's decision was a vindication of the students' choice to fight the claims. Justice Michael Jarrett found that there was no evidence to connect the posts under Calum Thwaites' name to the real Calum Thwaites. For Wood, Jarrett concluded that the statement "QUT stopping segregation with segregation" was targeted at a QUT policy, not Prior or Indigenous people more generally. In Powell's case, Jarrett decided that his posts (such as "I wonder where the white supremacist computer lab is") were a "poor attempt at humour" and that "tasteless jokes" did not inherently violate section 18C. Neither Wood's nor Jarrett's posts were sufficiently profound or serious to be seen as a violation of section 18C.

It is important to note that Justice Jarrett did not come to his decision on the basis that they, the students, were protected by section 18D, which purports to protect speech that is "made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest" and "done reasonably and in good faith". Supporters of section 18C have in recent months tried to deflect attention to section 18D.

A week after the complaint was dismissed by Justice Jarrett in November 2016, Labor's shadow attorney-general claimed in the *Australian Financial Review* that "Those who attack section 18C usually fail to mention section 18D." This is untrue. The uselessness of section 18D has been evident ever since Justice Bromberg found in the Andrew Bolt case in 2011 that the use of sarcasm indicated that arguments were not made in good faith.

But the QUT decision should drive a nail through the claims that section 18D protects freedom of speech. At the end of his judgment, Jarrett wrote that he was not able to conclude whether section 18D would protect the students: "The submissions for each of the parties reveal that there is a conflict in the authorities about the way in which section 18D might operate. The conflict is significant." If a statement such as "QUT stopping segregation with segregation" is not, as a matter of law, a clear good faith commentary in the public interest, then it is absurd to suggest that section 18D provides any protection of freedom of speech whatsoever.

Conclusion

As this suggests, the now widespread calls to reform the Australian Human Rights Commission would be a step in the right direction, but would not be a major advance in freedom of speech. Even if the Commission was given the power to *reject* frivolous complaints earlier in the process, the QUT case would have gone ahead. Prior's complaint was not even terminated for being "trivial, vexatious, misconceived or lacking in substance". A provision in the legislation requiring the Commission to inform people listed in a complaint directly of their part in a complaint is helpful in a small sense, but misses the key underlying problem.

The Australian Human Rights Commission is a poor administrator. But first and foremost, it is administering a bad law. It is not the fault of the Commission that they received the complaint. Despite the poorly run conciliation process, it is not even the fault of the Commission that the complaint was allowed to progress to the Federal Circuit Court.

By prohibiting offensive and insulting language, section 18C creates the sort of low threshold that enables especially sensitive university staff members to launch a three-year legal campaign against students. The only reason the students were taken to court in 2016 for innocuous Facebook comments made in 2013 is that section 18C of the *Racial Discrimination Act* 1975 remains on the statute books.

Postscript

(November 2017)

The legal battle over legal costs continued into 2017. On 9 December, Judge Jarrett in the Federal Court ordered that Cynthia Prior pay the costs of Alex Wood, Jackson Powell and Calum Thwaites, reportedly amounting to approximately $200,000. Also rejected was an application by Wood for Ms Moriarty to bear costs personally for an alleged "absence of scrutiny" in advising Prior of the realistic prospects of taking the complaint to the Federal Court. In February, *The Australian* reported that Wood had been billed $41,336 to fund lawyers for Moriarty in relation to that application.

On 17 March 2017, Prior filed a notice of discontinuance with the Federal Court, ending litigation against the Queensland University of Technology. No cost orders were made.

On 3 March 2017, Federal Court judge John Dowsett denied Cindy Prior leave to appeal the Court's decision to dismiss her case, and was ordered to pay the legal costs of the student respondents, amounting to $10,780. Thwaites and Powell applied to the Federal Court in May for a bankruptcy order against Prior for unpaid costs. The Federal Court heard on 26 July that Prior had paid the debt and avoided bankruptcy.

In response to the QUT case – as well as the complaints that were made against cartoonist Bill Leak and a major inquiry into section 18C by the Parliamentary Joint Committee on Human Rights – the Federal Government proposed the Human Rights Legislation Amendment Bill 2017. It was introduced into Parliament on 22 March 2017 and passed both Houses on 31 March. Aside from the procedural changes that successfully passed, the Bill originally included the deletion of the words "offend", "insult", and "humiliate" from section 18C to be replaced by the word 'harass'. The resulting formulation would have made it unlawful for a person to "harass or intimidate" another person because of their race.

This was an important first step towards restoring freedom of speech in Australia – but only a first step. The definitions of words like "harass" are mired in uncertainty, and problems

would inevitably have emerged under the Government's proposal. After all, Cindy Prior included in her claim that she was "intimidated" by the social media comments on the basis of her race. The proposed amendments to section 18C were lost in the course of parliamentary debate.

Section 18C in any form is a restriction on freedom of speech that chills public debate and damages social cohesion. That is why 18C has become such an iconic issue for such a broad group of Australians, and why its continuing existence as an Australian law is unsustainable. And that is why section 18C will inevitably be repealed in full.

Chapter 3

Cultural Self-Confidence That is What is Missing

The Honourable Tony Abbott

My first task is to congratulate The Samuel Griffith Society for its unflinching commitment to upholding our Constitution and to safeguarding our legal traditions. You are, if I may say so, a thoroughly conservative body – not in any partisan sense but in your respect for what has shaped us and in your determination to build on the best features of the past.

Although Sir Samuel Griffith led a 19th century Queensland version of the Liberal Party, there were occasions, he believed, when "the comfort of the individual must yield to the good of the public".

He had a strong social conscience but no sympathy for those "who endeavour to bring about reforms by crime and violence". He opposed indentured labour, but was more inclined to phase it out than to ban it.

And he was the principal author of the first draft of our Constitution. It has turned out to be a splendidly serviceable rule book for a practical people.

Although he once claimed no inconsistency whatsoever between any of his innumerable speeches on a huge range of topics, he was more pragmatist than ideologue. His was a pragmatism based on values: sympathy for the underdog, respect for institutions that have stood the test of time, and a preference for freedom.

Vexing times for conservatives

My second task is to confront a regrettable truth: these are vexing times for conservatives – legal conservatives no less than political ones – and we need to ask, "why?", if better times are to come.

Take an issue that has quite rightly exercised many people here: section 18C of the *Racial Discrimination Act* that prohibits what might "offend, insult, humiliate or intimidate" on racial grounds.

This is a troubling law. At its worst, it limits free speech merely to prevent hurt feelings. John Howard opposed it when Paul Keating introduced it but did not repeal it in government.

After the successful prosecution of Andrew Bolt, I promised to "repeal it in its current form" but reneged after fierce criticism from Liberal premiers and a wall of opposition in the Senate.

As well, I was seeking ways to limit jihadi hate preachers and worried about the appearance of double standards.

Perhaps the cause of free speech would have fared better if my Government's initial bid had been merely to drop "offend' and "insult" while leaving prohibitions on the more serious harms.

Still, as things stand, there is no real prospect of change – even though several young Queenslanders are now facing official persecution merely for questioning reverse discrimination

on social media and the Race Discrimination Commissioner is now itching to prosecute Australia's best-known cartoonist.

The decency and fair-mindedness of the Australian people will always be a better defence against hate speech than a law administered by ideological partisans – yet our Parliament prefers to tolerate over-the-top prosecutions than to upset thin-skinned activists.

Restoration of a better functioning federation

Take another issue dear to members of The Samuel Griffith Society: the restoration of a better functioning federation – a federation that more faithfully reflects the letter and spirit of our Constitution – by allowing the different levels of government to be more sovereign in their own spheres.

In the 2014 Budget, Joe Hockey, the Treasurer, and I implemented our election pledge to limit the Rudd-Gillard school and hospital cash splash to the 2013 forward estimates. We reduced Commonwealth support for the States from the unsustainable, beyond-the-out-years, pie-in-the-sky promises of the previous government, to CPI plus population growth in the fourth year of the budget projections.

Our idea was the constitutionally correct one: to have the States and territories running public schools and public hospitals take more responsibility for funding them. The public would then know better whom to blame when things went wrong.

Again led by Liberal premiers, the response was a fusillade of criticism along the lines of cruel cuts and broken promises.

Along with a modest Medicare co-payment for otherwise bulk-billed GP visits, reductions in stay-at-home-mum payments once the youngest child was at school, CPI rather than MTAWE (male total average weekly earnings) indexation for pensions, and insisting on learning-or-earning for school-leavers rather than going straight on the dole, these reductions-in-the-rate-of-increases to spending were sabotaged in the Senate.

So, as things stand, rather than reform a dysfunctional federation, the States would rather blame federal funding than address the shortcomings in their schools and hospitals; while the Commonwealth will not risk a scare campaign by considering real change.

There is much that my Government achieved in two short years: abolishing taxes, stopping the boats, finalising free trade agreements, boosting small business, starting big projects like Sydney's second airport, keeping our country safe – and not shirking Budget repair.

Still, I have to take responsibility for our inability to reform section 18C and to deliver the beginnings of federation reform.

Free speech is worth the risk of giving offence.

The Commonwealth cannot be the States' ATM if our federation is to work.

Government cannot continue to live beyond its means.

I did make these points but not often enough or persuasively enough to bring about the changes I sought; the changes, I suspect, that you wanted, too.

Hence the need for all of us to ponder how these good causes and other good causes might better prosper in the future.

Time as Leader of the Opposition

You will not be surprised that I have been reflecting on my time as Leader of the Opposition as well as Prime Minister.

Interestingly, while less than 50 percent of the current government's legislation has passed the Parliament, almost 90 percent of the former Labor Government's legislation passed without a division.

I think the Abbott Opposition was right not to oppose means-testing family tax benefits and means-testing the private health insurance rebate; because, although these measures hit the aspirational families the Coalition most wanted to help, they also helped to rein-in an increasingly out-of-control Budget deficit.

Unquestionably, we were right to oppose the carbon tax which was not just a broken promise but the antithesis of the Labor Government's 2010 election commitment.

We were right to oppose the mining tax which destroyed investment, cost jobs, and boosted red tape without raising serious revenue.

We were right to oppose the over-priced school halls program and the combustible roof batts program and the live cattle ban that threatened Indonesia's food security; because these were all bad policies incompetently implemented.

I wonder, though, about the former Government's people swap with Malaysia. The 800 boat people that could have been sent to Malaysia was less than a month's intake, even then.

I doubt it would have worked. Still, letting it stand would have been an acknowledgement of the government-of-the-day's mandate to do the best it could, by its own lights, to meet our nation's challenges.

It would have been a step back from the hyper-partisanship that now poisons our public life.

In the last Parliament, 2013-16, I could invariably count on Bill Shorten's support on national security issues. On deploying the Defence Force or strengthening anti-terror laws, there were Cabinet ministers harder-to-persuade than the Leader of the Opposition!

The challenge for the new Parliament elected in July 2016 will be to be as sensible about economic security as the old one was about national security; because we cannot keep pretending that economic growth on its own will take care of debt and deficit.

Labor's instinct is for more tax and the Coalition's preference is for less spending – but if Labor wants spending legacies such as the National Disability Insurance Scheme to survive, it should be prepared to work with the Government in dealing with the spending overhang that it created.

The sensible centre

After an election where the Government all-but-lost its majority, yet the Opposition recorded its third worst vote in 70 years, the sensible centre needs to focus even more intently on what really matters to middle-of-the-road voters.

All of us need to dwell less on what divides us and more on what unites us, and to have an open mind for good ideas – as the Howard Opposition did with the economic reforms of the Hawke Government.

Still, we are much more likely to rebuild trust by telling the truth than by running away from hard decisions. We have to keep reform alive because it is the reforms of today that create the prosperity of tomorrow.

Budget repair, federation reform, productivity reform and tax reform cannot stay in the too-hard basket for the whole term of this Parliament.

All significant change has costs that need to be taken into account. And, yes, it is easy enough to make a bad situation worse with ill-considered change.

Yet often enough we must change merely to keep what we have. We are free because we are strong. We are fair because we can afford to be.

But every day we must ask how we can be better, smarter, stronger – and adjust as circumstances require.

This is not ideology; it is common sense.

It should not be a crisis that forces Parliament to face facts: everything has to be paid for; every dollar government spends ultimately comes from taxpayers; and taxpayers are also voters with a vested interest in getting value for their money.

Constitutional and legal heritage

My job here is less to address the challenges of government than to address the challenges facing those wishing to build incrementally on our constitutional and legal heritage. The main problem is that fewer and fewer people actually know what that heritage is.

Some years ago, after John Howard had questioned the state of history teaching in our schools, I quizzed my then teenage daughters about some of the big events in Australia's past.

"We haven't been taught that", one shot back. Her history study had been ancient Egypt, "pharaohs and stuff ", she told me, "and the Rosetta Stone".

If people do not know the Bible and Gospel stories; if they have not read Shakespeare or Dickens; if they have not heard about ancient Greece and Rome; if they have not studied the political evolution of England; if they know little of the Great War and the struggles against Nazism and communism; how can they fully appreciate the society they live in, or deeply grasp Australian democracy, let alone the subtleties of the relationships between the different branches and levels of government?

With less common knowledge, shared understandings become more difficult. Without moorings and without maps, inevitably, we are adrift and directionless.

What is deep and lasting becomes harder to distinguish from the ephemeral. We end up taking sport more seriously than religion.

A few weeks ago, I addressed my old school and spoke briefly about the debt that the modern world owed to Christianity: how democracy rested on an appreciation of the innate dignity of every person; and justice on the imperative to treat others as you would have them treat you; or to love your neighbour as you love yourself.

The subsequent questions, I have to say, focussed on the alleged cruelty of the Abbott Government's border protection policies: the inadequacy of its climate change policies; and the insensitivity of its approach to same-sex marriage!

And why would not these be students' concerns, given teachers' preoccupations with multiculturalism, reconciliation and global warming?

At least the Safe Schools program is not yet mandatory at Catholic schools in New South Wales.

But there is hope; one Year Nine student I questioned recently, from a different school, volunteered that our biggest national problem was the Budget deficit. It turned out that during the election he had been exposed to a heavy dose of Sky News!

There would not be a person here – not one of you – who would say that our civilisation is more secure today than five, ten or twenty years ago. The new tribalism, the loss of civility, and reality TV politics is taking its toll across the Western world.

Yet for all our present discontents, there would hardly be any one, here, unconvinced that Western civilisation, especially its English-speaking version, is mankind's greatest achievement.

To be an Australian is to have won first prize in the lottery of life. A culture which welcomes diversity; which values women; which offers respect to everyone; with universal social security; with political and social and economic opportunity; which encourages people to look out for each other; which urges everyone to be his or her best self and which is always looking for ways to improve … deserves to be much better thought of.

Yet what is readily extended to other cultures is only grudgingly extended to our own: credit where it is due.

What is missing from the public discourse and what makes consideration of so many issues so contentious is an appreciation of our society's strengths as well as its weaknesses.

I will not try to persuade you that there has never been a better time to be an Australian – for cultural conservatives there are too many frustrations for that – but surely the contention, even now, that there is no better country to live in ought to be self-evident.

Cultural self-confidence: that is what is missing; and that is what is required for more of our debates to tilt the right way.

You appreciate what more of us should: that our national story has far more to celebrate than to apologise for.

The challenge for all of us who seek a better Australia is rarely to throw things out and start again. It is to build on the great strengths we have.

Chapter 4

In re Revenue Taxation & the Federation
The States v The Commonwealth

The Honourable Chris Kourakis

The thesis of my address is in two parts. First, it is that the Constitution has served Australia well in its division of legislative and executive power between the States and the Commonwealth. This is because the terms of the Constitution have allowed for a construction which has empowered the governments of Australia to deal with, first, the nationalisation of socio-economic forces, capital, labour and communications and, then, the internationalisation of those forces.

The second part of my thesis is not so Panglossian. It is that Australia's State and Commonwealth governments have failed the Constitution by not making efficient and fair arrangements for the Australia-wide provision of government services and by not implementing coherent and efficient taxation and regulatory regimes.

I

Constitutional adaptation

I shall first deal with the successful adaptation of 19th century ideas of federation and government, on which the Constitution was based, to the 21st century. For most of the first two decades of the 20th century, a conservative State-based construction of the Constitution prevailed. That is not surprising. The first High Court judges were drawn from the establishment of diverse and disparate colonies who were not experienced in the workings of a federated nation.

In *D'Emden v Pedder* (1904 1 CLR 91) and the line of cases which followed it, the Constitution was construed on the assumption, which had no textual basis, that the States and the Commonwealth had discrete areas of delineated governmental responsibility which could not be fettered, controlled or interfered with by the other tier of government.

In 1913 there were a number of referenda which sought to expand, among other things, Commonwealth powers in trade, commerce and monopolies. These referenda were narrowly lost despite affirmative majorities in Western Australia, Queensland and South Australia.

The majority judgment in the *Engineers* case ((1920) 28 CLR 129) was, not surprisingly, delivered by Isaacs, J, whose personal and political history predisposed him to the national government agenda. In strong language of the rhetorical kind often employed by Isaacs, the asserted foundation of the inter-governmental immunity doctrine – political necessity – was dismissed as an elusive and inaccurate doctrine.

R. T. E. Latham made the following insightful analysis of the *Engineers* case:

> The fundamental criticism of the decision is that its real ground is nowhere stated in the majority judgment. This real ground was the view held by the majority that the Constitution had been intended to create a nation, and that it had succeeded; that in the Great War the nation had in fact advanced in status while the States stood still and (as was a patent fact) that the peace had not brought a relapse into the status quo ante bellum; that a merely

> contractual view of the Constitution was therefore out of date, and its persistence in the law was stultifying the Commonwealth industrial power, which they believed to be a real and vital power; and finally that the words of the Constitution permitted the view of the Federal relationship which the times demanded.[1]

That assessment of the decision in the *Engineers* case made in 1949 remains true today. The *Engineers* case delivered more power to the Commonwealth than the failed 1913 constitutional referendum could have.

Tax powers

The Income Tax case which, in 1942, effected a substantial shift in governmental fiscal power from the States to the Commonwealth also demonstrated the adaptability of the constitutional text to modern economic conditions and challenges.

In *South Australia v Commonwealth* the High Court heard a challenge by the States to a suite of *Income Tax* legislation enacted in 1942 for the purpose of funding Australia's war effort ((1942) 65 CLR 373). A statutory sunset clause limited the temporal operation of the legislation to the last day of the first financial year which commenced after the end of World War II. The temporal limitation was thought to be important for both political and constitutional reasons.

The *State Grants (Income Tax Reimbursement) Act* 1942 (Cth) (State Grants Act) provided that in each year in which the Treasurer was satisfied that a State had not imposed income tax, an amount specified in a schedule to the Act would be paid to the State. The *State Grants Act* also provided for making further payments out of consolidated revenue to the States based on the recommendation of the Commonwealth Grants Commission. The schedule provided for repayments to the States of, approximately, the amounts they had collected with what might be described as a war effort commission skimmed off the top.

Despite the Commonwealth's heavy reliance on the defence power, section 51(vi) of the Constitution, and the national emergency created by the war, Latham, CJ, Rich, McTiernan and Williams, JJ, upheld the validity of the Act as coming within the income tax power, section 51(ii). Their Honours held that the *State Grants Act* was not invalid for being directed towards destroying or weakening the constitutional functions or capacities of the States or as involving discrimination contrary to section 51(ii). Thus a war-time measure became the Commonwealth's long-term monopoly of income tax.

The States lost another major revenue source in *Ha v The State of New South Wales & Ors* when the High Court invalidated New South Wales' ad valorem tobacco franchise licensing fees ((1997) 189 CLR 399). The High Court, by majority, held that the licence fees were duties of excise within section 90 of the Constitution.

The decision in *Ha* was not surprising. State sales taxes had been struck down several times. The decision in *Ha* is strongly supported by textual and contextual considerations. Nonetheless, it demonstrates how strongly the Constitution as framed and construed has facilitated the growth of a single national economy.

Section 96 and expenditure powers of the Commonwealth

The constitutional validity of the conditional payments to a State pursuant to section 96 of the Constitution was upheld as early as 1926 in *Victoria v The Commonwealth* ((1926) 38 CLR 399).

South Australia and Victoria argued unsuccessfully that the Commonwealth could not attach conditions to its grants which were, in substance, an exercise of a legislative power which did not fall within section 51 of the Constitution.

The judgment of the Court, delivered by Knox, CJ, was admirably succinct:

> The Court is of opinion that the *Federal Aid Roads Act No 46 of 1926* is a valid enactment. It is plainly warranted by the provisions of sec 96 of the Constitution and not affected by those of sec 99 or any other provision of the Constitution, so that exposition is unnecessary.

The imposition of conditions on section 96 grants was confirmed by the High Court in 1940 and again in 1956-1957.

In W R Moran Pty Ltd v The Deputy Federal Commissioner of Taxation (NSW) ((1940) 63 CLR 338) the Judicial Committee of the Privy Council observed that a "colourable" use of section 96 to overcome limitations on Commonwealth power might well be ultra vires.

However, in South Australia v The Commonwealth (the first uniform tax case), Latham, CJ, acknowledged that the State Grants Act could be used to induce the State parliaments not to exercise their income tax powers notwithstanding their continuing constitutional right to do so ((1942) 65 CLR 373). His Honour explained that the States may or may not yield to the inducement but that there was no legal compulsion to yield. Observing that "temptation is not compulsion", Latham, CJ, held that, just as the Commonwealth may properly induce a State to exercise its powers by offering it a grant of money, it could equally induce a State in the same way to abstain from exercising its powers.

Latham, CJ, then turned to the States' argument that the Commonwealth cannot use its legislative power to destroy or weaken the constitutional functions or capacities or to control the normal activities of the States. He accepted that revenue is essential to the existence of any organised State and that there could be neither reliable nor sufficient revenue without the power of taxation which was therefore an essential function of a State. He went on:

> There is no universal or even general opinion as to what are the essential functions, capacities, powers, or activities of a State. Some would limit them to the administration of justice and police and necessary associated activities. There are those who object to State action in relation to health, education, and the development of natural resources. On the other hand, many would regard the provision of social services as an essential function of government. In a fully self-governing country where a parliament determines legislative policy and an executive government carries it out, any activity may become a function of government if parliament so determines. It is not for a court to impose upon any parliament any political doctrine as to what are and what are not functions of government, or to attempt the impossible task of distinguishing, within functions of government, between essential and non-essential or between normal or abnormal. There is no sure basis for such a distinction. Only the firm establishment of some political doctrine as an obligatory dogma could bring about certainty in such a sphere, and Australia has not come to that. ((1942) 65 CLR 373 at 423)

When I come to address the second part of my thesis, it will be seen that financial arrangements between the tiers of government for the provision of government services depend to a great extent on section 96 of the Constitution.

The power to impose conditions on grants given to the States facilitated the expansion of the Commonwealth taxation. There would not be as much point in the Commonwealth collecting tax for the States if it could not use the resulting fiscal imbalance to control how it is spent.

Such is the Commonwealth's embarrassment of taxation riches that even the broad conduit provided by section 96 is too narrow to accommodate it. For decades the Commonwealth has expended money directly on matters for which it has no constitutional responsibility without even using the States as an intermediary. The Commonwealth has transferred taxation revenue directly to schools, local government and other agencies.

That practice was closely scrutinised in *Pape v Federal Commissioner of Taxation*, however ((2009) 238 CLR 1). In *Pape*, taxpayer bonus payments, which were part of the scheme used to combat the Global Financial Crisis (the GFC), were challenged. The High Court held that the appropriation power in section 81 of the Constitution did not support substantive expenditure but that the payments were justified under the nationhood power because of the economic emergency presented by the Global Financial Crisis.

The Commonwealth took the game points from the decision in *Pape* but failed to heed the warning about its finals prospects. In 2012 Mr Williams challenged the Commonwealth chaplaincy program (*Williams v The Commonwealth* (2012) 248 CLR 156) (*Williams*). The Commonwealth contended that the expenditure was supported by its executive power either because the Commonwealth executive has the capacity of a legal person to spend money on any matter it chooses or on the narrower view that the executive can spend money on subjects that fall within the scope of legislative power.

Both views were rejected by the High Court. Justices Hayne and Kiefel observed that section 96 would be redundant if the Commonwealth executive had power to spend money on whatever subjects it wished and to legislate to enforce conditions. Essentially, in *Williams*, the Court held that unless Commonwealth expenditure was:

- directly authorised by the Constitution;
- made under a prerogative power;
- made in the ordinary administration of the functions of government; or
- made pursuant to the nationhood power;

then it must be authorised by a statutory mandate which is supported by a head of Commonwealth legislative power.

Regulatory levers

I will now move from financial to regulatory powers and the corporations power in particular. In *Huddart Parker & Co Pty Ltd v Moorehead* in 1909, the High Court invalidated very early trade practices legislation ((1909) 8 CLR 330).

Griffith, CJ, Barton and O'Connor, JJ, held that the Commonwealth had power to decide whether corporations could operate at all or not within a particular area, but could not regulate what they did and how they acted within it.

Isaacs, J, dissented. He held that the power extended to regulate all of the dealings corporations had with natural persons or other corporate entities in whatever activity they were so engaged.

In 1971 another Act regulating trade practices again came before the High Court in *Strickland v Rocla Concrete Pipes Ltd* ((1971) 124 CLR 468). Some sections of the Act, for technical legal reasons, were declared to be invalid but all of the Judges unanimously agreed that the restrictive construction of the corporations power given in *Huddart Parker & Co Ltd v Moorehead* was wrong. Justice Isaacs was vindicated.

The extremely broad reach of the corporations power has been affirmed in a series of cases since that decision, most recently in the *State of New South Wales v The Commonwealth* ((2006) 229 CLR 1). The Commonwealth relied largely on the corporations power to enact the *Workplace Relations Act* 1996. It was challenged by the States of New South Wales, Victoria, Queensland, South Australia and Western Australia and several trade union organisations.

The case was argued over six days by a record 39 counsel. Most of those were for the plaintiffs. I appeared as Solicitor-General for South Australia. One by one the States and territory solicitors-general rose to the lectern to put their arguments only to have them dispatched with barely concealed derision. Just before I rose to my feet the Solicitor-General for the Northern Territory, Mr Pauling, QC, had made a brief submission leaving what I thought was just a scrap bit of paper on the lectern. I soon saw that the scrap of paper had been retrieved from a fortune cookie by Mr Pauling the night before. It read:

> The good thing about being wrong is the joy it brings to others.

The majority confirmed that the corporations power extends to comprehensive regulation of the activities, functions, relationships and the business of a corporation.

The majority found support for its construction by tracing the origins of section 51(xx) through the constitutional debates to the financial difficulties and bank collapses and scandals, particularly in Victoria, of the late 1880s and 1890s. It was a collapse that Justice Isaacs had had direct experience in managing as Attorney-General for Victoria at the time.

Their Honours cited Windeyer, J, in the *Payroll Tax* case:

> 'That is not surprising for the *Constitution* is not an ordinary statute: it is a fundamental law. In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances.'
> ((1971) 122 CLR 353 at 396-397)

The majority rejected those of the State submissions which relied on notions of a federal balance of legislative power between the Commonwealth and the States. The majority rhetorically asked:

> Thus when it is said that there is a point at which the legislative powers of the federal Parliament and the legislative powers of the States are to be divided lest the federal balance be disturbed, how is that point to be identified? (*The State of New South Wales v The Commonwealth* (2006) 229 CLR 1 at 120)

Corporations are the vehicles which drive 21st century commercial activity in Australia's single national economy. Regulatory power over corporations is therefore a twin pillar to the taxation power in supporting the Commonwealth's control of the national economy.

II

Taxation and revenue storing in the first century of the Federation

I will now survey how the taxation landscape has changed since federation. Before federation the sources of most tax revenues for the Australian colonies were customs duties and excises. Other receipts included stamp duties, stock taxes, land taxes and death duties.

The monopoly granted to the Commonwealth over customs duties and excises was calculated both to give the Commonwealth a source of revenue and to create a national free trade zone. During the last century, these taxes declined in importance as a proportion of tax revenue. In 1909 they accounted for three-quarters of total tax revenue but in 2003-04 for only 8.45 percent of tax revenue.[1]

From the early years of the federation the Commonwealth collected more revenue than its expenditure responsibilities required. From 1908 the Commonwealth placed money into special trust accounts for hypothecated purposes so that no money need be returned pursuant to the obligation imposed by section 94 of the Constitution. When the period of 10 years in which returning three quarters of the customs revenue to the States was mandated by section 84 of the Constitution had elapsed, the Parliament enacted the *Surplus Revenue Act* 1910 to remove the obligation to return excess customs revenue altogether.

State attempts to impose sales taxes were invalidated in 1926, 1938 and 1949. The Commonwealth first imposed wholesale sales taxes in 1930 to offset falls in customs revenues.

By 1901 estate taxes, levied progressively, were adopted by all of the colonies and later by the Commonwealth. Gift duties were introduced to prevent the circumventing of death duties by *inter vivos* gifts. Led by Queensland, other State governments and the Commonwealth abolished death and gift duties in the 1980s.[2]

Commonwealth land taxes were introduced during 1910 as a form of wealth tax but became less effective as the productivity base of the economy diversified away from agriculture and because of the wide exemptions given to primary producers. Land taxes were widely unpopular and were removed by the Commonwealth in 1952. Land taxes, however, remain a significant source of revenue for the States and territories. It is an efficiently levied tax which provides a predictable source of revenue. Indeed, there is some support for a broad-based land tax to replace stamp duty but no State or territory government has implemented that politically fraught reform.

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[1] Excise duties are now imposed on the domestic manufacture of petroleum fuels, certain bio fuels, alcoholic beverages other than wine, tobacco products, crude oil and oils and lubricants. Equivalent duties on identical imported products are imposed through customs duties.

[2] By the early 1970s there was substantial pressure to abolish those taxes. Because the taxation brackets had remained static, many ordinary working people fell within them whereas wealthy people avoided them by estate planning and the use of trusts in particular. Exemptions were granted to large classes. Queensland abolished the tax in 1977. Concerned about a flood of emigrants, the other States followed suit. The Commonwealth Government abolished estate and gift duties in 1979. In 1984 all estate duties had been removed at both the State and Commonwealth levels.

The colonies introduced income taxes in the 1880s. The Commonwealth first imposed personal and company income tax[3] in 1915 to replace declining customs duties and excises which resulted from the disruption to world trade by the First World War.

The Commonwealth's offer in 1934 to vacate the income tax field was rejected by the States, however. The Commonwealth's offer moved the recently retired Solicitor-General of Australia, Sir Robert Garran, GCMG, KC, to poetry:

> We thank you for the offer of the cow,
> But we can't milk, and so we answer now –
> We answer with a loud resounding chorus:
> Please keep the cow, and do the milking for us.

Left to collect the revenue needed by the States, it became necessary for the Commonwealth to devise a formula to redistribute that excess. The Grants Commission was established in 1933 to devise, independently, a formula to determine the level of financial assistance required. The formula adopted was that a grant should be awarded to a claimant State to make it possible for that State, by reasonable efforts, to function at a standard not appreciably below that of other States.

Offers to allow the States to levy income tax were repeated by the then Prime Minister, Robert (later Sir Robert) Menzies in 1952, and by Malcolm Fraser in 1977. The States declined, arguing that the Commonwealth had not allowed them enough taxation space within which to levy their own income tax.

Australia's top personal income tax rate has fallen steeply since 1951. The broadening of personal income tax has meant that by the early 1980s the share of personal income tax paid by the top income quintile fell to around half, a level that has since been broadly maintained. Notwithstanding the increase in the proportion of personal income tax paid by lower income quintiles, Australia's average effective tax rate on the income of a range of household types is in the lowest eight of the 30 countries in the Organization for Economic Co-operation and Development (OECD).

In the period, 1945 to 1957-8, the Commonwealth adjusted the special grant model for the reimbursement to the States to take into account per capita and demographic factors. In 1959, Financial Assistance Grants, which encompassed special grants, replaced tax reimbursements.

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[3] When income tax was introduced in 1915, companies were taxed on their profits after deduction of dividends. From 1922, all company profits were taxed.

From 1940 to 1986 Australia maintained this classical company taxation system under which profits were taxed at the company rate and at personal rates when distributed. In 1987, responding to calls to remove this "double taxation", Australia introduced an imputation system whereby resident shareholders receive a credit for tax paid at the company level thereby eliminating double taxation of dividends and, depending on the circumstances, offsetting taxes on wages and salaries.

Full refundability of excess tax credits for resident shareholders was introduced to the Australian imputation system in 2000.

The company tax rate has been reduced in recent times from a high of 49 percent in 1986 to a rate of 30 percent.

Financial Assistance Grants were calculated on a *per capita* basis, and adjusted for Grants Commission considerations. They were, however, then distorted by political considerations.

In the 1960s excess Commonwealth taxation revenue was directed towards education:

- A school laboratories program was funded in the 1960s
- In the late 1960s the Commonwealth commenced funding private schools on a per capita basis.

Grants increased dramatically between 1973 and 1975, drawn by the national reform agenda of the Whitlam Labor Government between 1973 and 1975. Grants were made directly to regional organisations in local government. Those grants could fairly be described as anti-State, but not anti-federalist, because they were consistent with the subsidiarity principle, which demands devolving power and responsibilities to the lowest practical level of government.

From 1975 to 1981, under the Fraser Coalition Government, there was a move away from centralised authority. A new system of tax-sharing entitlements replaced Financial Assistance Grants, giving States greater control of their revenue. Commonwealth funding to local government was wound back.

The States successfully lobbied for access to payroll tax in 1971. The Federal Government had introduced a 2.5 percent payroll tax in 1941 to finance a national scheme for child endowment. Having lost income tax, payroll tax was the sole growth tax available to the States. Payroll tax revenue accounts for between 24 and 36 percent of each State's total revenue.

Since the 1980s increasing attention has been paid to reforming the tax system to improve equity and efficiency. (In 1987 a petroleum resource rent tax was also introduced to generate an equitable return from off-shore petroleum sources.)

As a result of the Asprey Report, Capital Gains Tax and Fringe Benefit Taxes were introduced in 1987. (It was thought that the lack of a Capital Gains Tax distorted investment towards assets providing the terms in the form of capital gains rather than income streams. In 1999 a capital gains discount was introduced to promote more efficient asset management and improve capital mobility by reducing the tax bias towards asset retention and to make Australia's Capital Gains Tax internationally competitive.)

