# Upholding the Australian Constitution Volume Fifteen

## Proceedings of the Fifteenth Conference of The Samuel Griffith Society

## Stamford Plaza Adelaide Hotel, North Terrace, Adelaide, 23–25 May, 2003



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# Foreword

John Stone

The fifteenth Conference of The Samuel Griffith Society, which was held in Adelaide in May, 2003 coincided, as it happened, with the lead-up to the South Australian Constitutional Convention, and it was appropriate, therefore, that the program should mark that fact by the inclusion of four papers having to do with that (at the time of writing, still impending) event. This Volume of the Society's Proceedings, *Upholding the Australian Constitution*, contains those and other papers, as well as Dinner Addresses, delivered to the Conference, together with the usual brief concluding remarks of our President, the Rt Hon Sir Harry Gibbs.

As I said in my Foreword to the preceding Volume in this series, it is one thing to conclude with those remarks by a former, and greatly respected, Chief Justice of the High Court of Australia. It is another thing to begin, as this Conference did, with an address to its opening dinner by another Justice of that Court, and fellow Queenslander, the Hon Justice Ian Callinan, AC. As noted in my introductory remarks to the Conference on the following morning (see pp. xxix-xxx), it might be stretching things to suggest that being addressed by members of the High Court on two successive occasions (the Chief Justice, the Hon Murray Gleeson, AC having addressed our fourteenth Conference) has now created a tradition. That is, nevertheless, a thought to conjure with.

Be that as it may, Mr Justice Callinan's address, *The Law: Past and Present Tense*, will fully repay close reading. Having noted that the High Court's decision in the *Engineers' Case* was a "revolutionary" one – an opinion to which, needless to say, this Society wholly subscribes – he went on to discuss, in his entertaining parable, two other matters which have also been central to many of our deliberations.

First, there is the question "whether the decision of a bench which itself may have overturned what had for a long time been regarded as settled legal orthodoxy" [such as property rights?] "should have a monopoly on the thinking on the topic in question for all time?". And secondly, there are "the dilemmas that Courts must face in dealing with assertions about changing circumstances". As to that, "the pursuit and identification of public opinion by judges for the purpose of deciding cases are exercises fraught with danger ..... It is not the business of the Court to decide cases on the basis of any judge's perception of it [i.e. public sentiment]".

I would not, of course, seek in any way to put words in His Honour's mouth, but I could not but reflect, reading (and re-reading) the words above-quoted, that they may have formed a useful primer to six High Court Justices had they had them in mind in their legally infamous 1992 decision in *Mabo*. As my square-bracked interpolation above suggests, few areas of the law would have been regarded, prior to that decision, as more "settled legal orthodoxy" than our laws governing land title.

The Conference was also fortunate in being addressed by two of the most competent members of the Howard Government – the Hon Peter Reith, now retired from the Parliament, and the Hon Senator Nick Minchin, Minister for Finance and Administration.

At a time when the Prime Minister was about to suggest a referendum to remove (effectively) the capacity of the Senate to reject Government legislation, it was refreshing to hear one of his most able (ex-) Ministers praising the essential role of that body in holding in check the overweening arrogance of the Executive. Personally, I regard Mr Howard's *ballon d'essai* on that topic as purely a political gambit (or "confected ploy", as I described it at the time). But in any case, it was comforting also to have Mr Reith remind us that:

"The history of referendums in Australia is that the public will nearly always vote 'No' to propositions to advance the power or standing of the central government. Nearly all referendums since 1901 have tried just that and so have failed".

Equally refreshing was Senator Minchin's robust assertion of the case for replacement of Australia's compulsory voting system with one of voluntary voting. As Sir Harry Gibbs said in his summary remarks concluding the Conference, "Senator Minchin put forward an unanswerable case" for doing just that.

Partly because of its prominence in the SA Constitutional Convention context, but also because of its importance in its own right, the topic of Citizen Initiated Referendums (CIR) was the focus of papers by Professor Geoffrey de Q Walker and by Mr Reith. (It was also addressed by the Hon Len King, AC in the course of his more general paper about the Convention). Again, perhaps, the best summing up of the pros and cons of the debate was delivered by Sir Harry Gibbs in his concluding remarks, namely:

"It is hard to oppose a CIR limited to the repeal of existing legislation, and it is attractive to think that CIR would provide a useful balance to the power of the Executive in any State which had a unicameral legislature. The debate on this subject generally could usefully be pursued".

Like its fourteen predecessors, it is to stimulating such debate, on that and other topics dealt with during this Conference, that this Volume is dedicated.

# Dinner Address
# The Law: Past and Present Tense

Hon Justice Ian Callinan, AC

I do not want to revisit the topic of judicial activism, a matter much debated in previous proceedings of this Society. But it is impossible to speak about the law as it was, as it is now, and as it may be in the future, without at least touching upon a number of matters: precedent, judicial activism, and whether and how a final court should inform itself, or be informed about shifts in social ways and expectations.

To develop my theme I have created a piece of fiction. The law, as you all know, is no stranger to fictions.

It is not the year 2003, it is not even the year 1997 when the High Court decided *Lange v. Australian Broadcasting Corporation.*[1] It is the year 1937. Merely five years later Justice Learned Hand in the United States would observe:

> "The hand that rules the press, the radio, the screen, and the far-spread magazine, rules the country".

Only seventeen years earlier the High Court had decided the landmark *Engineers' Case.*[2] This, you may recall, was the case in which the Court held that if a power has been conferred on the Commonwealth by the Constitution, no implication of a prohibition against the exercise of that power can arise, nor can a possible abuse of the power narrow its limits. This was a revolutionary decision. It denied what had been thought to be settled constitutional jurisprudence, that the Commonwealth Parliament could not bind the Executive of a State in the absence of express words in s.51 of the Constitution to that effect. Not only did the case put an end to the doctrine of the implied immunity of the States, but it also made clear that there could be found in the Constitution very few implications, and only of the most necessary kind.

I return to the year 1937. Publishers are having a hard time. The Depression has greatly reduced advertising. Many people have, however, managed to save up to buy wirelesses. Radio broadcasts provide a highly desirable form of cheap entertainment and compete with the print media. Entry to grand deco picture theatres can be had for a few pence. Technicolour and pure sound are also seducing the masses. Already it has been demonstrated in the United Kingdom that television as a medium of mass communication is feasible and inevitable.

The hitherto powerful proprietors of the print media see three solutions to these menacing competitors. The first is obvious enough. It is to embark upon an early form of convergence: to buy up and take a position, preferably a majority position, in the owners of the electronic media and the film studios.

