Chapter One:
Today's High Court and the Convention Debates[1]

Hon Dr Frank McGrath, AM, OBE

The decision in *Cole v. Whitfield*[2] reversed, after some 80 odd years, the rejection by the High Court of the use of the Convention Debates as an aid to the interpretation of the Constitution. This rejection went back to the earliest years of the High Court.

In 1904, during the address of counsel for the State of New South Wales in *The Municipality of Sydney v. The Commonwealth*,[3] it was noted that counsel proposed to quote from the Convention Debates a statement of opinion that the section under consideration (s.114 of the Constitution) only referred to future impositions of taxes. In relation to such use, Griffith CJ intervened:

> "I do not think that statements made in those debates should be referred to".[4]

Barton J supported him in the following terms:

> "Individual opinions are not material except to show the reasoning upon which the Convention formed certain decisions. The opinion of one member could not be a guide as to the opinion of the whole".[5]

In the same year, in *The State of Tasmania v. The Commonwealth,* again during counsel's address, the question of the relevance of reference to successive drafts of the Constitution, considered at the Conventions of 1891 and 1897-8, for the purpose of the interpretation of the Constitution was discussed. The answer given by Griffith CJ was:

> "We think that as a matter of history of legislation the draft bills which were prepared under the authority of the Parliaments of the several States may be referred to. That will cover the draft bills of 1891, 1897, and 1898. But the expressions of opinion of members of the Conventions should not be".[6]

In view of this ruling it is difficult to understand why the Court has excluded from use in the interpretation of the Constitution the bills drafted by Andrew Inglis Clark and Charles Cameron Kingston for use at the 1891 Convention.

Barton J in his judgment rejected any attempt to consider the actual intentions of the framers of the Constitution:

> "It seems to me plain enough that we cannot construe Acts of Parliament by what might possibly have entered into the minds of the framers had their attention been called to the construction afterwards sought to be placed on their language".[7]

He then went on to concede that:

> "… the intention of an instrument is to be gathered from the obvious facts of history – if we are to go outside the four corners of the instrument itself and the policy logically to be deduced from its express words".[8]

In dealing with the interpretation of s.93 of the Constitution Barton stated:

> "It seems to me that these facts of history throw some light upon the question whether the primary meaning of sec.93 is to be modified".[9]

O'Connor J asserted that the duty of the Court was to:

> "… declare and administer the law according to the intention expressed in the Statute itself. In this respect the Constitution differs in no way from any Statute of the Commonwealth or of a State".[10]

He elucidated further:

"The intention of an enactment is to be gathered from its words. If the words are plain, effect must be given to them; if they are doubtful, the intention of the legislature is to be gathered from the other provisions of the Statute *aided by a consideration of the surrounding circumstances. In all cases in order to discover the intention you may have recourse to contemporaneous circumstances – to the history of the law, and you may gather from the instrument itself the object of the legislature in passing it*. In considering the history of the law, you may look into previous legislation, you must have regard to the historical facts surrounding the bringing the law into existence. In the case of a Federal Constitution the field of inquiry is naturally more extended than in the case of a State Statute, but the principles to be applied are the same. *You may deduce the intention of the legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it*".[11] (emphasis added)

Over the years, the Court continued its resistance to the use of the Convention Debates. In 1975 Barwick CJ stated :

"[I]t is settled doctrine in Australia that the records of the discussions in the Conventions and in the Legislatures of the Colonies will not be used as an aid to the construction of the Constitution".[12]

In the same case, Gibbs J (as he then was) expressed the reason for the rejection of statements in the Conventions:

"The question whether, in construing the Constitution, reference may be made to the debates at a constitutional convention, has been answered differently in the United States and in Australia. In the United States it has been held that such reference may be made. However, in Australia it has been accepted that in construing the Constitution, as in the case of any other statute, *although regard may be had to the state of things existing when the statute was passed, and therefore to historical facts and to earlier legislation*, it is not permissible to consider what was said in Parliament or at a constitutional convention by those who debated the measure, for one reason because it *cannot be certain that what any particular speaker said received the acquiescence of the majority of those present*".[13] (emphasis added)