Consistent with most industrialised countries, Australia's tax take (tax to GDP ratio) grew significantly over the 20th century as the role and functions of government expanded. At the time of federation, it was about five percent. It increased sharply when the Commonwealth introduced Commonwealth Income Tax in 1915 to close to 10 percent, and it grew steadily in the inter-war period and during the Second World War, peaking at just below 25 percent in 1946-47. There was a post-war decline before it climbed relatively steadily to 30 percent in 2000. There was a significant jump between 1973 and 1975 as a result of increased funding of social programs.

Australia remains the eighth lowest taxing nation of the 30 OECD members, however. From the position at the time of federation when 100 percent of the Federal tax revenue was from indirect taxes, by 2000 personal income tax made up about 60 percent of the Commonwealth tax take, company income tax 20 percent and indirect taxes under 20 percent. Australia's reliance on direct and indirect taxation is broadly consistent with other OECD countries.

Vertical Fiscal Imbalance

Vertical fiscal imbalance is a term used to describe the insufficient revenue raising power of the States to meet their expenditure responsibilities and the conversely excessive revenue raising power of the Commonwealth resulting in the need for inter-governmental transfers to correct the imbalance.

The level of vertical fiscal imbalance in Australia is amongst the highest of any federation. The States collect about 16 percent of all taxation revenue and that share accounts for only 40 percent of their own purpose outlays. Vertical fiscal imbalance is a major cause of substantial constitutional fiscal, and governmental service, dysfunction.

In the constitutional debates Charles Kingston of South Australia referred to one of its more obvious mischiefs when he observed that "there is nothing which conduces more to the reverse of sound finance and good Government than an overflowing Treasury".

Another issue it raises is at the heart of discussion about reforming inter-governmental relations. The relevant question is how do you return the revenue to where it can be spent more cost-effectively. In 2010-11 the Commonwealth Government budgeted to provide the States with $94bn in payments, being an amount equivalent to 6.7 percent of GDP and just under 30 percent of Commonwealth tax revenues.

The States have always been very critical of tied grants given pursuant to section 96 of the Constitution. In 2002, the economists Ross Garnaut and Vince FitzGerald estimated that the imposition of conditions by the Commonwealth wasted $145 million. Estimates for 2007-08 put the costs in the billions.

From a low of about 15 percent in 1950, tied grants reached a high of 50 percent in 1995-96, falling a little to 40 percent after the introduction of the goods and services tax (GST).

In 2006-07 grants tied to expenditure on public hospitals, government schools and roads accounted for close to three quarters of the tied grants made by the Commonwealth to the States. Tied grants are generally calculated to:

- encourage States to undertake projects which have greater benefit to the nation as a whole than they have to the residents of the particular State.
- secure cooperative arrangements to achieve national standards in particular services.
- top-up depleted State revenues to assist with such burgeoning expenditure as hospital running costs.
- effect an assumption of responsibility by the Commonwealth of a traditionally State service whether to promote efficiency or to impose its own policy.

Twenty percent of the grants were paid on condition that the State governments pass the money on to non-government schools and local governments.

The nature of the conditions vary, but include:

- General policy conditions such as requiring States to provide free public hospital access for Medicare patients;
- Expenditure conditions requiring, for example, education money to be spent on teachers' salaries and curriculum development;
- Input control requirement in the form of maintenance of effort requiring State governments to match funding arrangements;
- Performance and financial information reporting by the States; and

- Due recognition conditions whereby the States are required to acknowledge publicly the Commonwealth's funding.

The use of Specific Purpose Payments results in many functions being shared between the Commonwealth and the States. They result in a blurring of government responsibilities from cost and blame shifting among levels of government, wasteful duplication of effort or under-provision of services and a lack of effective policy coordination.

The States have argued that conditions are often poorly designed and, conversely, affect the State's ability to provide services by requiring the States to contribute additional resources to the Commonwealth priorities without giving thought to what the States already do. The States also complain that conditions controlling input limit incentives for service providers to improve efficiency and denies them the flexibility to redirect efficiency savings into other areas of expenditure.

Horizontal Fiscal Equalisation

Issues around how to allocate funds returned from the Commonwealth to States as between the States are even more difficult. Horizontal fiscal equalisation (HFE) is a feature of many federations. It is a process whereby the central government in a federation makes payments to the sub-national governments. It aims to take account of differences in the ability of States and territories to raise revenue and the cost of service provision arising from differences in geography, demography, natural endowments and economies, thereby reducing disparities in taxation across the States.

In 1950, Buchanan described horizontal fiscal equalisation as a system of transfers between the States to place "all State units in a position which would allow them to provide the national average level of public services at average tax rates". HFE prevents migration to areas of better government services unrelated to underlying economic opportunities and national development. It allows a more ready equilibrium to be reached when migration takes place to areas of greater economic opportunity.

A review in 1981 by the Commonwealth Grants Commission showed that, if pure horizontal fiscal equalisation principles were applied, there would be very large reductions in funding to the less populous States. Part of the reason for the review being initiated was an allegation that Commonwealth governments were favouring payments to States of the same political persuasion.

In 1985 the general revenue grant arrangements were restructured. Tax-sharing entitlements introduced in the late 1970s were replaced and a system of Financial Assistance Grants, unrelated to tax collection, resurrected. The amount of those grants was unilaterally reduced in the face of the economic recession of 1988-89, however.

In 1988 the Commonwealth Grants Commission reviewed efficiency aspects of HFE. The Commission concluded that the inefficiencies were not significant enough to warrant any changes in the manner in which the fiscal equalisation process was carried out.

In the aftermath of the decision in *Ha* the Commonwealth imposed a goods and services tax from 1 July 2000. In accordance with the June 1999 Intergovernmental Agreement on Principles for the Reform of Commonwealth/State financial relations (IGA), all of the GST

revenue is returned to the States and territories. Funding pursuant to the IGA has replaced Financial Assistance Grants. The IGA required that:

- the Commonwealth enact GST at 10 percent.
- the Commonwealth abolish its wholesale sales tax.
- the Commonwealth cease to make Financial Assistance Grants.
- the States abolish bed taxes, financial institution duties, stamp duty on marketable securities and debits tax.
- the States review stamp duty on commercial land.
- the Commonwealth would distribute GST revenue grants among the States and territories in accordance with horizontal fiscal equalisation principles subject to transitional arrangements.
- GST remaining would return to the States in bulk untied grants.

The principle adopted by the Commonwealth Grants Commission for the allocation of GST between the States was described by the former Treasurer of Western Australia, Christian Porter, as a "purist form of redistribution". The essential formula is:

> State governments should receive funding from the pool of goods and services tax revenue such that, after allowing for material factors affecting revenues and expenditures, each would have the fiscal capacity to provide services and the associated infrastructure at the same standard, if each made the same effort to raise revenue from its own sources and operated at the same level of efficiency.

The detail of the formula by which HFE is deployed is necessarily complicated. From the practical starting point of an equal per capita share of the national GST pool, each State's share is adjusted in accordance with two fundamental principles. First, the States with a higher per capita capacity to raise revenue from their own sources (assuming each applied national average tax/royalty rates) have their GST share reduced; States with low capacity have their GST share increased.

Secondly, States with higher per capita costs of service provision due to factors outside their control have their GST share increased and States with low costs have their GST share reduced.

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

Recent complaints from Western Australia about the system include:

- That its population has decreased.
- The timing of the assessment (it is based on historical data).
- That there is a high cost for the infrastructure it requires for mining.

Mr Porter argued that the fiscal autonomy of sub-national governments is a *sine qua non* of an effective federal structure. A high degree of financial dependency on central government stifles

federalism. Expenditure responsibility needs to be matched by revenue responsibility if sensible public choices are to be made. Vertical fiscal imbalance breaks the link between expenditure and revenue-raising decisions. It raises a confusion of accountability in the minds of voters and a tendency for the influence of the central government on subnational expenditure choices to grow, resulting in overlapping responsibilities. It works against efficiency and public expenditure. It curtails the flexibility of individual States to carry out their responsibilities differently from other States and to cater to their own residents' different preferences.

All of that can be accepted. But it cannot now be remedied by returning the exercise of extensive revenue powers to the States for two related reasons. First, there is a single national economy. Secondly, Australians rightly expect equal or, at least, equitable access to government services throughout Australia.

A future for the federation

A regression into 19th century's conceptions of State sovereignty is not necessary in order to entrench the principle of subsidiarity and to capture the benefits a federation can deliver.

Twomey and Withers have argued that, where responsibilities are shared, the appropriate approach is to allocate clear roles and manage shared responsibilities. In *Money and Power and Pork Barrelling – Expenditure of public money without Parliamentary authorisation*, Anne Twomey concluded:

> Governments often bleat about the need for budget savings and the improvement of productivity. One simple way of achieving this within the public sector would be for the Commonwealth to stop spending public money on matters beyond its areas of constitutional responsibility in an attempt to buy public favour and instead transfer this surplus public money to the States so that they can fulfil their responsibilities in a more efficient and effective manner.

In 2002, Garnaut and FitzGerald were commissioned by New South Wales, Western Australia and Victoria to prepare a report on the Horizontal Fiscal Equalisation formula. They criticised it as inefficient and recommended that it be abandoned. In its stead the authors proposed equal per capita distribution of grants including an amount for the minimum cost of State government. The States were to receive broad pooled funding for health and education with no micro-management or input control from the Commonwealth. The funds supporting the program were to be distributed on the basis of demographic based demand but no other factor. That is, the capacity of the States to raise their own revenue was to be ignored. The cost of the new program was $A880 million. The program was to be supervised by a Ministerial Council. Under the proposal the Commonwealth was to maintain control of indigenous programs.

That proposal is no longer actively supported by any State. It has serious difficulties, not the least of which would be great variations in the standards of health and education services throughout the country because money supplied by the Commonwealth could be supplemented by those States with substantial taxing capacity. The proposal for Commonwealth control of indigenous programs is impractical because the bulk of the services to indigenous communities must still be delivered through mainstream health and education services.

In November 2008 the Council of Australian Governments agreed on the Intergovernmental Agreement of Federal Financial Relations (IGAFFR). That agreement was said to provide a robust foundation for collaboration on policy development and service delivery.

Ultimately, the principles behind that agreement were not honoured by the Commonwealth or the States or territories. The States saw the execution of the agreement as a shift towards coercive federalism.

The reform of intergovernmental relations is again on the national political agenda.

The terms of reference for the 2014 White Paper on Reforming the Federation set out six principles:

- financial and political accountability for performance in delivering outcomes;
- subsidiarity – meaning that responsibility for particular areas should rest with the lowest form of social organisation capable of performing the function effectively;
- national interest considerations;
- equity, efficiency and effectiveness of service delivery;
- durability; and
- fiscal sustainability related to capacity of tax revenue to support expenditure.

Government services can be shared in a number of ways between Australia's governments. At a speech to the National Press Club on 8 July 2015, the Premier of South Australia, the Honourable Jay Weatherill, proposed that States and territories take responsibility for education from birth to the end of secondary schools with the Commonwealth Government taking responsibility thereafter. On the other hand, he proposed that the States and Commonwealth governments should continue to share responsibility for health. He also proposed a national heavy vehicle road user charging system managed by the Commonwealth to replace State-based registration fees and federal-based fuel excise, and that the States take responsibility for affordable housing by a transfer of the funds applied by the Commonwealth for rent allowance and first home owners grants.

Any number of alternative distributions of responsibility for government services may be proposed. Whatever their content, a clear delineation of responsibility is fundamentally important.

Before a thorough investigation and close study of the issues raised in the 2014 White Paper could be completed, what can only be described as a storm of thought bubbles from State and Commonwealth leaders was floated in the long *prodrome* to the 2016 Commonwealth election.

Reform of the federation will not be achieved by the political class alone. Civil society, business leaders, senior public servants, organisations such as The Samuel Griffith Society, and many others have a large part to play.

Some forecasting

I will conclude by trying my hand at forecasting, relying on the strands of constitutional authority, economic development and governmental fiscal positions that I have touched on.

It appears to me that sustainable economic development and management is even more obviously the proper province of the national government than defence. Indeed, it is only the global failure of the world economy that is ever likely to lead to a real defence crisis.

Economic management includes, obviously enough, the regulations of corporations, trade practices, securities, trading and banking. It extends to employment and macro-environmental regulation. Taxation is as much a lever for economic regulation as it is for revenue collection. For that reason the vast bulk of direct and indirect taxation is most efficiently levied, managed and collected nationally.

History is against any proposal to return income taxing powers to the States. Differential taxation rates will allow much room for evasion. For example, how is a place of residence or income generation to be determined? It would distort the national economy and, in any event, would not sufficiently disentangle the joint responsibility for the provision of government services which is the cause of considerable difficulty at the moment.

Minor taxes, such as gambling taxes, may well remain local because of the close connection between gambling and the localised problems gambling leads to.

There will continue to be pressure to reduce stamp duties on land transfers. Stamp duty impedes commercial development. It is an uncertain tax base which is affected greatly by economic downturn. There is good reason to doubt that State or territory governments will ever have the political courage to implement it. The fiscal pressures on all levels of government are, however, likely to sweep political concerns aside. Broad-based land taxes are an efficient and more certain tax base for States. A gradual introduction may well be necessary. Indeed, the process has arguably commenced surreptitiously in South Australia, at least, with the imposition of the Emergency Services Levy and the more recent Council Waste Levy.

The high degree of vertical fiscal imbalance in the Australian federation need not, in itself, be an obstacle to greater governmental efficiency at least if the States are not totally dependent on Commonwealth revenue. For so long as a State must collect the marginal revenue needed to fund its services, the State is politically responsible for the efficient use of that revenue. There must at the same time, however, be a reasonable degree of certainty and equity between the States in the grants provided by the Commonwealth, and a clear delineation of their respective areas of *de facto* responsibility. States can then be judged on their performance on the basis of the degree of marginal taxation they impose to derive the extra revenue they need and on the scope and quality of the services they provide.

Vertical fiscal imbalance is a greater problem than it need be because of the politically charged negotiations which drive an eternal cycle of deal-making and deal-breaking. Whilst horizontal fiscal equalisation allocation continues to be contestable in the political arena, the State, Commonwealth and territory governments can each scapegoat the other for political purposes. The dishonouring of agreements may have its source in the party politics of the governments concerned or because of unexpected, or insufficiently planned for changes, in the underlying economy which affect taxation revenues.

It is here that Australia's governments have failed the Federation. They have failed to strike robust agreements which demand adherence. Their agreements are not sufficiently documented to allow the defaulting government to be clearly enough identified and for political consequences to follow.

If this is to be achieved, intergovernmental institutional change is required. States must collaborate in ways which recognise the necessity of both transfers from the Commonwealth and the reasonably uniform provision of equitable standards of government service delivery throughout the country.

In my view, the Council of Australian Governments could play a strong extra-constitutional role in the Federation. It would need to be strengthened by the establishment of a joint Commonwealth, State and territory budgetary office to provide independent objective advice on funding arrangements. It would advise on appropriate adjustments to agreements over time, depending on changing economic circumstances. That agency must, of course, not be a

duplication of existing bureaucracy and will necessarily rely on data and information from State and federal agencies, and the Reserve Bank, to formulate its advice. It could be constituted by seconded Commonwealth and State Treasury officers and permanent staff. It could incorporate the Commonwealth Parliamentary Budget Office. Its work would necessarily include reports on the efficiencies with which all grant funded services are delivered.

The subsidiarity principle should continue to govern the delivery of services. The advantages of State control, where accountability is more immediate, and promotes greater responsiveness, seem obvious.

The starting point for the delivery of government services in the primary areas of health, education and aged care should be a political and economic decision about the standard of services to which Australians are entitled. Benchmark costings can be established for the delivery of those services, taking into account geographic and demographic factors.

Both State and Commonwealth money available for that purpose should be pooled in accordance with an agreed ratio. More efficient States will provide better service levels or a greater range of services demanded by their residents. Alternatively, those States will have surpluses to redistribute to other areas of need or to construction.

The benefits of a properly functioning federation are not limited to service delivery.

Policy formation and service innovation are best informed by practice. The States should not abdicate those fields to the Commonwealth. Collaboration and interstate co-operation to formulate policy and identify best practice would remove unnecessary, idiosyncratic and inefficient differences.

Conclusion

There is good reason to doubt the capacity of Australia's political class to make the Federation work. There is no point in despondent inaction, however. Ideological crusades are unlikely to achieve much more success in politics and government requires a careful study of the facts on the ground, sound planning and intense pragmatism.

It is that approach that Australian electors should demand of their governments. There is no need to change the constitutional foundations of the Federation to make it work.

Endnotes

1. R. T. E. Latham, *The Law and the Commonwealth*, 1949, 563-4.

Chapter 5

Is Legislative Supremacy Under Threat?
Statutory Interpretation, Legislative Intention, and Common Law Principles

Jeffrey Goldsworthy

The relationship between statute law and common law

Our legal system consists mainly of two different kinds of law – statute law, which is enacted by our Parliaments, and common law, which has been developed over centuries by the judges in deciding cases. Australia has a Constitution, which is superior to both, but my address is not directly concerned with it. My topic is the relationship between statute law and the common law, which is a crucial aspect of the relationship between Parliaments and the judiciary.

The orthodox view is that statute law is supreme and prevails over the common law: Parliaments can change even common law principles deemed "fundamental". This is crucial to the principle of parliamentary sovereignty or supremacy.[1] But the relationship is complicated because statutes are interpreted by the judges according to interpretive principles that the judges themselves have developed; in other words, the meaning of a statute depends on the application of these judge-made, common law principles.

The question I want to raise is the extent to which that enables the judges to regulate and perhaps even limit the exercise by Parliaments of their law-making power. Of particular concern are some modern ideas about statutory interpretation that, if taken further, may pose a threat to the principle of legislative supremacy. I do not accuse judges who are attracted to these ideas of plotting to undermine that principle, but I do want to warn that it may be at stake.

Interpreting statutes according to common law principles

In the late 19th century, Professor A. V. Dicey of Oxford University wrote what became a hugely influential classic on the British Constitution, in which he upheld the doctrine of parliamentary sovereignty including the supremacy of statute law over the common law.[2] But he also acknowledged that, in practice, the meanings of statutes are to some extent controlled by the judges:

> Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself . . . to the Houses of Parliament, if the Houses were called upon to interpret their own enactments.[3]

In other words, the judges used their power of interpretation to protect cherished common law principles from statutory change. Lord Devlin, a member of Britain's highest court in the 1960s, described 19th century judges as sometimes being "obstructive", by giving statutory words "the narrowest possible construction, even to the point of pedantry", in order to protect

> a Victorian Bill of Rights, favouring . . . the liberty of the individual, the freedom of

> contract and the sacredness of property, and which was highly suspicious of taxation. If the Act interfered with these notions, the judges tended . . . to assume that it could not mean what it said . . .[4]

The usual method of doing so was to "presume" that Parliament did not intend to infringe common law principles, and to allow that presumption to be rebutted only by language of irresistible clarity. Parliament would be tripped up unless it dotted every "i" and crossed every "t" – and even that might not be enough. As we will see, that approach to statutes is arguably being revived today, although the principles that the judiciary protects have changed.[5]

It is right and proper that statutes be interpreted by the judiciary when there is any dispute about their meaning. According to the principle of the separation of powers, while the law-maker has power to make the law, an independent judiciary must have the power to interpret and apply it. It would be dangerous if the law-maker were also the law-applier. The law-maker is not necessarily the best interpreter of its own laws: for example, it may confuse what it did enact with what it intended to enact, or with what it would have intended had it thought more carefully about the issues. And those subject to the law should be able to rely with confidence on the law that the law-maker did enact, even if the law turns out not to operate quite as the law-maker would have wanted. Judges therefore do not necessarily flout the supremacy of statute law merely by "constru[ing] statutory exceptions to common law principles in a mode which would not commend itself . . . to the Houses of Parliament, if the Houses were called upon to interpret their own enactments."[6]

On the other hand, the power of judges to interpret statutes should not be used to rewrite them. This is partly for the same reasons. First, the separation of powers: the judges' function is faithfully to interpret and apply statutes made by others, and not to usurp their law-making authority by rewriting statutes. This is especially the case in a democracy.

Secondly, members of the public and their legal advisers should be able to rely with confidence on the statute that was enacted, and not be vulnerable to unpredictable judicial revisions.

Statutory interpretation, legislative intention, and legislative supremacy

Whether or not a particular statute is somewhat deficient in communicating Parliament's intentions and objectives, they are relevant and even indispensable to the interpretation of statutes.[7] This is because the enactment of a law is an act of communication by the law-maker to those who are subject to it. This act of communication employs a natural, human language; it is governed by the same principles, and is subject to the same pitfalls, involved in ordinary language usage. One of those principles is that the meaning of what we communicate to one another is determined not only by the very bare or sparse literal meanings of the words we use, but by contextual information that helps to flesh out the much richer meaning that we intend to communicate.[8] In doing so, context helps resolve ambiguities and vagueness, fills in gaps or ellipses, and reveals implicit assumptions and other implications. Without recourse to that rich, contextual information, it would be much harder for us to communicate with one another successfully.[9] The same goes for Parliament's attempts to communicate by enacting statutes.

This is why, for at least six centuries, common law courts have maintained that the primary object of statutory interpretation is "to give effect to the intention of the [law-maker] as that

intention is to be gathered from the language employed having regard to the context in connection with which it is employed."[10] This has often been described as "the only rule", "the paramount rule", "the cardinal rule" or "the fundamental rule" of interpretation."[11] The former Chief Justice of the High Court of Australia, Murray Gleeson, said that "[j]udicial exposition of the meaning of a statutory text is legitimate so long as it is an exercise . . . in discovering the will of Parliament: it is illegitimate when it is an exercise in imposing the will of the judge."[12]

Now, let us return to the question I started with. Statute law is supposed to be supreme over the common law, but its interpretation is governed by common law principles of interpretation. Does this enable judges to regulate or perhaps even control Parliament's exercise of its law-making power? We can now see how this question has traditionally been answered: the fundamental interpretive principle I just mentioned protects the supremacy of Parliament. It is the anchor that prevents the judges from drifting too far from Parliament's communication of its intentions through the text of the statute understood in light of the context of its enactment.

But there are some worrying signs that this fundamental principle is now under threat.

Lacey v Attorney-General of Queensland

Consider an example: a case that went to our High Court in 2011 titled *Lacey v Attorney-General of Queensland*.[13] After the appellant had been sentenced for manslaughter, the Attorney-General appealed to Queensland's Court of Criminal Appeal on the ground that the sentence was "inadequate" or "manifestly inadequate". The Attorney sought a sentence even higher than the Prosecution had originally sought.

Section 669A (1) of the *Criminal Code* (Q) provided that, in determining an appeal by the Attorney-General against a sentence, the Court of Appeal "may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper". The question was whether this really meant what it said – whether the Court did have an "unfettered discretion". Justice Heydon, in a lone but powerful dissent, said it did, but the majority of six Justices held (in effect) that it did not.[14]

The majority explained at length the long history of a strong judicial preference for Crown appeals against sentences to be exceptional rather than routine, requiring demonstration that the trial judge made a clear error in applying established sentencing principles.[15] Appellate courts should not be able to impose a different sentence merely because they take a different view of the appropriate balance to be struck among the many relevant factors. That would open the floodgates to such appeals and reduce the "finality" of sentencing.[16] Instead of the appellate court maintaining and clarifying general principles, it would "plant a wilderness of single instances with more instances of its own choosing."[17] It would also create a kind of "double jeopardy", enabling the Crown to seek a "second bite of the cherry" by arguing for a higher sentence even than the one it had originally sought.[18]

The majority said that this would be contrary to "deep-rooted notions of fairness and decency", and also "infringe upon fundamental common law principles, rights and freedoms."[19] Consequently,

> common law principles of interpretation would not, unless clear language required it, prefer a construction which provides for an increase of the sentence without the need to show error by the primary judge.[20]

Justice Heydon considered that the statute's words, "unfettered discretion [to] vary the sentence and impose such sentence as to the Court seems proper", amounted to clear language.[21] But the majority interpreted the provision as allowing the Court of Appeal to impose a different sentence only if it first found that the trial judge had made an error in applying sentencing principles.

It seems to me that the majority are right as a matter of sound public policy. But Heydon J, in his dissent, showed that the provision was based on the opposite view of public policy. He outlined the history behind the provision. It had for thirty years – from 1942 until 1973 – been interpreted as conferring an unlimited judicial discretion, even though it did not then include the word "unfettered".[22] But, in 1973, the Court of Appeal held that the provision should be interpreted differently, so that legal error by the trial judge had to be shown.[23] Two years later, in order to restore the previous position, the Queensland Parliament added the word "unfettered" to the provision. When the legislation was discussed in Parliament at the committee stage, the Minister of Justice said this:

> For approximately 30 years, until a court decision in 1973, the Court of Criminal Appeal acted on the principle that the Court had an unfettered discretion and was not bound to inquire whether the trial judge was manifestly wrong in his sentence. The Court simply had to determine what was the proper sentence in the circumstances. The effect of the decision in 1973 was that the Court of Criminal Appeal does not have an unfettered discretion and the Attorney-General now has to prove that the sentence was manifestly inadequate. It is proposed to make it clear that the Court of Criminal Appeal does have an unfettered discretion and has therefore to determine what was the proper sentence in the circumstances.[24]

The Minister later said much the same thing in his Second Reading Speech, when he also mentioned that the legal profession was opposed to the amendment.[25]

How did the majority of the High Court deal with this very clear evidence of legislative intention (the statute was, after all, sponsored by a government with a majority in a unicameral legislature)? First, they said that the Minister's statements in Parliament were of little relevance. The statements showed what the Minister intended, but

> The Minister's words . . . cannot be substituted for the text of the law, particularly where the Minister's intention, not expressed in the law, affects the liberty of the subject.[26]

Secondly, they suggested that the very idea of legislative intention is a fiction:

> it is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.[27]

The majority said much the same thing about the idea of legislative purpose.[28] In other words, Parliaments do not really have intentions or purposes. Legislative intentions and purposes are in effect constructed by the judges themselves, by applying interpretive principles including common law principles. As one of the majority judges said in a later case, what matters is *not* "the

intention (expressed or unexpressed) of those who propounded or drafted the Act", but "the reach and operation of the law . . . as . . . ascertained by the conventional processes of statutory interpretation."[29] " 'Intention' is a *conclusion* reached about the proper construction of the law in question *and nothing more*."[30] So legislative intention is not something that was in the minds of the law-makers that the judges try to *discover* ; it is, instead, something the judges *construct* by applying to the statutory text principles – including common law principles – of interpretation.

Having sidelined the powerful evidence, and even the very concept, of legislative intention, the majority focused on the words of the statute, and held that in this statutory context the meaning of the word, "appeal", meant an appeal against an error of legal principle.[31] But that rings hollow, given that as a matter of historical fact the word "appeal" had not had that meaning in this statutory context in Queensland from 1942 until 1973.[32] Moreover, as Justice Heydon pointed out, the interpretation the majority gave to the 1975 amendment – which added the word "unfettered" to the provision – entailed that the amendment achieved nothing. The 1973 court ruling, which the amendment was clearly designed to reverse, remained in place and unaffected.[33]

The "principle of legality"

Importantly, the common law principles that led to this result include what is now called "the principle of legality,"[34] which is the modern label for an expanded version of the interpretive principle I mentioned earlier – that Parliament is presumed not to intend to interfere with established common law principles and freedoms.[35] In the *Lacey* case, the majority put the point more strongly: the common law "imputes" to the legislature an intention *not* to interfere with those principles and freedoms.[36] Moreover, the principle of legality has been expanded to cover what the judges regard as "fundamental rights". Consequently, it is now often described as a constitutional principle – one the judges have created – because it provides some protection of fundamental rights and legal principles from legislative interference.[37]

The traditional justification for this interpretive principle – if not always its application – was entirely consistent with legislative supremacy, because its express aim was respect for presumed legislative intentions.[38] As the High Court said in 1990, "[t]he rationale . . . lies in the assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear."[39]

But there is a growing tendency to dismiss this traditional justification as an artificial rationalisation or polite fiction. Sir Anthony Mason, Chief Justice of the High Court, 1987-95, once referred to the "evident fictional character" of strong interpretive presumptions, because "they do not reflect actual legislative intent."[40] It has been claimed that these presumptions "no longer [have] anything to do with the intent of the Legislature; they are a means of controlling that intent."[41] In reality, it has been said, the courts stubbornly protect fundamental common law values from legislative interference, while acknowledging political constraints on their ability to do so.[42] Consequently, the presumptions "can be viewed as the courts' efforts to provide, in effect, a common law Bill of Rights — a protection for the civil liberties of the individual against invasion by the state."[43] *Déjà vu*, given what Lord Devlin said about 19th century judges protecting a Victorian Bill of Rights.[44]

Do Australian judges still regard the principle of legality as resting on a sincere presumption that Parliament is unlikely to intend to infringe fundamental or common law rights and principles? Or – perhaps because they regard the very concept of legislative intention as a fiction – do they

believe it is really an attempt to protect a "common law bill of rights"? If the latter, then the judges have brought in a bill of rights through the back door, so to speak – or are in the process of doing so – without anyone except lawyers noticing.

There is evidence that our judges disagree about this. In a very recent case in the High Court, [45] three judges described the traditional justification for the principle of legality – in terms of presumptions of legislative intention – as its "longstanding rationale". But then they added this quotation from a leading British academic:

> The traditional civil and political liberties . . . have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction.[46]

By approving this statement, these judges suggest that because of the intrinsic importance of certain liberties, the principle of legality can be used to protect us from legislation that judges consider to be unwise or ill-considered. But, in the same case, Justice Gageler expressly disagreed, observing that "[t]he principle [of legality] provides no licence for a court to adjust the meaning of a legislative restriction on liberty which the court might think to be unwise or ill-considered."[47]

The principle of legality now arises frequently in litigation requiring the interpretation of statutes. No doubt this disagreement will be the subject of further judicial consideration and discussion in the near future.

Summary and conclusion

To summarise my concerns, our Parliaments' authority to make laws may be undermined by some combination of the following ideas about statutory interpretation (which I do not attribute to any particular judge):

(1) That the meaning of a statute depends (partly) on common law principles of interpretation, which the judges can change;
(2) That the very idea of Parliament having an intention – other than merely to enact a bare text – is a fiction; and
(3) That the purpose of the principle of legality must be to protect rights, rather than fidelity to Parliaments' (non-existent) intentions.

As for the first idea, it is true that statutory interpretation depends partly on common law principles, and that common law principles can be changed by the judges. But great caution is needed. There is a crucial difference between principles of statutory interpretation, and ordinary common law rules and principles governing the law of property, contracts, torts and so on. No-one believes that the latter are static; the judges have acknowledged authority to continue to develop them, as circumstances change, in the interests of justice and the public interest.

By contrast, principles of statutory interpretation concern the interpretation of laws, made by elected Parliaments possessing superior law-making authority, that the judges are not permitted to change (subject to some narrow exceptions). It follows that the judges do not possess the same relatively unfettered authority to change these interpretive principles according to their own assessment of justice and the public interest. While there is some scope for modification, the judges must not usurp or subvert the authority of Parliaments.[48] As Sir Gerard Brennan, Chief Justice of the High Court, 1995-98, put it:

> The authority of the courts to change the common law rules of statutory construction must . . . be extremely limited for the courts are duty bound to the legislature to give effect to the words of the legislature according to the rules which the courts themselves have prescribed for the communication of the legislature's intentions.[49]

But that brings us to the second idea: that legislative intentions do not really exist. If that were so, then Parliaments could only enact bare texts, with very sparse literal meanings, prone to ambiguity, vagueness and gaps, and shorn of presuppositions and other implications. This would drastically diminish a Parliament's ability to communicate successfully, and give rise to countless interpretive problems that, if there is no underlying intention, would have to be resolved by judicial creativity. Recall Chief Justice Gleeson's statement, quoted earlier, that statutory interpretation "is legitimate so long as it is an exercise . . . in discovering the will of Parliament: it is illegitimate when it is an exercise in imposing the will of the judge."[50] But if there is no such thing as "the will of Parliament" – if there is only a bare text – then there is no alternative to interpretive problems being resolved by the will of the judges, even if they do so through the medium of common law interpretive principles.

That leads to the third idea. If legislative intentions do not really exist, it would make no sense for the "principle of legality" to be based on genuine presumptions of legislative intention. It would become simply a way of protecting rights in the absence of a properly enacted Bill of Rights – rights chosen as worthy of protection by the judges themselves. Parliaments would be able to qualify such a right, but they would have to anticipate the potential judicial obstacle and take great pains to do so with irresistible clarity.

Moreover, if judges were to adjust the apparent meaning of legislation to accommodate common law rights they themselves have developed, regardless of Parliament's intentions, they would become co-authors of the laws resulting from their interpretations. Parliaments would no longer be the sole author of the statutes they enact; no matter what words they use, their meaning would be determined partly by values preferred by the judges. This is applauded by opponents of legislative supremacy, who claim that the meaning of any statute is "the joint responsibility of Parliament and the courts"[51] acting in a "collaborative enterprise".[52]

To a limited extent this is true: appellate courts often necessarily do contribute to the meanings of statutes. When, as is all too common, a statute is ambiguous or vague on some crucial point, judges may be forced to fill the gap in order to decide a case before them. But, in doing so, they are supposed to act as Parliament's faithful agents, seeking to implement its objectives. If they do not, and *a fortiori* if they modify clearly intended meanings that are not ambiguous or vague, then they become joint law-makers rather than faithful agents. Parliament then merely provides raw material, in the form of a text, which the judges refashion according to their own value judgments in order to produce the law.[53] It is difficult to see how that could be reconciled with the fundamental principle that it is Parliament – and not the courts – that has the authority to make statute law.

In conclusion, let me caution against exaggerating these dangers. There is no reason to be alarmist. I do not believe that our judges are intent on staging some kind of constitutional revolution. They do not all accept the ideas about statutory interpretation that I have criticised. They are well aware of and almost always respect the constitutional principle of legislative

supremacy in law-making. But I do want to caution them, and others, that these ideas may pose a threat to that principle, and should therefore be very carefully scrutinised.

Endnotes

1. See J. Goldsworthy, "The Constitutional Protection of Rights in Australia", in G.J. Craven (ed.), *Australian Federation, Towards the Second Century*, Melbourne University Press, 1992, 151.