The second solution is a little less obvious although its end is clear enough, to treat the news as itself a form of entertainment. The third is the old stand-by, to reduce costs. There are risks in pursuing all of these. Infotainment, as it has come to be called, requires a degree of sensationalism, that is to say, exaggeration and colour. Contrarianism and polemicism are to become the order of the day. The theory is that they will arouse strong emotions and stimulate sales. The best way to reduce costs is to reduce staff. Fewer journalists, using less time to check and counter check, will save money.[3]

The greatest risk associated with these is of a liability for defamation. But the proprietors are resourceful, and there are some issues, particularly issues of profit, which are so important that they require the making of a common cause. The Media Association well knows who is the best defamation

silk in the country, Fox, KC. The office bearers of the Association and its solicitor wait upon Fox. Is there any systemic way in which, they ask him, the risk of defamation may be reduced? Fox conceives a bold plan. Somewhere, he says, in the interstices of the Constitution there will be, and I will find, a constitutional implication of free speech.

The solicitor is disbelieving. What about, he asks, the *Engineers' Case*? Did that not effectively abolish constitutional implications? Fox replies, only unnecessary ones. Free speech, Fox ringingly states, is a necessary implication.

The solicitor remains sceptical. Our Constitution contains nothing like the First Amendment to the United States Constitution. The authors of our Constitution knew all about the First Amendment and yet included nothing about free speech in it. Besides, no-one in the last 36 years has ever suggested that any implication of it could be found in our Constitution.

Fox, KC is undeterred. That sounds like a piece of mere originalism to me, he says. The times have changed. No-one is going to be interested these days in what the founders – those old waistcoated and whiskered men – thought. This is a time to be bold and creative.

The office bearers of the Association like Fox's style. They search for a test case. They find one in which a politician is suing one of their members for a vast sum of money for defamation.

History is made. The media have a great triumph in the High Court. The judgment uses language to this effect. Since 1901, the common law of Australia has had to be developed in response to changing conditions. The franchise has expanded, more people are literate, the political structures have changed, as have the means of mass communication, especially the electronic media. All of these require that a different balance be struck between freedom of speech about political matters and the protection of personal reputation. The Court is bound to examine these changed circumstances. Sections 7, 24, 64, and 128, together with some other related sections, require careful consideration. From all of these the Court infers an implied right of freedom of communication between the people of the nation concerning political or government matters to enable them to exercise a free and informed choice as electors.

Of course this was not the actual language of the High Court in any real case in 1937. It is however the substance of the language of the Court 60 years later when it decided *Lange v. Australian Broadcasting Corporation*.[4] But it could well have been the language of the Court in 1937. To the perceptive it was already clear that the message would be the medium, and the medium would be electronic.

May I come forward in time to the present? Mr Jones is a longstanding and popular president of the Union of Tinkers and Matchmakers. He wishes to crown his career as a unionist by election to Parliament. He is, in all respects, an ethical, honourable and principled person. But like all people who have participated in public life, he has his enemies. Indeed, he has enemies whom he has not even met, and of whom he has never even heard.

One of his enemies telephones a journalist on *The Daily Clarion* whom she knows. She tells the journalist that Jones is unfit for public office. Of her own knowledge, ten years before he had covered up a defalcation by a committee man of the Union of $70,000.

Jones had gained nothing from the events in question. And as with any story of the past, there are both elements of truth and falsity in its recounting. The truth was that Jones became aware of the defalcation a few days after it occurred, at the same time as he learnt that the perpetrator had taken the money to pay for medical treatment for his daughter which was obtainable only in the United States. He formed the view, rightly or wrongly, that his friend must have been temporarily deranged. Mr Jones is not without important friends. He arranges for a credit union to lend his friend $70,000 on a mortgage over his house at a low interest rate, to enable him to make good the loss. The money is restored. The committee man holds his office, and no-one speaks of what has happened for ten years.

The journalist makes a few enquiries. Not surprisingly, she learns little. She does not try to contact the credit union that lent the money. Indeed, she does not even ask the *Clarion*'s solicitor to

search the Register of Titles, to see whether a mortgage to secure a loan by the credit union was registered about the time of the alleged defalcation. She tries, but fails, to contact the committee man, who has moved to a different address. She writes her story. It is a strong story. It is highly accusatory. She uses the words "scandalous", "dishonest", "fraudulent", "disgraceful", "cover-up", and concludes with the question, "How could you let this man Jones loose near the public purse?".

When the story is written, and only ten hours before the printing presses will begin to turn, she telephones Mr Jones's number. It is a Friday evening. She cannot reach him because he is at the ballet. She adds only one sentence to the article, "*The Daily Clarion* attempted to speak to Jones, but he was unavailable for comment".

The sub-editor likes the story. He makes a few minor changes, and one embellishment by way of headline of which he is particularly proud: "Gotcha. Candidate caught out in fraud?"

He selects from the paper's morgue a photograph taken at the Union's picnic fifteen years earlier. In it Mr Jones has a schooner of beer to his lips.

The story is printed and causes a sensation. *The Sydney Repeater*, *The Melbourne Echo*, and *The Canberra Responder* take it up. After all, the *Clarion* would not have printed it had it not been true. By the end of the following week, no radio station, no television channel, and not even one provincial newspaper has failed to repeat, enlarge upon, and more devastatingly, comment on Mr Jones, his morals, and his unfitness for public office.

But just as powerful friends had come to his aid in the past, they will do so on this occasion. They are prepared to fund, no matter what it costs, a defamation action against the *Clarion*.

Fox, KC, after elevation to the Bench, has passed on. He has been succeeded by the equally creative Wolf, QC. Mr Jones's solicitor gets to him before the *Clarion*, which had failed to renew his retainer, can. A conference is arranged. Jones's solicitor is an old campaigner, and bears the scars of many Quixotic causes. He has two particular concerns. The journalist seems to have made some enquiries, although possibly not enough for the purposes of the constitutional defence. There is no doubt that Mr Jones was engaged at the relevant time in political affairs. His solicitor fears that the *Clarion* will succeed on a defence of freedom of political communication.

But like his predecessor, Fox, KC, Wolf, QC thinks conceptually and can rise above petty concerns. The times have changed, he says, and, because Wolf likes the language of the market place and mixes his metaphors, he points out that the media have become a monolithic critical mass answerable to no-one, and are bent upon inflicting mortal damage to every public reputation that puts its head above the parapet.