Barwick CJ reiterated this view in 1981:

"The settled doctrine of the Court is that [Convention Debates] are not available in the construction of the Constitution: and, in my opinion, rightly so. An academic exercise to explain historically why the Constitution was cast in a particular form is one thing. To identify the meaning of the words in which the Constitution is expressed by examination of its discursive development is quite another. The former, in my opinion, has no place in the task of construing the text of the Constitution *except perhaps in the case of an ambiguity in that text which cannot otherwise be resolved. But absent the possibility which such ambiguity may present, the task of deducing the meaning of the words constitutionally employed derives, in my opinion, no assistance from a consideration of the process by which that text came into being*".[14] (emphasis added)

Gibbs J (as he then was) expressed a similar and, perhaps, a more specific view in the same case:

"It would seem paradoxical if we, although forbidden to consider the debates of our own constitutional conventions *for the purpose of discovering what the delegates thought was the meaning of a particular provision accepted by them, should nevertheless, in construing s.116 indirectly give weight to the opinions of Thomas Jefferson as to the meaning of the similar words of the First Amendment*".[15] (emphasis added)

In cases where the Court considered that the Constitution was vague or ambiguous, extraneous evidence was permitted for the purpose of elucidating the evil that was to be remedied, or, where a term had a special meaning in 1900, its meaning at that date could also be sought outside the express word used in the Constitution.

It might be asked why it was that reference to historical facts was permissible, but reference to the matters discussed in the Convention Debates was not. The answer seems to lie in the fear that reference to individual expressions of opinion would be of no utility, where equally strong and opposing opinions on the same point could be found. This issue was considered by Sir Anthony Mason in 1986:

> "The objection usually made to the use of the Convention Debates is that we have no means of knowing whether remarks of a particular speaker commanded assent of the majority. The objection is not universally true and, even if it were true, it is a very slender reason for refusing to take account of the comments of the founders in the course of their deliberations on drafts of the Constitution.
>
> "One speaker may provide an unexpected insight or explain why a particular draft was not accepted. What is more, the debates are a primary source of material for commentaries by experts which the Court does not hesitate to use as an aid to interpretation".[16]

A recurring theme in opposition to the use of the Convention Debates was that, if such opinions were permissible, they would only be of value where a supporting opinion of the whole could be found. Later formulations of this view suggest that it would be impossible to find such an undivided opinion of the whole.

Michael Coper, whilst arguing against the prohibition of the use of the Convention Debates, and whilst doubting their utility, stated:

> "No doubt their examination will more readily facilitate an understanding of how a provision was arrived at than a revelation of the collective intent, a notion variously, and rightly, described by distinguished commentators as 'whimsical nonsense' and 'a mythical or ritual exercise'. But it is only whimsical nonsense if it is taken to imply the existence of a uniform subjective intention; if it is understood objectively to refer to the proper interpretation of the provision or provisions, arrived at after due consideration of the variety of factors outlined earlier, then the notion is harmless enough, if a little misleading. Amongst those factors the subjective intentions have a legitimate place, whether it is to reinforce a conclusion about the objective intention, or to hold to the view that the framers failed to achieve what they, or some of them, appeared to intend. In either case, it does not follow that because the subjective intentions are not compelling they should be excluded from consideration".[17]

What assistance can be gained from the Convention Debates?

The rejection of the Debates on the ground that no unanimous subjective intention can be found is, with respect, somewhat of a red herring. The Constitution was drafted during two Conventions, the last of which consisted of members chosen by the electors of all Colonies except Western Australia, which appointed its representatives from the Parliament of that Colony. The proceedings were conducted roughly on parliamentary lines, with debates being recorded in full in Hansard form. Each and every one of the sections of the Constitution were proposed, considered by special committees, subjected to a Drafting Committee, and then resubmitted to the Convention sitting as a Committee of the whole, where they were debated again and voted upon. Not every section was the subject of extensive debate. However, many of the Sections which have given trouble in later years were the subject of extensive debate, sometimes on more than one occasion. After initial consideration by the Convention, drafts were submitted to the Houses of Parliament of the Colonies, which made recommendations for change which were then considered by the Convention.