2. A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed., E.C.S. Wade (editor), Macmillan, 1967.

3. Ibid., 413-14.

4. Lord Devlin, "Judges and Lawmakers" (1976) 39 *Modern Law Review* 1, 13-14, quoted in Chief Justice Murray Gleeson, "The meaning of legislation: context, purpose and respect for fundamental rights" (2009) 20 *Public Law Review* 26, 34.

5. See text to n. 42 below.

6. See text to n. 3, above.

7. See R. Ekins and J. Goldsworthy, "The Reality and Indispensability of Legislative Intentions" (2014) 36 *Sydney Law Rev* 39.

8. See R. Ekins, *The Nature of Legislative Intent*, Oxford, Oxford University Press, 2012, ch. 7.

9. Ibid. See also J. Goldsworthy, *Parliamentary Sovereignty, Contemporary Debates*, Cambridge, Cambridge University Press, 2010, 236-43.

10. Maxwell, *On the Interpretation of Statutes*, W Maxwell & Son, London, 1875, 1.

11. Respectively, *Sussex Peerage Case* (1844) 8 ER 1034 at 1057 (Tindall CJ); *Attorney-General (Canada) v. Hallet & Carey Ltd.* [1952] AC 427 (Lord Diplock); *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161 per Higgins J.

12. The Hon Murray Gleeson, "The meaning of legislation: Context, purpose and respect for fundamental rights" (2009) 20 *Public Law Review* 26, 27.

13. (2011) 242 CLR 573.

14. French, CJ, Gummow, Hayne, Crennan, Kiefel and Bell, JJ.

15. (2011) 242 CLR 573, 578-84 [8]-[24].

16. Ibid., 583 [20]; for mention of the "floodgates" argument, see Heydon J at 603 [78].

17. Ibid., 596 [55].

18. Ibid., 581 [15] and 582-83 [17]-[19].

19. Ibid., 582 [17] and 584 [20] respectively.

20. Ibid., 583 [20].

21. Ibid., 603 [79].

22. Ibid., 602 [76].

23. *R v Liekefett; Ex parte Attorney-General (Qld)* [1973] Qd R 355.

24. Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 April 1975 at 834-835, quoted by Heydon, J. in *Lacey*, op cit., 606 [92].

25. Ibid., 586 [30].

26. Ibid., 598 [61].

27. Ibid., 592 [43].

28. Ibid., 592 [44].

29. *Momcilovic v The Queen* (2011) 245 CLR 1, 136 [327] and 134 [315] respectively (Hayne J).

30. Ibid., 141 [341] (emphases added) (Hayne J).

31. Ibid., 596-98 [56] – [60] (Hayne J).

32. See n 22, above.

33. Ibid., Heydon J at 604 [81].

34. Discussed at ibid, 582 [17], 583 [20] and 592 [43].

35. See text following n 4, above.

36. *Lacey*, op. cit., at 598 [61].

37. *Monis v R* (2013) 249 CLR 92, 128 [60] (French CJ). See also R. French, "Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons", Speech delivered at the Anglo-Australasian Lawyers Society and Constitutional and Administrative Law Bar Association, London, 5 July 2012, 22, available at: http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj05july12.pdf

38. See J. Goldsworthy, "The 'Principle of Legality' and Legislative Intention", in M. Groves and D. Meagher (eds), *The Principle of Legality in Australia and New Zealand*, Federation Press, Sydney, forthcoming.

39. *Bropho v Western Australia* (1990) 171 CLR 1, 18.

40. Sir Anthony Mason, *Commentary*, (2002) 27 *Australian Journal of Legal Philosophy* 172, 175 (2002).

41. Luc Tremblay, "Section 7 of the Charter: Substantive Due Process", 18 U.B.C. L. REV. 201, 242 (1984). *See also* Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act*, Oxford University Press, Oxford, 2009), 335.

42. John Burrows, "The Changing Approach to the Interpretation of Statutes", 33 *Victoria University Wellington Law Review* 981, 982-83, 990-95, 997-98 (2002).

43. D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia*, 7th ed., 2011, 168, [5.2].

44. See text to n 4, above.

45. *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 90 ALJR 38 (French, CJ, Kiefel and Bell JJ)*.

46. Ibid., 47 [11], quoting T.R.S. Allan, "The Common Law as Constitution: Fundamental Rights and First Principles", in Cheryl Saunders, (ed.), *Courts of Final Jurisdiction: The Mason Court in Australia*, Federation Press, 1996, 146, 148.

47. *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 90 ALJR 38, 61 [81].

48. See J. Goldsworthy, "The Constitution and Its Common Law Background" (2014) 25 *Public Law Review* 265, 270-71.

49. *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 322.

50. The Hon Murray Gleeson, "The meaning of legislation: Context, purpose and respect for fundamental rights" (2009) 20 *Public Law Review* 26, 27.

51. T.R.S. Allan, "Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority" (2004) *Cambridge Law Journal* 685, 689 n 13.

52. P.A.S. Joseph, "Parliament, the Courts and the Collaborative Enterprise" (2004) 15 *King's College Law Journal* 321.

53. R. Ekins, "The Relevance of the Rule of Recognition" (2006) 31 *Australian Journal of Legal Philosophy* 95, 100.

Chapter 6

Originalism in Australia

Lael K. Weis

I have been asked to speak about an article I published a few years ago about "originalism", those theories of constitutional interpretation which hold that the text of a written constitution means what it meant at the time of the framing. In that article, I compared the practice of originalism in Australia to the practice of originalism in the United States.[1] I argued that the most plausible defence of originalism as a theory of constitutional interpretation is grounded in a particular understanding of constitutionalism: an understanding that accurately describes Australia but that does not accurately describe the United States. I am delighted to revisit these ideas, and to explore them in this address.

Part of the aim of the article was to correct a common misapprehension: namely, the idea that originalism is a distinctively American theory of constitutional interpretation. American constitutional law scholars often claim – and it has been widely assumed by legal scholars elsewhere – that originalism is a distinctively American invention.[2] I think that this claim is incorrect, or at least overstated.

So the question I posed then, and the question I pose in this address, is this: what do we learn once we appreciate that originalism is not an American invention? How does our understanding of originalism as theory of constitutional interpretation change once we appreciate that, in many respects, originalism has a more mainstream place in Australia than it does in the United States?

My claim is that appreciating the place of originalism in Australian constitutional practice helps us see that the best defence of originalism is not based on guarding against judicial activism or based on an appeal to popular sentiments about the founding. The best defence is rather based on factors that go to the type of constitution being interpreted. Here is the punchline: the more plausible it is to think of the Constitution as (nothing more than) a legal text – a text with highly specialised terms designed for legal experts and not for laypersons – the stronger the case for originalism. And in Australia I think that we have a constitution that is more like that than the Constitution of the United States.

Preliminaries: what is "originalism"?

Before I set out my argument, I first need to explain what I mean by "originalism". Broadly speaking, originalism is a theory of constitutional interpretation holding that a written constitution must be interpreted in light of the original understanding of the words contained in its text. There are, however, many different ways to be an originalist. I focus on what I take to be the most mainstream variety of originalism, which is often referred to as "textualist originalism".

There are three core elements of "textualist originalism". I will briefly sketch these out in order to be clear about the kind of view that we are talking about:

1. ***Textualism:*** textualist originalists are committed to the view that a written law is nothing more than its text, including presumptions and implications that follow from text and

structure. So the kind of originalist view that we are talking about relies predominantly on ordinary methods of statutory interpretation to discern the meaning of constitutional provisions. Text and structure are always the starting point.

2. ***Anti-intentionalism*:** textualist originalists are committed to the view that the relevant source of a law's meaning is the public meaning of the text at the time of its enactment. So the kind of originalist view that we are talking about is *not* interested in the subjective intentions or expectations of the drafters. What the framers predicted or hoped for the future is irrelevant.
3. ***Semantic fixation*:** textualist originalists are committed to the view that the language used in a written law continues to mean what it meant at the time of enactment.[3] So the kind of originalist view that we are talking about is opposed to "living constitutionalism". That is, originalists *reject* the view that the meaning of provisions can evolve over time in response to contemporary, popular understandings of constitutional provisions.

From now on, when I refer to "originalism", I am referring specifically to a view of this kind.

The Place of Originalism in Australian and American Constitutional Practice

Originalism in Australia

Originalism, as I have just described it, is an interpretive theory that will be familiar to anyone who is familiar with Australian constitutional practice. It is familiar because it offers a fairly accurate description of the orthodox approach to constitutional interpretation that has long been used by the High Court – as I think Professor Jeffrey Goldsworthy has convincingly argued in his work.[4] That approach is more commonly labelled "legalism" but, whether we call it "legalism", "textualism" or even "formalism", we are essentially talking about the view that I have just described: "originalism".

Indeed – speaking now as someone who had to learn Australian constitutional law as a second language – the highly "originalist" character of the High Court's approach to constitutional interpretation is something that is immediately striking. Despite the evident *popularity* of originalism in the United States – in the sense that originalism is widely discussed and debated by American academics, jurists, politicians, and members of the public alike – originalism does not describe the predominant approach to constitutional interpretation used by the Supreme Court of the United States. In the United States, originalism has only ever had the support of a few Supreme Court justices, the most famous being the late Justice Antonin Scalia (the Court's greatest *dissenting* voice).

Originalism occupies a much more mainstream place in Australian constitutional practice. It is true that the strength of the High Court's commitment to originalism has waxed and waned over the course of Australia's constitutional history, and that it has varied among different judges on the Court. Nevertheless, I think it is fair to say that originalism (in the "textualist" sense that we are interested in here) has more or less continuously defined the High Court's approach to constitutional interpretation since the early 1900s. As Justice McHugh once observed, "[p]robably most Australian judges have been in substance what Scalia J of the United States Supreme Court once called himself – a faint-hearted originalist."[5]

Originalism in the United States

Despite the fact that originalism is a well-established method of constitutional interpretation that has a very long history in Australia, a common assumption is that originalism has its most natural home in the United States. I think that this assumption is wrong. The unique features of American constitutionalism that have shaped the way that originalism is debated and understood in the United States do not provide the basis for a very good defence of the view. In fact, they tend to undermine it. To explain why, I first need to say what those features are.

The first feature that makes the American reception of originalism unique has to do with the significant role that the founding moment plays in popular constitutional culture. As anyone who follows American political debates knows, the founding and the framers figure prominently in American public life. For instance, the most popular show on Broadway at the moment is *Hamilton*, a musical about none other than the American founding father, Alexander Hamilton. This is a significant point of contrast with Australian constitutional culture. I suspect few will disagree that it is highly unlikely that we will see *Samuel Griffith: The Musical* popping up at the Sydney Opera House anytime soon!

What is the significance of this observation for the place of originalism in American constitutional practice? The role of the founding fathers in popular culture in the United States means that there is a kind of natural link between the appeal to original understanding as a source of constitutional meaning and popular constitutionalism. Appealing to the views of the founders has traction precisely because Americans agree that the founding moment was special and that the founders are worthy of respect.

The second feature of American constitutionalism that makes the American reception of originalism unique has to do with the US Constitution's vague and morally-loaded rights provisions. Many of these provisions are cast in wide terms and use non-technical language that appeals to the opinions and moral sentiments of laypersons. Consider, for instance, the Eighth Amendment's prohibition on "cruel and unusual punishment". Moreover, the interpretation of these rights provisions has been a continuing battleground within the "culture wars" in the United States. Many have argued that as a society's values change over time, so, too, should the interpretation given to rights provisions – particularly so where they are cast in laypersons' language.

Again, what are the implications for the place of originalism in American constitutional practice? These continuing debates about the interpretation of constitutional rights mean that American originalism is reactionary in a way that Australian originalism is not. Originalism in the United States first emerged as a critique of the US Supreme Court's progressive rights jurisprudence,[6] and it continues to exist primarily as a counter-narrative to interpretations of constitutional rights that appeal to contemporary social values.

I draw attention to these two features of American constitutionalism because they help us to appreciate how originalism has been understood and debated in the United States. The trouble, however, is that these reasons for the popularity of originalism in the United States have often been mistaken for a defence of the view. But, although popular reverence for the founding fathers and concerns about judicial restraint in interpreting vague and morally-loaded rights provisions explain why originalism is attractive to Americans, they do not offer a particularly compelling justification for originalism as a theory of constitutional interpretation. In fact, I think they have worked against it.

My suggestion is that examining the place of originalism in Australian constitutional practice makes better sense of the view's underlying logic and justification as an interpretive theory, precisely because Australian constitutionalism lacks these two features. To see why, let us examine how originalism is defended.

Defending Originalism

Judicial Restraint vs Constitutional Formalism

The basic challenge for originalists in defending their view has to do with explaining the authority of original meaning. Why should understandings of a constitution at the time of its drafting be binding in the present day?

American constitutional practice makes it appear as though originalism is best defended as a remedy for judicial activism. In the American context, originalism is overwhelmingly presented both by its defenders and by its critics as concerned with preventing judges from giving effect to contemporary social values when they interpret rights provisions, something that is said simply to disguise a judge's insertion of her own preferences and moral views. Originalism is said to prevent judges from doing this by requiring them to give effect to the original meaning of the text.

But the problem with the judicial restraint-based defence of originalism is that how good a defence it is turns on how well originalism actually *does* restrain judges in practice. The concern is that there is no good reason to think that original meaning is any less susceptible to manipulation than other sources of constitutional meaning – originalism can be practised well, or it can be practised poorly. Here critics argue that originalism is subject to the same kinds of objections raised against consulting Hansard materials when interpreting legislation: for example, the worry about simply "cherry-picking" views that support one's own. Critics point to cases where judges applying originalist approaches reach opposite conclusions. *District of Columbia v. Heller* – the 2008 American case interpreting the Second Amendment – is a good example of this.[7] Both the majority and dissenting judgments were robustly originalist, and yet they reached opposite conclusions on whether the Second Amendment supports an individual right to bear arms.

Although originalists have responses to this set of criticisms, they are not fully satisfying. But examining those responses need not detain us here because there is a far better defence of originalism than the judicial restraint-based defence. This is what I want us to focus on. That alternative and more plausible defence, I suggest, can be found by examining Australian constitutional practice.

The predominant reason why originalism is so well-embedded in Australian constitutional practice has to do with the nature of the Constitution of Australia. Unlike the Constitution of the United States, it is not implausible to think that the Australian Constitution is a text like other legal texts. I call this kind of view, "constitutional formalism". By "constitutional formalism" I just mean the view the written constitution has no other significance for constitutionalism apart from the fact that it is a legal text.

There are a few different variations on this. One might take the view that the Constitution is a statute in all relevant respects – differing from ordinary statutes only in its subject matter and the process of its revision or repeal. Alternatively, one might take the view that the Constitution is a kind of contract – that is, a binding legal agreement that contains the essential terms of the "constitutional bargain".

This kind of characterisation of the Constitution of Australia is widely accepted by scholars and commentators from across the political spectrum. They point to the Constitution's lack of a bill of rights and its emphasis on mundane structural issues. Some lament it,[8] whereas others celebrate it,[9] but either way there is considerable consensus that the Constitution of Australia is first and foremost a pragmatic charter of government. It is plausibly described as a compact between the States or as a special kind of statute, but not as a declaration of the social values and aspirations of the Australian people.

It is not difficult to see why constitutional formalism goes hand-in-hand with originalism. Indeed, once it is accepted that a law *is* (nothing more than) its written text, it is difficult to dismiss original meaning out of hand: all laws have a meaning; a law is what it means; thus, if the meaning of the law changes, the law changes.[10] So constitutional formalism, the view that the constitution is a text like other legal texts, appears to make originalism (at least in a broad sense) uncontroversial. As a consequence, the defence of originalism in Australia is more closely attached to a formalist conception of constitutionalism than it is to concerns about judicial activism (at least as those concerns are typically understood).

This is certainly not to suggest that judicial activism *never* figures in Australian debates about constitutional interpretation. Such a proposition is obviously incorrect. My suggestion is only that judicial activism is not the overriding concern that figures in the defence of originalism. It is true that original meaning has frequently been invoked to criticise rights-like implications, such as the implied freedom of political communication, which sounds in concerns about judicial activism. But original meaning has been at least as frequently invoked as a corrective to an overly rigid "literalism" associated with certain forms of legalism, which as we know has led to an expansion of Commonwealth power not contemplated by the Constitution's framers. Indeed, the High Court's landmark decision in *Cole v Whitfield* to permit the consultation of Convention debates alongside other standard historical sources was a response to perceived failures of overly literal readings.[11]

In both its anti-implication and its anti-literalism strands, then, the common logic of originalism in Australia is not preventing judicial activism *per se* but preserving the constitutional bargain struck between the States at the time of federation. Rights implications are suspect insofar as they upset that bargain. But so, too, are overly literal readings that ignore the terms of the bargain that was struck. This includes narrow, literalist readings of rights provisions. For instance, it has often been suggested that the few express rights guarantees found in the Constitution require a broad construction if so indicated by original understanding.[12]

In the United States, by contrast, it is not very plausible to describe the written constitution in formalist terms. In fact, there is a strong *anti-formalist* understanding of the US Constitution, which has to do both with its contents and with its special status as a founding document. The written constitution is widely understood not simply as a legal text but as a revolutionary historical achievement that symbolises the aspirations of the American people.

Notably, however, there have been attempts to present the Constitution of the United States in a formalist light in order to strengthen the case for originalism. For example, in his extra-judicial writings, Justice Scalia insisted that the US Constitution is not "philosophical" or "aspirational," but rather a "pragmatic and practical charter of government" that consists of concrete and specific provisions.[13] Moreover, Justice Scalia played down the significance of rights, insisting that structural provisions concerning federalism and the separation of powers are the

"real" Constitution. "[I]t is a mistake," he argued, "to think that the Bill of Rights is the defining, or even most important, feature of American democracy."[14]

Leaving aside whether his view of the US Constitution is normatively attractive, as a purely descriptive matter Justice Scalia's formalist characterisation of American constitutionalism can only be described as "revisionary" and "prescriptive". To put it bluntly, his description simply does not hold water with the US Supreme Court's interpretive practices or with the weight of authority.

This leads to the next possible line of defence.

Popular reverence for the founding versus Founding Expertise

The lack of a widely-accepted formalist understanding of the US Constitution means that American scholars have to rely much more heavily on a judicial restraint-based defence of originalism. This makes American originalists more vulnerable to the charge that originalism is an irrational form of "ancestor worship". After all, if original meaning is just as susceptible to judicial manipulation as other sources of constitutional meaning, then why else privilege the views of the founding generation over the views of the people today?

Here American originalists are able to bolster the defence of their view by tapping into the reverence for the founding in popular constitutional culture. No argument is needed to explain why original meaning is entitled to deference because the wisdom of the founding generation is so widely assumed. Originalism has instant popular appeal.

But there are some obvious problems with relying on popular sentiment. For one thing, popular sentiment is fickle: what if "the people" change their minds about the founding generation? Another problem with relying on popular sentiment is that it makes original meaning vulnerable to re-appropriation by living constitutionalists. The reverence for the founding in American popular culture, coupled with a strong anti-formalist view of the written constitution, suggests that it is the inheritance of particular values, ideals, and aspirations that matters and not the firm settlement of norms and principles in a binding legal agreement. In this way, many American scholars have transformed originalism into a form of living constitutionalism, a trend referred to as "living originalism" or as the "new textualism".[15] The ready-made appeal of originalism thus appears to be its undoing.

Here, too, I want to argue, Australian constitutional practice suggests a more promising line of defence. This lies in meeting the "ancestor worship" charge by establishing that the Framers had a special kind of *expertise*. To help tease this out, I think some of Justice Heydon's references to sources of original meaning are apt. In *XYZ v The Commonwealth* his Honour wrote that:

> the meaning of an expression in the Constitution … comprises the meanings which *skilled lawyers and other informed observers* of the federation period would have attributed to it.[16]

Besides "skilled lawyers and other informed observers," his Honour also referred to the debates that "[t]he most distinguished lawyers and political thinkers … attended and participated in,"[17] the views of "prominent writers at the time,"[18] and to "other materials reflective of the views of distinguished lawyers contemporary with the federation period".[19]

The emphasis is clear: the views of the founding generation merit consideration because of their special expertise and *not* because the public esteems the framers or because the founding

plays a role in public deliberation. Indeed, arguments based on popular reverence for the founding are simply non-starters in Australia: there is no such popular constitutional culture here. But why think that the founding generation, way back then, had expertise that warrants our deference here today?

There are two sets of considerations that we might draw upon. First of all, we might consider the nature of the constitution-making project. The framing of a written constitution is very different from ordinary law-making. Ordinary law-making concerns problems that are more concrete and particularistic than that of designing the fundamental framework that defines the state's legitimate exercise of political power. So we might think that the founding generation's commitment to and active engagement in the project of constitution-making means that their views are entitled to deference.

Second, we might consider the personal characteristics and traits of the framers that distinguish them from other constitutional actors. In doing so, we might reach the view that the framers' understanding is entitled to respect because of the special knowledge and unique practical experience that they brought to bear on the set of issues falling within the constitutional law-making project.

Now, the American founding and the Australian founding can both be plausibly described as involving the extraordinary commitment of the founding generation to an extraordinary law-making project. But the second step in the argument, which involves appealing to the special expertise of the founding generation, seems far more plausible in the Australian context than it does in the United States. This, too, goes to the differences between the kinds of constitutions being interpreted.

The Constitution of Australia is famously (some might say "notoriously") a highly technical, legalistic document – particularly so in comparison to its global counterparts. Justice Ronald Sackville once described the Australian Constitution as "inaccessible".[20] His Honour observed that "without legal training (or sometimes with it), even diligent readers may have considerable difficulty relating the text of the document to current political institutions and practices."[21] As such, the Australian Constitution does not readily lend itself to importing popular understandings. Instead, it can plausibly be argued that its interpretation in fact *requires* consulting the expert views of those who drafted it.

In the first place, most constitutional terms are drawn from legal concepts or terms of art. For example, the Constitution grants the Commonwealth power to make laws for "peace, order, and good government" with respect to a list of enumerated subjects. Although the ordinary meaning of that phrase appears to limit the Commonwealth's legislative power, the phrase is a term of art that was used by the Privy Council at the time of federation to refer to a plenary grant of legislative power.[22]

In the second place, because the dominant character of the Constitution is that of a bargain struck between the States, even less technical terms may need to be understood in the context of federation. For example, section 92 states that "trade between the States … shall be absolutely free." Without going into detail, this is an area of law where importing a "layperson's understanding" of the phrase, "absolutely free" – which suggests that there is an individual right to free trade – is widely agreed to have taken jurisprudence in this area off course. The High Court overruled this view in Cole v Whitfield,23 the landmark originalist decision endorsing reference to the Convention debates.

In the United States, by contrast, an expertise-based argument for the authority of original understanding is much harder to defend. Although Justice Scalia claimed that most constitutional interpretation involves terms with technical legal meanings rather than moral meanings, this is a far more plausible characterisation of the Australian Constitution than the US Constitution. As I noted earlier, many of the US Constitution's rights provisions contain morally-loaded language, such as "cruel and unusual", where consulting contemporary social values as a source of meaning seems far more plausible than consulting views held hundreds of years ago. Far from being an "inaccessible" lawyer's document, the US Constitution has been described as offering "a common vocabulary for our common deliberations, and a shared narrative thread".[24]

Thus, even if American originalists can plausibly argue that the founding generation is entitled to deference given the nature of the constitution-making project, they nevertheless face pressure to grapple with the question of why popular understandings do not count in a way that Australian originalists simply do not.

To conclude, I have argued that the logic of originalism is more compelling in the Australian context than it is in the American context for reasons that have to do with the nature of the constitution being interpreted. In Australia, it is far more plausible to describe the Constitution in formalist terms. Thus, in the same way that it makes sense to inquire into the objective understanding of Parliament when interpreting a written statute, a view long-accepted by the High Court, it makes sense to ask the same about the Constitution's drafters. Moreover, the Constitution of Australia is not a constitution "for the people" in any socially profound sense, but a technical legal document. This, too, makes it more plausible to think that the understanding of the founding generation merits deference.

Why, then, have so many people assumed that originalism has its most natural home in the United States? I suggest that this is only because of the attention that originalism has received from American constitutional scholars and members of the American public. There has been a confusion of the popularity of originalism with its soundness as a theory of constitutional interpretation. But once the features of American constitutionalism that account for the popularity of originalism in the United States are stripped away, it is clear that these features do not offer the best defence of the view. To the contrary, I have suggested, they have led to the transformation of the view to suit anti-originalist purposes, such as advent of "living originalism."

Originalism not only has firm footing on Australian turf but the features of the Australian constitutional system that are most at odds with standard (that is, United States-biased) assumptions about what makes originalism an attractive theory of constitutional interpretation – namely, the lack of a bill of rights, and the lack of a popular constitutional culture – in fact allow for a far more plausible defence of the view. For this reason, I say, Americans have overstated their claim to originalism. Originalism may have been popularised in the United States, but its more natural home is here in Australia.

Endnotes

1. Lael K. Weis, "What does comparativism tell us about originalism?" (2013) 11 *International Journal of Constitutional Law* 842.

2. See Jamal Greene, "On the Origins of Originalism" (2009) 88 *Texas Law Review* 1.

3. This terminology is adopted from Lawrence B. Solum, "Semantic Originalism" (2008) *Illinois Public Law Research Paper* No. 07-24 <http://ssrn.com/abstract=1120244>.

4. Jeffrey Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Federal Law Review* 1.

5. *Eastman v The Queen* (2000) 203 CLR 1, 41.

6. Starting with the work of Raoul Berger and Robert Bork: see Raoul Berger, *Government by the Judiciary: The Transformation of the Fourteenth Amendment*, Harvard, 1977; Robert H. Bork, *The Tempting of America: The Political Seduction of the Law*, Simon & Schuster, 1990; Robert H. Bork, "Neutral Principles and Some First Amendment Problems" (1971) *Indiana Law Journal* 1.

7. 554 U.S. 570 (2008).

8. See Justice Ronald Sackville, "The 2003 Term: The Inaccessible *Constitution*" (2003) 27 *University of New South Wales Law Review* 66.

9. See Jeffrey Goldsworthy, "Constitutional Cultures, Democracy, and Unwritten Principles" (2012) *University of Illinois Law Review* 683, 684-90.

10. Above n. 3, 9-10.

11. (1988) 165 CLR 360, 385.

12. For example, Justice Heydon has urged a liberal approach to the Commonwealth's obligation to provide "just terms" for acquisitions of property pursuant to section 51(xxxi) on this basis: see *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, 211; *JT International SA v Commonwealth* (2012) HCA 43 [193].

13. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, A. Guttman (ed.), Princeton, 1998, 133-134.

14. Antonin Scalia, "Foreword: The Importance of Structure in Constitutional Interpretation" (2008) 83 *Notre Dame Law Review* 1417, 1417.

15. See Jack M Balkin, *Living Originalism*, Harvard, 2011; David A Strauss, "The New Texualism" (1998) 66 *George Washington Law Review* 1153 (reviewing Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale 1988)).

16. (2006) 227 CLR 532, 584.

17. Ibid 585.

18. Ibid.

19. Ibid., 587.

20. Above, n. 6.

21. Ibid., 67.

22. See *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1.

23. Above, n. 9.

24. Akhil Reed Amar, "Foreword: The Document and the Doctrine" (2000) 114 *Harvard Law Review* 26, 47.

Chapter 7

Taxation of Multinationals
OECD Guidelines and the Rule of Law

Simon Steward

Perhaps you thought that the problem of taxing multinationals was only a recent thing. If you did, you would be mistaken. In Philip Ayres' splendid biography of Sir Ninian Stephen, there is contained a photograph of Sir Ninian, and that other great titan of the Victorian Bar, Sir Keith Aickin, at a restaurant in New York City in March 1962. They were dining – well, it would seem, with their client. Stephen was still a junior. He had been briefed with Aickin, QC, to represent Vacuum Oil in a forthcoming transfer pricing tax case. Ayres records that this was Stephen's first trip overseas since the war. They "flew out of Sydney", he relates, "on a Pan American 707, first class with all expenses paid, for San Francisco and on to New York . . ." This, I should add, regrettably no longer occurs – unless you are a Sydney silk.

The transfer pricing case was subsequently heard in the Taxation Board of Review, and is reported as 11 CTBR (NS) Case 53. It concerned the correct pricing of oil sold by the parent to its subsidiary in Australia. As you would expect, Aickin and Stephen were victorious. The series of Vacuum Oil and Mobil Oil tax cases of the early 1960s established, according to Ayres, Stephen's reputation as a junior of note.

Stephen had to wait some time before considering again the transfer pricing provisions of the *Income Tax Assessment Act* 1936 (Cth) (the ITAA). In 1980, the High Court of Australia heard and determined *FCT v Commonwealth Aluminium Corporation Ltd* (1980) 143 CLR 646. By then, Stephen was a justice of the High Court. So was Aickin who, interestingly, did not sit on the appeal. The resulting loss to the Commonwealth came as a great shock. The old transfer pricing provisions were consequently repealed and replaced with a new Division 13 in 1982.

As we shall see, it took another 25 years before the occurrence of the first Australian case concerning these new rules. Then, between 2005 and 2015, the level of activity increased substantially. Five cases were reported. Division 13 was effectively replaced by new and different rules contained in subdiv 815-A – with retrospective effect, and then Subdivision 815-A was itself within a year supplanted by another new regime contained in subdiv 815-B.

With each legislative change, the rule of law, it might be argued, eroded in two ways; by the enactment of very retrospective laws, and by adoption of "guidelines" published by the Organization for Economic Co-operation and Development (OECD) as part of the means of ascertaining the liability to tax. But to understand these potential erosions, we must first survey what has happened over the last 10 years.

Taxing multinationals – an overview

There are really three topics of importance in considering how to tax multinationals who carry on business in Australia.

The first concerns transfer pricing and what is called the "arm's length principle". This requires an Australian business which purchases goods or services from its parent or overseas

related company to pay an arm's length price. It also requires the Australian business to be paid an arm's length price for services or goods it may supply to its parent or related overseas company. The principle is very easy to articulate and thus appears attractive. But in practice it is almost unworkable.

The second concerns the level of debt an Australian business is allowed to have. Most countries, including Australia, allow businesses to deduct interest outgoings on loans used to fund income producing activities, but not deduct dividends paid as the cost of raising equity. To prevent an overseas parent from "loading up" its Australian subsidiary with deductible debt, many countries, again including Australia, have what are called "thin capitalisation" rules. These prescribe, amongst other things, a maximum debt to equity ratio. If the ratio is exceeded, interest deductions are disallowed.

The third concerns the location of a business. Traditionally, multinationals have incorporated wholly-owned subsidiaries in Australia to undertake their local businesses. Sometimes, they create large and complex corporate groups here. But, in recent times, and depending on the industry, the need to do so has declined. Using the internet, Australians are able to acquire goods and services from entities that are non-residents who have either no or not much physical presence in Australia. The consideration that is paid for those goods and services flows overseas and is usually not taxed here. The issue for the regulator is whether the overseas entity, by reason of its activities in Australia, has nonetheless created what is called a "permanent establishment" – a local place of business – which Australia can tax.

Complicating all of these topics is the inexorable fact that the overseas parent and the related companies will almost always be residents of other countries. Very often, they, or at least their parent, will be a resident of a country with the same taxing ambitions as Australia. For example, the United States, in general terms, taxes the world-wide income of a resident corporate taxpayer as well as all of the income of its subsidiaries, regardless of where they are located. A credit is then normally given for any tax paid overseas. Australia has a similar system with its controlled foreign company or "CFC" rules. These systems often clash. Double Tax Treaties, entered into by sovereign countries, exist to prevent such conflicts, but these are ceasing to be as effective as they once were because the international competition for revenue is now so acute. (The OECD has reported an increase in unresolved disputes between countries: http://www.oecd.org/ctp/dispute/map-statistics-2013.htm)

The "arm's length principle"

In this paper, I wish to focus on the first topic and its impact on the rule of law. Let me commence with two observations.

First, the "arm's length principle", which Australia's transfer pricing laws adopt, is derived from an internationally accepted standard. This is explained in the Explanatory Memorandum that accompanied the enactment of Division 13 in 1982 (by the *Income Tax Assessment Amendment Act* 1982). It states:

> Once the initial tests in the revised provisions, referred to earlier, permit the Commissioner to make adjustments to an item of income or deduction shown in a taxpayer's return, and the case is one where it is appropriate for the Division to apply, the Commissioner will be required to re-determine the taxpayer's assessable income or allowable deductions, basically

> by using the internationally accepted 'arm's length' principle, a principle relevant under existing section 136. The arm's length principle is also at the base of provisions in each of Australia's comprehensive double taxation agreements that enable the determination of profits attributable to business activities in one or other of the countries concerned.

In 1979 the OECD published guidelines entitled "Transfer Pricing and Multinational Enterprises". The names of the author or authors of the report are not disclosed, although we do know that it was negotiated by representatives of the 24 member countries in Paris, and that it was adopted by the Committee on Fiscal Affairs and then approved by the Council of the OECD. The Guidelines are 96 pages long. They affirm the centrality of the "arm's length" principle and set out suggested methodologies for pricing. The importance of these guidelines will be revealed shortly.

Secondly, whilst representatives of sovereign governments continue to affirm the validity of the "arm's length" principle, in reality it has been found to be a poor means of determining one's liability to pay tax. First, transactions which regularly occur between related parties often do not take place between unrelated parties for perfectly sound commercial reasons. For these, there is no readily identifiable "arm's length price". Secondly, transfer pricing has become a game played by professional experts, with the taxpayer and the revenue authority invariably able to find an "expert" or "experts" to support each side's pricing. In the United States, there are dozens of professional experts who travel the world giving evidence in tax cases. When they do, the principles of economic theory invariably clash with the standards of the lawyers. Good money is also being earned even before a given price is disputed by the revenue. Every year the major accounting firms earn handsome profits by the production of long – often very long – valuation reports to support pricing positions taken by taxpayers.