That's as may be, the solicitor cautiously remarks. But even if it is true, how would you convince the Court that it was? All that you have to do, Wolf replies, is look around you. That is what the Court did when it found the implication of freedom of political communication. There was no evidence called on the point. I will argue that the times require the dismantlement of the defence found in 1937. But I have a fall back plan, in any event. Cryptically he adds, I will tender a lecture to the Court, if they let me, that is.

The great legal adventure begins in one of the Supreme Courts of the States. Wolf's attempts to introduce evidence of what he says can be seen by anyone with eyes to see, of the power and pervasiveness of the media, and their deterrence of political involvement by the less than lion-hearted, fail. If what he claimed was self-evident, the Court responds, it is not a matter for evidence, certainly not expert evidence. Furthermore, the so-called facts on which he relies are legislative, and not adjudicative facts, and on that ground also not admissible in evidence.

The *Clarion* of course relies upon the constitutional defence. All of the courts below the High Court are bound by its 1937 decision recognising it. *Jones v. The Daily Clarion* inexorably makes its way to the High Court.

There, Wolf, QC is allowed to read, on a provisional basis only, subject to a later ruling as to its admissibility in evidence, its relevance, or acceptability as a submission adopting it, that which he wished to introduce in the courts below. It is this:

> "Today information is abundant, but it's often mixed with misinformation and a little spice of disinformation. It can be hard to check and test what we read and hear. There are easy cases: we can check weather forecasts for their accuracy by waiting for tomorrow; we can rumble supermarkets that don't sell goods at advertised prices. But there are hard cases: how can parents judge whether to have a child vaccinated or to refuse a vaccination? How can we tell whether a product or a service will live up to its billing? Yet for daily and practical purposes we need to place our trust in some strangers and some institutions, and to refuse it to others. How can we do this well?
>
> "Meanwhile, some powerful institutions and professions have managed to avoid not only the excessive but the sensible aspects of the revolutions in accountability and transparency. Most evidently, the media, in particular the print media – while deeply preoccupied with others' untrustworthiness – have escaped demands for accountability (that is, apart from the financial disciplines set by company law and accounting practices) .....
>
> "Newspaper editors and journalists are not held accountable ..... Outstanding reporting and accurate writing mingle with editing and reporting that smears, sneers and jeers, names, shames and blames. Some reporting 'covers' (or should I say 'uncovers'?) dementing amounts of trivia, some misrepresents, some denigrates, some teeters on the brink of defamation. In this curious world, commitments to trustworthy reporting are erratic: there is no shame in writing on matters beyond a reporter's competence, in coining misleading headlines, in omitting matters of public interest or importance, or in recirculating others' speculations as supposed 'news'. Above all there is no requirement to make evidence accessible to readers.
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> "We may use twenty-first century communication technologies, but we still cherish nineteenth century views of freedom of the press, above all those of John Stuart Mill. The wonderful image of a free press speaking truth to power and that of investigative journalists as tribunes of the people belong to those more dangerous and heroic times. In democracies the image is obsolescent: journalists face little danger (except on overseas assignments) and the press do not risk being closed down. On the contrary, the press has acquired unaccountable power that others cannot match. Rather to my surprise and I think ultimately my comfort, the classic arguments for press freedom do not endorse, let alone require, a press with unaccountable power. A free press can be and should be an accountable press.
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> "Accountability does not mean censorship: it precludes censorship. Nobody should dictate what may be published, beyond narrowly drawn requirements to protect public safety, decency and perhaps personal privacy. But freedom of the press does not also require a licence to deceive. Like Mill we want the press to be free to seek truth and to challenge accepted views. But writing that seeks truth, or (more modestly) tries not to mislead needs internal disciplines and standards to make it assessable and criticisable by its readers.
>
> "There is no case for a licence to spread confusion or obscure the truth, to overwhelm the public with 'information overload', or an even more dispiriting 'misinformation overload', let alone to peddle and rehearse disinformation".

I interrupt my parable, for that is what it is, to make it clear that the last six paragraphs are not my words or an expression of any opinion of mine. They are the actual words of the English philosopher, Baroness O'Neill, in the fifth and last of her Reith Lectures for the BBC this year.

After reading these passages, Wolf, QC makes the submission that the Court should develop the law in response to changing conditions. The common convenience and welfare of society to which the

High Court had frequently referred on previous occasions, including in 1937, now require the inference of a different implication, one that would compel a higher level of accountability upon the media, and one which would have the practical effect that well meaning and able people, such as Mr Jones, and others in public life, would not be deterred from seeking election to Parliament, or of holding other high office by the threat of extravagant and vicious reporting, and the magnification of long past errors of judgment.

I regret to have to say that I cannot tell you whether Mr Jones succeeded. Let us just say that the decision is reserved.

Why have I made up this rather long, and I fear, somewhat discursive story? I have done it to demonstrate the dilemmas that courts must face in dealing with assertions about changing circumstances. To what extent can a court know, or should it seek to find out, that circumstances have changed? Is one judge's judicial notice another's blind spot?

I must say I found it difficult to believe, as I read in the recently published biography of Sir Owen Dixon, that that most eminent judge, unlike practically any other sentient being of his era, could be totally unaware of the existence of Ginger Megs.

One of the difficulties about the doctrine of precedent is that although all common law judges subscribe to it, few invariably, rigidly apply it. At one extreme, Lord Denning of Whitchurch said of the doctrine that it did nothing to broaden the bases of freedom, rather it narrowed them. He called in aid the poem *Aylmer's Field*, by Tennyson:

"That codeless, myriad of precedent,
That wilderness of single instances".[5]

Why do judges not universally apply the doctrine of precedent, or of *stare decisis*? I will try to answer that with a practical example. In 1969 the High Court decided in *Beaudesert Shire Council v. Smith*[6] that a local authority was liable for an intentional positive act forbidden by law and inevitably causing damage to another. That does not sound like an unreasonable proposition by any means. There was some old authority to support it.[7]

The decision was criticized from time to time.[8] Barristers were loath to rely on it. By 1995 no one could cite a case in which it had been applied.

In that year in *Northern Territory v. Mengel*[9] the High Court concluded that *Smith* should be overruled. This was so, the Court said, because of difficulties associated with notions of "unlawful act" and "inevitable consequences".[10]

The criteria[11] for an overruling were said to have been satisfied: in particular, that the principle for which *Smith* stood had not been worked out in a significant succession of cases. Some would say, indeed many in the profession have, that on the application of that criterion, a number of other cases may be looking decidedly shaky.