After all these discussions were concluded, a vote was taken on the final form of the specific provisions of the Constitution. To suggest that the detailed debates on the particular provisions should not be used, to assist in ascertaining the meaning of the specific provisions of the Constitution, rather suggests that the Members of the Conventions, even after extensive debate, did not know precisely what they were voting for or against. Consideration of the various extensive debates makes it quite clear that it is possible to gain a fairly definite view as to what the voting members understood the meaning and purpose of the particular provisions to be, whether they agreed with them or opposed them.

Such an approach can throw great light on the meaning and purpose of the provisions of the Constitution. It does not rely on the opinion of any particular person, nor does it endeavour to raise some impossible unanimous subjective intention on the part of the framers. It is surely the best possible way to ascertain what the High Court has always considered relevant, namely, the evil which the particular provision was designed to remedy, the nature of the subject matter to which the constitutional provisions were directed. Some examples will be given in the course of this paper to illustrate this approach.

Despite the legitimating of the use of the Convention Debates in interpreting the Constitution, the Court in *Cole v. Whitfield* specifically rejected any attempt to ascertain the actual intentions of the framers:

> "Reference to the history of s.92 may be made, *not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have*, but for the purpose *of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged*". (emphasis added)

Thus, it is clear that no substantial change in the Court's attitude to the use of extraneous matters of history as aids to the interpretation of the Constitution was contemplated by the judgment.

Various members of the Court did not always obey the strictures against the reliance on the individual opinions of members of the Conventions. Some members of the Court sought support from individual Founding Fathers, when emphasizing the nation-creating nature of the Constitution, in support of increased power for the Commonwealth Government, as the representative of the new nation. For example, Deane J (as he then was) made use of views expressed by Sir Henry Parkes during the 1891 Convention to counter a submission that a restrictive interpretation should be given to the "external affairs" power:

> "As early as the 1891 Convention, Sir Henry Parkes identified, as a basic object of the proposed federation, the creation of 'one great union government which shall act for the whole'. 'That government', he continued 'must, of course, be sufficiently strong to carry the name and the fame of Australia with unspotted beauty and with uncrippled power throughout the world. One great end, to my mind, of a federated Australia is that it must of necessity secure for Australia a place in the family of nations, which it can never attain while it is split up into separate colonies' ".[18]

This is precisely the type of use of the Convention Debates which the Court had specifically rejected over the years. In the quotation above the stress is upon union rather than federation. If anything is clear from the Convention Debates, it is that what was being created was not a union of the kind familiar in the United Kingdom, but a federation in which extensive provision was made for the protection of the independence and the integrity of the federating Colonies in their new guise as States of the Commonwealth. The very rejection of the Canadian form in favour of that of the Constitution of the United States of America, clearly reinforces this view.

How should the Convention Debates be used?

It is submitted that the use of the Convention Debates for the purpose of elucidating the meaning and purpose of the various sections of the Constitution, as understood by those who were called upon to vote for or against them, is a legitimate tool in aid of the interpretation of the Constitution. Such meaning and purpose can be elucidated, without necessarily infringing the strictures that the High Court has placed on the use of the opinions of individual members of the Conventions.

Has actual intention crept into the reasoning of the High Court?

In an article in 1994, Professor Schoff has persuasively argued that, in some recent judgments of the High Court, consideration of the actual intentions of the framers has in fact crept into the reasoning of the Court, or at least of some of its members. He analysed the expressions of opinion in the recent cases of *Capital Duplicators v. Australian Capital Territory (No 2); Port McDonnell Professional Fisherman's Association v. South Australia;* the *Corporations Act Case* and *Smith, Kline & French Laboratories v. Commonwealth,* together with *Sykes v. Cleary; Cheatrle v. The Queen; Re Tracey; Ex parte Ryan,* and *Mutual Pools and Staff v. Federal Commissioner of Taxation.* He concluded:

> "These cases demonstrate that subjective intentions, contemporary meaning, the subject of the language and the objectives of the movement towards federation all bleed into one another. Whether history in *Cole* is properly characterised as going to contemporary meaning, or the objectives of the movement towards federation, it nevertheless seems clear that subjective intentions intrude as well".[19]