We then leave it to the judges to decide the issue of price if a dispute does not earlier settle. But lawyers are not necessarily well qualified to determine which economic expert should be preferred. Sometime this has led to remarkable confusion. *Xilinx Inc v Commissioner* illustrates the problem. In that case the Internal Revenue Service of the United States challenged the pricing of a cost allocation agreement entered into by a US parent and its Irish subsidiary under the American transfer pricing rules. The US Tax Court upheld the taxpayer's position. There was an appeal. On 27 May 2009, the 9th Circuit of the US Court of Appeals reversed the decision below (567 F.3d 483 (2009)). Then, remarkably and without comment, on 22 March 2010 the Court reversed itself. It withdrew that "opinion" and issued a new one in replacement of the old. This time the decision below was upheld (2010 US App. LEXIS 5795).

The Australian experience so far

Something should be said about old Division 13 and the cases concerning it. Its provisions were satisfied upon the presence of certain objective conditions. One of these was the Commissioner being satisfied that the parties to a supply of goods and services had not dealt with each other at arm's length. Another was the making by him of a determination that the provision should apply. In other words, the provision is not self-executing. But the most important condition was this:

> the taxpayer gave or agreed to give consideration in respect of the acquisition and the amount of that consideration exceeded the arm's length consideration in respect of the acquisition.

(An equivalent provision was enacted for cases where the Australian taxpayer was the vendor of goods and services.)

The key term in this condition is the phrase, "arm's length consideration". It was defined relevantly in former s 136AA(3)(d) which provided:

> (3) In this Division, unless the contrary intention appears:
> . . .
> (d) A reference to the arm's length consideration in respect of the acquisition of property is a reference to the consideration that might reasonably be expected to have been given or agreed to be given in respect of the acquisition if the property had been acquired under an agreement between independent parties dealing at arm's length with each other in relation to the acquisition; . . .

Plainly, the definition invites us to contemplate a hypothetical transaction between two independent parties, but who are those parties to be? In some cases it may not matter. But in others the economic and legal personality of the hypothetical vendor and purchaser may impact upon pricing. The most obvious example is the provision of financial accommodation. The quantum of the interest payable is affected by the credit worthiness of the borrower who is the taxpayer. Who should the borrower be in the hypothetical transaction? Should it be attributed with the actual assets and liabilities of the taxpayer? Should its credit worthiness include any enhancement that might arise from the fact that it is a member of a larger multinational? Or should one try and find the usual credit profile of participants in the same industry, if any exist. The legislation offers no guidance; the "arm's length principle" offers even less.

These issues become more complex if, as the Commissioner of Taxation presently contends, he is allowed not only to adjust the price paid for goods and services and the terms upon which those goods and services are supplied, but also to change both the amount supplied, and the thing supplied. This contention – commonly described as a "reconstruction" power – would, if accepted, expand dramatically the content of the hypothetical transaction to be priced. It would give the Commissioner a blank slate from which to tax, and would permit him to reverse that long accepted observation of Williams J in *Tweddle v FCT* 180 CLR 1:

> It is not suggested that it is the function of income tax Acts or of those who administer them to dictate to taxpayers in what business they shall engage or how to run their business profitably or economically. The Act must operate upon the result of a taxpayer's activities as it finds them.

To permit taxation by reference to such a wide-ranging fiction, conceived of by the regulator years after the actual impugned transaction has been entered into, raises in itself issues about the rule of law in this country.

Syngenta Crop Protection Pty Ltd v Commissioner of Taxation

A short survey of the five Australian cases concerning these provisions is now required. The first case is *Syngenta Crop Protection Pty Ltd v Commissioner of Taxation* (2005) 61 ATR 186. It neatly illustrates two features of early transfer pricing litigation in this country; first, the quality of the Counsel that appear; and, secondly, the attempt made in the early years by taxpayers to attack the procedures adopted by the Commissioner in assessing the taxpayer, rather than by defending the

price paid. The former feature is noteworthy. It shows that even with the best Counsel, the system still ended up in quite a mess.

The second feature is exemplified by *Syngenta* itself which was a dispute over a request for particulars and not a full trial. The taxpayer wanted to attack the way in which the Commissioner had formed his state of satisfaction that the parties had not dealt with each other at arm's length. He wanted more details about how he became to be so satisfied. *Syngenta* was represented by D. H. Bloom, QC, perhaps Australia's most famous tax silk, with two juniors. The Commissioner was represented by B. J. Shaw, QC, of the Victorian Bar, long regarded as the most intelligent barrister of his day. He led M. M. Gordon, SC, now Justice Gordon of the High Court, and J. Davies, SC, now Justice Davies of the Federal Court. Gyles, J, threw the taxpayer's application out in an *ex tempore* judgment, much to the great surprise of those in Court. With some confidence his Honour observed:

> The question as to whether the consideration is that which might reasonably be expected to have been received or receivable as consideration in either a supply or acquisition if the property had been supplied or acquired under an agreement between independent parties dealing at arm's length is an objective question. It does not depend upon anybody's opinion, save that of the Court or body making that decision. It is a matter for evidence. In cases such as the present, the taxpayer is very much better equipped to cope with such a question than the Commissioner, the taxpayer being in the trade itself. Furthermore, the burden of showing that the consideration nominated by the Commissioner is excessive or inadequate as the case may be is not, in my view, a very high burden as it is to be decided on the balance of probabilities. I am not suggesting that the factual question may not be difficult and may not involve contestable questions of fact, but they are the types of questions with which courts commonly deal. I can see no disadvantage to a taxpayer in addressing itself to that issue. If this is correct, it renders irrelevant almost all of the contentions in the submissions before me which have complicated these matters.

As it happens, in my experience, and with great respect to his Honour, taxpayers are usually in no better position than the Commissioner in pricing what are hypothetical transactions, which usually have no real equivalents in "trade." Moreover, the types of factual questions raised in these cases have – so far at least – been far from commonly encountered.

W. R. Carpenter Holdings Pty Ltd v FCT

The second case (*W R Carpenter Holdings Pty Ltd v FCT* (2006) 234 ALR 45) also concerned a point of procedure and was decided in 2006. On this occasion the taxpayer wanted particulars as to how the Commissioner had decided to make his determination that Division 13 should apply. On this occasion, the taxpayer was represented by Mr Durack, SC, a distinguished tax silk of the Sydney Bar and two juniors. The Commissioner was represented by Justice Gordon. The application was rejected by Lindgren, J, one of Australia's greatest judges, in a typically careful and learned decision handed down almost three months after the hearing. In essence, his Honour decided that the due making of the determination was an essentially procedural step, which did not form part of the criterion for liability under Division 13. It had to be made, but how it was made was irrelevant.

Unlike *Syngenta*, *W R Carpenter* was not content with the first instance decision. It appealed to the Full Federal Court which duly dismissed the taxpayer's case in 2007: (2007) 161 FCR 1. *W*

R Carpenter nonetheless kept going with grim determination, such was its zeal to obtain the long sought after particulars. It sought and was granted leave to appeal to the High Court. The case was heard by a Full High Court on 22 April 2008. By this time Justice Gordon had been appointed to the Federal Court. So the Commissioner assembled a new team of Senior Counsel. Leading it was Mr Alan Robertson, SC, now Justice Robertson of the Federal Court. His Honour would end up as the trial judge in the last of the cases surveyed in this paper. He appeared with Mr J. W. de Wijn, QC, of the Victorian Bar, a tax lawyer of great experience. Poor *W R Carpenter* ultimately lost its appeal. The High Court did not need to decide the correctness of the reasons of the Courts below; that is because they simply decided that the taxpayer was merely fishing.

Roche

Meanwhile, in 2008, the first full transfer pricing trial was heard by Justice Downes, sitting as the President of the Administrative Appeals Tribunal. The taxpayer was Roche Products Pty Ltd. At issue was whether the prices the taxpayer paid to its Swiss parent for pharmaceutical products exceeded the arm's length price for those products. Many of the products were unique, the subject of world-wide patents, and were only ever sold within the Roche group. For these products, it was impossible for find comparable transactions that had been entered into by independent parties. As always, the bar table was full of notable barristers. Roche was represented by T. F. Bathurst, QC, now Chief Justice of New South Wales, leading A. H. Slater, QC, a very senior and talented Sydney tax silk, A. J. Payne, now a Justice of Appeal in NSW, and J. O. Hmelnitsky, now a very much in demand NSW silk. The Commissioner was represented by J. W. de Wijn leading Justice Davies amongst others. The case took place over a month in a small crowded room with instructors spilling into the corridor.

How did each side lead evidence as to the correct arm's length price for the products, in particular the patented products that were sold? They did so by calling upon the American transfer pricing economic experts. These economists are able to price anything and can do so even where there are no comparable sales to examine. They do so by, amongst other things, using a methodology not yet fully sanctioned by the OECD (but approved by US Treasury); it is called the "transactional net margin methodology" or TNMM. Under this method, the economist does not search for the comparable transaction, but rather for a comparable company, having regard to the functions of the actual taxpayer. In *Roche*, Roche Products was characterised as a distributor. This led the experts to look for other distributors of a similar size in a similar market. The product sold, on this approach, did not need to be similar to the products in fact sold, so long as the comparator company assumed similar functions, assets and risks.

For example, in *Roche*, one of the experts decided that a distributor of toys was comparable to Roche Products. Invariably, by trawling through publicly-available databases, such as filings with the Securities and Exchange Commission, a large list (in excess of 100) of possible comparable companies is able to be assembled. That list is then pruned down by rejecting candidates for not being sufficiently similar, or because of some problem with the information they have filed with the SEC. One is usually left with between five and ten companies. Sometimes adjustments are then made to address unique features which might exist with these companies. The profit made by these companies is then averaged over the years in issue. That average figure is then attributed to the taxpayer as being the profit it should have earned if it had dealt at arm's length with its parent. The method is commonly used in the United States.

Justice Downes did not like it at all. He said at par [115] of his reasons:

> 1. The method . . . used requires multiple subjective determinations which admit of error at every step.
> 2. The method requires the use of figures derived from the overall results of companies assessed to be comparable, to determine profit components of part of the activities of the subject. This is because adequate figures relating to divisions of potentially comparable companies are not generally available. This aspect admits the possibility of further error. The profitability of single purpose companies will not necessarily accord with the profitability of divisions of multi-purpose companies.
> 3. The method requires the drawing of profit figures from the results of many companies. These produce statistical averages and not real or actual results.

There was another contention with which Downes, J, did not agree. At the time, the Commissioner was of the view that he had an additional power to adjust prices in accordance with the "arm's length" principle. He argued that this power was contained in each of the Double Tax Treaties to which Australia is a party. These treaties exist primarily to prevent double taxation by two taxing regimes. But each also contains what is called an "Associated Entities Article", usually in this form:

> Article 9 – Associated enterprises
> (1) Where:
> (a) an enterprise of one of the Contracting States participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State; or
> (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of one of the Contracting States and an enterprise of the other Contracting State, and in either case conditions operate between the two enterprises in their commercial or financial relations which differ from those which might be expected to operate between independent enterprises dealing wholly independently with one another, then any profits which, but for those conditions, might have been expected to accrue to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.
> (Article 9 of the USA/Australia Double Tax Treaty)

The Commissioner submitted that these words conferred on him a power to adjust the "profits" earned by a taxpayer to those that might have been earned if the parties had been independent of each. Downes, J, doubted the existence of this additional power. His Honour said:

> In the result I do not need to decide the issue although I note that there is a lot to be said for the proposition that the treaties, even as enacted as part of the law of Australia, do not go past authorising legislation and do not confer power on the Commissioner to assess. They allocate taxing power between the treaty parties rather than conferring any power to assess on the assessing body. On this basis Division 13 should be seen as the relevant legislative enactment pursuant to the power allocated.

This tentative rejection of the Commissioner's argument should be noted. It becomes important when considering the subsequent legislative changes.

In the end, Downes, J, determined that the arm's length prices were somewhere in the middle of the range comprising the taxpayer's numbers and those of the Commissioner. Understandably, neither side had any appetite to appeal the decision.

SNF (Australia) Pty Ltd v Commissioner of Taxation

In 2009, the next transfer pricing trial took place in Melbourne before Middleton, J, in the Federal Court. The taxpayer was a French subsidiary called SNF (Australia) Pty Ltd which was in the business of distributing its parent's polyacrylamide products in Australia. In the best traditions of the Bar, on this occasion the taxpayer was represented by Mr de Wijn, QC, (he had previously acted for the Commissioner), whilst the Commissioner was represented by Mr Bloom, QC, (he had previously acted for taxpayers). For many years, the subsidiary had made tax losses, thus arousing the suspicions of the Commissioner that it was paying excessive prices to its French parent. In 2010, Middleton, J, found for the taxpayer: (2010) 79 ATR 193. In simple terms, he accepted the taxpayer's explanation for the losses, namely, that it was incompetent.

Like Downes J, Middleton, J, rejected the American TNMM. His Honour said at [129]:

> In my view, undertaking the TNMM does not provide a proper basis for determining what consideration it was reasonable to expect that an independent purchaser would pay for the products. The TNMM does not address the issue as is required by Div 13 of the ITAA, as interpreted earlier in these reasons. I reject the use and applicability of the TNMM as contended for by the Commissioner in the context of applying Div 13.

But, unlike Downes, J, Middleton, J, was tentatively attracted to the Commissioner's contention that he has a separate power to adjust prices under the Double Tax Treaties because of amendments made in 2004 so section 170 of the ITAA which appeared to have been made on the assumption that there already existed that power (section 170 imposes time limits on the Commissioner's power of assessment). His Honour said at par [23]:

> As the stand alone taxing power issue was raised in written submissions, I make the following very brief comment. I do see some force in the argument that by operation of s 170(9B) of the ITAA and the terms 'prescribed provision' and 'relevant provision' as defined in s 170(14) of the ITAA, there is a clear legislative intention (at least from the time of the introduction of s 170 (9B)) that the Commissioner may in amending an assessment, rely on either s 136AD or the relevant associated enterprises article, as conferring upon the Commissioner, as a separate power, a power to amend an assessment. I say this although there is no provision expressly stating that 'the relevant provision' (namely, the associated enterprises article) has been incorporated into the ITAA. However, it seems to me that the express words in the ITAA necessarily and naturally imply the required incorporation of the relevant associated enterprises article into the ITAA.

The Commissioner appealed to the Full Federal Court ((2011) 193 FCR 149) and argued that, in accordance with recent Canadian decisions (*GlaxosmithKline Inc v The Queen* [2010] FCA 201 and *R v General Electric Capital Canada Inc* [2010] FCA 344), the hypothetical transaction to be priced was to consist of all of the facts in the real world with one fact changed, namely, the fact that the taxpayer and its parent were not independent of each other. This required one to assume a set of facts in which the purchaser was an entity with all of the qualities of the taxpayer except its relationship to the parent manufacturers. In the case of SNF (Australia), because it had been

making losses the Commissioner argued that, had it acted as an independent party, it would have bargained for lower prices in order to remain in business.

The argument was decisively rejected. At paragraphs [98] and [99] the Full Court said:

> There is no doubt that s 136AD(3) is, as the Commissioner submits, about the taxpayer; that it requires a comparison between that which was actually paid by the taxpayer and an arm's length consideration; and, that, in appropriate circumstances, it then substitutes one for the other. However, it does not follow from acceptance of all those features that arm's length consideration – which does not, in general, refer to the actual position of either party – must be treated as overlaid by a further requirement that the consideration not only be at arm's length but that the arm in question be attached to the taxpayer.

The foregoing passage creates problems where the personality of the "arm" in question can affect the arm's length price, such as a loan. It provides no guidance as to what, in such a case, the "arm" should comprise.

The Commissioner's associated enterprises article was not directly considered by the Full Court. Inferentially, however, it would appear that the Court doubted its existence. At paragraph [109] the Court observed:

> Article 9(1) attempts to address at a high level of generality the problems thrown up by transfer pricing by providing for pricing as if the transactions had been between independent parties.

The Full Court made one further observation of relevance. It decided that the OECD guidelines on transfer pricing could not be considered at all for the purpose of construing and applying Division 13.

The Commissioner was deeply disturbed by this aspect of the decision and by the result generally in *SNF*. He did not, however, decide to seek special leave to the High Court. Instead, he decided that a complete re-write of the legislation was needed to overcome his losses in court so far. As it happens he did this twice before the next case was heard.

The first new legislation and its retrospective application

By Act No 115 of 2012 new Subdivision 815-A was introduced into the *Income Tax Assessment Act* 1997. It aspires to achieve two principal objects:

(a) first, it effectively incorporates into domestic law the Associated Enterprises Articles of each of Australia's Double Tax Treaties (the American example is set out above), thus giving the Commissioner that long sought after additional power to adjust prices. This is sought to be achieved by making the criteria for liability turn upon whether 'the requirements in the associated enterprises article for the application of that article to the entity are met' (s 815-15(1)(b));

(b) secondly, and for that purpose, it mandates that the OECD Guidelines must be considered, thus reversing *SNF*. Section 815-20(1) provides that subdivision 815-A must be applied 'consistently' with the Guidelines. In 2012, the relevant version of those Guidelines was specified to be those approved on 22 July 2010. These are an updated version of the earlier 1995 Guidelines, which in turn updated the 1979 version I have already referred to.

This new subdivision represents a striking example of the power of the legislative branch to overturn the work of the judiciary. But the new subdivision is not remarkable merely because of that attribute. It is notable because of this: pursuant to section 815-1 of the *Income Tax Assessment (Transitional Provisions) Act* 1997, Subdivision 815-A is expressed to apply to income years commencing on or after 1 July 2004. In other words, it applies retrospectively. And not just by one or two years; it changes the law for a period going back eight years. Australia has never before seen such a retrospective tax.

As it remains a live issue in the *Chevron* tax appeal, described below, I will not comment upon the constitutional validity of this retrospectivity. I do wish to say something about it from a tax policy perspective, however. In the Explanatory Memorandum for the bill which introduced the subdivision, it is asserted that Parliament had made a "consistent assumption" since 1982, when Division 13 was first introduced, that the additional power to adjust prices in the Double Tax Treaties existed. It is then said that the 2004 amendment to section 170 (briefly considered by Middleton, J) was made based on that same assumption, and that therefore retrospectivity to that date was justified. *Roche* is not mentioned at all. *SNF* is dismissed in this way: "[t]his case was argued only on the basis of Division 13" (par 1.12).

These statements in the Explanatory Memorandum are, I regret, false. There is not the slightest evidence of a "consistent assumption" since 1982. Rather, the position is this: the Commissioner for some time had argued publicly that he had the additional power to make pricing adjustments. He was perfectly entitled to make that argument. Some members of the Bar agreed with him. Most did not. He nonetheless argued for it in *Roche* and his arguments were not accepted. He argued for it in *SNF* and Middleton, J, was, as set out above, cautiously attracted to it. As we shall see, he argued for it again in *Chevron*, and it was convincingly rejected.

In 2012, the prevailing view of the law was that articulated by Downes, J, in *Roche* in 2008, Middleton, J, having not overruled it. From that date, given that the Commissioner did not appeal *Roche*, taxpayers were reasonably entitled to rely upon his Honour's observations, and order their affairs accordingly. To subject them to retrospective legislation by which the criteria upon which they were to pay tax in past years changed, in circumstances where that new criteria could not then be ascertained (as it did not then exist) is, in my view, unjustified. It is very bad tax policy. It is equally bad for an explanatory memorandum to contain false statements, and for amendments to be passed based on falsehoods. The result is perhaps an affront to the rule of law.

One year later new subdivision 815-B was introduced by Act No 101 of 2013. It at least has prospective effect only – from 29 June 2013. It repealed Division 13 and replaced Subdivision 815-A with another new set of transfer pricing rules. These are described below.

Chevron

Meanwhile, the *Chevron* case was beginning to brew. Again, I must be careful about what I can say about it as it is the subject of an appeal to the Full Federal Court due to be heard over five days at the end of August. Suffice it to say, certain facts are not in dispute and can be disclosed. The case concerned the pricing of an inter-company loan entered into in 2002 between a subsidiary of Chevron resident in the United States and Chevron's holding company in Australia, called Chevron Australia Holdings Pty Ltd (Chevron Australia). The money was needed to fund the commencement of the Gorgon Project in Western Australia. Interest was paid on the loan by Chevron Australia and deductions accordingly claimed. Chevron Australia thought it was paying

an arm's length rate of interest; the Commissioner disagreed.

We can see an immediate problem following *SNF*. Given that the credit worthiness of a borrower is important in determining what interest independent parties might pay, how should one go about pricing this loan? Do we assume that the borrower has the same assets, liabilities and risks of Chevron Australia. And, if so, is that Chevron Australia as a stand-alone business, or Chevron Australia as the subsidiary of a very credit worthy multinational. Or is it something else entirely?

The Commissioner argued that the hypothetical borrower should be an entity identical to that of Chevron Australia in its capacity as a member of the same credit worthy multinational, albeit with a different name, and now borrowing from an independent entity. On this basis he contended that the hypothetical borrower should be attributed with a very high credit rating, so that the resulting interest rate would be lower than that in fact paid. Chevron disagreed and submitted that the hypothetical borrower should be identical to Chevron Australia, but as a stand-alone and independent entity.

But the disagreements did not end there. The parties could not agree on the thing to be priced. The loan agreement imposed obligations of repayment in Australian dollars. Chevron contended that this was an Australian dollar loan. The Commissioner disagreed because the bank account into which the loan amount was credited was expressed in US dollars. At the time the Australian LIBOR rate was higher than the LIBOR rate in the United States. In the years leading up to the loan being entered into, it had been the other way around.

The Commissioner, nonetheless, said that because the loan should be characterised as a US dollar advance, the base for calculating the interest payable should be the lower US LIBOR rate. He did not stop there. He argued that if the loan was to be properly characterised as an Australian dollar loan, it should, in any event, be substituted for a US dollar loan with different terms and for a different and lower amount. In this way, he wanted to attribute to Chevron interest much lower outgoings on a loan it had never entered into, and he contended he could do this either under Division 13 or Subdivision 815-A with its retrospective effect. The Commissioner had never before argued that he had such an extensive reconstruction power; in the past he had simply priced the thing in fact supplied.

The case was heard over five weeks. The Commissioner called eight expert witnesses. Some experts were called to assess Chevron Australia's credit rating as a subsidiary of Chevron. Some were professional transfer pricing economists. One was a retired Shell executive who gave evidence concerning what in his view should generally have happened. Chevron called twelve experts in response.

The tasks the Commissioner asked his experts to address were entirely different to the tasks undertaken by Chevron's experts. No expert issue was ever joined; the same question was never asked of each side's experts. As a result, each side objected to almost all of the expert evidence of the other party. The objections remained unresolved at the commencement of trial. The Court Book containing the evidence and pleadings was more than 13,500 pages in length and extended over 30 volumes.

Almost a year later, judgment was handed down. The primary judge decided that each of the opinions the Commissioner had asked his experts to form did not assist him because in each case the Commissioner had asked the wrong question or the expert was not properly qualified. He found that Chevron had also asked the wrong questions and that the resulting expert opinions

it had procured did not address the statutory task. Because under our system the onus is on the taxpayer to show that an impugned assessment is excessive, it followed that Chevron had necessarily lost. Because it had asked the wrong questions, it had failed to discharge its onus of proof.

I am sure there is a word to describe what happened in this case; for the moment I just cannot think of it.

Finally, and as mentioned above, the Commissioner again submitted that he had a separate power to adjust prices under the double tax treaties. Robertson, J, considered the arguments in some detail, and rejected the existence of the power. He said at [61]:

> I reject the respondent's submission that Art 9 of the United States convention, independently of the transfer pricing provisions in the domestic legislation, may be relied on to support the 2010 or the 2012 amended assessments.

Thus the premise of subdiv 815-A's retrospectivity was found to be misconceived.

The second legislation

Before addressing the new legislation, something needs to be said about the supposed power of reconstruction. Traditionally, transfer pricing has focused upon a single issue: was the price paid for an actual supply of goods and services an arm's length amount? Whilst it was contemplated that this might include some tampering with the terms of sale used by related parties, generally speaking, one priced the actual supply and not a different supply. And one did this by examining, if possible, the price paid by independent parties for the same, or very similar, products, in the same, or very similar, markets.

This approach is reflected in the OECD Guidelines. Take the 1995 Guidelines; they record the following at par 1.36:

> A tax administration's examination of a controlled transaction ordinarily should be based on the transaction actually undertaken by the associated enterprises as it has been structured by them . . . . .

In other words, the obligation on the taxpayer is to pay the arm's length price. Other than this, related parties do not have to pretend that they are independent of each other. They do not need to enter into faux negotiations; they do not need to mimic the behaviour of arm's length parties in all things. They do not need to create a sham world when they are in fact members of the same group of companies.

Again, the OECD Guidelines have recognised this. It is well understood that related parties might make supplies of goods and services that would never take place between independent parties. Roche, for example, would not sell its patented pharmaceuticals outside its group. As the 1995 Guidelines observe at par 110:

> A practical difficulty in applying the arm's length principle is that associated enterprises may engage in transactions that independent enterprises would not undertake.

At some point during the early 1990s it would appear that some representative members of the OECD decided that transfer pricing should not be just about pricing, but about making

related parties behave as if they are independent in all things. I say, "it would appear", because one does not know what really goes on in Paris. The meetings are not held in public. We do not know who pushed for these changes. Presumably, the process of reform took place incrementally, perhaps over a good bottle or two of Bordeaux at some pleasant bistro on the Ille Saint-Louis – paid for by the taxpayer. In any event, inferentially, the reformers wanted domestic revenue authorities to have the power to second guess how one should undertake one's business; in other words, to have a broad power of reconstruction. This would mean imposing tax by reference to a reconstructed transaction never in fact entered into by the taxpayer.

The result was the insertion of the following words into the 1995 Guidelines following the passage quoted above from par 1.36:

> However, there are two particular circumstances in which it may, exceptionally, be both appropriate and legitimate for a tax administration to consider disregarding the structure adopted by a taxpayer in entering into a controlled transaction. The first circumstance arises where the economic substance of a transaction differs from its form . . . . The second circumstance arises where, whilst the form and substance of the transaction are the same, the arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner and the actual structure practically impedes the tax administration from determining an appropriate transfer price.

Inferentially, those advocating for a broad power of reconstruction have not had much further success at the OECD. The same words appear in the latest 2010 version of the Guidelines. As the author understands it, this is because there has yet to be any clear agreement between member countries as to whether a broad power of reconstruction should exist and, if so, when it should be engaged. Based on the current Guidelines, and leaving aside the scope of the power, it remains the case that it should only ever be engaged in "exceptional" circumstances, whatever that might mean.

The author also understands that the Guidelines are usually the product of negotiation between member countries. Predictably, where there is disagreement, a compromise is often found and this is reflected by the use of broadly expressed language. Very broadly expressed principles, however, are seldom capable of supplying a criterion for liability.

Nonetheless, the passage set out above was relied upon by the Commissioner in *Chevron* to support a reconstruction of the loan in fact entered into by that taxpayer. There was much debate about the meaning of the words used in it; the passage was scrutinized by the parties with the same rigour reserved for sections in a domestic Act. Chevron even led evidence from the former head of the OECD transfer pricing unit.

Three problems emerge immediately:

(a) First, how should one interpret the Guidelines when they are expressed in only the most general of terms? Taking the passage above, what does it mean when it refers to a 'commercially rational manner'? In the author's limited experience, much ordinary commercial activity could, with the benefit of hindsight, be considered irrational. And what standard of rationality is required? Is imprudence (itself a subjective concept) sufficient? We do not know because the Guidelines supply no further clues. How, one might ask, should one apply domestic law 'consistently' with the Guidelines if they are devoid of sufficient meaning?

(b) Secondly, the command to interpret law consistently with third party Guidelines raises issues about the rule of law in Australia. I do not suggest that it constitutes an impermissible delegation of the taxing power of the Commonwealth (cf *Giris v FCT* (1969) 119 CLR 365). But the rule of law is not promoted by granting to an unelected foreign body the capacity to influence the scope and meaning of domestic tax legislation; *a fortiori* when the body produces a work pregnant with ambiguous meaning and which is not legally binding on taxpayers in any other OECD country. Moreover, it is unsatisfactory that the Guidelines can be amended with or without Australia's consent, and with or without the knowledge, oversight or approval of the Commonwealth Parliament.

(c) Thirdly, enacting legislation of this kind sets a dangerous precedent. For example, in this year's budget, it was announced that new subdiv 815-B will be amended to require one also to take into account proposed amendments to the OECD Guidelines that have yet to be approved by the OECD, and may never be approved. Domestic law could be informed by guidelines that have been rejected.

It is in this context that there are two observations to be made about this new transfer pricing regime in subdiv 815-B:

(a) first, like former subdiv 815-A, one must apply the new rules so 'as best to achieve consistency with' the OECD Guidelines;
(b) secondly, it would appear that the drafter wanted to give to the Commissioner of Taxation a power of reconstruction which goes well beyond the limited language of the OECD Guidelines set out above. Indeed, it is arguably inconsistent with them. Section 815-130(1) sets out a basic rule that requires one to apply the actual commercial or financial relations. But there is then carved out a large exception set out in section 815-130(2) and (3) which obliges one to 'disregard' the actual commercial or financial relations to determine the pricing adjustment. It provides:

> . . .
> (2) Despite paragraph (1)(b), disregard the form of the actual commercial or financial relations to the extent (if any) that it is inconsistent with the substance of those relations.
> (3) Despite subsection (1), if:
> (a) independent entities dealing wholly independently with one another in comparable circumstances would not have entered into the actual commercial or financial relations; and
> (b) independent entities dealing wholly independently with one another in comparable circumstances would have entered into other commercial or financial relations; and
> (c) those other commercial or financial relations differ in substance from the actual commercial or financial relations;
> the identification of the * arm's length conditions must be based on those other commercial or financial relations.
> (4) Despite subsection (1), if independent entities dealing wholly independently with one another in comparable circumstances would not have entered into commercial or financial relations, the identification of the * arm's length conditions is to be based on that absence of commercial or financial relations.
> (5) Subsections 815-125(3) and (4) (about comparability of circumstances) apply for the purposes of this section.

No-one really knows what the term "commercial or financial" conditions means. There is no relevant case law. It could be read in a number of different ways. It might be limited to the contractual terms for a given supply. Or it might encompass the entire basis upon which a business is undertaken. In that respect, asking what "commercial or financial" conditions independent parties would have entered appears to invite the Commissioner to tell you how you should have conducted your business – an effective reversal of *Tweddle* (above). There are other significant difficulties with the design of subdiv 815-B which I will not advert to here. Suffice to say, the field of disputation may be very wide indeed in the years to come.

The confines of this paper have not permitted me to consider these other recent legislative changes:

(a) changes made to the level of debt multinationals may have when investing in Australia;
(b) what is called the Multinational Anti-Avoidance Legislation or "MAAL" which attacks the use by companies of the internet to avoid having a taxable presence in Australia; and
(c) the new "Diverted Profits Tax" to be introduced later this year (2016).

Each of these merits its own paper.

In conclusion, this survey of the law relating to transfer pricing in Australia reveals, I think, the following:

(a) the applicable tests are very unclear. That is because the "arm's length" principle does not work well in practice and especially in a court;
(b) Parliament's reaction to the case law has been extreme. It has even resorted to very retrospective legislation; and
(c) there has been an unprecedented transfer of sovereignty over the content of our tax laws to an unelected and foreign body, namely the OECD.

None of this really promotes the rule of law. Indeed, when John Adams aspired to a "government of laws and not of men", (Novanglus, Essays No.7), I doubt if the foregoing is what he had in mind.

Chapter 8

Australian Universities, Law Schools and Teaching Human Rights

James Allan

The subject of this address is the result of a compromise. I wanted to talk about the awful – and I mean awful – state of legal education in this country. The organisers wanted me to talk about the teaching of human rights in Australian law schools. The compromise is that I am going to do a bit of both.

I will start by giving you a very quick overview of the many problems with Australian universities generally; then I will take you through the problems more specifically with tertiary level *legal* education in this country – and, at the risk of spoiling the ending, law schools are in my view in a lot worse shape in Australia than what you see in the United Kingdom, or the United States, or Canada, or even New Zealand. Once I have laid out some of those defects and weaknesses, I am going to turn to the teaching of human rights in our university law schools. At any rate, that is the plan for this talk.

But before I embark on it, let me digress briefly and tell you about the ICC (the International Criminal Court). The University of Queensland law school where I work attracts the best-performing high school students in the State of Queensland. Well, we share the cream of the crop with our medical school. You have no hope of entry if you are not well inside the top two percent or so. (And, yes, I realise there will be people in the audience, especially those from Sydney, rolling their eyes and thinking, "well, hold on now, we are only talking about the brightest *Queenslanders*". But I am confident what I am about to say can be generalised across the country.)

So, back to these very bright law school students at a G8 university who had exceptional high school marks to get into law at the State's premier university. My point is that by the end of their degree a significant percentage of these students will think that the best thing they can do with their lives is to go and work for or with the International Criminal Court. This is the body set up to prosecute dislodged dictators and others for genocide and war crimes and the like. The ICC has received incredible amounts of money – $152 million in 2015 alone. And yet it has only ever had two successful prosecutions, ever. And only black people have ever been indicted, 36 of them.

Is it on balance worth having such an international criminal court? Maybe. It certainly sends a signal to those in power that they cannot rely on their own domestic laws – and on the attempted defence used at Nuremberg that "it wasn't against the law when we did it". You cannot rely on that because, now, what you have done – if it is horrific enough – will be against a rule of international law.

Nothing is free in life. Dictators and hard men around the world know all this. They know about the ICC. In the past you could (and, in fact, we did) negotiate with Idi Amin to get him out of power in Uganda with the promise of a beachside retirement in relative ease in Saudi Arabia for the last couple of decades of his life. Awful for the relatives of his myriad victims, no doubt. But pretty damn good for the future prospects of Uganda.

Today, you cannot make that deal because everyone – including Syria's Assad and Zimbabwe's Mugabe and all the rest of the world's nasty strong men – well, they know that they will be pursued and prosecuted by the ICC whatever is promised to them. So they have no choice but to go down fighting.

Now, if you are a consequentialist like me, that counts as a cost, a big cost, to pay for putting in place any ICC-type set-up. I do not say it is a knock-out argument against having an International Criminal Court. If pushed, I would say it is a razor-edged question whether to have one. In fact, I might well go for one, but it would be with no real confidence I was making the right call.

But I sure as heck would not see working at the ICC as the equivalent of doing God's work – as the most moral way I could spend my working life. And yet so many top law students do see the world that way. That is how they have been taught to think about rights and, more particularly, human rights. They learn to think about them in very non-consequentialist terms; call it deontological or natural law thinking or pseudo-theological.