The question whether a precedent should be overruled, whether it is to be regarded as little more than of curiosity to legal historians, conceals another question: whose precedent, formulated when, and in what circumstances, are we talking about? I have said this elsewhere[12] and I would, if I am not bound to do otherwise, wish to adhere to it:

> "Should this Court take the view, for example, that a decision reached by a majority of three to two should command the same weight and respect as a decision reached by a majority of all the Justices of the Court? Another question which may arise is whether the decision of a bench which itself may have overturned what had for a long time been regarded as settled legal orthodoxy should have a monopoly on the thinking on the topic in question for all time? If the answer to this last question is an affirmative one it would mean that those who support change of this kind would be able to entrench their changes by capitalizing on the caution of those who favour an incrementalist approach. … In *Astley v. Austrust Ltd*,[13] I referred to the disadvantage to people, particularly litigants, who have acted on a perceived, settled state of the law, when the law is restated in a quite

different way. Lord Browne-Wilkinson in *Kleinwort Benson Ltd v. Lincoln City Council*[14] also recently pointed to the anomalous position of a party who had acted on the basis that the law precluded reliance on mistake of law to ground a claim, when the House of Lords decided to change the law to make such a claim then, and in those proceedings maintainable. Legislators can, and usually do enact transitional provisions when they change the law. The courts have so far found and provided no like means of cushioning the impact of decisions which effect significant changes. It may ultimately turn out to be an inescapable concomitant of any role that a final court may arrogate to itself to change the common law markedly, that it do so only in a way which is sensitive to the affairs and expectations of those who have acted upon the basis of what they reasonably took to be the legal *status quo*. If the proposition that judges do not change the law is to be acknowledged as a fiction, then something may have to be done to displace the effect of the other legal fiction, that the law as found by the Court has always been so, and those who may have acted upon a different understanding in the past are nonetheless bound by the Court's most recent exposition of the law. Merely to state the problems is to expose the difference between the legislative and curial roles. Certainty, predictability, the desirability of a gradual and incremental development of the common law only, and respect for the knowledge, wisdom and experience of those who made the earlier decision are very important considerations. The last of these matters will always however invite the question whether those who made the decision under challenge themselves paid due deference to those who in the past held a different opinion".[15]

More succinctly and colourfully, Justice Roberts of the United States Supreme Court, said in 1944 – I paraphrase – a decision is not an excursion railway ticket, good for the day only.[16]

The pursuit and identification of public opinion by judges for the purpose of deciding cases are exercises fraught with danger. Ask any experienced politician how hard it is to gauge even majority opinion. Not a few Prime Ministers have miscalculated to their detriment public sentiment. If politicians find it difficult, how, it may be asked, can courts expect to do it with confidence? The truth almost certainly is that at any one time there is no single public opinion but a multiplicity of them. Public sentiment, to the extent that it may be singular just like fashion, is in any event liable to change overnight. It is as elusive as a spark from a furnace. It is not the business of the Court to decide cases on the basis of any judge's perception of it.

That, ladies and gentlemen, really sums up all that I would wish to say to you this evening on the law, past and present tense.

**Endnotes:**

1. (1997) 189 CLR 520.

2. (1920) 28 CLR 129.

3. As recently as today I read (in *The Australian Financial Review* of today) Christopher Hitchens's review of Bob Woodward's latest book on the Presidency of the United States, *Bush at War*, in which the reviewer referred to the *Washington Post's* requirement that journalists check their sources as "pedantic".

4. (1997) 189 CLR 520, especially at 565-567.

5. Tennyson, *The Romanes Lecture* (1959), at 1.

6. (1966) 120 CLR 145.

7. Summarized in (1966) 120 CLR 145 at 154-156.

8. For example, *Elston v. Dore* (1982) 149 CLR 480 at 491; *Takaro Properties Ltd v. Rowling* [1978] 2 NZLR 314 at 339; *Van Camp Chocolates Ltd v. Aulsebrooks Ltd* [1984] 1 NZLR 354 at 359; *Lonrho Ltd v. Shell Petroleum Co Ltd* [No 2] [1982] AC 173 at 188; *Copyright Agency Ltd v. Haines* [1982] 1 NSWLR 182 at 199; Fleming, *The Law of Torts*, 8th edn (1992) at 702; and Balkin and Davis, *Law of Torts* (1991), at 687.

9. (1995) 185 CLR 307.

10. *Ibid.*, at 344.

11. In *John v. Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439, the criteria for the Court to review and depart from an earlier decision were set out by Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ. These are: 1. The earlier decision does not rest upon a principle carefully worked out in a significant succession of cases. 2. There is a difference between the reasons of the majority judges in the earlier decision. 3. The earlier decision has achieved no useful result, but has rather led to considerable inconvenience. 4. The earlier decision has not been acted on in a manner militating against its reconsideration.

    See also *Queensland v. The Commonwealth* (the *Second Territories Representation Case*) (1977) 139 CLR 585.

12. *Esso Australia Resources Ltd v. Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49, overruling *Grant v. Downs* (1976) 135 CLR 674, particularly at 101-107.

13. (1999) 197 CLR 1 at 56-57.

14. [1999] 2 AC 349 at 358-359.

15. *Esso Australia Resources Ltd v. Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 at 104-105 per Callinan J.

16. *Smith v. Allbright* (1944) 32 1 US 649 at 669.

# Introductory Remarks

John Stone

Ladies and Gentlemen, welcome to this, the fifteenth Conference of The Samuel Griffith Society, and our second in Adelaide, where once again we have benefited from the enthusiasm and hard work of our South Australian member of the Board of Management, Mr Bob Day. May I take this opportunity of congratulating Bob, on behalf of all the members of the Society, on his award in this year's Australia Day Honours List, as an Officer (AO) in the Order of Australia.

Members of the Society will be aware that our previous Conference, in Sydney last June, was honoured with an Address to the opening Dinner by the Chief Justice of the High Court of Australia, the Hon Murray Gleeson, AC. Those of you who were present at last night's Dinner will have heard, similarly, the lively address by another member of the High Court bench, Mr Justice Ian Callinan, AC. I note in passing that Mr Justice Callinan has addressed us earlier, at our fourth Conference in Brisbane in 1994, in his then capacity as plain Mr Callinan, QC. I will say only that his address last night, with its deft admixture of his twin skills both as a jurist and a novelist/playright, fully lived up to the high expectations which that earlier precedent had generated.

I suppose that it might be stretching things to suggest that being addressed by members of the High Court on two successive occasions had now created a tradition. Still, it's a thought to conjure with . ....