He drew attention to the reference to *Cole v. Whitfield* in *Capital Duplicators v. ACT (No 2):*

> "In the course of its reconsideration (in *Cole v. Whitfield)*, the Court adopted an interpretation of the section (s.92), based partly on historical considerations, which gave effect to what was thought to be *the intention of the framers of the Constitution"*.[20] (emphasis added)

Schoff refers to the method used by Dawson J in the same case to ascertain the objectives of s.90 of the Constitution. He quoted Dawson J as stating that the objectives of the section were "the only safe guide to its true meaning". He then comments:

> "That may be so, but what emerges from the history is not abstract purpose, or mischief, rather it is 'the function which it was intended to perform' ". (emphasis added)

Seeking the framers' actual intentions was the very thing proscribed by *Cole v. Whitfield.*

In the *Corporations Case*, the majority asserted the positive intention of the framers:

> "There is thus no ground for thinking that s.51(xx) *was framed with the intention* of conferring on the Commonwealth the power to provide for the incorporation of companies. Indeed, the history of the paragraph plainly indicates that the draftsmen of the provision *did not contemplate* that it should confer any power otherwise than in respect of corporations already formed". (emphasis added)

It was against this view that Deane J dissented:

> "It is not permissible to constrict the effect of the words by reference to the *intentions or understandings of those who participated in or observed the Convention Debates*".[21] (emphasis added)

In conclusion Schoff summarised his critique:

> "The framers addressed certain subjects with certain intentions and the attempt to separate the subject and the intention is impossible; the distinction between the subject and the intended scope of the section must collapse".[22]

The "Living Force" theory of interpretation

The Justices who reject the primacy of the intentions of the framers tend to enunciate their viewpoint in terms of the "living force" theory of interpretation, enunciated by Andrew Inglis Clark.[23]

In *Theophanous v. Herald & Weekly Times Ltd,* Deane J argued that the legitimacy of the provisions of the Constitution "lay in their acceptance by the people":

> "Moreover to construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines would deprive what was intended to be a living instrument of its vitality and its adaptability to serve succeeding generations. Indeed, those errors of such a dead hand theory of construction were made plain by Inglis Clark in explaining why the Constitution was to be 'construed as having reference to varying circumstances and events' ".[24]

Toohey J also argued in McGinty that:

> "The Constitution must be construed as a living force".[25]

The "living force" theory of constitutional interpretation derives from Andrew Inglis Clark, who, paradoxically, was the strongest advocate of the rights of the States protected by the Constitution. As Sir Anthony Mason commented in his foreword to the 1997 reprint of Clark's work on constitutional law:

> "The trend in favour of an expansive interpretation of Commonwealth legislative powers would not have pleased Inglis Clark".

The "living force" theory takes two forms. The first is that, in some way, the Constitution itself is a document which has a life of its own, and changes in response to changes in social developments, and in the values of the Australian community. Such a vague notion can be used to support almost any interpretation of the Constitution in contemporary circumstances.

The second is that the words of the Constitution should be interpreted and read by modern eyes, and that the intentions of the framers are totally irrelevant. If the framers understood the meaning and purpose of particular sections of the Constitution in a particular way, a different view of the meaning and purpose in the minds of the modern community should be substituted for the original view. An unkind view of such a theory would be to describe it as the anachronistic interpretation of the Constitution.

Kirby J in the *Hindmarsh Bridge Case* rejected the view that constitutional provisions should be considered in the light of what was understood in 1901:

> "In that century the concept of what it is, in the nature of law, that may be deemed 'necessary' and in a 'special' form for the people of a race, cannot and should not, be understood as it might have been in 1901. Such a static notion of constitutional interpretation completely misunderstands the function which is being performed".[26]

The motivation behind approaches such as these, which are supported by many legal academics and commentators, is to be found in the assertion that the framers of the Constitution intended the Constitution to be flexible in this way, and that it was never intended that constitutional change could only be achieved by the formal procedures of s.128. Impatience with the electorate's conservatism, coupled with the difficulty of achieving the double majority required by s.128, is a common complaint of those who regard the Constitution as out-dated.