And if that sort of thinking is not as regards the ICC, then it will perhaps be as regards the rights-infringing resolutions flowing from the UNHRC (United Nations Human Rights Council). These resolutions will be the mark of good and bad human rights conduct for them – with hardly a law student being aware that the UNHRC and United Nations General Assembly have issued more resolutions alleging rights-infringing conduct against Israel than against all other countries on earth, combined. That, and other factors such as some of the God-awful countries that in part make up this UNHRC, make it a joke of a body. But not to most law students. And if it is not the ICC or the UNHRC, well, maybe the law student's goal will be to work for some UN committee overseeing a rights-related convention, say.

The thought that a democratically elected legislature full of politicians (and, in law schools, you cannot say that last word, "politicians", without sneering and without self-righteous condescension oozing from your every pore), but the thought that these elected legislators might have as good a grasp of what is rights-respecting conduct, dare one say a better grasp, than some United Nations functionary (chosen to represent a country from whose leaders you would not take moral advice if your life depended on it – and people to boot who pay no income tax as UN employees), or better than some unelected and so unaccountable ex-lawyer judge, or better than some supranational European Union bureaucrat (and I note that a pre-Brexit survey of UK academics showed that 90 percent were for "Remain" – 90 percent! And be clear that that lop-sided ratio would be the same here in Australia) – well, the thought of any of that pro-democracy and pro-voting and "hey, rights questions are inherently full of reasonable disagreements over which nice, smart, well-informed people will disagree so counting everyone as equal and voting for MPs to decide these issues" – well, that pretty much does not enter the heads of far, far too many law students in this country. Or the law professors teaching them, for that matter.

Too many of our law students have a grasp of human rights that looks a lot like what you might get in a 40-minute video/tutorial put on by the activist organisation GetUp! By the way, and before you get too down on the students for succumbing to the GetUp! worldview, you could say pretty much the same thing about the High Court of Australia's prisoner voting case in *Roach* – a more flabbily reasoned, argument-in-the-service-of-an-agenda case it is hard to find. Well, unless you look at their next voting rights case of *Rowe*, which Professor Anne Twomey

picked as the worst-reasoned and least convincing High Court of Australia case ever. And one's understanding of rights was not wholly peripheral to that decision.

Universities

But enough of this introductory stuff. Let me turn to a quick over-view of the problems in Australia with universities and then, more specifically, with law schools before moving back to the teaching of human rights. To get you in the mood to hear about universities, let me tell you a joke that should resonate with anyone who works in a university and is judged on the calibre of his or her peer-reviewed publications. It goes like this: "A peer reviewer walked into a bar and he immediately started complaining that this was not the joke he would have written."

I have written elsewhere about the poor state of Australia's universities, most verbosely in *Quadrant*. Here I will simply touch on a few highlights or, rather, lowlights. First off, Australia has the Anglosphere's most centralised and bureaucratic universities. More than 60 percent of employees at all Australian universities are doing something other than lecturing and publishing. They are non-academics, some sort of administrators. To adapt the language of psychiatry, "this is crazy". And it is not just low level administrators there to fawn over every academic's needs. Those sorts of administrators seem to be an endangered species. Before I came to Australia, and based on the solid groundings of the concept of comparative advantage, I never entered marks, or put exams into alphabetical order, or did that sort of office work. It is now commonplace to have the professors do it. The explosion of administrators is at the top and middle of universities. Marketers. Supposed teaching gurus. Grant-getting advisers. Etcetera. And it is so top-down in universities that in my 11 years I do not recall a single time when our law school got to make a single important decision on anything by having a meeting and voting. That is how it was when I worked in New Zealand. And in Hong Kong. And in Canada and the United States in 2013. Not here. In Australian universities the centralisation, the top-down management structure, the one-size-fits-all approach rivals General Motors in the 1950s, or maybe the former East Germany.

I have been writing since the Coalition Government came into office in 2013 with suggestions about how to start to tackle this. Here is a good place to begin. Make every single Australian university publish the salaries of its top 25 earners, together with what they do. I can tell you that you would be lucky to find a single professor who publishes and teaches in that list anywhere in Australia. It would be our Vice-Chancellors on salaries of more than a million dollars per year – so multiples of what a prime minister or a chief justice gets.

And then the "Team" of DVCs, PVCs, Deans of Schools, Heads of Diversity or Equity or Whatever it is called that tries for a balance of reproductive organs on campus.

Let me say this. The bureaucratic and centralised nature of Australian universities simply beggars belief. And the Liberals have done nothing about it. Zero. Nada. Nothing. Why? Perhaps because they seem to take their advice from sitting vice-chancellors, your Greg Cravens and Glyn Davises.

Then there is the obsession with grants. This country's universities are obsessed with grants and grant-getting. This is the science model imposed on the rest of the university. To get promoted you need to find someone to give you money to do your research, with the most kudos coming to you if it's the ARC (Australian Research Council) – meaning the money comes from the taxpayer.

Now let us be blunt. If you are in history, most parts of law, the Arts, much of Business, and big chunks of the rest of the university you can publish in top journals without soliciting a cent of grant money. But then you will never be promoted. The universities have huge grant-getting bureaucracies that need to be fed.

Here is an example I have used at various times in the past. Take two academics in the same area who have published in the exact same top line peer-reviewed international journals. Academic A gets no grants. He is, in effect, doing his research on his salary without more taxpayer monies. Academic B, by contrast, gets huge amounts of grant money (providing work for all sorts of university bureaucrats). She produces not a jot more than Academic A. The outputs – the things that ultimately matter – are the same.

So, how do they fare, comparatively speaking? Academic B will be feted and promoted. Academic A will never, ever get a promotion and may be fired. This is true throughout Australia. It is bonkers. Universities treat inputs (grant money to allow research to be done) as outputs (what is produced). In fact, they care *more* about the input grants. It is exactly analogous to you choosing to buy your car based on which car company got the most taxpayer support, the most subsidies, the most grants. That is your proxy for excellence. Bonkers, right? (Well, I suppose that actually explains how we buy submarines in this country, but I digress.)

Worse, no academic outside Australia judges you based on your grant-getting prowess. They want to know what you have written, and where. Full stop. Again, the Liberals have done nothing about this insanity. And they could fix it without having to pass a bill through the Senate. This is a Lambie-free zone.

And notice that I have been careful not to say a thing about the left-leaning nature of ARC grants in the social sciences. If you favour stopping the boats or Bjorn Lomborg responses to carbon dioxide reduction or a successful plebiscite before changing the definition of marriage, you can guess your chances of the ARC giving you grant money. It rhymes with a Roman Emperor. The fifth one – the pyromaniac.

Next, there is the lack of competition between universities in this country when it comes to attracting students. Next to no one sends his or her kids away to university. Yet that is largely what happens in my native Canada. And in the United States. And in the United Kingdom. And even in New Zealand. So, in Canada, the University of Toronto has to compete with McGill in Montreal and the Queen's University in Kingston and the University of British Columbia in Vancouver for the best students. It has to improve. Ditto everywhere else in the Anglosphere.

But not in Australia. Brisbane students stay in Brisbane. I generalise but the best come to the University of Queensland. Next best go to the Queensland University of Technology. Then to Griffith University. And so on down the perceived hierarchy.

UQ could be functionally braindead – and in some ways it comes close to that – and yet we would still get the best students in Queensland. I doubt that a team of Nobel Prize winners could figure out how to change this. And it applies to Sydney, and Melbourne, everywhere, because there is no cross-country competition in this country, competition between G8 unis such as the universities of Sydney and of Melbourne and the University of Queensland. Why? Almost no-one leaves home to go to university so any competition is intra-city. Basically, it does not exist save for a bit of the intra-city sort between Sydney and the University of New South Wales and between Melbourne and Monash.

This is not a problem if you do not believe in competition and its powers to produce good outcomes. It is a problem, though, if you believe competition is a force for good. From all appearances the Liberals are not for competition.

Penultimately I will just say a quick word on the rankings of universities that our million-dollar-a-year VCs like to tout. Believe me, these rankings are worthless, meaningless fluff for 99 percent of all questions related to universities. They are focused ONLY on the natural sciences. They have nothing to say about undergraduate life and teaching (indeed, your university's ranking probably goes up if the top professor has been able to win a grant to buy out his teaching responsibilities and so never sees an undergraduate student). They use criteria such as surveys by others of your perceived prestige, number of international students and "number of Nobel Prize winners on staff " – the last of these literally implying that a university could go out and hire a Nobel laureate, put her up in a five-star hotel drinking champagne all year, and its ranking would go up. A lot!

These rankings say nothing at all about picking a university for an undergraduate – and it is here that Australian universities are particularly awful. Moreover, the rankings criteria seem almost to have been chosen specifically to stop 48 of the world's top 50 universities from being US ones, when in fact they are. Put Oxford and Cambridge in the mix near the top and the other 48 are US universities. See where academics go. See where the money is.

Lastly, I suppose the "diversity" or "equity" bureaucracies are worth a quick mention. These are highly paid university bureaucrats whose goal is to get a statistical match between a percentage of something you find in the population at large and what you find in jobs or the student body at the university. The "diversity" that is being aimed at is one of the type of reproductive organs you bring to the table, or the type of skin pigmentation. Now I am opposed to all forms of affirmative action but, if you are aiming for diversity at a university, maybe the place to start is with a diversity of political outlooks in the Arts and Social Sciences and Law. Forget it. Australian universities lean massively to the left.

Law Schools

I am now moving down to the more specific level of law schools and will mention some of the problems with legal education in Australia. I mention them but without any optimism that anything much will improve in this country. And I say it again, in my view law schools in this country are in worse shape than in other comparable Anglosphere countries.

I have mentioned the obsession with getting grants, which also infects our law schools and for most law professors is a complete waste of time. Then there are government-mandated "let's try to measure the quality of the research" exercises. In Canada and the United States such comparisons are done by private magazines to sell to would-be students; they are based on woolly assumptions and weird criteria; and they end up producing an ordinal ranking of universities and of law schools. At least it costs the taxpayers nothing.

In Australia there is a bureaucratic "research assessment" exercise that I believe – having made the mistake of being an assessor in the first round – produces wholly meaningless data. Gobble-de-gook. If anything it is worse than the North American results. The difference is that our one is a government-mandated, bureaucratic one that costs tens of millions of dollars (not counting the huge costs of treating academics' time in helping with this nonsense as a free good).

It is a joke! In a sense it does not even assess individuals while still purporting to give a judgment on research excellence.

There have also been attempted rankings of journals lists that have produced laughable results. Soon they are going to try to "measure" an academic's "impact". The judges in the room should be laughing out loud at this one for law professors. (The thing you need to realise in Australian universities is that meaningless data is much preferred over no data, as people can be employed to work with meaningless data.)

And leave all that aside and turn to teaching. Our universities are so centralised that professors, including law professors, get told how much we must assess students. I am under immense pressure to record my lectures, as most University of Queensland lecturers do this already *under orders*, as is the case widely throughout the country.

Why? Because so many of our law students work. They are supposedly doing a full-time degree and, yet, they work downtown in law offices three, even four days a week. That is a core reason why the expectations for our law students are way, way lower than what they are in Canada, the United States and Britain, where being a full-time student means – wait for it – *being a full-time student* (with maybe a bartending job one night a week). Not here. The inevitable result is that our expectations in Australian law schools are lower than they are in law schools in other Anglosphere countries. You can not read as much when you are a student working three or four days a week at a big law firm. I suppose I could ask for a grant to try to prove that, but would it be a good use of taxpayers' money?

Oh, and the lowered expectations go hand-in-hand with pretty massive grade inflation!

At any rate, law firms are partly to blame for this phenomenon of supposedly full-time students working full days downtown three or four days a week. Actually, some judges employ students as law clerks before they have finished their degrees so they are to blame, too.

Then there is the fact we have so many law schools for the size of the country. It was 42 or 43 law schools at last count, though if you go to sleep the number can go up on you – and 13 in NSW alone! To put that in context, in English Canada (so that is about 27 million people or so) there are 17 law schools. Most take only 150 to 180 students per year.

Here, in Australia, we have the Queensland University of Technology and Monash taking in, what, more than a thousand students each a year. In fact, per capita, we now turn out more law students than the United States. Boy, that is surely the way to achieve the Turnbullian "innovation" revolution dream – by flooding the country with lawyers.

So we have too many law schools, taking in too many students each, and allowing students basically to be working near on full-time while supposedly studying full-time (by listening to recorded lectures each night and by the university's keeping expectations way down and grades way up). And these law schools all exist in a wider university that is massively too centralised, too regulated, too one-size-fits-all, and too top down.

We are also supposed to pretend that all the law schools in the country are more or less equal. This is a lie. Some are awful. Even the best law schools in Australia are not as good as Otago law school in New Zealand, and certainly nowhere nearly as good as the best in the United Kingdom, the United States or even Canada.

And now I should return to the topic of teaching human rights. Here is a nice segue that takes us from law schools to understandings of human rights. In the Brisbane area we have four

or five main law schools. The quality varies distinctly, at least if you go by the calibre of high school students who gains entry to them.

In 2015 we had a senior partner from a big Brisbane firm come to our law school and say that all student applications for jobs were now taken by his human resources department and the name of the law school was blacked out. You could only see their grades. This is the weirdest sort of "equality" mindset I have possibly ever encountered, with the exception of the judgments flowing from the European Court of Human Rights of course. I noticed that this law partner had a Master of Laws from Harvard, which he advertised in his promotional bio. So I asked him why he mentioned Harvard. Did he think the Harvard Masters of Law was better than one from the University of Arkansas or the University of Vermont. Why did not he just list his grades?

He was more or less speechless.

Unless you believe that high school marks are completely meaningless, then this example shows a bizarre sort of genuflecting at the altar of some mutant understanding of egalitarianism and equality. The University of Queensland takes in 280 to 300 students virtually all of whose high school marks are better than the very top student at the next university down the Queensland hierarchy. On what planet does it make sense to delete the name of the law school and just look at marks? Is this law partner someone you would want giving you legal advice? At least he saw the point with his Master of Laws degree and I am told that this law firm has now stopped this idiotic practice.

Teaching human rights in Australian law schools

Let us return to where I started with the claims about so many students hoping one day to work for the International Criminal Court. This is part and parcel of how the supranational human rights world is taken at face value as somehow, "by definition", a force for moral goodness. Remember, in the last 25 to 30 years the teaching of law subjects that might plausibly fall under the aegis of "human rights related" has mushroomed. Disability law. Public international law. Anything to do with bills of rights. Or discrimination. Women and the law. The list goes on.

Meantime, the number of law schools that teach a compulsory jurisprudence course can be counted on one hand, mine being one of those disappearing few. Yet this is the course that should teach students that rights are correlated to duties and the two are connected by rules; that there are legal rules and non-legal rules, so legal rights and non-legal rights; that the latter of those, and the whole natural law tradition, sits on pretty insecure foundations; that bills of rights finesse that legal v non-legal rights distinction, allowing the point-of-application interpreters (but no-one else) to transmogrify one of their own personal "oughts" into an "is" – to make a non-legal "ought" become a legal "is".

Alas, the vast preponderance of law students in this country finish their degrees without reading Hohfeld, or H. L. A. Hart's, *The Concept of Law*, (which every educated lawyer should have read, or been forced to read). They get almost no exposure to serious writers on the foundations of non-legal rights.

At the risk of caricature, a risk I am prepared to run, a lot of law school human rights courses start with an understanding of human rights that can be put quite frankly and simply. On this approach you just ignore the issue of foundations as far as possible. You sweep the question under the carpet and pass along in silence. The thinking here goes something as follows: If a commitment to fundamental human rights is the foundation of political legitimacy, then we just

have to assume such human rights (whenever we stray into the non-legal realm) actually exist. Or, as US law professor Stephen Smith puts it, without in any way endorsing such an approach, and in regards to the related issue of equality:

> Just as in one kind of philosophy elusive but indispensable things like causation, time, space and continuity of personal identity are not so much observable facts *in the world* as commitments or categories we *bring to and impose on the world*, so equal moral worth is a starting point or necessary presupposition that we assume in order to deal with the normative and political world as it is. That presupposition need not be justified . . . on any other grounds. (Steven Smith, "Equality, Religion, and Nihilism" (2014) 14-169, *San Diego Legal Studies Paper*, 9-10)

I call this the Eleanor Roosevelt school of human rights thinking. Where you just pretend that everything starts with the Universal Declaration of Human Rights, sweep all the hard questions under the carpet, and go from there. If you do that you will be inclined to see the United Nations as a font of moral goodness – it is not. And you will be predisposed to favour supra-nationalism over the hard and dirty work of compromise and winning elections that comes with "democracy". And if, in the international rights-related legal world, they have not much time these days for a vigorous approach to free speech, well, then, the students and their professors will not either.

Let us be honest. On any half-way decent understanding of so-called human rights – their foundations, aspirations, weaknesses and strengths – you have at least to have a basic understanding of the debate in meta-ethics between the moral realists and the non-cognitivists or moral sceptics. And between consequentialists and deontologists. In our 36 Australian law schools I venture to say there is not a lot of that understanding out there.

Pick a law student at random and ask him or her what a right is. It is a hard question. Many law school courses just assume human rights are somehow self-evident. So the law professor can move on with satisfying armchair work of assuming the decisions of the European Court of Human Rights will, if implemented, make the world better.

Or, take it as read that the view of human rights held by unelected judges or by the members of some United Nations committee that monitors some rights-related convention are by definition the "right" view. Better than yours, a mere teacher's or plumber's or Member of Parliament's. Before you know, you end up with some such committee making the sort of idiotic assertions about rights and allegations of false imprisonment that they made about Julian Assange.

All of us living in the post-Second World War Anglosphere are living through an era that is seeing the rebirth of the dominance of a natural law world-view. For 150 years before, it was Benthamite consequentialism that dominated, arguably even in the United States (just look at Justice Oliver Wendell Holmes). How many law students know that J.S. Mill was a utilitarian, a disciple of Bentham? Or that Mill's defence of free speech was through and through a utilitarian one? Is it any surprise they do not have much concern for free speech?

As for our current post-Second World War era's dominant world-view, we have renamed this reborn Jeffersonian natural law outlook using the language of human rights. But it would do all law students well to understand its strengths and weaknesses; its inherent distrusts of democracy; and what can plausibly claim to be its foundations.

Chapter 9

Great Harm to Innocent People
An ICAC story

Margaret Cunneen

C. S. Lewis said of the various tyrannies to which one can be subject, the most oppressive of all is the tyranny of the busybody and the do-gooder, supposedly acting in our own interest.

The robber barons at least sometimes go to sleep and sometimes have their appetites sated. But those oppressing us for our own good have the benefit of believing in their own conscience that they are helping us, all of us – and so they never relent. Nor can they ever accept that they are wrong. And so much idealism is no more than disguised love of power.

I shall come back to them.

Our common law system, with all its appeals, formalities and procedures, checks and balances, hard-won evidentiary rules developed for the protection of individual liberty, may be slow and even arcane. But the hierarchy of the courts, and the many sets of eyes that review every allegation at every point, ensure that the citizen is not subject to the arbitrary view of a single person in whom is reposed the functions of investigator, prosecutor, judge and gaoler.

The right to a fair trial is an essential human right in all countries respecting the rule of law. In fact, the right is much more widespread than that. Article 11 of the Universal Declaration of Human Rights declares that: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law".

It is the "one golden thread always to be seen" throughout the web of our common law, as Lord Sankey observed in 1935 in the House of Lords in *Woolmington*. You will recall that Woolmington was acquitted three days before his scheduled execution, the Lords pronouncing:

> No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner [beyond reasonable doubt] is part of the common law . . . and no attempt to whittle it down can be entertained.

The presumption of innocence finds expression in the direction to the jury of the onus of proof that rests upon the Crown. It is proof beyond a reasonable doubt of every element of an offence as an essential condition precedent to conviction which gives effect to the presumption.

We depend on juries to represent the community in the practical application of the common law. Not only are we confident that they offer a tribunal of fact that is, because there are twelve minds and twelve sets of life experience, more worldly than a single set of eyes, but we know that between twelve people any prejudice that may be present in one person is leavened out and eliminated.

At the start of a trial a jury is warned to keep an open mind and that it will not be until all the evidence is heard that they will be in a position to evaluate it. "Wait", the judge will say, "keep an open mind until all the evidence is in. You must not rush to an opinion".

I had heard this admonition to juries hundreds of times until I realised that it is a recognition of the human tendency to form an opinion early in an evidence-evaluation process

and then to evaluate further evidence with a bias that favours that initial opinion. Fortunately, in a trial, each side – guilty and not guilty – is represented.

The only evidence admitted, and can possibly become public, is evidence deemed admissible by a disinterested judge. In other words, it is material which is relevant, has not been obtained illegally, and is not unfairly prejudicial.

Prosecutors in common law states are subject to additional ethical rules governing their conduct in court that do not apply to other barristers. They must not do even a little wrong for the sake of expediency, or to please any power.

Prosecuting is a specialised role, not easily assimilated by legal practitioners. Advocacy in the role must be conducted temperately and with detachment and restraint.

And prosecutors are reminded that they are not investigators. They have neither the training nor the hierarchy of investigative experience behind them.

Lawyers are trained to elicit evidence from a witness in the courtroom. But they did not gather the evidence.

It is the professional detective who is trained in ethical and effective investigative techniques. The trained and ethical investigator commences with an open mind, seeking knowledge of all facets of an event, those consistent with innocence and those consistent with guilt. There is no pre-determined hypothesis. And each investigation has terms of reference which establish a focus and set limits on itself. There is never a justifiable reason for a professional investigator to suppress relevant information obtained during his or her investigation.

You may not be surprised to hear that, this being the 40th year in which I have served in our common law system, I have developed a guarded sense of caution about governments creating self-contained, autonomous investigating bodies that are not courts and which have no judicial functions but which have extraordinary powers which abrogate fundamental common law and human rights and privileges. As the High Court of Australia has said:

> The duties of the commission [any commission] are to inquire and report . . . the commission can neither decide nor determine anything and nothing that it does can in any way affect the legal position of any person. Its powers and functions are non-judicial.

These bodies have no power to determine guilt but that message is lost because the media machines that they invariably have ensure that any apparently damaging material they can suggest about their targets is spread across the press, often embroidered by favoured media outlets with salacious associations that are tenuous at best and malicious fiction at worst.

But surely bodies with coercive powers which exceed those of the police, the ability through their self-promoting media machines to inflict serious damage on the lives and reputations of individuals even during the course of their investigations, and the power to issue public reports that condemn people irreparably without need of proper proof, should be required to apply high standards of natural justice.

These government investigative bodies, commissions of various sorts, are concerned with a much earlier phase than the courts – determining whether to recommend that a charge be laid – and their recommendation is not determinative. They bring together, in a single office, the roles of investigator, prosecutor, judge and media unit, abandoning the traditional separation of those

roles, and the objectivity and fresh sets of eyes on an allegation, or suspicion, that the proper criminal justice system boasts.

Because these government agencies are not courts and cannot convict or pass sentence, they have developed a mode of punishment which is often far worse. In 1998, showing great prescience, the then Chief Justice of the High Court, the Honourable Murray Gleeson, AC, QC, lamented:

> the ever widening gap between what is required to be done in a court of law to prove that a person is guilty of misconduct and what is sufficient, outside a court of law, to create about a person such an atmosphere of suspicion, distrust and hostility, that for all practical purposes it does not matter whether anything can be proved against him.

On 30 July 2014, my life and the life of each member of my family, changed forever.

It was early in the morning, I was asleep and alone in my home in Sydney. (KNOCK, KNOCK). I shuffled to the front door wearing only a dressing gown. Through the glass I saw two grim looking people, of the style of police but not nearly as well-dressed. Still, my immediate thought was that this was a death message about one of my three sons. I opened the door with the greatest dread and, hardly finding voice, said "which one?"

It was at one level a relief when the answer came back: "we are from ICAC [Independent Commission Against Corruption] and we have a warrant. Can we come in?" They flashed badges that were like police badges but with the dread four letter word in blood-red like violent graffiti over the coat of arms of the State I have served for 40 years.

I let them in. They handed me what was not a warrant at all but a notice to produce. I recognised the signature at once. It was the signature of a woman with whom I had worked side by side as solicitors in the late 1980s, including over the time that I was carrying my eldest son, Steve. We had been Crown Prosecutors together for years and I have appeared before her in both the courts to which she was later appointed. We have often attended the same social and professional functions and we know each other's partners. In fact, she chatted at some length to my husband, Greg, who at one stage had taught her son, at a Christmas party only six months before.

I said, "I've only just woken up. Is this the first of April?" They grimly told me they wanted my mobile phones. I truly thought it was a practical joke, because I also had a solicitor friend who worked at ICAC and both she and the Commissioner who had signed the document well knew where I lived.

I asked what this was all about, if they knew. They said they did, but I was not permitted to know.

I made a reference to Kafka, which was not appreciated – in either sense.

My phones then started ringing in another room. I did not answer them.

I asked them where they worked before their current position. "I'm from the UK".

Yes, I'd gathered that. The other was from Queensland.

I made a cup of tea, declined by my guests. I felt ridiculous in only a dressing gown. I knew that this was either a gee-up or a stuff-up.

Then I started thinking that I must have inadvertently used my work phone for a private purpose. But, no, it is so old people ask if I got it from the Smithsonian – I use my personal phone for work whenever I can.

Then my husband, Greg, arrived. I said, "these people want my phones". He said, "well, I hope they don't want mine or I won't know where my work is on today". Then he was handed a Notice. He said, "Look who's signed this, Marg". He recognised the name – even the handwriting, at once.

The phones were handed over, after a false undertaking that they would all be back within a day or so, and I was extremely confident that whatever malicious rumour or false complaint they were acting on, they would soon realise that it was all a monumental blunder.

And then I was told, by Greg, that another team had swooped upon my son's home. He and his girlfriend, Sophia, had never heard of ICAC. They are not in government service. Sophia asked whether they were the police. She was told: "we're above the police" and that if she did not hand over her phone she would go to gaol for five years. When my son asked what ICAC does, one of them whom we now know to be one Grainger, said: "We're the ones who got the Obeids".

The right to privacy is surely a fundamental human right. It was shocking that a demand should be made by these employees of an esoteric arm of the executive government for these young people, neither of whom has ever worked for the government, to be woken from their beds to hand over their phones and given no reason whatever.

And it started to hit me, what a diabolical humiliation it was for me that a woman I had known well for 30 years would have access to my contacts lists and to texts with people we both knew. All my personal communications over the last four years – and my work phone – NSW Government issue with about ten years on the clock.

I headed directly to my son's place. I could barely concentrate on driving, wondering what on earth it could all be about. We could not come up with the slightest idea of what linked the four of us in such a way as to attract the attention of a corruption agency.

I knew, then, that my children had been subjected to fear, intimidation and humiliation because someone was after me.

You are in trouble and you are not allowed to know why.

The people who swoop in to harass you are very invested in the matter. They know what it is about but they will not tell *you*. If you get frustrated with them – or your child or husband does – that just helps them to assuage their consciences about what they are about to do to your family, your work and your good name.

The staff of ICAC are all part of a team, championing their achievements with a crusading zeal. And the specific ethical obligations of investigator and prosecutor are blurred by people doing both and defending, as it were, the investigation they have initiated or directed.

Even with the best will in the world, the people making the decisions in agencies like ICAC to search and seize and go public are highly likely to be influenced, and influenced early, by the suspicions that are part of the investigative process and susceptible to making subjective rather than objective assessments of the need for the use of invasive powers.

None of the roller coaster ordeal that followed would have been nearly as difficult if it was only about me. But it would have been over faster, too, because I would not have been motivated to challenge it.

I am very accustomed to professional attacks.

I had, just the week before, withstood a curious episode in the Royal Commission into Institutional Responses to Child Abuse. I was cross-examined for two days about an advice I had

given 10 years before about allegations of indecent assault by a swimming coach in the early 1980s. My then boss, Nick Cowdery, had agreed with the advice and sent it with his endorsement to his counterpart in Queensland. I remain of the view that the advice was sound. But the Commissioner was convinced the coach (who has never been brought before the courts and remains a person of good character) was guilty. It was an unprecedented thing for a barrister to be hauled over the coals, in effect, for a bona fide advice expressing genuinely held views which had been endorsed by others.

Which brings me to something the Royal Commissioner, Peter McClellan, said in quite a good paper about ICAC, delivered at Sydney University Law School 25 years ago. In "ICAC, A Barrister's Perspective", he said:

> The ICAC will ultimately be effective only if its performance justifies its extraordinary powers. If the Commission is to justify those powers it must be scrupulously fair, value the rights of individuals and accept that persons should only be convicted after due process in the relevant court. The experience of the first twelve months is that as a result of ICAC's actions . . . great harm has been done to many innocent people.

But I am accustomed to courtroom tactics and techniques and, knowing I had never in my life acted corruptly, I would have faced the ICAC business and the allegation would ultimately have been found to be baseless, as it now has.

But for Steve and Sophia it was a different matter. David Bennett, QC, with whom I was (and still am) on the Bar Council, said to me: "Whatever you do, don't let them tear your children apart limb from limb".

It was eight days later that we all had another visit. Embarrassingly for Sophia, they showed up at her workplace wearing obtrusive body cameras. Sophia's boss told her to get a new boyfriend.

I was at home and I thought they were there to return my phone. No such luck. This time they had a search warrant, which they had realised was needed to cover the seizure of the phones, although I thought (and they knew it) that they were going to spend the day turning my house over. They arrived with my personal phone in their hands and then proceeded with the risible and blundering contrivance of seizing the only thing on the warrant – a phone that they had brought to the premises themselves.

When the ICAC Commissioner was asked, by the Parliamentary Committee into ICAC in March 2016, about the practice of entering our homes and seizing our phones without any warrant, she made an extraordinary admission. She said:

> the notice to produce was a very low-key, unobtrusive way of obtaining the phones and when we had access to the contents of the phones, we could determine whether or not there was anything we needed to pursue.

She thereby admits that ICAC had no basis for seeking Search Warrants to obtain the phones at the time she used Notices to Produce illegally to seize the phones *to search for something to justify obtaining a Search Warrant.*

It is trite to observe that law enforcement agencies are simply not permitted to enter a citizen's home and seize his or her phone without a warrant in order to conduct a fishing expedition to find something upon which to justify seeking a Warrant for the same phone. The

Notice to Produce contained no allegation because they had not worked one out. (A Search Warrant must contain an indication of the nature of the investigation.) Using a Search Warrant, a week after taking the phones, to seize a phone they brought back to my home themselves, is an extraordinary abuse of an extraordinary power.

Finally, we were advised of the allegation that Steve and I had counselled Sophia to feign chest pain to avoid a breath test at the scene of a car accident of 31 May and that she had done so. We were all in the frame for attempting to pervert the course of justice.

My husband, Greg, was teaching taekwondo to pre-school children at the time he was paid a visit by the camera-wearing spooks waving a summons in his face. The children's mothers were no doubt nonplussed to see what was going on with this hitherto respected teacher.

The next week, two years ago now, there were compulsory examinations. We all had to get lawyers, separate lawyers. I started to wonder how people who did not know any lawyers could afford it. Thank God I did not know what was to come! There's no right to silence there, as there is in the criminal courts. Yet this was an alleged crime. Why was it never referred to the police? The answer can only be that they knew the police would hose it out in 10 minutes flat because Sophia's blood test proved she had been completely sober and nothing untoward had happened at the scene. We each gave our accounts of the events surrounding Sophia's car crash, when she was T-boned by a vehicle travelling at high speed while she was stationary at a red light driving to my home after work on a Saturday afternoon.

Then, nothing. We were quite comfortable that our explanations of what really happened had saved us from any further trauma. Sophia was in a massive five car crash, not her fault, and had been rescued and placed in the back of the ambulance before police arrived. Steve arrived later and I, later still – **after the police**.

Sophia was taken to hospital, and routinely blood tested with a 0.00 result. I had been the last to know about the crash because Sophia rang my son and he rang his father, not me – there was no legal advice required. It was quite clear that ICAC had no idea that Sophia had indeed been tested and found to have no alcohol in her system, nor were they aware that Sophia never spoke to the police at the scene so it was quite impossible for her to have told them any lies.

The Australian published a feature piece about it all and I learned that there were more than a dozen eyewitnesses to the crash, none of whom had been spoken to by ICAC. They described how the car had become airborne on its side, with Sophia suspended by the seatbelt. The man who rescued Sophia from the wreck, thinking it was about to explode, said he did not smell any alcohol on her. All confirmed the ambulance arrived well before the police and it was a hospital blood-test, rather than a roadside breath-test, situation. She had been asked by paramedics whether she had chest pain and she said she did, which was entirely unsurprising.

We thought that all that had been accepted and then, two and a half months later, public hearings were announced at the same time summonses were issued to us by e-mail. I have since found out that the police and ambulance personnel were called for private examination at ICAC the day before public hearings were announced and were each handed summonses as they left the hearing. None had any evidence in support of the allegation. They all said that they had seen or heard nothing untoward, and that I had only arrived at the heel of the hunt, in any event. But the point is, the decision had been made to proceed to a public hearing regardless of what those witnesses would say. What other decisions had already been predetermined?

When I read Hedley Thomas's report on the Greyhound Inquiry in New South Wales, it struck a chord. He maintained that Counsel Assisting, in his opening address last September, "gave every indication he had made up his mind before the start of public hearings". "Right from the outset", Mr Thomas wrote, he "made it plain that greyhound racing was bad for too many animals. He introduced an amorphous requirement, saying that 'a sport that utilises animals cannot operate without a social licence' and declaring the industry had lost this indeterminate thing".

A veterinarian from Casino with extensive experience in the industry was quoted as saying that the short public hearings relied heavily on a few vets with known predetermined agendas who worked together to provide the commission with false and/or misleading evidence. The retired integrity chief for the industry said that "there was a narrow and pointed line of questioning tending to lead witnesses to answer questions favourable to the opening address".

One is left with the impression that government has been devolved onto lawyers who hold to the desired agenda, whose positions are protected, when it is supposed to be done by elected representatives.

And because the commissions are generally headed by a former judge, they carry the majesty of the law and the appearance of a court when all the while they are part of the executive without any judicial functions. The politicians who rely on them, and champion them, often call the commissioner, who is in reality merely the head investigator, Justice so-and-so.