In the day and a half before us we have in prospect ten papers and another Dinner Address – in that case by Senator the Hon Nick Minchin, himself a distinguished South Australian and, if I may presume to say so, one of the most competent members of the present Government in his current role as Minister for Finance. His Address on *Voluntary Voting* will, I am sure, be as lively as it will be thought provoking.

It is a coincidence that we should be meeting at this time in Adelaide where, a few months hence, the Government will be convening a Constitutional Convention. Our first four papers today all have to do with that Convention, in the initiation of which, it is proper to note, one of the Society's own members, the Hon Peter Lewis, MHA (now Speaker of the SA House of Assembly) played a dominant role. Of course, the two papers dealing with Citizen Initiated Referendums relate not only to the forthcoming South Australian Convention, but also bear on the more general question of the possible use of that device to restore a greater level of democratic participation to our parliamentary processes in Australia more generally.

This afternoon, apart from the paper by our President, Sir Harry Gibbs, on the *Teoh Case*, we shall have papers from Professor Peter Howell and Professor Philip Ayres, each dealing with the topics of their recently published books, *South Australia and Federation* and *Owen Dixon*, respectively. Tomorrow, apart from the report by Julian Leeser on the state of the Republic debate as evidenced by the conference at Griffith University last November, we shall hear papers form Dr Geoffrey Partington and Keith Windschuttle.

Dr Partington will lay out in some detail the process of fabrication of Aboriginal mythology as evinced in the notorious Hindmarsh Island bridge affair, while Keith Windschuttle will close our Conference with his paper on *Mabo and the Fabrication of Aboriginal History*. The latter's recent enormously successful book, dealing with the historical fabrication process within the History departments of some of our major Universities, has already indicated the sources of the crude historical distortions from which,

none the less, six Justices of the High Court in 1992 chose to draw their judicial inspiration in the *Mabo Case*. Mr Windschuttle's paper should ensure that our Conference ends, to adapt T S Elliott, not with a whimper but a bang.

To return, however, to our immediate proceedings, we begin today with two papers assessing the work leading up to next month's South Australian Constitutional Convention – each of them from a participant in the Group of Experts appointed by the South Australian government to assist in that process. The first of these papers will be delivered by the Hon Len King, AC, previously Chief Justice of South Australia (and prior to that, Attorney-General in the Labor government of that time), and the second by the Hon Trevor Griffin, who recently retired as Attorney-General in the then outgoing Liberal Party administration. The session will be chaired by Mr Bob Day, to whom I now hand over.

# Chapter One
# An Experiment in Constitutional Reform – South Australia's Constitutional Convention 2003

Hon Len King, AC, QC

I welcome this opportunity of delivering this paper on the Constitutional Reform project on foot in South Australia. I was a member, together with Trevor Griffin, who is to follow me and also with three other speakers at this conference, namely Professor Geoffrey Walker, Dr Geoffrey Partington, and Professor Howell, and others, of a so-called Panel of Experts whose task it was to prepare a discussion paper for use in connection with the Convention. Part of our brief was to be prepared, as the occasion arose, to speak to interested persons and bodies about the project. It is therefore in that capacity that I speak to you today.

In the title to this paper I have described the project as an experiment. I do so because, so far as I know, it is an unprecedented method of attempting constitutional reform. It had its genesis in the outcome of the South Australian general election in 2002. The outcome of that election was that the Labor Party won 23 seats in a House of Assembly of 47 seats, that is to say one seat short of the number required to form government. The Liberal Opposition won 20 seats. One seat was won by a National Party member, but in South Australia the National Party is not in coalition with the Liberal Party and that member is for all practical purposes an Independent. There were three other Independents, one of whom is Mr Peter Lewis.

Mr Lewis entered into a compact with the Labor Party by which he agreed to provide it with support on motions of no confidence and Appropriation and Supply Bills, thereby enabling the Labor Party to form government. Mr Lewis became Speaker of the House of Assembly. His support for the government was conditional upon the Labor Party's adherence to a compact which included the establishment of a Constitutional Convention to consider certain specified issues. A Steering Committee of the Parliament, comprising members drawn from both major parties and also Mr Lewis, was established to manage arrangements for the Convention. The Panel of Experts to which I have already referred was established to prepare a discussion paper for use in connection with the Convention.

The Panel of Experts consisted of academics or retired academics in the fields of History and Politics and also two former members of the State Parliament, namely Mr. Griffin and myself. Meetings have been held or are to be held in local communities throughout the State. I understand that there are to be some 27 such meetings. The ideas expressed at those meetings will be fed into the Convention.

The experimental character of the exercise consists in the nature of the Convention and the method of choosing its members. It is to be a Convention of some 300 members chosen at random from the population of the State. I am not aware of the methodology to be used in selecting 300 persons from the general population. A Constitutional Convention chosen in this way is, to my knowledge, unique and can fairly be described as an experiment. The Convention will have before it, as I understand the intention, the discussion paper prepared by the Panel of Experts and a compendium or distillation of the views expressed at the local community meetings. The Convention in its turn will make recommendations for changes to the Constitution to the Parliament of the State.

The power to amend the Constitution vests in the State Parliament. Amendments must be made by Act of Parliament. There are special provisions in the *Constitution Act* with respect to certain types of amendments. A Bill by which an alteration in the constitution of the Legislative Council or House of

Assembly is made, or by which the deadlock and double dissolution provisions are affected, or which abolishes local government, must be passed by an absolute majority of the whole number of the members of the Legislative Council, and of the House of Assembly, respectively.

A Bill providing for or effecting the abolition of the House of Assembly or the Legislative Council, or any alteration of the powers of the Legislative Council, or repealing or amending the absolute majority requirements, must be approved by the electors at a referendum. The "one vote, one value" and electoral redistribution provisions of the Constitution are protected in the same way. The final say as to which, if any, of the recommendations of the Convention are implemented therefore rests with the Parliament, and may require approval by referendum.

A constitutional reform process of this kind is necessarily limited in its scope. The Convention is restricted to the questions which have been referred to it. Moreover, such a Convention, by its nature and composition, is not a suitable instrument for tackling the more fundamental issues of constitutional reform which, in my view, require attention.

The Constitution of this State is a thing of rags and patches. The *Constitution Act* 1934, as amended from time to time, contains many of the principal constitutional provisions, but it lacks completeness and assumes a good deal. There are other statutes having constitutional implications, notably the *Australia Act* 1986. The role of the Governor is dealt with in Letters Patent and Governor's Instructions as modified by the *Australia Act*. The whole structure assumes the operation of the unstated conventions of constitutional government.