Two examples where rejection of the relevance of the intentions of the framers has led to confusion and conflicting results

(1) Section 41 of the Constitution

Analysis of the Convention Debates on this particular section demonstrates a clear understanding of its meaning at the time it was passed by the Convention in 1897.

The original form of this section was moved by Frederick William Holder, the Treasurer of South Australia. He had been defeated on an earlier attempt to make specific provision for adult suffrage in the Constitution. He then moved what has become s.41, for the express purpose of protecting the voting rights of the women of South Australia, who had the right to vote for the Lower House of that State. In the clearest terms, he indicated that what he proposed was that any person who had the right to vote for the Lower House of any of the Colonies, at the time when the Constitution was implemented, or who acquired such a right up to the time when the Commonwealth government instituted a federal franchise, should be entitled to vote in federal elections.

This had the effect of protecting not only the voting rights of women, but also of those Aborigines who continued to retain the right to vote in this manner at the time when the federal franchise was instituted. After such time, the only persons who were entitled to vote would be those who were specifically enfranchised by the Commonwealth statute, subject to the continued right of those protected by s.41.

At the Melbourne session of the Convention in 1898, Barton, as head of the Drafting Committee, attempted to change the original form of this provision by limiting the right to those who had the right as at the date of the creation of the Commonwealth. The mover protested at this change, and was strongly supported by Charles Cameron Kingston, Premier of South Australia, who made it quite clear what the mover had specifically explained when he moved the section. The section was adopted on the clear understanding that it meant precisely what the mover had explained that he intended it to mean.

When the Commonwealth legislated for a federal franchise in 1902, it was the complete misunderstanding, or mis-statement, of the purpose covered by the section which contributed to the passing of that part of the federal Act which totally deprived Aborigines of the vote in the Commonwealth, except those protected by s.41. It was argued by those who desired to deprive Aborigines of the vote that, when the States felt that Aborigines were sufficiently mature to merit the vote, a State Act to give them the vote for the State House of Assembly would automatically give them the federal vote under s.41. Richard Edward O'Connor, who was the Leader of the Government in the Senate, tried in vain to explain that s.41 only protected those people who had, or acquired the vote for the Lower House of a State after the Commonwealth was established, but no later than the date on which the Commonwealth Government legislated for a federal franchise.

The contrary and mistaken view was adopted by Murphy J, who also interpreted the word "acquires" in the way the opponents of Aboriginal votes did in 1902.[27] It is interesting to note that Murphy J made use of the actual debate at the Convention in an attempt to argue that the rejection of an amendment which sought to make clear precisely what Frederick William Holder specifically intended the section, as moved by him, to mean, supported the view that the word "acquires" would apply to rights to vote acquired in the State even after the institution of a federal franchise. So much for the prohibition of the use of the Convention Debates before *Cole v. Whitfield.*

The High Court finally came to the same view of the section as that expounded in the Convention Debates by Frederick William Holder, and by O'Connor in the course of the debate on the federal franchise, but without reference to either of these circumstances. They achieved the same result by legal reasoning on the basis that it would be inconsistent with the Constitution if unilateral State action could actually alter the constitutional power of the Commonwealth Government to legislate in the field of a federal franchise.

(2) Section 51 (xxvi): The Special Laws power

The second example of the unnecessary problems which can arise from a refusal to interpret the Constitution in accordance with the meaning and purpose of particular provisions, as understood by those who framed and voted for them in the Conventions, is that of s.51(xxvi), the Special Laws power.[28]

Much time and argument has been devoted in the High Court, the Parliament, and the electorate, as to whether, or not, this power is one which empowers the Commonwealth to make "beneficial" laws in favour of the groups specified in the provision. On the basis that it was a power to enact "beneficial" legislation, it was argued during the 1967 constitutional referendum that the exclusion of Aborigines from the scope of its provisions was discriminatory against the interests of Aborigines. Doubts were expressed at the time, by such a respected lawyer as Professor Sawer, as to the effectiveness of the removal of the words of exclusion, to achieve the clear vesting of power in the Commonwealth to enact "beneficial" legislation in favour of Aborigines. Despite this, the change was approved at the referendum. The difficulties foreshadowed by Professor Sawer surfaced when the section came before the High Court for interpretation in the *Hindmarsh Island Bridge Case.*

Two major matters were debated in this case:

1. Whether or not the *Hindmarsh Island Bridge Act* could, or did, repeal in part the provisions of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984.
2. Whether the *Hindmarsh Island Bridge Act*, or any part thereof, was invalid in that it was not supported by s.51(xxvi) of the Constitution.