There is an enormous trust and acceptance of these bodies, some of which almost claim infallibility. And then redress to the proper courts of law is often removed or made impossible. I shall return to that thought.

The day after ICAC announced in the press that public hearings into the allegation was the first of many days when press photographers lined the footpath outside my home, and they were at my son's home and his girlfriend's workplace. We were all over the news.

Allegations of perverting the course of justice, with none of the real facts, appeared on google entries about my son and his girlfriend. Every future potential employer they have will see them.

I felt diminished in my children's eyes. I had never been in trouble before. I felt humiliated everywhere I went. Because of the intensity of the pursuit, on one occasion while I was waiting on the edge of a platform for a train, I realised that this would go on even if . . . I could never catch another train.

If my child was accused of a crime he would have a right to silence. He would be given a brief containing all the evidence against him. He would have a privilege against self-incrimination.

Steve and Sophia would never have been in this nightmare if someone was not interested in pursuing me. I had to protect them and every lawyer I knew urged upon me the view that ICAC had clearly gone way beyond its charter.

ICAC had now neutered both major political parties, taking down a Premier, a Police Minister and more, had ended the career of a fine State Emergency Services Commissioner for the obscure offence of dismissing a whistleblower, expropriated mining leases to the detriment of thousands of innocent shareholders in an equally innocent company, Nucoal (how is ICAC qualified to make such recommendations when it understands nothing about sovereign risk and the consequences to the investment reputation of NSW? And even ICAC recommended Nucoal

be compensated when it realised it was in error – but the Premier said the State did not have the money).

Now it was going after a barrister, a silk, a member of the Bar Council, a Deputy Senior Crown Prosecutor and Commissioner into an Inquiry about pedophile priests with almost 40 years unblemished service AND her family – over a car accident she was nowhere near. This outfit wants to show that it can go anywhere it likes. The traditional guardians of our civil society are not only not immune – it is as though they are targeted.

The treatment of Mr Murray Kear, a decorated fireman who rose to the position of Commissioner of State Emergency Services, was particularly disgraceful. His career was destroyed after he was accused of dismissing a "whistleblower". In this case the said whistleblower had made allegations against another employee which were false. Mr Kear made herculean efforts to counsel her and help her adjust to the organisation and the demands of her role. Finally her services were dispensed with and she complained to ICAC.

A public hearing was held and ICAC branded Mr Kear corrupt and recommended criminal charges. He was asked to resign and did, losing superannuation benefits that can never be recovered.

During the criminal proceedings it was discovered that ICAC had not served upon Mr Kear evidence from witnesses in private hearings who had given evidence favourable to him. The Magistrate said, "I find that investigators cannot simply chose not to serve such evidence from witnesses because they have provided evidence contrary to the prosecution case". He found that the ICAC investigation had been conducted in an unreasonable and improper manner, the proceedings had been initiated without reasonable cause and he dismissed the charge because the evidence in support of the defendant's contention was overwhelming.

But ICAC still maintains Mr Kear is corrupt and will not remove the finding from its website. He has not been offered the chance to return to his position.

One of the extraordinary powers this outfit has is the power to initiate investigations without anyone else granting terms of reference or otherwise authorising them, formulating its own allegations and investigating in its own way. It does not require a victim, a complainant, an aggrieved bystander or a policeman saying these people should be charged. It just starts, and no-one is there to cross-examine about what they allege against you. You just do not know where it has come from. You just know it is wrong.

We challenged ICAC's jurisdiction to investigate an allegation that did not amount to corruption and the NSW Court of Appeal agreed with us. But within minutes of the decision, ICAC announced it would appeal to the High Court. I had always hoped to get to the High Court. Never in my wildest dreams could I have imagined it would be as one of the respondents. More cameras at home.

I wondered how my security at this house would ever be adequate for me to get back to prosecuting murderers. I woke every morning with the same foreboding feeling. I had become used to a wave of horror every time I passed my front door and palpitations anytime anyone knocked. My family had become used to unloading our phones and going outside to talk to one another. And I had lost five kilos on the ICAC diet.

In the High Court appeal by ICAC it was accepted for the purposes of the jurisdictional argument, erroneously, that Sophia had lied to police to avoid a roadside breath test. The High Court dismissed ICAC's appeal, finding that that conduct could not be corruption.

When ICAC carted my son, Sophia and me to the High Court, the Chief Justice (concerned for my family's finances and the enormous imbalance between us and the unlimited resources of the State) raised the question of costs. He said to counsel for ICAC that, as they sought to pursue the appeal because it affected "a variety of other investigations", they should undertake to pay our costs. That undertaking was made. However, ICAC has since challenged our costs all the way, resulting in them being severely taxed down to about half what has been incurred. My family will end up hundreds of thousands of dollars out of pocket. ICAC knows that even when it loses, it can harm targeted families in this crippling fashion.

Three weeks later, on 6 May 2015, after ICAC demanded it, the New South Wales Parliament passed legislation retrospectively to validate ICAC's ultra vires acts and thereby stripped the right of victims of ICAC overreach to legal redress. Because ICAC had been stopped from investigating us, it had to find another way to attack us.

Then I suffered an excruciating public humiliation. I had started a murder trial at Darlinghurst that received a small amount of press on the second day. On the morning of the third day, while I was on my feet taking evidence from the bereaved son of the murdered lady, I was conscious of dozens of calls and messages registering on my phone. At morning tea time there were many more press photographers outside the court than there had been for the start of the trial and they were asking me for comments on the latest developments.

ICAC had made a 622-word press release which read as an indictment. It was, arguably, a de facto report on the investigation which the High Court said had been entirely illegal. It said that the matter had been referred to the Director of Public Prosecutions (my own employer) for consideration of criminal charges against all three of us and, failing that, disciplinary proceedings against me. It was all over the papers, and the press were all over the front of my home, again. The pursuit of my family over a car accident in which the driver, who was not me, was not at fault and absolutely sober, was placed higher in priority than a man's murder trial in which the bereaved relatives had already completed their painful ordeal of giving evidence.

The press release was virtually a finding of guilt. What was the real purpose of having scheduled a public hearing if they had already made up their mind? Just a means to humiliate a family.

I was suspended from duty by the Director of Public Prosecutions (DPP), who presumably did not realise the paucity of the so-called evidence as he was alive to his conflict of interest and sent the matter to be evaluated by the Chief Crown Prosecutor of Victoria and the Solicitor-General of NSW. I found out since that the Commissioner, at this time, drew to the attention of the DPP a couple of text messages from two and a half years before Sophia's car crash in which I had been critical of him not cross-examining a witness in the appeal about a criminal trial in which I had appeared for the Crown. It had all the appearance of an attempt to engineer a bias in him. No wonder he suspended me from duty.

The next day I had to appear in my trial to withdraw. I had to be up early and focused. I was dressing and walked into a front room in my underwear. There was a TV camera at the window. I ran out to the bathroom and looked in the mirror. I knew I had a choice of two reactions: crying with violation or "hey, you don't look too bad". I went with the latter.

Walking up to Darlinghurst, having just been suspended, to withdraw from a murder trial because I had been accused by ICAC of attempting to pervert the course of justice was one of the most painful experiences of my life.

And, as I left at the first adjournment, defence counsel handed me a note. It was from the accused, telling me that he was so sorry about what happened, that it was obviously a witchhunt and wishing the best for my family and me. The man was later convicted of murder. But he was not heartless.

This was the fourth time in the whole saga that I had thought it was all over, only to find it had grown a new tentacle. That roller coaster effect – being so relieved after the private hearing, so relieved after the Court of Appeal, so relieved after the High Court, was what really exacerbated the torture, for every member of the family. I have two other sons who were 24 and 22 when this began, and they have suffered too. The kids did not know it but I had risked our home in legal costs to prove what I knew in my gut from the start was true. ICAC had no right to do this to my family.

The Solicitor-General soon announced that there was no wrong-doing and there would be no charges against us. About five months later, the ICAC Inspector, the Honourable David Levine, AO, RFD, QC, published his Report on ICAC's attempted investigation of my family. He labelled it a "debacle", a "grotesquerie" and the stuff of a family's "worst nightmare". He illustrated instances of illegality and unjust and oppressive behaviour in the aborted investigation. And he concluded:

> Whatever was captured by happenstance as having been said or done by Ms Cunneen finds no support in reliable, credible or cogent material, let alone material elevated to constitute evidence, of any conduct on her part, let alone of her son or his girlfriend, warranting the intervention and intrusive exploration by one of the most powerful agencies of this State.

This Report precipitated an investigation by the Parliamentary Committee into the workings of ICAC. ICAC, however, tried to make it about me again, rather than them. Material was leaked to the favoured media outlet that has never been served on me. I query whether it exists. But, unsurprisingly, given the decision of the Solicitor-General that there was no evidence of any criminality, there was no "smoking gun". There was instead an attitude of contempt displayed toward the ICAC Inspector and a resistance to the Committee's attempt at its duty of oversight of ICAC. It was almost a declaration of infallibility.

"We need a strong ICAC", the catchcry goes. Well, we need a strong police force, even more, and we have one because of the stringent accountability and constant scrutiny to which it is subject, including the way its methods and decision-making are tested each day in our proper courts. Police know that they may be cross-examined in court about every decision they make about any suspect. But the people who make the decisions at ICAC and who storm people's homes and seize their phones and computers almost always remain faceless.

It is time to query whether "independence" is a quality with no downside. Where there are no controls and no accountability, in any organisation, the conditions for corruption to flourish are rife.

Because these government agencies are not courts and can therefore not convict, nor pass sentence, they have developed a means of punishment which is in many cases far worse. Well in advance of any charge being laid, often in cases where charges will never be laid and even in cases where the decision that no charge will be laid has already been made by the proper authorities, ICAC justifies its existence by condemning the presumed innocent in the media.

Even if we have done nothing for which the proper law would punish us, can any of us be confident that we will not be caught up in an effort to investigate the perceived breach of some pettifogging ordinance that a government official has decided is suddenly of such importance that all the protections of the common law are to be circumvented? Or can we be satisfied we will not be targeted for intrusive inspection and character destruction because of who we are or what we believe?

We must insist that all government agencies remain subject to the rule of law. If we do not, we can be certain that our hard-won freedoms and protections under the common law will be inexorably eroded.

There was no nobility in this pursuit. Vulgar, prurient, personal. There was a mean and malign feeling about this. It was sneaky and the attempts to justify it were disingenuous.

Chapter 10

The Dismissal
Reflections 40 Years On

David Smith

Gough Whitlam and others have described the events of 11 November 1975 as a coup, but it was nothing of the kind. A coup is defined as a violent or illegal change of government. The events of that day were neither violent nor illegal.

With nothing more than some signatures on a few pieces of paper, a Prime Minister was removed, another was installed, and the issue was immediately referred to the Australian people in a national election for both Houses of the Commonwealth Parliament. One month later the people delivered their verdict, and it was a decisive verdict. The Fraser Caretaker Government was returned in a landslide. The Governor-General's actions were vindicated.

The late Philip Graham, former publisher of *Newsweek* and *The Washington Post*, said that good journalism should aim to be "the first rough draft of history".

So let me now go back to 1975 and look at what falsehoods and errors the future historian, searching through that first rough draft of history, might find in the contemporary accounts of those days. I begin with Malcolm Fraser's early arrival at Government House on that fateful day in November 1975, before, and not after, Gough Whitlam, as the Governor-General had instructed. That was due to a simple error by someone on Fraser's staff, and had nothing to do with Government House, but it was presented as the beginning of a Vice-Regal conspiracy.

It was alleged that Fraser was closeted in a room at Government House with the blinds drawn. This clearly was the figment of a vivid journalistic imagination on the part of someone who was not there, for Fraser waited with me in a room next to the State Entrance, a room which at that time was used as a waiting room for visitors who had arrived early, and the blinds were certainly not drawn. Why would they be? There was no one outside trying to look in.

It was alleged that Fraser's car was moved and hidden round the back, out of sight. It was not. It was in fact moved even closer to the front of the building, and was in full view.

The next pair of myths grew out of my arrival to read the Governor-General's proclamation from the steps of Old Parliament House. I came, as always, to the front entrance. I drove up to the front steps in a big, black Government House car, clearly identified as such by the traditional Crowns where number plates would normally be. I wore full morning dress, so I could hardly have been mistaken for one of the crowd that had gathered in front of the building. I was met by a Senate officer, escorted into Parliament House via Kings Hall, and taken to the office of the Clerk of the Senate, where I was to wait until the top landing could be cleared and Whitlam had vacated the microphone which I was to use.

On being asked to leave the microphone, Whitlam, who apparently had not noticed my arrival, expressed surprise that I was already in the building, questioned the officer who had met me, then he immediately returned to the microphone. He described me as an emissary from the Governor-General, and then, in what sounded very much like an incitement to riot, given the way he had already stirred them up, told the mob that I would appear shortly, and asked them to give

me the reception I deserved. Then, having just been told that I had arrived at the front of the building, he announced that the Official Secretary normally arrived at the front of the building but that on this occasion I had come through the kitchens and, as he so elegantly put it, up the back passage.

I could see and hear what was happening from my position in the Clerk's office and, although I was alone, I was so affronted by Whitlam's deliberate lie that I shouted out at the top of my voice, "You bloody liar!" No one could hear me, but it made me feel better.

Whitlam later claimed that my reading of the proclamation was an unnecessary provocation on the part of the Governor-General. This allegation was also not true, and he knew it was not true. The practice of having the Governor-General's proclamations dissolving Parliament read from the front steps commenced in 1963, on the advice of the then Attorney-General, and for good legal reasons. The 1963 public reading was followed by similar public readings in 1966, 1969, 1972, and 1974, before we came to the 1975 reading, and there have been fourteen more since then. My first reading was in 1974, when Sir Paul Hasluck dissolved both Houses of the Parliament on the advice of Prime Minister Whitlam. Whitlam had no complaints about my reading of that proclamation, yet he denounced an identical reading the next year as unnecessary and provocative.

So far I have dealt only with minor events which preceded the main game: each was not greatly significant by itself, yet together they helped establish an atmosphere designed to taint the public's perceptions of what was to follow. They suggested an aura of irregularity or impropriety emanating from Government House, which Whitlam and his supporters then sought to transfer to the major events of the day.

The original attack, of course, had been on the Senate's refusal to pass the Labor Government's budget. The Whitlam Government's view was that the Constitution and its associated conventions vested control over the supply of money to the Government in the House of Representatives, and that the actions of the Senate in threatening to block that supply of money were a gross violation of the roles of the respective Houses of the Parliament.

This view of the respective roles of the Houses of the Parliament had not always been the view of the Labor Party, nor had it been the view of Whitlam himself prior to 1975. On 12 May 1967, in the Senate Chamber, Senator Lionel Murphy, then Leader of the Opposition in the Senate, had this to say about the upper house and money bills:

> There is no tradition, as has been suggested, that the Senate will not use its constitutional powers, whenever it considers it necessary or desirable to do so, in the public interest. There are no limitations on the Senate in the use of its constitutional powers except the limits self imposed by discretion and reason. There is no tradition in the Australian Labor Party that we will not oppose in the Senate any tax or money Bill, or what might be described as a financial measure.

On 12 June 1970, the then Leader of the Opposition, Gough Whitlam, had this to say in the House of Representatives:

> The Prime Minister's assertion that the rejection of this measure does not affect the Commonwealth has no substance in logic or fact. . . . The Labor Party believes that the crisis which would be caused by such a rejection should lead to a long term solution. Any

> Government which is defeated by the Parliament on a major taxation Bill should resign . . . . This Bill will be defeated in another place. The Government should then resign.

Let me repeat that view of Whitlam's, as he expressed it in Parliament in 1970:

> Any Government which is defeated by the Parliament on a major taxation Bill should resign . . . . This Bill will be defeated in another place. The Government should then resign.

When that same Bill reached the Senate, this is what Senator Lionel Murphy, Leader of the Labor Opposition in the Senate, had to say on 18 June 1970:

> For what we conceive to be simple but adequate reasons, the Opposition will oppose these measures. In doing this the Opposition is pursuing a tradition which is well established, but in view of some doubt recently cast on it in this chamber, perhaps I should restate the position. The Senate is entitled and expected to exercise resolutely but with discretion its power to refuse its concurrence to any financial measure, including a tax Bill. There are no limitations on the Senate in the use of its constitutional powers, except the limitations imposed by discretion and reason. The Australian Labor Party has acted consistently in accordance with the tradition that we will oppose in the Senate any tax or money Bill or other financial measure whenever necessary to carry out our principles and policies. The Opposition has done this over the years, and in order to illustrate the tradition which has been established, with the concurrence of honourable senators I shall incorporate in Hansard at the end of my speech a list of the measures of an economic or financial nature, including taxation and appropriation Bills, which have been opposed by this Opposition in whole or in part by a vote in the Senate since 1950.

At the end of his speech Senator Murphy tabled a list of 169 occasions when Labor Oppositions had attempted to oppose money Bills in the Senate for the sole purpose of forcing the Government of the day to face the people at an early election.

On 25 August 1970, the Labor Opposition launched its 170th attempt since 1950. On that occasion, Whitlam had this to say in the House of Representatives:

> Let me make it clear at the outset that our opposition to this Budget is no mere formality. We intend to press our opposition by all available means on all related measures in both Houses. If the motion is defeated, we will vote against the Bills here and in the Senate. Our purpose is to destroy this Budget and to destroy the Government which has sponsored it.

As Jack Kane, one-time Federal Secretary of the Australian Democratic Labor Party and former DLP Senator for New South Wales, wrote in 1988:

> There is no difference whatsoever between what Whitlam proposed in August 1970 and what Malcolm Fraser did in November 1975, except that Whitlam failed ... Senator Murphy, for Whitlam, sought the votes of the DLP senators, unsuccessfully. That is the only reason why Whitlam did not defeat the 1970 Budget in the Senate and thus fulfil his declared aim to destroy the Gorton Government.

While all this was going on in the Parliament, the High Court of Australia was also given the opportunity to express its view on whether the Senate had the power to block supply. On 30 September 1975 the High Court handed down its judgment in *Victoria v the Commonwealth*. Four of

the learned judges expressed opinions which supported the view that, except for the constitutional limitation on the power of the Senate to initiate or amend a money Bill, the Senate was equal with the House of Representative as a part of the Parliament, and could reject any proposed law, even one which it could not amend.

The relevant parts of these judgments were incorporated in Hansard on 30 October 1975. Yet still the media, and particularly the Canberra Parliamentary Press Gallery, kept silent on this issue, and Whitlam continued to rail against the Senate. As a result, many Australians still believe that the Senate has no right to block supply.

The next two myths which Whitlam sought to propound were part of a package and they related to the question of advice to the Governor-General The first myth was that the Governor-General could act constitutionally only on the advice of his ministers or, more particularly, only on the advice of his Prime Minister, and then only in accordance with that advice. The second myth was that the reserve powers of the Crown, which allow a Governor-General to act contrary to, or even without, ministerial advice, had long since lapsed into desuetude, and that the Governor-General no longer had any discretion to act other than in accordance with ministerial advice.

But Whitlam and his acolytes in the media had forgotten, if they ever knew, that Lord Casey, as Governor-General, as recently as 19 December 1967, had exercised the reserve powers following the disappearance of Prime Minister Harold Holt. Without ministerial advice, for there was no-one who legally could give it, the Governor-General had revoked Holt's appointment as Prime Minister, in accordance with section 64 of the Constitution, exactly as Sir John Kerr did with Whitlam's appointment, and had chosen Sir John McEwen to be the next Prime Minister, exactly as Sir John Kerr did with Fraser's appointment.

Although Whitlam was constantly reminding the Governor-General, both privately and publicly, that he could act constitutionally only on the advice of his Prime Minister, the existence of the reserve powers would have been, or should have been, well-known in Labor circles. One of the most definitive and scholarly works on the subject, entitled *The King and His Dominion Governors*, published in 1936, had been written by H.V. Evatt, then a Justice of the High Court, later to become a member of the House of Representatives and Leader of the Parliamentary Labor Party.

Then there is the more-recent double dissolution which Prime Minister Menzies had recommended to Governor-General Sir William McKell in 1951. On that occasion the Governor-General did in fact accept the advice of the Prime Minister, supported by the opinions of the Attorney-General and the Solicitor-General, that the Senate's failure to pass a Bill which had twice been passed by the House of Representative satisfied the requirements of s. 57 of the Constitution and allowed the Prime Minister to recommend a double dissolution. Significantly, nowhere in the documents submitted to the Governor-General by Prime Minister Menzies was there any reference to any obligation on the Governor-General's part to accept the ministerial advice unquestioningly. On the contrary, Prime Minister Menzies advised the Governor-General that he was entitled to satisfy himself and to make up his own mind on the matters submitted to him.

Interestingly enough, and specially so in the light of the Labor Party's contrary views in 1975, the Labor view in 1951 was that the Governor-General was not obliged to accept the Prime Minister's advice and indeed should not accept it unquestioningly; that he should not simply

accept the advice of the first two Law Officers of the Crown, and should instead seek independent legal advice; and that he should seek it from the then Chief Justice of the High Court, Sir John Latham.

Labor's view in 1951, and particularly that the Governor-General should consult the Chief Justice, accords exactly with what happened in 1975, but with the boot on the other foot, Labor quickly changed its tune. Whitlam started claiming that Sir John Kerr, in consulting the Chief Justice, and Sir Garfield Barwick, in responding to that request, had acted improperly and unconstitutionally, and almost without precedent. The attacks sought to discredit both the Governor-General and the Chief Justice. As a result, as in the case of the blocking of supply by the Senate, many Australians believe, quite wrongly, that Sir John Kerr and Sir Garfield Barwick acted improperly, unconstitutionally and without precedent.

In fact, at least two other Chief Justices, in addition to Sir Garfield Barwick, have given advice to Governors-General on the exercise of their Vice-Regal powers. They were Sir Samuel Griffith and Sir Owen Dixon. These three Chief Justices gave their advice, when it was asked for, to no less than seven Governors-General. They were Lord Northcote, Lord Dudley, Lord Denman, Sir Ronald Munro Ferguson, Lord Casey, Sir Paul Hasluck and Sir John Kerr.

As the supply of money started to run out in October 1975, Whitlam sought to bypass the Constitution and the Parliament by trying to arrange with the banks for them to advance his Government the funds which it could not get from the Parliament. Such action by the banks would have been illegal, and they refused to participate, yet Whitlam has always claimed that his proposed arrangement with the banks would have solved the supply crisis, had the Governor-General given him more time. This was simply not true.

As the crisis continued, and as calls mounted in the Parliament and in the media for the Governor-General to do something, Sir John Kerr asked Whitlam for a joint legal opinion on certain matters from the two Law Officers of the Crown – the Attorney-General, Kep Enderby, and the Solicitor-General, Sir Maurice Byers. Whitlam claimed at the time, and always continued to claim, that these two men gave the Governor-General their joint legal opinion on 6 November, and that he ignored their advice. The truth is somewhat different.

Attorney-General Enderby did call on the Governor-General on 6 November 1975 with a document that had been prepared by the Solicitor-General. At the top it was headed "Joint Opinion", and at the bottom it had been signed by the Solicitor-General, and there was a place for the Attorney-General to add his signature. Enderby told the Governor-General that there were parts of the document with which he did not agree and that he could not add his signature to it. So he took out his pen, wrote the word "Draft" at the top of the document, and crossed out the signature of Sir Maurice Byers – an insult that caused Sir Maurice great offence. The Attorney-General went on to say that he proposed to prepare another joint opinion with which he could agree and which he could sign, and that he would send it to the Governor-General as soon as possible. That joint legal opinion never came: the Attorney-General was obviously busy with far more important matters.

So what Whitlam has always described as a joint legal opinion from the first two Law Officers of the Crown was in fact a draft signed by neither of them and disowned by the Attorney-General. Despite Whitlam's claim to the contrary, the Governor-General did not receive a joint legal opinion from the first two Law Officers of the Crown.

Over the past three decades we have seen the creation of the Whitlam legend by those who still believe that his was a brilliant prime ministership that was cruelly cut short. And there was no more committed proponent of this legend than Whitlam himself. The facts, however, are somewhat different.

How many times have we read that Whitlam needed more time to prevail over Fraser; that Fraser won the 1975 election because Kerr intervened when he did; that Fraser persuaded Kerr to close off the issue on 11 November; and that Kerr chose the timing that Fraser wanted.

The fact is that it was Whitlam, and no-one else, who chose the fatal day. That was the day he called on the Governor-General to advise a half-Senate election to be held on 13 December, for the election of senators who would not take their seats in the Senate for another seven months.

Such a possibility had already been canvassed in the media. However, writs for Senate elections are issued by State Governors, following a request from the Governor-General, and there had been much speculation in the media that the Premiers of Queensland, New South Wales and Victoria would be likely to advise their respective State Governors to ignore any request from the Governor-General, and to refuse to issue the necessary writs for the election of senators for their States.

In the event, the Governor-General did not give Whitlam the opportunity to present his advice on 11 November, and for very good reason. Had the Governor-General refused to accept his Prime Minister's advice, that would have precipitated another constitutional crisis, right in the middle of the one we already had. On the other hand, had the Governor-General accepted his Prime Minister's advice and gone on to ask all State Governors to issue writs for the election of senators for their respective States, a refusal by even one State Governor to do so, let alone three, would have precipitated yet another kind of constitutional crisis.

So the best advice that this so-called great Prime Minister could give to the Governor-General in the midst of the country's greatest constitutional crisis ever – a crisis which, if allowed to continue, could have led this country into economic ruin and could have resulted in the collapse of good government – was to present the Governor-General with the impossible task of choosing between two more unprecedented, and potentially equally disastrous, constitutional crises.

Had Whitlam not decided to go to Government House on that day to ask the Governor-General for a half-Senate election, the events of 11 November simply would not have occurred. If Whitlam had needed more time, he could have had it. Instead, he chose to present the wrong advice at the wrong time. Whitlam was the architect of his own misfortune; he was hoist with his own petard.

Having himself tried to use the Senate to force a Government to an early election on two occasions, and with his Party having tried to do it 170 times, did it never occur to him that his opponents might one day try to use the same tactics against him?

In a press statement he issued on 19 October 1975 Whitlam referred to the Opposition's actions in the Senate as an abuse of power, and as a violation of every constitutional and democratic principle. Yet the very same actions were legitimate and principled when he was doing them to his opponents in 1967 and 1970 when he was in opposition.

On 28 October 1975 he told the House of Representatives that the Senate was in breach of constitutional conventions relating to the passage of Appropriation Bills, Supply Bills and money

Bills. Apparently these must have been new constitutional conventions, because we saw no sign of them in 1970 or 1967, nor as far back as 1950. Or maybe they were very specialised constitutional conventions that applied only to Coalition Oppositions and not to Labor Oppositions.

When Whitlam opened his December 1975 election campaign in the Festival Hall, Melbourne, on 24 November 1975, his theme was that his removal from office was the end of parliamentary democracy as we knew it, because an elected Government in full command of a majority in the House of Representatives had been brought down by the Senate's attack on its Budget. And this was the same Leader of the Opposition who had attempted to do the very same thing to the Holt Government in 1967 and to the Gorton Government in 1970, and whose Party had tried to employ the same tactic against incumbent governments 170 times.

As I have already said, the Whitlam Opposition gloried in that record – its Senate Leader, Lionel Murphy, had proudly tabled it in the Senate in 1970. That which had been a legitimate parliamentary tactic for twenty-five years while it was used by Whitlam and his Party against their political opponents, suddenly became the end of democracy as we know it as soon as his political opponents used it on him.

As we approach yet another anniversary of the dismissal of the Whitlam Government, no doubt many a journalist will go to their files and regurgitate what they find there. I suggest that, instead of doing that, they should go to the original records and write an accurate account. They might begin by seeking answers to a few simple questions, such as:

- Why did Whitlam claim that the Governor-General acted too soon on 11 November 1975, when it was Whitlam himself who chose that date to force the Governor-General's hand, by giving defective advice?
- Why did Whitlam tell the crowd in front of Parliament House on 11 November 1975 that I had arrived at the back of the building, when he had just been told that I had arrived at the front?
- Why did Whitlam incite the mob against me, when he knew that I was a public servant simply doing my job?
- Why did Whitlam claim that Fraser's car had been hidden at the back of Government House, when it had been moved closer to the front and was in full view?
- Why did Whitlam ignore the Senate in planning his Party's parliamentary tactics following the withdrawal of his commission as Prime Minister?
- Why did Whitlam describe my reading of the proclamation from the steps of Old Parliament House as a needless provocation when he knew full well that it was a long-established practice, and that the previous year I had carried out the same duty for him and his Government?
- Why did Whitlam describe the consultation between the Governor-General and the Chief Justice as almost unprecedented, himself acknowledging only one precedent, when in fact there were many precedents?
- Why did Whitlam claim that his scheme to get money from the banks was lawful, and would have solved the supply crisis, when the banks had legal opinions that it was not lawful, and had decided not to participate?
- Why did Whitlam say that the Governor-General had received a joint legal opinion from the first two Law Officers of the Crown, when he knew full well that there was no such legal opinion?
- Why did Whitlam describe the Senate's actions in 1975 as unprecedented, when his Party had created 170 precedents and he himself had created two of them?

I said earlier that the late Philip Graham, former publisher of *Newsweek* and *The Washington Post*, once said that good journalism should aim to be "the first rough draft of history". On the other hand, Thomas Jefferson, the third President of the United States, once said that "A man who never looks into a newspaper is better informed than he who reads them; inasmuch as he who knows nothing is nearer to truth than he whose mind is filled with falsehoods and errors."

When one looks at much of the reporting of the dismissal, and the events surrounding it, one would have to conclude that Jefferson was closer to the mark than Graham.

Chapter 11

Reserve Powers of the Crown
Perils of Definition

Don Morris

What are the reserve powers of the Crown? I am tempted to begin this short paper with the familiar words of Justice Potter Stewart in *Jacobellis v. Ohio* about an entirely different subject when His Honour said:

> I shall not today attempt further to define the kinds of material to be embraced within that short-hand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .[1]

This address is about the difficulty of defining the reserve powers, some examples of how they have been deployed, and one instance where they have been misunderstood. Any examination of the reserve powers of the Crown must axiomatically also consider the constitutional rights and the conventions that are comingled with them. We are all familiar with Walter Bagehot's commentary on the Sovereign's powers and duties, in *The English Constitution*.[2] *Halsbury's Laws of England* continues to recognise these rights today and has slightly modernised the language:

> The Queen still has the right to be consulted, the right to encourage, and the right to warn. However she also has the right to offer, on her own initiative, suggestions and advice to her ministers even when she is obliged in the last resort to accept the formal advice tendered to her.[3]

Professor Rodney Brazier believes there are five conventional rights:

> To be informed, to be consulted, to advise, to encourage, and to warn.[4]

Brazier makes the point that a right to be consulted necessarily involves the notion that the Sovereign may wish to express a view about the subject matter.

Several scholars have also had a good crack at trying to define the reserve powers. For the purposes of this address, I will begin with the summary provided on the website of the Office of the Governor-General. It states:

> . . . there are some powers which the Governor-General may, in certain circumstances, exercise without – or contrary to – ministerial advice. These are known as the *reserve powers*. While the reserve powers are not codified as such, they are generally agreed to at least include:
>
> 1. The power to appoint a Prime Minister if an election has resulted in a "hung parliament";[5]
> 2. The power to dismiss a Prime Minister where he or she has lost the confidence of the Parliament;
> 3. The power to dismiss a Prime Minister or Minister when he or she is acting unlawfully; and
> 4. The power to refuse to dissolve the House of Representatives despite a request from the Prime Minister.[6]

With great respect to the Governor-General's Office, I would submit that three of the four powers as they have listed them are wrong. The first power listed is "the power to appoint a Prime Minister if an election has resulted in a 'hung parliament'."

The Governor-General's reserve power to appoint a Prime Minister is not limited to this circumstance. Whilst conventionally the Governor-General will appoint the person who leads the largest parliamentary party, it is in fact a reserve power, even though a relatively circumscribed one.

Take just two recent examples, the appointment of Kevin Rudd as Prime Minister for the second time in 2013 and the appointment of Malcolm Turnbull on 15 September 2015.

On 26 June 2013 the Prime Minister, Julia Gillard, was replaced as leader of the parliamentary Labor Party by Kevin Rudd. That evening the Prime Minister wrote to the Governor-General to advise that Kevin Rudd had been elected leader of the federal Parliamentary Labor Party and recommended that the Governor-General send for Mr Rudd and ask him to accept appointment as Prime Minister.

Ms Gillard went on to say that she wished to resign as Prime Minister, with her resignation to take effect from the appointment of Mr Rudd to the office.

As Professor Anne Twomey has written, this letter adopted almost identical language to a similar letter Kevin Rudd had sent to the Governor-General when he was replaced as leader of his party in 2010 and one Bob Hawke had sent in 1991.[7]

The circumstances were, however, completely different in 2013 because the Government did not command a majority in the House of Representatives. The advisers to the Prime Minister should have taken note of that, and tailored any draft letter accordingly.

Julia Gillard was correct in not "advising" the Governor-General to appoint Kevin Rudd as Prime Minister. As a resigning Prime Minister she loses capacity to offer formal advice to the Governor-General because she could not be responsible to the House for any such advice.

She was wrong, however, to state that her resignation would take effect from the appointment of Mr Rudd to the office. She could have said that her resignation would take effect from the appointment of her successor.

In the circumstances that pertained, the Governor-General knew several things. She knew that the ALP did not hold a majority of seats in the House of Representatives. She also knew that several of the crossbench MPs who had signed written agreements to support the Gillard Government had made it explicit that their support was personal to Julia Gillard and would not necessarily be given to another person.

While it would have been objectively unlikely that enough of the crossbenchers would have supported the Leader of the Opposition, Tony Abbott, to form a government, there was at least that possibility, and it would have been perfectly proper for the Governor-General to see Mr Abbott and test whether he thought he could form a government.

At the time, the Governor-General sought advice from the Acting Solicitor-General on how she should respond to Julia Gillard's letter. The Acting Solicitor-General provided advice in person and then confirmed it in a short letter.

He said it was his opinion that the Governor-General should commission Mr Rudd as Prime Minister. In response to a question, he went on to say that it is open to the Governor-General to seek an assurance that he will announce his appointment at the first opportunity to

the House of Representatives, but that the Governor-General cannot insist on that assurance or make his appointment conditional.[8]

I would submit that the Acting Solicitor-General was right in the second part of his letter, but wrong in the first part.