The only reference in the *Constitution Act* to the third, the judicial, arm of the government of the State is a provision that the Commissions of Judges remain in force notwithstanding the death of the Monarch, and that the Monarch may remove any Judge of the Supreme Court upon the address of both Houses of Parliament. The establishment of a court structure, even the Supreme Court, is not provided for in the *Constitution Act*, and there is no guarantee of the independence of the judiciary, except such implication as may arise as to the Supreme Court from the provision as to removal of judges to which I have referred.

The executive government fares no better. The provisions relating to the Executive are not only inadequate; they are downright misleading. They are based upon the traditional British model in which executive authority vests in the Crown. In South Australia that translates to the Governor, acting in some circumstances with the advice and consent of Executive Council. Ministers of the Crown are provided for, but there is no reflection in the *Constitution Act* of the political reality that the executive government of the State is carried on by the Ministers as a body, a Ministry or Cabinet, presided over by the Premier. Indeed, the office of Premier is not mentioned at all except for a provision for the appointment of a Parliamentary Secretary to the Premier.

A reader of the *Constitution Act* would be left with the misleading impression that the executive government of the State is in fact carried on by the Governor, albeit at times with the advice and consent of an Executive Council. There is no reference to the conventions of constitutional government, or the principle that the Governor acts on the advice of the Ministers. These anomalous provisions are not, of course, peculiar to South Australia, but they are nevertheless archaic and misleading.

These points are not by any means exhaustive of the incongruities in our constitutional documents, but they are perhaps the most blatant. It seems to me that the most imperative need for constitutional reform is modernisation. The time is surely ripe for a modern Constitution which truly reflects the constitutional and political realities.

The reality of executive government of the State by Cabinet and Premier should be unambiguously set out. The formality of the signing of executive orders by the Governor should be dispensed with. If this modernisation requires definition and specification of the reserve powers of the Governor, that thorny issue should be tackled and resolved. There should be explicit recognition in the Constitution of

the court system, and adequate safeguards of the independence of the judiciary. The experiment upon which the State has embarked does not embrace these fundamental issues of constitutional reform. Perhaps the composition of the proposed Convention and the nature of the process would make that impossible. The process is confined to questions which do not include these weighty matters.

There is another respect in which the process fails to address the most important constitutional issues. I notice that the question of the republic is the subject of a session later in this conference. I should make my position clear. I consider that the advent of an Australian Republic is both desirable and inevitable. I find very few people nowadays who really see the future of Australia as a monarchy. Many question the timing, some relating it to the lifetime of the present Queen. Others are uncertain about the model which ought to be adopted. A great many do not see it as a matter of urgency. But there are very few who really believe that it will not come. For that reason I use the word "inevitable". When there is a sentiment in a community as pervasive as this, the outcome takes on the air of inevitability.

In those circumstances, it seems to me that those undertaking a process of constitutional reform in a State should have as a priority the fashioning of the Constitution to accommodate the advent of the republic. Probably no great changes are necessary although, obviously, there must be new provisions for the appointment or election of a Governor. I regret that this process of constitutional reform will pass without an attempt to adjust the South Australian Constitution to accommodate a future Australian republic.

With all its limitations, however, the forthcoming Convention does have issues of importance to resolve. I will discuss some but by no means all of them.

**Citizens Initiated Referendum**

The first question to be submitted to the proposed Convention is: "Should South Australia have a system of initiative and referendum (citizen initiated referenda) and, if so, in what form and how should it operate?".

Most of you will be familiar with the concept of CIR. It may be defined as a form of direct democracy, in which a given minimum number or percentage of voters has the power to require a referendum to be taken on a given issue without the approval of the Parliament. It has two essential characteristics:

- The people have the power, by petition, to compel the holding of a referendum on whether a particular law should be enacted or repealed;
- The government and Parliament are bound by the results of such a referendum.

There are two principal forms of CIR. One restricts the power of voters to petition for a referendum to the question whether an existing law should be repealed. Another empowers voters to compel, in the same way, not only the repeal of an existing law, but also the enactment of a new law. The result of the referendum in either case is binding, in the sense that the result of the referendum, without further legislative intervention, has the force of law.

A variant has been discussed which would not give the result of the referendum the force of law, but would give the Parliament the choice of repealing or enacting, as the case may be, the result of the referendum. Failure of the Parliament to do so would result in a general election. I do not think that this second variant requires serious consideration. A general election, once called, would be decided on issues other than the issue which was the subject of the referendum, and to a great extent upon the voters' general ideological positions. The particular issue, the subject of the referendum, would not be satisfactorily resolved in that way.

The first variant, however, requires serious consideration. CIR was first introduced at the national level in Switzerland in 1874. In one form or another it has been adopted in 28 States of the United States of America, has been used in Italy, and now also operates in all German States and nationally in Russia. In

Canada it is widely employed at a local government level.

I note that CIR is the subject of the second session at this conference and a paper will be delivered by Professor Geoffrey Walker. Professor Walker was a member of the Panel of Experts to which I have referred. He is a very well informed enthusiast for CIR. As I do not share Professor Walker's enthusiasm for CIR, I suppose that what I intend to say on the subject can be regarded as, to borrow the current language of military strategists, a pre-emptive strike.

The genesis of democracy in the ancient Greek city states took the form of direct democracy. The Athenian democracy involved decision-making by an assembly of all the citizens of Athens. History shows that the assembly was often swayed by the power of persuasive orators into making unwise and sometimes unjust decisions, at times leading to the banishment of the city's best citizens. Where democracy came to be adopted as a form of government in modern nation states, it was necessarily in the form of representative government.

Our constitutional system is grounded upon the principle of representative government. In a true democracy the people are sovereign. They exercise their sovereignty by electing representatives to govern them. Those representatives are empowered, and may even be required in some situations, to submit questions to the people by way of referendum. In all ordinary circumstances, however, the representatives make the decisions on behalf of the people and are accountable for their stewardship at periodic elections.

Representative government is the means by which modern democracies meet what has always been the principal challenge for democracies – namely, how to reconcile the exercise of the sovereign will of the people with the need for strong and effective government. In a representative democracy, it is the business of representatives elected by the people to consider and determine public issues. They have the time and the means to do so. In modern democracies, Ministers, having the advantage of expert advice and input from public servants, are able to make considered decisions on proposed legislation. Backbenchers on the Government side generally have to approve legislation in the party room and, therefore, have to apply their minds in a deliberate way to the issues involved in the proposed legislation. The Opposition has to formulate a view and there is debate in the Parliament. It seems to me that democracy works effectively and efficiently only if legislation is left in the hands of the representatives elected by the people who, in the end, have to be accountable at an election.