All Justices except Kirby J held that the Act was not invalid. He argued that the term "special laws", in the minds of the framers of the Constitution, were not solely related to "non-beneficial" laws, because of the conflict of opinion during the Convention Debates. He accepted that non-beneficial laws as well as beneficial laws were within the scope of the power to make "special laws". However, he argued that the overall intention of the voters in 1967, when the words of exclusion of Aborigines were deleted, was to give the Commonwealth government power to enact beneficial laws in favour of Aborigines. He quoted with approval the strong words of Murphy J in the *Koowarta Case*:

> "A broad reading of this power is that it authorises any law for the benefit, physical and mental, of the people of the race for whom Parliament deems it necessary to pass such laws. To hold otherwise would be to make a mockery of the decision of the people to delete from s.51(xxvi) the words 'other than the aboriginal race in any State' ".[29]

He also quoted favourably from the judgment of Brennan J (as he then was) in the *Tasmanian Dam Case:*

> "No doubt par (xxvi) in its original form was thought to authorise the making of laws discriminating adversely against particular groups. The approval of the proposed law for the amendment of par(xxvi) by deleting the words 'other than the aboriginal race' was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object is beneficial".[30]

It is a paradox that reliance is placed on the presumed intentions of the electors at the 1967 referendum, and yet the intentions of those who framed the original section at an elected Convention called for the purpose are rejected.

The posing of the description of "beneficial", and "non-beneficial", in relation to s.51(xxvi) completely obscures the original purpose of the section itself. A careful analysis of the Convention Debates on the provision demonstrates that the section was designed to meet what were seen as certain undesirable consequences of the entry of certain racial groups into the Australian community, either temporarily, or on a permanent basis. The section was not designed to inflict gratuitous harm on such groups. Neither was it concerned with legislation designed to benefit particular races. However, it was designed to enable laws of a special nature, not applicable to the general community, to ensure that such immigrant groups conformed to the laws and *mores* of the existing Australian community. The current concerns with the activities of some immigrant groups, in relation to drug dealing, extortion, and the gang rape of white Australian women, are similar to those of the Australian community in the 1890s in relation to the activities, both economic and social, of ethnic groups such as Chinese, Afghans, Pakistanis and Kanakas.

What provoked the need for such power was the local perception that these races were so culturally different that, without legislative provision, they would refuse to conform with the local laws, customs, and *mores* of the settled community. Today, similar concern is being strongly expressed that certain immigrant groups are engaging in activities which, whilst not regarded as improper or unusual in their own cultures, are either illegal or obnoxious to the views, customs and morals of the local community.

The following quotation from an article by Mark Barbeliuk in a local Sydney suburban newspaper could easily have been written in 1897:

> "Sure, there are more than our fair share of idiots, mugs, louts and losers from typical white, Anglo middle class backgrounds, but we have mechanisms and laws in place to generally deal with such home-grown problems.
>
> "You can be born here *but come from a social or ethnic background where the values are not those shared by most Australians*. If that is the case, *you need to be educated as to what is acceptable and unacceptable behavior in our community. If you come to this country to start your life over again, you need to respect the values of those who already live here and promote those values in your own children*".[31]

The fact that in 1901 these views were linked to notions of racial purity and "white Australia" does not alter the particular concerns which inspired the provisions of the section, and which find startlingly identical echoes in 2001.