It is not proper for the Government's legal advisers to give a formal opinion as to whom the Crown should commission, especially in the case of a hung parliament. What the Acting Solicitor-General should have said is that it was *open* to the Governor-General to commission Mr Rudd.

The problem with this advice, which was published, is that it could be seen to be a shield of protection for the Governor-General's actions. Her Excellency in fact had several valid courses open to her, including the one recommended by the outgoing Prime Minister.

It was reasonable for the Acting Solicitor-General to suggest that the Governor-General should ask the new Prime Minister to announce himself to the House at an early opportunity, because that is where the legitimacy of any government is found.

On 14 September 2015, Tony Abbott was replaced as leader of the parliamentary Liberal Party by a vote of Liberal parliamentarians. He remained Prime Minister until the middle of the next day. It later turned out that the new leader, Malcolm Turnbull, was fashioning a new coalition agreement with the National Party.

It is relevant to know that, in the 44th Parliament, the Liberal Party and Country Liberal Party had a total of 73 members. One of the Liberals was Speaker, however, and only had a casting vote in the event of a tied vote.

The ALP had 55 members. The National Party had 15, and there were five who either sat as Independents or as sole representatives of their particular party. That totals 75.

Mr Abbott, in his letter of 15 September, said he resigned from the office of Prime Minister from the time of the appointment of Mr Turnbull. This wording is almost identical to that written by Julia Gillard as Prime Minister to the Governor-General advising her to call Mr Rudd, and therefore is deficient for the same reasons in pre-empting the Governor-General's decision.

But, in a circumstance where the Liberal Party did not have a majority on the floor of the House, should the Governor-General have made enquiries of the leader of the National Party, Warren Truss, as to whether his party would support the new Prime Minister, given that a new coalition agreement was in the process of being negotiated and the Governor-General could not have that independent knowledge?

As it turns out, when Mr Turnbull went to Yarralumla on the afternoon of 15 September, he took with him a letter from Mr Truss addressed to the Governor-General. That letter said:

> Your Excellency
> This letter is to confirm that Mr Turnbull has the support of The Nationals in the formation of a Coalition Government under his leadership in the 44th Parliament.[9]

It was proper for Mr Truss to write that letter, and for Mr Turnbull to provide it to the Governor-General, before the swearing in, because it provided the Governor-General with written assurance that Mr Turnbull had the confidence of a majority of members of the House of Representatives.

But it was not competent for Mr Abbott to advise the Governor-General that his resignation takes effect on Mr Turnbull becoming Prime Minister.

The ability of a Prime Minister to advise the Queen or the Queen's representative ceases on the resignation of that person from office, because they cease to be responsible to the Parliament for that advice.

There may in fact be extreme occasions where the vice-regal representative must act to appoint a prime minister or premier without any recommendation or binding advice. An example is the appointment of John McEwen as Prime Minister on 19 December 1967 after the disappearance of Harold Holt.[10]

The second reserve power the Governor-General's Office suggests is, and I quote, "the power to dismiss a Prime Minister when he or she has lost the confidence of the Parliament."

No Prime Minister need have the confidence of the Parliament and, in fact, in Australia's history, at least half of the time they probably have not. Confidence of the House of Representatives is all that is required.

The third reserve power suggested is "the power to dismiss a Prime Minister when he or she is acting unlawfully." Prima facie, that seems unremarkable, but I will come back to that with a Tasmanian example where a vice-regal representative was formally advised to act unconstitutionally.

The fourth reserve power listed is "the power to refuse to dissolve the House of Representatives in spite of a request from the Prime Minister."

I would submit that this is also wrong, but would be right if the wording was changed to read, "the power to refuse to dissolve the House of Representatives *immediately*".

There have been numerous examples in Australia of the Crown's representatives declining a request to dissolve a Lower House if there appeared to be a viable alternative government available. It is quite reasonable for a Governor-General or Governor to send for leaders of other political parties or relevant parliamentarians to test whether they might have sufficient support in the House to form a ministry.

The test is linked to whether the person commissioned can face the House at an early opportunity to prove that any assurance they have given is, in fact, true. Otherwise the legitimacy of the invitation and its acceptance could be called into question and damage the standing of the Crown.

I would contend that there are at least two other reserve powers available to the Crown: the right not to accept advice about prorogation; and the right to confer Royal Assent contrary to ministerial advice.

So, what can we say about the reserve powers here? Are they definable in a comprehensive way? There is a variety of eminent views.

Professor Peter Boyce, our foremost political science scholar on the Crown, said that none of the three old Commonwealth monarchies, Canada, Australia or New Zealand, has made any serious attempt to codify the reserve powers, though there have been periodic suggestions that they should do so.[11]

Sir Harry Gibbs, in a paper written for Australians for a Constitutional Monarchy, said:

> According to the conventions, there are some powers which the Governor-General may exercise according to his own discretion, and without the advice, or even contrary to the

> advice, of the Ministry. These powers, which are rather misleadingly called 'reserve powers', are designed to ensure that the powers of the Parliament and the Executive are operated in accordance with the principles of responsible government and representative democracy, or in other words to ensure that the Ministry is responsible to Parliament and that the ultimate supremacy of the electorate will prevail. The reserve powers provide an essential check against abuse of power by the Executive or by Parliament. In Australia . . . they fill a real need in relation to the Executive.[12]

H. V. Evatt, whose book, *The King and His Dominion Governors*,[13] remains the seminal text, thought that they should be set out in positive law. He wrote that the best way to help a Governor to understand the scope of the reserve powers is to "ascertain, define, declare and enforce rules which can be applied to govern the exercise of the reserve powers of the Crown's representative."

In considering the establishment of an Australian republic, Sir Gerard Brennan, a former Justice and Chief Justice of the High Court, has made the suggestion that a small "Constitutional Council" be set up, in his words, to *supervise* the exercise of a President's reserve powers.[14]

Prime Minister Paul Keating, in his 1995 republic proposal, said:

> [T]he reserve powers currently possessed by the Governor-General would remain with the President, and the Constitution would provide that the constitutional conventions governing the exercise of those powers would continue, but the conventions would not be spelt out.[15]

> In its report, the 1998 Constitutional Convention proposed that the *undefined* reserve powers and relevant conventions should continue to exist in an Australian republic.

> Accordingly, the 1999 Bill would have authorised the Australian President to exercise a reserve power "in accordance with the constitutional conventions relating to the exercise of that power," accepting at the same time that the conventions should be allowed to evolve.

Well, that seems to me to be as clear as mud.

Let us look at some of these more elusive jelly fish to see if we can indeed catch hold of them.

Prorogation

Let us start with something very topical – prorogation. The Constitution sets out very clearly that the Governor-General may prorogue a session of Parliament and summon it to meet in new session.

But in doing so, is the Governor-General obliged to act on the advice of the Prime Minister?

The answer to that question, I submit, is "Both yes and no, depending on the circumstances."

On 21 March 2016, the Prime Minister wrote to the Governor-General advising him to exercise his power under section 5 of the Constitution to prorogue the Parliament and to summon it in a new session.

Accompanying the Prime Minister's request was a letter from the Attorney-General assuring the Governor-General that it would be within his constitutional powers and consistent with his duty to accept the Prime Minister's advice.

The Attorney cited 28 times since 1901 when the Parliament of the Commonwealth of Australia had previously been prorogued: and 17 other times when it has been prorogued prior to dissolution. Importantly, the Attorney wrote:

> In line with the principles and conventions of responsible government, these powers are, of course, exercised on ministerial advice.[16]

What the Attorney-General was saying was entirely consistent with the general constitutional approach approved of by Bagehot, Evatt and many other scholars: that the responsibility for accepting advice tendered rests with the ministers giving that advice.

And Sir Peter Cosgrove's response accepting the Prime Minister's advice was unremarkable.

But could there be circumstances where the Governor-General might have the discretion not to accept advice to prorogue?

Certainly there could be. For example, if the governing political party has changed its leader and the person holding the commission as Prime Minister has, for a short period, not been the leader of any party. When they lost the leadership of their respective parliamentary parties, both Kevin Rudd and Tony Abbott continued to be Prime Minister until the following day.

Could they have advised the Governor-General to prorogue or, indeed, to dissolve the House?

Certainly they could have. And could the Governor-General have declined to accept that advice? Yes – most people would say it would be the correct response to delay a decision until the Governor-General could confirm that was also the advice of the incoming Prime Minister.

A good example of where a vice-regal representative counselled his premier on prorogation occurred in Tasmania in 1981. This example has been previously outlined to The Samuel Griffith Society by a distinguished former Governor of Tasmania, William Cox.[17] Essentially the facts were that a new Premier of Tasmania, Harry Holgate, had seen his immediate predecessor and another member cross the floor of the House of Assembly, depriving him of his majority, and the House had then risen for the Christmas break.

The Premier called on the Governor on 14 December 1981 to advise him to prorogue the Parliament until May 1982, in order that he could establish his government. He told the Governor that the situation in the House of Assembly was "volatile and unstable" and gave some other specific public policy reasons why a prorogation was necessary.

The Governor, Sir Stanley Burbury, a former Chief Justice of the Supreme Court of Tasmania, counselled the Premier not to give him such advice, and instead suggested that he would welcome advice for a shorter, three-month prorogation period, until March.

The Governor wrote, in a file note, that he told the Premier that while he felt he had made out a case for prorogation, his strong view was that it would not be in the public interest to prorogue Parliament for a period exceeding six months.

The Premier therefore provided a written request for prorogation until 26 March 1982. Sir Stanley wrote:

> Although ordinarily the Governor acts on the advice of his Ministers in relation to prorogation or dissolution of the Parliament, it is a fundamental constitutional convention under the Westminster system that he is not in all circumstances bound to accede to that advice. Two examples occur to me:
>
> Advice to grant prorogation when a motion of No Confidence is before the House;
> Advice not to dissolve Parliament after a Government has been defeated in the House.[18]

I believe Burbury acted entirely properly. He did not put himself in the position of rejecting advice from the Premier; he counselled him to provide amended advice, which counsel was readily accepted. He also did not do this in any formal correspondence, thus sparing any potential political embarrassment to the Premier.

During the prorogation period, significant public pressure was put on the Governor. Petitions were signed and political opponents railed against the Premier running away from facing the music, sure in the knowledge that he would face a want of confidence motion as soon as the House met.

In response to the petitions and statements by political leaders, Government House issued a short statement which stated, simply: "support for a government is not measured by counting outside the House".

Burbury deployed all three of Walter Bagehot's suggested rights of the Monarch, to "advise, encourage and warn". The Governor also underlined to the Premier that government office depended on majority support in the people's house.

Was Burbury wrong? Should he have simply accepted Holgate's advice, and let the Premier take the heat? Would he have done so if the Premier had pressed his original advice? Was this essentially an exercise of a reserve power, at least in terms of the length of the prorogation period?

It is, prima facie, true that the Prime Minister or Premier takes responsibility for the advice tendered to the vice-regal representative. But I would contend that it is also true that the power of prorogation is a reserve power and especially so where the government of the day does not enjoy a majority on the floor of the Lower House.

That was the approach that Burbury took in 1981. And it was the approach that the Governor-General of Canada, Michaelle Jean, took late in 2008 when she was asked by the Prime Minister, Stephen Harper, who headed a minority government, to prorogue the Parliament.

In that case, the Governor-General sought independent constitutional advice and decided after discussion with the Prime Minister to grant the request for prorogation. She did so on two conditions, that it was only for a period of one month and that, when the new session convened, the Government would immediately present a budget, the approval or rejection of which would constitute a vote of confidence.

In taking this approach, Michaelle Jean was adopting the same general approach as Sir Stanley Burbury adopted. She was allowing some time for the Government to regroup, but making clear that the Government must face the House at an early date.

The result in the Tasmanian instance was that the Holgate Government was defeated in a no confidence motion on the first day of the new session of Parliament. In Ottawa, the Harper Government survived after a new political alliance was negotiated during the prorogation period.

Imposing conditions on a commission

In 1914, the Governor of Tasmania, Sir William Ellison-Macartney, refused a request from the Premier, Albert Solomon, to dissolve the House of Assembly after a vote of censure had been carried. The Governor told the Leader of the Opposition, John Earle, he would commission him as Premier provided three conditions were met. The first was that he would immediately recommend a dissolution of the House. The second was that the new Parliament should meet within two months, and the third was that in the case that the Attorney-General was not a qualified lawyer in practice, the Governor should be free to obtain legal advice from outside the Ministry.[19]

Earle said later he protested against these conditions but nevertheless accepted the commission and proceeded to form a Ministry. He then promptly sent the Governor a memorandum stating that to exact the pledge of a dissolution was contrary to the principle and well-established practice regulating parliamentary government and that the circumstances were not such as to justify a Governor forcing a dissolution on his ministers.

For good measure, Earle had the House of Assembly pass a motion condemning the Governor's actions and asking that the text of the motion be conveyed to the King.

The Governor sought advice from the Secretary of State for the Colonies, Lewis Harcourt. Harcourt said that the Governor should not have exacted this pledge and re-stated the constitutional doctrine that all the Governor's actions must be clothed with ministerial responsibility. Harcourt said that the action of Earle in now refusing to advise a dissolution transferred the responsibility for that action from the Governor to himself.

Silent in these communications was the fact that the Governor had earlier declined Solomon's request, as Premier, for a dissolution. It has never been explained why.

There are two other pertinent examples where the Crown has used powers of persuasion to encourage an outcome to a political dilemma, deploying Bagehot's principles.

In 1991, the Premier of British Columbia, Bill Vander Zalm, was replaced by a vote of his party's caucus after a financial scandal involving his family company. The Lieutenant-Governor of the Province, David Lam, accepted a message from the chairman of the party caucus confirming its wish that the Premier resign and naming an acceptable successor.[20]

But the Premier refused to resign. The Lieutenant-Governor, faced with the problem of having a chief adviser who was no longer leader of any party but who still held the commission as Premier, received him and privately encouraged him to resign. Vander Zalm did bow to the inevitable and a smooth succession took place. The constitutional scholar, Edward McWhinney, described it as a "low-key and graceful interposition of the reserve powers".

A not dissimilar situation rose, in a more robust way, in Queensland in 1987.[21] The Premier, Sir Joh Bjelke-Petersen, was swiftly losing the support of his own party colleagues. He decided to reconstitute his ministry in order to shore up support and determined that five ministers should be sacked for disloyalty. The Premier decided to offer his own resignation, which would have carried with it the resignation of his ministry, as a way of avoiding having to ask the ministers to quit. He wrote to the Governor:

> I therefore propose tendering to Your Excellency, on a date to be mutually agreed upon, the resignation of myself, and thereby placing at Your Excellency's disposal the offices of all the members of my Ministry. At the same time I seek a further commission from Your

Excellency to form a new administration.

Relevantly, the Queensland Parliament had adjourned a few days before this letter, to a date to be fixed.

The Governor advised the Premier that a re-structuring of the ministry should not be done by way of Sir Joh's resignation and that the proper course was for the Premier to discuss the matter with his ministers and request the resignation of the ministers he did not want.

The Governor, meeting with the Premier, asked officers to join them. He asked them whether there was a precedent for a Premier resigning in these circumstances and asking to be re-commissioned.

The only example proffered was the resignation of Winston Churchill in 1945 at the end of the National Government, but that was a very unusual circumstance where the Labour Party was leaving the government in preparation for a general election to be held later that year.

Another example that could have been cited to Sir Walter was when Ramsay MacDonald resigned as Prime Minister of a Labour Government in 1931 and was re-appointed as Prime Minister of a National Government. But, again, that was an exceptional situation because the Great Depression had presented a national emergency.

Campbell made clear to Bjelke-Petersen that, should the Premier resign, he as Governor would have to be satisfied, before re-commissioning the Premier, that he could form a new administration and that he and his new ministry would have the confidence of the Legislative Assembly.

Sir Walter Campbell warned the Premier that he might not be prepared to re-commission him, and that he might consult other members of Parliament, including members of the Premier's own party, as to whether Sir Joh retained the confidence of the House.

Again, we see Bagehot's three rights – advise, encourage and warn.

Campbell's position was also strengthened because the Bjelke-Petersen Government had had amendments passed in 1977 to the State's Constitution to say that the Governor, in appointing and dismissing ministers, "shall not be subject to direction by any person whatsoever nor be limited as to his sources of advice."[22] Indeed, the Governor received two of the disaffected ministers whom the Premier wanted to sack, but he refused to reveal to them any advice he had given the Premier.

In the meantime, the parliamentary National Party met and elected a new leader, Mike Ahern. The Premier still refused to resign. Ahern provided the Governor with legal advice, including from the Solicitor-General, that suggested that the Governor might withdraw the Premier's commission.

The Governor disagreed and said, in my view entirely correctly, that the floor of the House was the ultimate judge of these things, not what happens within the meeting of a parliamentary party. He said that before commissioning anyone as premier, he would have to be satisfied that the person could form a ministry and command the support of the Legislative Assembly.

The Governor kept the Palace informed as events unfolded and a subsequent letter from the Queen's Private Secretary, Sir William Heseltine, reiterated what he had told the Governor by telephone:

> [T]hat you would have been safe in withdrawing the Premier's Commission only when and if he had suffered a defeat in the Parliament itself.[23]

There was significant pressure, including from the media, for the Governor to act to end Bjelke-Petersen's premiership.

As the resumption of Parliament loomed, the Premier eventually saw the writing on the wall. He called on the Governor and resigned, the resignation carrying with it the resignation of his ministry. He also resigned from the Executive Council. It later emerged that he also wrote to the Speaker resigning his seat.

The Governor called Ahern and commissioned him as Premier on the proviso that he sought a vote of confidence when the Parliament resumed the next day, and that he advise him within eight days of the composition of his new ministry.

Thus Campbell imposed conditions on the commission, contrary to advice given to Ellison-Macartney in 1914, and to Dame Quentin Bryce in 2013, but the incoming Premier was happy to accede to them.

The Parliament met and passed a vote of confidence in the new Government.

Campbell later maintained that the crisis was essentially a political one, not a constitutional one, and so he had not deployed the full range of reserve powers, preferring the Premier who had lost support to see sense.

As we have seen, Lieutenant-Governor David Lam in British Columbia took a very similar path in 1991.

Refusal of dissolution when another government available

I believe, had Bjelke-Petersen advised Sir Walter Campbell to dissolve the Legislative Assembly during the turmoil surrounding the end of his premiership, the Governor would have refused to accept that advice.

In the 1989 Tasmanian election the Liberal Government had won the largest number of seats at a general election, but faced a post-election alliance between the Labor Opposition and five Green Independents which would constitute a majority on the floor. The Governor, Sir Phillip Bennett, nevertheless re-commissioned the Premier and on his advice swore in a new Ministry before the Parliament met. He ignored calls from the Opposition and five Greens Independents that another government was apparently available.

Privately, the Governor made it clear to the Premier that, whilst it was open to him to request an election, the Governor would be likely to decline to accept that advice; given the proximity of the election and that an alternative government seemed available.

In the event the House met, a constructive motion of no confidence was passed, and the Premier resigned.

I believe that had the Premier given advice recommending a fresh election, Bennett would have dismissed him in the knowledge that an alternative and viable government was available, and an election had just been held. That new government could then have been tested on the floor of the House.

Royal Assent

There is another area where I would contend a reserve power may be found to exist, and that is in a vice-regal representative giving the Royal Assent.

The Royal Assent procedure involves two elements. The Governor-General or Governor acts, in giving the Royal Assent, constitutionally as part of the Parliament, not of the Executive. But in the act of Assent, the Attorney-General must furnish a certificate advising the vice-regal representative that there is no reason why a particular Bill should not receive Assent.

There are at least two examples where there has been executive intervention in the giving of Royal Assent and, in both, it is my contention that the Governor could rightly have rejected ministerial advice.

In 1924, in Tasmania, there was a tussle between the House of Assembly and the Legislative Council about amendments to an Appropriation Bill. The Legislative Council of Tasmania cannot be dissolved, members coming up for election on a rotational basis each year. It also has the right to reject any Bill, including a money bill. It has therefore been called the most powerful upper house in a Westminster system.[24]

At the time, the Administrator of the State pending the arrival of a new Governor was the Chief Justice, Sir Herbert Nicholls.

The Legislative Council refused to pass the Appropriation Bill unless certain amendments were made. The House refused the amendments and the Government contended that the Council had no capacity to make them.

The Speaker then presented the Appropriation Bill to the Administrator following a resolution of the House directing it be presented "in the form it passed the House of Assembly".

Nicholls had sought advice from the Secretary of State for the Colonies in London. The Secretary of State cabled back merely advising the Administrator to seek the opinion of the Law Officers as to whether he could give assent to the Bill in that form and that, if they confirmed in writing that such action was valid, "responsibility will rest exclusively with your Ministers and no question can arise as to the constitutionality of your action".

The Administrator therefore gave the Royal Assent, and the Bill went onto the statute books with the usual preamble that it had been enacted "…with the advice and consent of the Legislative Council."

I would contend that this was clearly unconstitutional and possibly an illegal act, advised or not. It framed the Administrator as a "mechanical idiot" or a constitutional automaton; a model discussed by Sir Guy Green as supported by some scholars but which he cogently argues is precisely what a vice-regal representative is not.[25] And it also framed him as solely acting as the head of the executive government rather than also as part of the Parliament.

A similar stress on conventions occurred in 1985 in Victoria. When the Racing and Gambling Acts (Amendment) Bill was presented to the Governor by the Clerk of the Parliaments in the usual way, the Clerk of the Executive Council read out an advice from the Premier that the Governor should not give the Assent.[26]

The Clerk of the Parliaments reported this to the Presiding Officers who duly announced it to their respective chambers. Questions were asked and an urgency motion was moved, condemning the Government.

The Premier wrote to the Presiding Officers explaining that he had elected to advise the Governor to defer assent to the bill because it was expressed to come into force the day after Royal Assent and administrative preparation had not yet been completed. While the reason for the delay may have been quite understandable in terms of public administration, an intervention of the Executive like this should, in my view, be condemned, because it unnecessarily put the Governor in a conflicted situation. Which hat was he wearing?

The only saving grace was that the Attorney-General's certificate was not withheld, and direct advice from the Premier was tendered instead.

I asked a subsequent Attorney-General of Victoria about this case and he said it was his strong view that the certificate should never be withheld, even if a government vehemently opposed the provisions in a particular Bill, provided the Bill itself was technically in order.

It would have been preferable for the Government to have advised the Governor to return the Bill to the Houses under section 14 of the Victorian Constitution requesting a Governor's amendment. That could have been easily explained.

It is my view that the Governor of Victoria was placed in a most invidious position in this instance, perhaps due to administrative incompetence rather than constitutional malice, but I also believe he would have been within his rights to have repudiated the Premier's advice.

Misunderstanding of reserve powers

Sometimes, because they are hard to define, vice-regal representatives can fall into traps in the interpretation of reserve powers and conventions. An over-reach occurred after the inconclusive election in Tasmania in 2010. That poll returned 10 Labor Members, 10 Liberals and 5 Tasmanian Greens to the House of Assembly.

The Governor saw the Premier and then, at the Premier's suggestion, the Leader of the Opposition, to see who could form a government. Ultimately, he determined that the Premier should face the House and see if his government had the confidence of the House.

The Governor published the reasons for his decision[27] and rightly, in my view, said:

> In the exercise of the duty to commission a person who can form a stable government the Governor will take formal advice from the current holder of that commission but is not bound to act on that advice.

He also said the following, about what he had told the Premier:

> I also told him that as he was still the holder of my commission to form a government and the Premier of the State he had a constitutional obligation to form a government so that the Parliament could be called together and the strength of that government tested on the floor of the House of Assembly.

I do not believe this was correct. There is no constitutional obligation on a Prime Minister or Premier to retain his or her commission. They can resign at any time.[28]

This specific issue was examined in detail in the United Kingdom after the 2010 general election. A *Cabinet Manual* was published, which included a commentary on elections and government formation.[29] The *Cabinet Manual* stated that it has been suggested that an incumbent

Prime Minister's responsibility involves a duty to remain in office until it is clear who should be appointed in their place.

Professor Vernon Bogdanor said in evidence to a House of Commons select committee examining the *Cabinet Manual*:

> The incumbent Prime Minister has a right to remain after an election in a situation where no single party enjoys a majority but not, in my view, a duty. The decision as to when to resign is in my view a political one with no constitutional implications.[30]

The House of Lords also had a select committee examining the *Manual* and it concluded:

> It is a matter of debate as to whether a Prime Minister has a duty to stay in office until it is clear who might command the confidence of the House of Commons. The Manual should distinguish between the right to remain in office and the duty to do so.[31]

It cannot be right that a Prime Minister or Premier is obliged to stay in office; that is certainly not a convention, though it is understandable that a Governor-General or Governor wants any break to be as short as possible. The previous Cabinet Secretary in Britain, Sir Gus (now Lord) O'Donnell, probably had it right when he said:

> It is the responsibility of the Prime Minister to ensure that the Monarch remains above politics and that when the Prime Minister resigns it is very apparent who the Queen should be calling to produce the next, hopefully stable, government.[32]

Conclusion

The Republic Advisory Committee in 1993, chaired by Malcolm Turnbull, wrestled with the dilemma of the reserve powers. It rightly said that conventions in relation to the reserve powers develop slowly and haphazardly and, if a power has not been used for some time, there is bound to be argument as to whether it has ceased to exist or has simply not been needed.

The Committee report went on to say that any attempt to codify the reserve powers would be criticised as "freezing" the conventions in time and reducing their flexibility. It says that one of the arguable virtues of the system of conventions is that it allows appropriate responses to unforeseen circumstances and is capable of changing to take account of developing expectations as to the roles of the government and the head of state.

Having made these eminently sensible comments, the Committee then went on to say that the question of codifying them will have to be resolved in any move towards an Australian republic.[33]

As I have endeavoured to point out with just a few examples today, it would not only be almost impossible to distil all the reserve powers accurately, but also when and in what circumstances they should be deployed.

It would seem to me that the words of the eminent Canadian constitutional scholar, Eugene Forsey, are as accurate today as when he wrote them. Forsey said of the reserve powers:

> To embody them in an ordinary law is to ossify them. To embody them in a written Constitution is to petrify them.[34]

I hope this short tour around some constitutional conundrums is a reminder of the perils of trying to define the reserve powers.

Precisely because political situations are so organic, constitutionally challenging situations cannot all be predicted. What we want, and what we have had in Australia in our vice-regal representatives, are ultimate arbitrators in whom the community has confidence, who are above the ruck of politics, and who can be trusted to operate efficiently and fairly – and rarely – as is needed.

Endnotes

1. *Jacobellis v. Ohio*, 378 U.S. 194.

2. Walter Bagehot; *The English Constitution*, Chapman & Hall, 1867.

3. *Halsbury's Laws of England*, LexisNexus Butterworths, published and updated online.

4. Ronald Brazier; *Constitutional Practice*; 3rd ed., Oxford, 1999.

5. "Hung" parliament is a misapplied term, deriving from the notion of a "hung" jury, a jury that is unable to come to a verdict. A "hung" parliament may be well able to function, unlike such a jury. Minority parliament might be a more apposite term.

6. Governor-General's Role; Office of the Governor-General website – http://gg.gov.au/. Accessed: 30 July 2016.

7. Anne Twomey, "Advice to the Governor-General on the appointment of Kevin Rudd as Prime Minister", (2013) 24 *PLR* 289.

8. Advice from the Acting Solicitor-General to the Governor-General, the Honourable Quentin Bryce, AC, CVO, on Commissioning a new Prime Minister. Office of the Governor-General website; http://gg.gov.au/; Published online: 27 June 2013.

9. Letter dated 15 September 2015 from the Honourable Warren Truss, MP, Deputy Prime Minister and Leader of The National Party. Provided by the Office of the Official Secretary to the Governor-General to the Senate Finance and Public Administration Legislation Committee on 2 November 2015.

10. *Commonwealth of Australia Gazette*, No. 107A 19 December 1967. The Governor-General (Lord Casey) determined the appointment of Harold Holt as Prime Minister and "directed and appointed" John McEwen to hold the office of Prime Minister. This has been cited as an example of the doctrine of necessity. The doctrine has also been cited in relation to certain actions the Governor-General of Grenada, Sir Paul Scoon, took in 1985 after the collapse of government in that country.

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18. The Honourable Sir Stanley Burbury, Undated Memorandum made December 1981, His Excellency the Governor's Establishment, Hobart.

19. W. A. Townsley and John Reynolds in F. C. Green (ed.), *A Century of Responsible Government in Tasmania 1856-1956*, L.G. Shea, Government Printer, Tasmania, 1956.

20. Peter Boyce, *op.cit.*.

21. Geoff Barlow and Jim E. Corkery, "Sir Walter Campbell: Queensland Governor and his role in Premier Joh Bjelke-Petersen's resignation 1987," Owen Dixon Society eJournal, Bond University. Published online: 1 March 2007.

22. *Constitution Act Amendment Act* 1977 (Qld). This was repealed in 2001 and the current equivalent clause is slightly different. Constitution of Queensland 2001, section 24, reads: "Ministers hold office at the pleasure of the Governor who in the exercise of the Governor's power to appoint and dismiss the Ministers is not subject to direction by any person and is not limited as to the Governor's sources of advice."

23. Geoff Barlow and Jim E. Corkery, *op.cit.*.

24. W. A. Townsley and John Reynolds, *op.cit.*.

25. The Honourable Sir Guy Green, *Governors, Democracy and the Rule of Law*, Menzies Oration on Higher Education, University of Melbourne, 29 October 1999.

26. For a full summary of this event and the procedures in Victoria for Royal Assent, see: Kate Murray, "Royal Assent in Victoria," For the ANZACATT Parliamentary, Law Practice and Procedure Program, Legislative Assembly, Victoria, 12 February 2007.

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28. See also: Michael Stokes, "Why I disagreed with the Governor's reasons for recommissioning the Bartlett Government," *Tasmanian Times* website. Published online 22 April 2014. Accessed: 30 July 2016.

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31. House of Lords Constitution Committee, Twelfth Report, 7 March 2011 – Chapter 3: The content of the Manual.

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33. For a comprehensive analysis and discussion on the reserve powers in Australia, see *An Australian Republic: the options*, Report of the Republic Advisory Committee; AGPS, 1993. Especially Appendix 6, The Reserve Powers of the Governor-General.

34. Peter Boyce, *op.cit.*, quoted at 61.

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Chapter 12

The Speaker

Ken Coghill

My comments will reflect my experience and observations as Speaker of the Legislative Assembly in Victoria from 1988 to 1992 – the last two years of John Cain's premiership and Joan Kirner's two years as premier. I have built on that period in subsequent research and writing at Monash University.

Background

The context for my comments is the conference theme of "Parliaments: Constitutional roles and realities". They will take a broad, expansive view of constitution – spelt with a small "c". "[T]he law and custom of Parliament are regarded as one of the many sources of [their] 'unwritten' constitution", according to New Zealand authorities.[1] I argue that that being so, Speakers have uniquely important constitutional roles. I will focus on Australia but our history inevitably leads to some references to other jurisdictions, especially Westminster. I will concentrate on three themes:

(1) what the public thinks Speakers do, or should do;
(2) the responsibilities of Speakers; and
(3) reform proposals.

The office of Speaker in Australia derives from Westminster so let me begin the description of the office by that great English authority, Erskine May. Writing before responsible government in any Australian colony, he stated that:

> The Speaker of the House of Commons is the representative of the House itself in its powers, proceedings and dignity. The Speaker's functions fall into two main categories. On the one hand the Speaker is the spokesperson or representative of the House in its relations with the Crown, the House of Lords and other authorities and persons outside Parliament. On the other hand, they preside over the debates of the House of Commons and enforce the observance of all rules for preserving order in its proceedings.[2]

More recently, one of Westminster's finest Speakers, Betty Boothroyd (1992 to 2000), is reported to have described three roles of the Chair in the Commons: The bringing of order and coherence to the proceedings of the House through the selection of speakers and amendments; the administration of the House (as chair of the House of Commons Commission); and representing Parliament abroad (and she has stressed elsewhere the extent of her activities in representing parliament to a wide range of audiences within the United Kingdom as well).[3]

These descriptions are compatible with contemporary practice in Australian parliaments, although there are differences which I will touch upon. For example, Speakers at Westminster leave their political parties upon taking the Chair, their constituency is not contested by major parties, the House re-elects them to office even after a change of governing party and, when they leave office, they resign from the House. However, there is one subtlety to notice: after a change

of government, the reappointed Speaker sometimes resigns after a number of months, providing the opportunity for the new government to support one of its own for the vacancy. None of these are features of Australian practice. For example, many former Speakers have remained in Parliament, as indeed did I for a full parliamentary term.

Each of these roles described fulfils a constitutional function that contributes to the structure and operation of the Parliament – the supreme democratic institution in the system of government.

What the public sees

In Australia, the Speaker is elected by the House by secret ballot and is generally a member of the party holding a majority in the House, although there have been exceptions such as Queensland Legislative Assembly Speaker Wellington; former Speaker of the Legislative Assembly of New South Wales, Richard Torbay; and former Speaker of the House of Representatives, Peter Slipper.

What the public sees are attempts by Speakers to bring a sort of order. Too often the public, at least those who watch the TV news, see the House in uproar, with the Speaker trying to impose order whilst members on both sides try to drown out the sound of the other, in support of their own.

That is not to say that the public blame the Speaker for the disorder. The opprobrium is usually directed to "child-like behaviour" of MPs in general.

Question Time – questions without notice – is overwhelmingly the time of most disorder. It is not well-known that questions without notice is a peculiarly Australian invention. Most other parliaments allow only questions of which ministers have had prior notice, although supplementary questions can be similar in effect to questions without notice. In Australia, the disorder reflects the high emotion inherent in putting the government under intense scrutiny, and in Government counter-attacks. Salisbury found evidence of increasing levels of misbehaviour in his study of several Australian parliaments.[4]

When a Speaker is criticised for disorder in the House, it is generally claimed that he or she is showing partisan bias in their treatment of members, especially Opposition members. The Speaker is in a difficult position. As Boothroyd put it: "When you have committed all your adult life to the ideals and policies of one party, impartiality is a quality you have to work at".[5] Nonetheless, she was widely respected for the impartiality that she displayed.

The Australian experience is mixed. Speakers have not made the break with party seen at Westminster.