There are many reasons for this, and I will discuss some of them:

- A proper decision on most public issues requires an assessment of complex considerations for and against a proposal. It also requires an understanding of the impact which a particular decision will have on other areas of policy or government, and of its wider social, budgetary and economic implications. Few members of the general public, who will be called upon to vote at a referendum, will ever have the opportunity to consider fully the merits and the wider implications of proposed legislation. Many members of the public may have only a superficial understanding of the legislation and the issues involved.
- The principle underlying representative governments is that the elected representatives have the responsibility of providing strong, consistent and effective government and of enacting wise and just legislation, and are accountable to the people who elect them at periodic elections. CIR detracts from this general principle, by placing some decisions in the hands of anonymous voters at a referendum who cannot be held accountable for any adverse effects of their collective decisions. Individual members of Parliaments, and even more so, political parties, can be held accountable for the policies they implement; anonymous voters cannot be held accountable.
- Strong and effective government requires from time to time the enactment of measures that are temporarily unpopular in order to promote the common good in the long term. CIR would enable such measures to be repealed by referendum. It is simply not true to say, as often is said, that the

people are in as good a position as politicians to make the required judgments on public matters. There are times when politicians are able to take a long view, knowing that they have until the next election to be proved right.

Voters would tend to cast their votes at a referendum according to their perception of their own interests at the time, and without much regard for the impact of the decision upon the longer term common good. Popular influence is already strong, and is exercised by the expression of public opinion through contact with local members, petitions, talk-back radio, letters to the press and demonstrations. Public opinion polls have a great influence, perhaps too great an influence. Poll driven politics does not always produce good policies. Finally, the ultimate control is expressed through the ballot box, when the electors have the opportunity of assessing the overall performance of their elected representatives. CIR is not necessary to ensure that the will of the people prevails in the long run, and it may well prove to be detrimental to good government.

- A referendum is a blunt and unrefined legislative instrument. Once a proposal is put before the voters, there is no capacity for amendment or refinement of the proposed legislation in response to public debate. Voters are then confronted with a particular proposition that may deal with only one aspect of a complex matter.
- Legislation by referendum has an inherent tendency to produce results which are oppressive to minorities or minority interests. Political parties and their parliamentary representatives must have regard to minority interests and views. Minorities have votes, and no political party can afford to antagonise a significant minority in the community. They will often tend to endeavour to tailor legislation to reflect the will of the majority in a way which is not unduly detrimental to minorities. There is thus an inbuilt safeguard in representative democracy against the tyranny of a majority. This safeguard is absent in legislation by referendum.
- There is a risk that different initiatives and referendum results, occurring at the same time, may lead to conflicting policy outcomes. For example, one popular initiative may operate to reduce State revenue, while another proposal, enacted at the same time, may have the effect of incurring substantial additional expenditure. A referendum result mandating balanced budgets may accompany other referendum results requiring additional expenditure and restricting capacity to raise additional revenue by taxation.
- The referendum process, as an instrument of wise legislation, is fraught with peril. The history of referenda on proposals to change the Commonwealth Constitution shows that debate has often been influenced by irrelevant arguments and scare campaigns which have deflected attention from the real issues, and have obscured the merits or demerits of the proposals. This would certainly happen in a referendum campaign as to particular legislative proposals, especially when those proposals might affect powerful interests adversely. Interests with access to funds for intensive campaigning, or with influence in the media, could easily mount scare campaigns which would deflect the voters from a proper consideration of the merits or otherwise of the proposal.

CIR has an undeniable attraction for our democratic instincts. There are occasions when all of us would dearly like to have the opportunity of a vote on a particular issue. When I thought about how much I would like to have had a vote on Australia's participation in the invasion and occupation of Iraq, I was almost deflected from my firm adherence to the principle of representative government. In my opinion, however, the dangers inherent in CIR far outweigh any potential benefits. It is, in my opinion, an undesirable constitutional innovation, which is not justified by the experience of other countries and which is not warranted by any demonstrable defect in our system of representative democracy.

**The numerical strength of the Parliament**

The second question referred to the Convention is: "What is the optimum number of parliamentarians in each House of Parliament necessary for responsible government and representative democracy in the Westminster system operating in South Australia?".

In South Australia there are two Houses of Parliament, the House of Assembly in which governments are made and unmade, and a second Chamber, the Legislative Council. There are 47 members of the House of Assembly and 22 members of the Legislative Council.

The belief that there are too many politicians in Australia is quite ingrained in the community. It surfaces, often associated with the notion that we are over-governed, in almost every discussion about Parliaments and politicians. It has its source, I think, in the fact that there is a separate Parliament in each State and Territory as well as a federal Parliament, and there is a common perception that the result is just too many politicians. The problem flows from the nature of the federal system. In a federal system there must be a legislature in each of the constituent parts. There is no escaping that; the question therefore becomes whether the legislatures in the various constituent parts have too many members. I am not convinced that there are too many members of Parliament, but I acknowledge the strength of public sentiment on the point.

To my mind one point is clear. If there is to be a Parliament in South Australia, the House of Assembly, in which governments are made and unmade, must be of sufficient size to perform that function adequately. The House of Assembly needs to be of sufficient size to make it likely that, in ordinary circumstances, an elected government will have a working majority sufficient to enable it to implement its programme. The prosperity and welfare of the State depend to a considerable extent on stable government. The smaller the number of members of the House, the more likely it is that the government will be dependent on a narrow majority. This might give a disproportionate influence to any member upon whose vote the government depends for its survival. It does not encourage good government, and it may discourage the implementation of necessary reforms that may be controversial. It may result in the tail wagging the dog to the detriment of good policy and the welfare of the State. To my mind, 47 members is the minimum number required to serve that purpose. I think that any reduction in the size of the House of Assembly would be most inadvisable.

The argument for reducing the number of parliamentarians is usually based upon the cost savings which would result. In a State the size of South Australia those savings could be significant. It is often urged that the responsibilities of the State Parliament have changed since Federation. Many of its former most crucial functions, such as defence, customs and immigration, were surrendered to the Commonwealth at Federation. Other responsibilities have gradually been taken over as a result of the financial dominance of the Commonwealth Parliament. Some other State responsibilities have been changed, as certain functions (for example, the provision of some government services) have been assumed by private corporations. As a result of these changes the responsibilities of the State Parliament have diminished, and some believe that, as a consequence, it may be appropriate to reduce the size of its membership.