Conclusions

1. Detailed study of the Convention Debates can reveal the meaning and purpose contemplated and understood by the framers of the Constitution of those provisions which were significantly debated.
2. Such use of the Debates does not conflict with the traditional approach to the interpretation of the Constitution in the light of the context in which the words of the instrument were adopted. It is the best means available to ascertain the subject matter upon which the detailed provisions of the Constitution were to operate. It is a far more reliable source than the secondary sources previously permitted, some of which were an indirect, and sometimes inaccurate, way of getting before the Court the substance of the Convention Debates themselves.
3. The accurate disclosure of the meaning and purpose of the various provisions, which the framers were called upon to support or oppose by their votes, could have saved much unnecessary time and argument, not only in the High Court, but also in the political arena. It would have avoided the divergence of view on the High Court as to the meaning of the word "acquires" in s.41. If accepted, it would also have resulted in a more open and honest approach to the whole question of Aboriginal voting rights in 1902.

4. An appreciation of the actual meaning and purpose of s.51(xxvi), as contemplated by the framers, would have led to a more rational, and less confusing, approach to the question of Commonwealth power in relation to Aborigines. Through the caution expressed by Professor Sawer, the constitutional reformers were on notice as to the unsuitable means adopted to achieve their desired result. The contemplated change would have been more effectively achieved by the original proposal by WC Wentworth, that s.51(xxvi) should be repealed, and replaced by a clear and precise provision giving power to the Commonwealth to enact legislation beneficial to Aborigines.

Endnotes:

1. The full title of Dr McGrath's paper as submitted was *The Use of the Convention Debates before the High Court after the Decision in* Cole v. Whitfield. That title is truncated here for convenience of presentation.

2. *Cole v. Whitfield* (1988) 165 CLR 360.

3. *The Municipality of Sydney v. The Commonwealth* (1904) 1 CLR 208.

4. *Ibid.,* p.213.

5. *Ibid.*

6. *The State of Tasmania v. The Commonwealth of Australia and the State of Victoria* (1904) 1 CLR 333.

7. *Ibid.,* p.348.

8. *Ibid.*, p.350.

9. *Ibid.*, p.355.

10. *Ibid.,* p.358.

11. *Ibid.,* p.359.

12. *AG (Cwth); ex rel. McKinlay v. Commonwealth* (1975)135 CLR 1, 17.

13. *Ibid.,* p.47.

14. *AG (Vic); ex rel. Black v. Commonwealth* (1981) 55 ALJR 155, 157.

15. *Ibid.,* p.167.

16. *The role of a constitutional court in a federation*, Sir Anthony Mason (1986), 16 *FLR,* Vol. 16, 1 at pp.25-26.

17. Michael Coper, *The Place of History in Constitutional Interpretation*, in *The Convention Debates, Indices and Commentaries,* Legal Books, Sydney (1986), pp.16-17.

18. *The Commonwealth v. Tasmania (The Tasmanian Dam Case)* (1983), 158 CLR 255. The reference to the 1891 Convention Debates is given as p.14. The correct page is p.27.

19. Paul Schoff, *The High Court and History: It still hasn't found(ed) what it's looking for*, in (1994) 5 PLR 253, p.261.

20. *Ibid.,* p.263.

21. *Corporations Act Case* (1990), 169 CLR 482 at 511.

22. Schoff, *op cit.,* p.270.

23. *Studies in Australian Constitutional Law* (1901), Andrew Inglis Clark, p.21. The Constitution:

    "… must be read and construed, not as containing a declaration of the will and intentions of men long since dead…but as declaring the will and intentions of the present inheritors of sovereign power. ... It is they who enforce the provisions of the Constitution and make a living force of that which would otherwise be a silent and lifeless document".

24. *Theophanous v. Herald & Weekly Times Ltd* (1994), 168 CLR 340 at 171.

25. *McGinty v. The State of Western Australia* (1996), 185 CLR 140 at 200.

26. *Kartinyeri and Anor v. The Commonwealth of Australia (The Hindmarsh Island Bridge Case)* (1988) ACA 22, 56.

27. *R v. Pearson; Ex parte Sipka* (1983), 152 CLR 254,272.

28. Also, and perhaps more colloquially, known as the Race power. (Editor's note).

29. *Koowarta v. Bjelke-Petersen* (1983), 158 CLR at 180.

30. *The Tasmanian Dam Case, loc. cit.*, p.242.

31. *Educating to avoid the culture divide*, Mark Barbeliuk, *The St George and Sutherland Shire* Leader, 23 August, 2001, p.19.