In recent times, few Speakers have been openly accused of bias. In an interesting study, Teo found strong differences between the performances of three Speakers of the Legislative Assembly in Victoria at times of minority government. There was minimal criticism of Speaker Andrianopoulos, strong criticism of Speaker Ken Smith and only moderate criticism of Speaker Fyffe.[6]

Federally, Speakers in the 1980s and 1990s were less sensitive to the desirability of the appearance and reality of impartiality than were most in more recent times. Speaker Bronwyn Bishop was widely accused of bias in her rulings excluding members from the House for misbehaviour, but her long-serving predecessor, but two, Speaker Jenkins (Jnr), was well-respected and his rulings rarely questioned. Whilst Speaker Slipper was embroiled in other controversies, his chairmanship was also well-regarded.

Governments of both complexions have misused their power over the office. Speaker Jenkins should not have been inveigled into resigning and followed by the installation of Speaker Slipper. Speaker Bishop's previous reputation for vigorous partisanship should have precluded her from consideration for the office.

It is useful to observe that once any member decides he or she wants to be named in order to make a political point, there is little the Speaker can do to stop it without diminishing his or her authority. In those circumstances, the Speaker can be portrayed as biased against the member, invariably an Opposition member.

With the benefit of hindsight and an outside perspective, I do acknowledge that the perception of my impartiality would have been enhanced had I not attended parliamentary party meetings and that had been known. My practice was then the norm. Non-attendance is now increasingly common practice in Australia.

It is in that context that I find a constitutional principle to be relevant – the principle of public trust. To me, this mirrors the public expectation that members of Parliament should act impartially in the public interest, with dignity, decorum and respect.

Although the public does not put this in terms of legal principle, the sentiment is consistent with members' status as public officers. That Members of Parliament are public officers was confirmed in a High Court decision in the 1920s, as reported by French, CJ.[7] As public officers, members hold a public trust, whereby they have an entrusted responsibility. As Brennan put it:

> It has long been established legal principle that a member of Parliament holds 'a fiduciary relation towards the public' and 'undertakes and has imposed upon him a public duty and a public trust'.[8]

Brennan stated further:

> a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party.[9]

This has general application to all members. All members of Parliament are public officers with an inescapable duty to act in the public interest above personal, party or other private interests. It is especially relevant to the Speaker as his office is at the heart of the system of government.

The Speaker has an even greater public trust as his or her office involves advocating and defending the institution's function of acting in the public interest, whether in legislating or scrutiny, that is, holding government to account.

It is widely accepted that the members of any organisation have a responsibility to defend the integrity of their organisation. Correspondingly, all members should defend the Parliament. I argue, however, that a Speaker is elected to serve the interests of the House, is seen by the public as having some responsibility for its performance, and is thereby accorded a leading role and hence a higher duty than other members in Westminster parliaments.

If that is what the public sees, what do Speakers actually do?

Speaker's responsibilities

The Speaker literally occupies the Chair and applies the Standing Orders (that is, rules of procedure). The Standing Orders are formally adopted by resolution of the House on recommendation for new or amended provisions. These are recommendations of the Standing Orders Committee (or equivalent), chaired by the Speaker; they generally have all-party support. It is common, however, for governments to use their majority in any House to introduce Sessional Orders which suspend the operation of specific provisions in Standing Orders and substitute provisions which facilitate government business – especially passage of legislation, such as by limiting opportunities for Opposition members to move motions. Sessional Orders are imposed by government majorities and do not have input from the Standing Orders Committee or the Speaker.

The Speaker interprets the Standing Orders and Sessional Orders (if any) in Rulings on individual points of order. Speakers' Rulings build like common law to form a body of precedent and practice that guides the incumbent Speaker and members. Rulings, however, are not necessarily consistent with each other and can appear contradictory.

The Speaker is not constantly in the Chair when the House is in session. Speakers invariably take the Chair for Question Time but, beyond that, often vacate it for a Deputy Speaker or one of the Temporary Chairs who are selected and appointed by the Speaker. In the Commonwealth Parliament there is also the Federation Chamber which provides "an additional forum for the second reading and consideration in detail stages of bills and debate of committee reports and papers presented to the House". It is "chaired by the Deputy Speaker".[10] The House of Commons in the United Kingdom has adapted this Australian model.

The Speaker also vacates the Chair for the committee stage during which a bill is considered in fine detail.

In addition to occupying the Chair, the Speaker has responsibilities akin to a minister of a small government department. The extent of these responsibilities varies between jurisdictions and over time. Some Speakers have responsibility for electorate office staff or members, buildings, equipment and consumables (for example, Victoria) whilst others are limited to the parliamentary building and the staff of their House. The Bligh Government in Queensland caused an uproar when it handed control and supervision over all things affecting the Legislative Assembly of Queensland to a committee consisting of ministers and Opposition executives. This severely undermined the separation of powers and the authority of the Speaker which are elsewhere seen as important to the Parliament's independence from the Executive Government – essential to Parliament's scrutiny of the Executive Government.

The greatest weakness of this aspect of the Speaker's role goes to the heart of the Parliament's independence from Executive control – its budget. The Speaker has responsibility for the Parliament's budget. That budget determines its capacity to fulfil its constitutional roles of scrutinising the Executive Government, conducting committee meetings and inquiries, gathering information and evidence, deliberating on legislation, and meeting constituents.

There is considerable variation in parliamentary budgetary processes throughout the Westminster world. Commonly, Parliament's budget allocation is simply part of the general Appropriation Act – in other words, the Government budget. In Victoria, since my initiative in 1992, there is a separate Parliamentary Appropriation Act. This is important symbolically, but in

practice still leaves the Presiding Officers as supplicants pleading their case to the ministers who frame the Government budget. A better model is in the United Kingdom, where a parliamentary commission chaired by the Speaker prepares estimates that are tabled in the House of Commons and those estimates are appropriated.

A further recognition of the status and role of the Speaker is to receive diplomatic representatives including newly-appointed ambassadors, high commissioners, consuls-general, and visiting delegations of MPs and other representatives of foreign countries. Speakers also lead delegations but these are relatively few and far between.

Reform proposals

There are a number of reforms affecting the constitutional roles of the Speaker that are desirable. I begin with perceptions of the independence of the Speaker. Emerging Australian best practice should be adopted – that is, Speakers should suspend active membership of any political party from the moment of their election to the office, with the sole exception of within their home electorates. The number of members in Australian houses of Parliament, however, precludes the Westminster practice of quarantining the Speaker's seat from electoral contest: as we have seen in the House of Representatives in 2010 and 2016, that one seat could make the difference between Government and Opposition, which is far less likely with the United Kingdom's 650 members.

Secondly, the parliamentary budget process should be a blend of the UK and Victorian models – controlled by the Speaker, with estimates prepared by a bipartisan committee with the benefit of advice from the Government, tabled in the House and incorporated in a separate appropriation bill introduced by the Speaker.

Thirdly, Question Time. The Speaker applies the rules and sets the tone. Some Houses, such as the Legislative Assembly in Victoria, have restructured Question Time in genuine attempts to improve its function of providing answers to questions on government policies and management. Only non-government MPs can ask questions in the time for general questions. Questions about constituency matters have a separate time allocation.

It is not apparent that Question Time in the House of Representatives has enjoyed significant reform.

One of my last acts as Speaker in 1992 was, however, to issue a set of reforms that I reproduce in the Appendix. There were 16 points, among the most important of which were that:

1. questions must ask for information on matters for which ministers have ministerial responsibility;
2. where a question makes an allegation, the member asking is responsible for the accuracy of the facts; and
3. ministers' answers must actually answer the question asked.

Unfortunately, those guidelines were not adopted by my successor.

A more pressing issue than reform of the theatre of Question Time is the ethical conduct of members of Parliament. The conduct of members is central to the House fulfilling its constitutional roles and maintaining its legitimacy in the eyes of the citizens. The Speaker has, or should have, the central role in ensuring that a parliamentary integrity regime is in place to enhance and sustain high ethical standards by individual members and to maintain the House's reputation for integrity.

The Commonwealth Parliamentary Association commissioned me to lead the development of *Recommended Benchmarks for Codes of Conduct for Members of Parliament*, published in 2015.[11]

Whilst Australian parliaments may not have displayed the egregious corruption seen in some other jurisdictions, the handling of ethics in our parliaments is weak compared with nations with which we like to compare ourselves. For example, few are aware that neither the House of Representatives nor the Senate has a Code of Conduct or Code of Ethics for their members. Our counterparts in the United Kingdom and Canada have codes with provisions for rigorous enforcement. What is more, there is a supportive culture amongst their members and the provisions are used, so much so that members have told me that their parliament is better for it.

Integrity systems extend beyond parliament to include, for example, corruption control bodies, but parliaments are the supreme democratic institutions in each jurisdiction and Speakers are elected to lead them. Speakers have the opportunity to take a leading role as advocates of reform to enhance the integrity system, given the stature of Speakers as public officers with elevated responsibilities.

Key features which could and should be built into new or updated codes are included in the *Benchmarks,* for example:

- fostering a culture of ethical conduct;
- independent investigation of allegations of unethical or improper conduct to determine the facts; and
- rigorous application of appropriate sanctions where independent investigation confirms unethical or improper conduct.

Conclusion

In concluding, I reiterate that the Speaker has a little appreciated central role in the operation of our constitutional arrangements. That role deserves greater recognition. Speakers are public officers exercising one of our most important public trusts. They should be encouraged and supported to use their constitutional responsibilities to the maximum possible extent, including budgetary independence, reform of key accountability procedures such as Question Time, the establishment of effective codes of conduct and leading enhanced recognition of the status of members of Parliament as public officers.

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Appendix

Legislative Assembly, Victoria

GUIDELINES ON THE CONDUCT OF QUESTION TIME

It is important that question time is conducted in a manner which both ensures that it fulfils its intended purpose and is consistent with the status and proper dignity of Parliament.

The following are the guidelines based on Standing Orders, Speakers' rulings and May[1] which apply to the conduct of question time:

- a member or a Minister must not read a question or an answer. Such questions and answers may be ruled out of order by the Chair;
- questions and answers must relate to government administration or policy and should be directed to the Minister most directly responsible or answering on behalf of such Minister in another place;
- questions to the Premier may relate to matters within the Premier's portfolio responsibilities and to general matters of government policy and administration, but questions concerning detail affecting another portfolio should be directed to the responsible Minister;
- questions should not seek an expression of opinion, seek a legal opinion or ask whether statements reported in the media are accurate or correct;
- questions should not seek a solution to a hypothetical proposition, be trivial, vague or meaningless;
- questions should not contain epithets or rhetorical, controversial, ironical, unbecoming or offensive expressions, or expressions of opinion, argument, inferences or imputations;
- questions should not raise matters which are sub judice or anticipate debate on an Order of the Day;
- where a question relates to an allegation, assertion, claim, imputation or similar matter, the member is responsible for the accuracy of the facts. Where the facts are of sufficient moment the member may be required to provide prima facie proof to the Speaker before the question is admitted;
- questions cannot reflect on the character or conduct of members of either House and certain other persons in official or public positions which are defined in May. Attention is also drawn to the provisions of the Australian House of Representatives Standing Orders which restrict questions critical of the character or conduct of other persons to questions on notice;
- where a question seeks information which is too lengthy to be dealt with in an answer to a question or otherwise invites a Ministerial statement, the Chair may disallow it and suggest that the Minister to whom it is directed consider making a Ministerial statement on the matter following question time. It should be noted that such action is not constrained by the practice of issuing copies of Ministerial statements, which is a courtesy only, or by the relatively recent practice of Ministerial statements being followed by debate on the question that the Ministerial statement be noted;
- questions which breach the guidelines are out of order and there is no right to immediately rephrase or re-ask questions which have been disallowed;
- answers must comply with the same rules and practices as apply to the asking of questions;
- answers must be directly responsive, relevant, succinct, limited to the subject matter of the question, may provide statements of policy or the intentions of the government, including information on examinations of policy options and other actions which the Minister has had undertaken but must not debate the matter. (Answers to questions should be limited to 2 minutes usually and an absolute maximum of 5 minutes actual speaking time);
- an answer may be refused on the grounds of public policy, for example, that answering may

jeopardise criminal investigations or for some other particular reason may be against the public interest;

- that the information is not available to the Minister, in which case it may be requested that it be placed on notice;
- that the Minister intends to make a Ministerial statement on the subject matter in the near future.

The conduct and effectiveness of question time is in the hands of members. It will assist if:

- personal conversation is limited as it is discourteous and adds to the background sound which creates difficulty in clearly hearing questions and answers;
- a member or a Minister speaking pauses whenever audible conversation, interjection or other disorderly behaviour occurs;
- a member or a Minister who is unable to control his/her disorderly conduct leaves the Chamber for the remainder of question time rather than risk being named. The Chair may exercise its absolute discretion concerning the call by not giving the call to a member or a Minister whose conduct has been disorderly, including interjections.

A member or Minister who has been consistently warned as a result of disorderly conduct in question time may be named without further warning as a result of further disorderly conduct during any part of proceedings on that day or a future day during the current sittings period.

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Chapter 13

Clerks of Houses of Parliament

Peter Patmore

What is the role of the Clerk of a house of Parliament?

Two wise old owls sat at the table,
Their wigs were grey, their gowns were sable,
They looked so sad, so melancholy,
As if depressed by human folly.[1]

There is no shortage of material on the advisory and administrative roles[2] of Clerks of houses of Parliament, but the casual parliamentary observer may be forgiven for overlooking them. As Prime Minister Robert Menzies noted, they are neither flamboyant nor obvious. Indeed, anyone showing those attributes would be unsuitable for the job.

But this is to miss the vitally important role they carry out as minders of corporate history and providers, on a non-partisan and strictly confidential basis, of advice on parliamentary law and procedure to all members. At this deeper level they fulfil a vital but often unacknowledged role in assisting to maintain the integrity of Parliament, responsible government and the doctrine of separation of powers. This address seeks to go beyond describing their basic role to consider the important democratic principle that Parliament should be supreme.

The basics

The role of the Clerk dates from 1315 when there was a need to provide the largely illiterate membership of the Parliament with information as to the proceedings. Essentially the main job qualification was that they could read and write.

Robert Melton became the first recorded Clerk of the House of Commons in 1363, while the first Clerks for the Australian Houses of Parliament were appointed in 1901.

The Clerks of the House sit at the table of the House, in front of the Presiding Officer's chair. In the House of Representatives they wore wigs until the practice was discontinued at the Speaker's direction in 1995.[3] They still wear academic gowns, mainly to distinguish themselves from the members.[4]

They are the only non-elected participants in Parliament who are allowed to speak on the floor of the Chamber as they read items of business and announce bills at the appropriate stage.

The main role of the Clerk is to provide procedural support and advice to all members, but most often to the Presiding Officer. It is common for the Clerk to meet the Presiding Officer each morning that Parliament sits to consider the agenda for the day and possible problems that may arise.

The Clerk's role is more than advisory and includes administrative support to the appropriate House under the provisions of the relevant legislation. However, a Clerk is not to be appointed unless they have ". . . extensive knowledge of, and experience in, relevant Parliamentary law, practice and procedure."[5]

Who are the Clerks?

If the Clerk's role is so central to Parliament, how are they to be classified? Are they public servants or officers of Parliament or something else? To answer this question we must first consider the often-conflicting roles of Government and Parliament and the vexed question of separation of powers in the Australian context.

The doctrine of the separation of powers, entrenched in the Constitution, refers to the three arms of government (the Parliament, the Executive Government and the Judicature) being separate. Whereby the legislature enacts law, the executive (Prime Minister and Cabinet or Premier and Cabinet) applies these laws and the courts resolve disputes relating to the legality.

The vast bulk of debate on this doctrine swirls around the notion of judicial independence where there is a more clear-cut separation. The doctrine becomes unclear when the Executive Government and Parliament are considered, for in Australia a complete separation of powers is not possible as the ministers, who constitute the Executive, must also be members of Parliament.[6]

The Executive is therefore integrated into the legislature, often resulting in confusion over references to Parliament and Government.[7] In fact the founding fathers did not believe a complete separation, such as the United States, was desirable. They instead adopted the British system of responsible or cabinet government.

The American position was described as:

> The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of the government powers among the three departments, to save the people from autocracy.[8]

A significant minority of the delegates to Australia's constitutional conventions wished to adopt the American position[9] but Sir Samuel Griffith, speaking during the Constitutional Convention on 4 March 1891, argued against such a complete separation of powers and supported the Executive residing within parliament. To him the American system showed the "unwisdom . . . of having ministers dissociated, and the executive government entirely dissociated, from the legislature".[10]

In Australia, under responsible government, the Executive is to be accountable to Parliament and only hold power as long as it retains the confidence of the House of Representatives.[11] There is little doubt within a bi-cameral parliamentary system, however, that the Executive has the most influence when a party majority occurs. The Executive sets government priorities, allocates resources to particular issues and makes the most important policy decisions. It is because of these powers that many regard the lower house as subordinate to the party-room of the governing Executive.[12]

It is now widely believed[13] that, as Chalmers and Davis express it, power has become skewed in the Executive's favour and that the primary forum for decision-making is now the party room.

> The dominance of the Executive is entrenched by party discipline, procedural control, a monopoly of information and advice, increasing government complexity and workload, and the scarcity of parliamentary time.[14]

If the Government of the day forms the view that its role includes "managing" the Parliament, rather than being ruled by it, then how it responds to the regulatory attempts of Parliament to ensure disclosure and accountability will be coloured by this perspective.

If the concept of responsible government is to have any meaning it is of the utmost importance to ensure accountability of the Executive to Parliament. Parliamentary scrutiny of executive actions is accountability – and public accountability means the Executive has an obligation to explain publicly.

But, with a strong Government, what assistance can be given to Parliament, through the Opposition, independent and even government backbench members, to ensure accountability so central to responsible government? It cannot be the public service for a number of reasons.

At least on paper the Australian public service accepts the requirement for accountability.[15] It requires departmental secretaries and heads of executive agencies to assist the responsible agency minister to fulfil their accountability obligations to the Parliament by providing factual information about the operation and administration of the agency.

In this regard public servants can be described as apolitical and, in a highly defined way, impartial, but they are still expected to provide advice having regard to the Government's interests and policy framework above others. To senior public servants "politics" are part of the job:

> Impartiality does not mean that the APS gives equal treatment to all sides of politics. It is not the role of the APS to serve the Opposition. Employees should generally have limited contact with the Opposition and other non-government parties.[16]

The public service is therefore ". . . not neutral between the government and the government's opponents but is in fact obliged to serve the government party, often against the interests of its opponents".[17]

The Tasmanian Government has confirmed the role of the public servant in preparing question time briefs:

> The drafting of a question time brief or media statement by a public servant is not an offence; it is normal business for many public servants . . . They are scripts that need to be clear, consistent with the Government's view . . . A professional public servant will understand the purpose and nature of these documents and compose them accordingly.[18]

Therefore public servants, unlike Clerks, are subject to the Government's agenda. Their advice provided to the Executive to be technically accountable to Parliament is neither independent nor unbiased.

With the skewing of the powers of the Executive and the primary responsibility of the public service to the Government rather than Parliament the role of the Clerk becomes of vital importance in providing independent and confidential advice to members to facilitate Parliament in its supervisory role.

If Clerks are not public servants, how should they be categorised? Are they best described as officers of Parliament for, in practical terms, they act on behalf of Parliament and not the Executive or Government?

If so, what qualifies someone as an officer of Parliament? When the term is used, the offices of Auditor-General and Ombudsman are more often thought of than the office of Clerk. There are some immediate differences in that the formers' roles are ones of examining the actions of the Executive and reporting to Parliament; clearly the Clerk has no reporting role, nor one in examining the actions of the Government.

A statement of the Victorian Public Accounts and Estimates Committee assists in further consideration:

> . . . the categorization of officers of parliament depends on whether the functions and responsibilities of a particular office-holder are primarily directed to serving the interests of parliament rather than the executive government. In other words, are the functions and responsibilities of an office-holder concerned with independent review or scrutiny of the implementation of executive government policy on behalf of parliament, or do they constitute, even with a clear and vital independent status, an inherent element of the policy framework of the government or have a judicial role.[19]

Although the Clerks have no reporting role there can be no doubt that their responsibility is to Parliament and not the Executive. But are they sufficiently independent to be an officer of Parliament? One author includes as major factors of independence the following;

- Appointment – whether selection and appointment is by the Executive or Parliament.
- Tenure – the appointee must be secure in the knowledge that an unhappy Executive could not remove him or her from office.
- Statutory independence – this is a practical and highly symbolic way of asserting independence from the Executive.[20]

A consideration of the three points leads to the conclusion that Clerks do qualify as officers of Parliament, even though a review of Australian parliaments[21] does not disclose a coherent legislative approach to appointments.

Some are statutory, involving a requirement for the Presiding Officer to consult with members while others are silent. Some have clear limited tenure, such as a 10-year non-renewable term for the Commonwealth Parliament, while others have no set term. Some may be removed by the Speaker whilst removal of others would require a resolution of the relevant House.

Federally, the Clerk is not subject to direction by the Chair in relation to advice sought by other members.[22] In other jurisdictions, although it is not specified, Clerks are independent of the Speaker in providing confidential advice to all members.

The criteria for appointment, tenure and independence fits the role of the Clerks of the Senate and of the House of Representatives and generally the Clerks of State parliaments, but, in coming to this conclusion, there is a caveat that the Executive still has some elements of control. A government with a majortiy can amend legislation and Standing Orders.

Professor John Wanna, commenting on a dispute between the President of the Australian Human Rights Commission, Gillian Triggs, and the Federal Government, issued a clear warning:

> One of the dimensions of statutory independence is for the office-holder to retain the respect and confidence of the parliament, and that includes the executive in our Westminster system.
> Statutory office-holders and the commissions or authorities they head are primarily the creations of executive government. This point is generally ignored by those who think these officers are free spirits able to criticize governments at will.[23]

David Solomon, in his review of Queensland developments relating to independent statutory offices, particularly the turbulent history of the Criminal Justice Commission, highlighted the ability of the Executive to alter their roles and functions depending on the Government of the day – true independence is not always guaranteed.[24] Indeed, there is a common, although not publicly spoken, view that the now limited tenure of 10 years for Commonwealth Clerks had its genesis partly in the desire of the Government to rid itself of a too outspoken Clerk.

The retention of the respect and confidence of the Parliament is something of which the Clerks are vitally aware. McClelland points out that non-partisan and impartial advice is to be provided to all members of Parliament independent of the Executive.[25] Clerks recognise that once they are no longer seen as non-political and independent, their position is lost.

The position of Clerk in Australian parliaments is therefore one where impartiality is an integral part of the role. This recognition colours, by necessity, how they interact with members. The members themselves, who do not understand the Clerks' requirement for independence, often make this more difficult.

> The principal responsibility of a parliamentary officer is to provide timely, accurate and apolitical support to the members in order that the members can effectively perform the duties of their office. It is not appropriate to allow a personal relationship with a member to affect the advice we give or the service we provide.
> In the work sense, when parliamentary officers are providing advice or assistance to members, they are not our mates, but our 'clients.'[26]

For the Clerks' role to be properly executed, the concept of a member of Parliament as a client is uppermost. Both the Usher of the Black Rod in the NSW Legislative Council[27] and a former Clerk of the Senate underline the client/adviser role and the need for frank advice:

> An advisor who tells the client what the client wants to hear and supports every course of action suggested by the client is not only useless but dangerous.[28]

The following can be distilled: Clerks as officers of the Parliament have independence from the Executive and, in providing confidential advice to all members of Parliament, are not subject to the directions of Presiding Officers. Their position is protected from the Government to some degree, but only as long as their work is held in regard by Parliament.

In this respect they fiercely protect their high standards and the recognition that experience is not gained overnight. With up to twelve years between staff movements, the knowledge gained is comprehensive but also requires the attribute of patience.[29] This also underlines the body of parliamentary corporate knowledge they carry as the authoritative recorder or "memory" of Parliament.[30] By comparison, in the 43rd Parliament 65 percent of the members had less than 12 years experience[31] and in the 44th Parliament 25 percent of the members for the House of Representatives and 18 percent of senators were new.[32]

Although not usually prone to public comment, the regard Clerks have for these high standards and the institution of Parliament sometimes enters the public domain. The following dispute highlights the issues previously canvassed: the difference between public servants and

Clerks, the requirement to provide frank and sometimes unwelcome advice and the requirement of high levels of specialised skills.

The 1991-92 Annual Report of the Department of the Sentate presciently noted a tendency for the participants in political debate to attack the advisers, not on the grounds of unsoundness of the advice but on the basis of the advice not being welcome.[33]

In 2014 the recently-retired Clerk of the Senate, Dr Rosemary Laing, again noted a continuing tendency of senators, who in the past would either adopt the Clerk's advice as their own or ignore it, thereby preserving the anonymity of the advice, to involve them now in political disputes.[34]

In 2014 she was involved in two public altercations. In the first she warned her staff not to tolerate "unacceptable behaviour" by a newly-elected member of the House of Representatives, Clive Palmer. Palmer had tried to have distributed amendments to what were effectively money bills and constitutionally could not originate in the Senate. The Clerk refused to allow them to be distributed. Palmer was not amused and complained, but to no avail.

In a staff bulletin with a clear reference to Palmer, she warned against workplace bullying: "None of you need have any contact with the member in question if you feel at all threatened or intimidated by him".[35]

In August 2014, Laing intervened in a clash between the Speaker of the United Kingdom House of Commons, John Bercow, and a group of senior members of the House of Commons fighting against the appointment of the Secretary of the Commonwealth Parliament's Department of Parliamentary Services(DPS), Carol Mills, as Clerk of the House of Commons. Mills had managerial experience but lacked the necessary parliamentary experience.

Speaker Bercow was keen to modernise Parliament and the Clerk's Department. He ensured the appointment was advertised for the first time since the position was created in 1363, seeking a person with strong managerial experience. At the stage of intervention a six-member panel to replace the retiring House of Commons Clerk, Sir Robert Rogers, had approved the prospective appointment of Mills.

Laing, in an e-mail to the retiring Clerk, wrote that both she and her colleagues had followed the events with "increasing disbelief and dismay". "It seemed to us impossible that someone without parliamentary knowledge and experience could be under consideration for such a role".[36] She continued that there was not one of her colleagues ". . . who has not seen this candidacy as an affront to our profession and the professionalism of us all." Laing specifically commented on the requirements of the role:

> It (is) not a simple matter to move from serving the executive government to serving the parliament if there is a lack of understanding of what parliaments are and what they do.[37]

Laing expanded her comments to say that the DPS did not have an appreciation of and/or respect for the roles and status of members and senators and had an over-emphasis on the authority of the Presiding Officers. In essence the head of the DPS lacked the impartiality so necessary to the role of a Clerk. (Mills later lost her DPS position and withdrew her application for the post of Clerk of the House of Commons.)[38]

It is therefore clear that one of the Clerk's roles is to provide frank advice, even if it is not what the recipient wants to hear.

Can Clerks, however, sometimes fall prey to a parliamentary Stockholm syndrome whereby they deliver advice favouring their own Chamber?

In the final report of the Senate inquiry into the children overboard affair, correspondence between the Clerks of the House of Representatives and the Senate was released. It dealt with conflicting advice as to the ability of one House to summons a member or ex-member of the other.[39]

The Clerk of the House of Representatives, Ian Harris, advised that immunity applied to members and probably extended to ex-members. The Clerk of the Senate, Harry Evans, disagreed. Within the correspondence was an indication of how they viewed their role with a hint of partisanship towards their respective Houses. It was indeed pens at ten paces.

Ian Harris's letter of 2 April 2002 to the Secretary, Senate Select Committee on a Certain Maritime Incident, said:

> . . . In the absence of decisions of the House, unelected officials do not have the power to assert with any finality the practices of the House in question. My attitude would always be to regard myself as the servant of the House for which I work, and not as a determinater of its practices.

Evans, in a letter of 5 April 2002, stated:

> Mr Harris' letter contains serious misrepresentations of the actions of the Senate . . . these misrepresentations add several more layers of confusion over the issues.

Harris's letter of 8 April 2002 observed:

> Over the years I have noted a number of occasions when the Clerk of the Senate has responded to comments by people who have a different opinion to his own with accusations of misrepresentation, being confused and creating confusion, and being bellicose . . . The ploy seems designed to give weight to the Senate Clerk's opinions by personal attacks on those who think differently.
>
> As in the past such attacks have been made on people with at least the same level of skills and training as the Clerk of the Senate and myself, and in some instances with a higher level of intellect than the Clerk of the Senate and myself, I thought myself in good company and was prepared to let the matter rest there. However, . . .

Apart from entertaining a certain delight at the unusually public display of emotions, the question remains: would the advice of the Clerks remain the same if they had different positions?

An almost identical dispute later occurred in the Parliament of Tasmania. The Clerk of the House of Assembly and the Clerk of the Legislative Council were at odds over the ability of the Legislative Council of Tasmania to summons members and ex-members of the House of Assembly – indeed, the advice proffered looked suspiciously similar to that given in the "children overboard" affair.[40]

Therefore, apart from recognising the human nature found in all occupations, what conclusions can we draw?

With the creeping power of an Executive that tends to regard Parliament as a hindrance rather a force for accountability, the Opposition and independent members must have complete

faith that there is a source of independent, professional and confidential advice to assist them in their role of keeping the Executive accountable to Parliament. The fact that the advice given may be counter to the agenda of the Government of the day is necessarily irrelevant. A properly operating Parliament ensures accountability of the Executive and Government.

Unlike public servants, Clerks are beholden to Parliament and are clearly officers of Parliament with elements of tenure, independence and parliamentary rather than government appointment; their role goes beyond the purely administrative and advisory. Although not immediately obvious to the casual observer they are vital in supporting the concepts of separation of powers and responsible government.

They are the holders of parliamentary corporate knowledge and providers of valuable advice to members, many of whom are newly-elected. They contribute to the smooth operation of Parliament and individually advise members so that the institution of Parliament and the concept of responsible government operate as efficiently as possible.

The advice can be given freely in the knowledge that the institution of Parliament protects the Clerks' position. This is not a protection granted without condition, however. To retain the respect of Parliament and all members Clerks are reliant on their professionalism and their interaction with members. Thus they must be at arm's length from members and regard their interaction as one of client/adviser. As one retired Clerk accurately described, they must be "friendly to all but friends with no-one".

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Contributors

The Honourable **Tony Abbott**, Prime Minister of Australia from 2013 until 2015 and Leader of the Parliamentary Liberal Party, 2009-2015, has been a member of the House of Representatives since 1994. He was educated at St Ignatius College, the University of Sydney (LLB), Oxford University (MA) and St Patrick's Seminary. A former journalist, he was press secretary to the Leader of the Federal Opposition, 1990-93; and Executive Director, Australians for a Constitutional Monarchy, 1993-94. His ministerial appointments have included Minister for Employment and Minister for Health and Ageing. He is the author of *The Minimal Monarchy* (1995); *How to Win the Constitutional War* (1997); *Battlelines* (2009); and *A Strong Australia* (2012).

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The Honourable Dr **Ken Coghill** was a member of the Legislative Assembly in Victoria from 1979 to 1996 during which time he was Speaker from 1988 until 1992. After attending Caulfield Grammar School, he studied veterinary science at the University of Melbourne; after leaving Parliament he took a PhD at Monash University. Since 2001 he has been Co-Director of the Parliamentary Studies Unit at Monash University.

Margaret Cunneen, SC, has been Deputy Crown Prosecutor, New South Wales, since 2002. She has worked in New South Wales Government since 1977. Among the posts she has held are Senior Principal Solicitor, Office of the Director of Public Prosecutions, 1986-90; and Crown Prosecutor,1990-2002. From 2012 to 2014 she conducted an inquiry into Child Sexual Abuse by Clergy in Maitland-Newcastle. She has a degree in Law from the New South Wales Institute of Technology (now University of Technology Sydney) and a Master's degree from the University of Sydney. She has twice been a member of the NSW Bar Council (2006-08; 2014-15).

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Don Morris is a Senior Member of the Administrative Appeals Tribunal, based at the Melbourne Registry. He studied politics and philosophy at the University of Tasmania and, before appointment as a Member of the Tribunal in 2016, worked for 29 years in the public sphere, at Commonwealth, State and Territory level. He has been on the Personal Staff of the Governor of Tasmania, Secretary to the Government of Norfolk Island and was Private Secretary to three Presidents of the Senate. He is a Fellow of the Royal Geographical Society and co-author of *History in Our Streets*, published in 1990.

Brendan O'Neill, brought up in North London, is editor of *Spiked Online* and a columnist for various publications including *The Australian* and *The Big Issue*. He commenced his career in journalism at *Spiked*'s predecessor, *Living Marxism*, journal of the Revolutionary Communist Party. His books include *Can I Recycle My Granny?* (Hodder & Stoughton, 2008) and *A Duty to Offend: Selected Essays of Brendan O'Neill* (Connor Court, 2015).

The Honourable Dr **Peter Patmore**, born in Launceston, Tasmania, is a graduate in Laws from the University of Tasmania and also holds a Diploma of Criminology from the University of Cambridge. From 1984 until 2002 he was a member of the House of Assembly in Tasmania, holding several ministerial posts including Deputy Premier and Attorney-General in various

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John Roskam has been Executive Director, the Institute of Public Affairs, since 2005. He was previously Director of the Menzies Research Centre from 2000 until 2002. After attending Xavier College, Melbourne, he took honours degrees in Law and Commerce at the University of Melbourne. He has been Senior Adviser to Don Hayward, Minister for Education in Victoria (1990-96); Chief of Staff to Dr David Kemp, Commonwealth Minister for Education, Training and Youth Affairs (1996-98); and Manager, Government and Corporate Affiars, Rio Tinto (1998-2000).

Sir David Smith, KCVO, AO, was Official Secretary to the Governor-General, 1973-90, and Secretary to the Order of Australia from 1975 until 1990. He previously held various posts in Australian Government including in the Department of the Interior and the Prime Minister's Department. His book, *Head of State*, was published in 2004. He was President of The Samuel Griffith Society, 2006-10.

Simon Steward, QC, was educated at Xavier College and the University of Melbourne where he has been a Senior Fellow in the Law School since 2008. He was appointed a Senior Counsel (Victoria) in 2009 and a Queen's Counsel (Victoria) in 2014. He has recently been appointed a Justice of the Federal Court.

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