If that sentiment is to prevail, it seems to be necessary to look at the Legislative Council. I cannot see the Legislative Council functioning as a useful second Chamber with much less than the present number of 22 members. If there is to be any worthwhile reduction in the number of parliamentarians, it seems to be that it could only come from the abolition of the Legislative Council. It is therefore necessary to consider that option.

**Abolition of Legislative Council**

The Legislative Council was established with the grant of responsible government to South Australia in 1857, as a House of Property with a very restrictive property franchise. There was some broadening of the franchise over the years, but it continued to be based on property, and all efforts to introduce full

adult franchise were resisted and defeated in the Legislative Council itself, where there was an inbuilt Liberal Party majority.

In a research report presented to the South Australian State Electoral Office in 2002 by Professor Dean Jaensch, School of International Studies, Flinders University, it is said:

> "The issue of equality of access became subordinate to the interests of a party which, through a severe malapportionment in favour of rural areas, and the property restrictions, was virtually guaranteed a majority of the seats in the Legislative Council and hence a veto power over all legislation".

Needless to say the Labor Party, which was so severely disadvantaged by the property franchise, was no friend of the Legislative Council.

Jaensch, in the same research paper, says:

> "Proposals for reform of the system to 'one person one vote' by the Labor Party were based on the principle of equality of access, although there was also the desire to have a better opportunity to win more representation in the Council".

The abolition of the Legislative Council became part of the ALP policy platform. In 1973, however, the Dunstan Labor government was at last successful in introducing full adult franchise for the Legislative Council and abolishing the electoral malapportionment, by establishing the State as a single electorate with members elected by means of proportional representation. The ideological basis for the Labor Party's advocacy of the abolition of the Council therefore disappeared, and the Labor Party lost interest in abolition.

By a curious twist, during the period of the Brown and Olsen Liberal governments in the 1990s, sections of the Liberal Party became so frustrated by the difficulties which a Legislative Council elected on proportional representation presented to the implementation of its legislative programme, that there was serious talk within at least some sections of the Liberal Party of the possibility of abolishing the Council.

The Council, however, remains, with 22 members elected by a State-wide single electorate on the basis of proportional representation, half the members retiring at each House of Assembly election. The system of proportional representation has resulted in the election of some members of minor parties and Independents, with the result in practice that since the system has been introduced, no governing party has had a majority in the Council in its own right. A question to be resolved is: Does the existence of the Legislative Council have a positive or a negative effect on the good government of the State? Or perhaps the question should be: Is any positive effect sufficient to justify the cost burden of its continued existence?

There are two types of argument advanced for the continued existence of the Legislative Council. Some see a second Chamber as a valuable constituent of the legislature in that it slows the pace of the passage of legislation through the Parliament, thereby giving greater opportunity for reflection and for the public to make its views felt. There is also an argument in this State based upon the method by which the Legislative Council members are elected and the consequent composition of the Council. Value is seen in a second Chamber elected on proportional representation, because it results in representation of minority parties and Independents, and thereby gives a voice to minority views in the community. The consequence that governments do not in practice have a majority in the Legislative Council is also seen by some as a valuable brake upon the power of a governing party.

I am not persuaded by these arguments. Unicameral legislatures function quite effectively, as we see in Queensland and New Zealand. The function of a second Chamber as a house of review would be largely fulfilled by constitutional changes affecting the passage of legislation through the House of Assembly. Provision could be made for a strong system of standing and select committees. Adequate opportunity for public scrutiny of, and comment on, proposed legislation could be provided by requiring

a minimum period between the second reading of a Bill in the House of Assembly and its committee stage (perhaps one to three months), although provision for emergency measures would have to be made. The House of Assembly would have to have the power to declare formally that a measure was of an emergency nature, and that the constitutional timetable therefore should not apply. This would have its dangers, but the voters would be likely to hold a government seriously accountable if it abused the emergency power.

I am not impressed by the arguments based upon the method of election of the Legislative Council. The supporters of proportional representation make big claims for it as being the most democratic method of election. I question the system's democratic credentials. Its practical effect, more often than not, is to produce the undemocratic consequence of enabling minorities to exercise an influence quite disproportionate to their degree of support in the community. The State, generally speaking, does not benefit from the frustration of the implementation of the government's programme by the second Chamber and the illogical and undesirable compromises which often result.

I am unable to see that the existence of a second Chamber in the State achieves anything for the benefit of the State which could not be achieved as well by appropriate modifications of the legislative process in a single Chamber. In my view the machinery of government would be streamlined by the abolition of the Legislative Council, and certainly the cost of government would be reduced. If it is desired to reduce the number of politicians in the State, this must be the way to go about it.

**The Houses of Parliament**

The third question to go to the Convention is: "What should be the role and function of each of the Houses of Parliament?".

*Independent Speaker:* One of the persistent complaints among members of the public about the workings of Parliament is the combative and sometimes disorderly behaviour of members of Parliament, especially in the lower House. I think that these complaints to a great extent arise from a misunderstanding of the role which Parliament plays. It seems to be thought of as a polite discussion group in which there is a co-operative search for the common good. The truth is that Parliament, among other things, is an arena in which conflicting interests and aspirations in the society struggle for supremacy. These societal conflicts tend to be reflected in the policies and the tactics of the opposing parliamentary parties, and the Parliament becomes the arena in which the power struggle between the parties, and the interests which they represent, is fought out. It is unrealistic to expect that such struggles and conflicts will not produce heat and passion, and at times spill over into disorder.

Nevertheless, much of what is undesirable in parliamentary debate can be greatly curbed by a wise, resolute and impartial presiding officer. In Australian Parliaments, however, presiding officers tend to be members of the governing party. In South Australia at the present time the Speaker of the House of Assembly is an Independent, but that is unusual. Generally speaking, the Speaker is a member of the governing political party, attends its party room meetings, participates in party decisions, and in all respects continues as a member of the governing party team. This makes it extremely difficult, for both personal and political reasons, for the Speaker to act firmly and independently when dealing with infringements of decorum by government members. Where partisanship occurs there is a general breakdown of confidence in the Speaker, and Oppositions become rebellious and unruly.

There is a great deal to be said for the system which exists in the House of Commons, where the Speaker elected by the House withdraws from the Party Whip and the party room meetings, and is thereby empowered to deal impartially with members from all sides of the House. Much has been written about a similar system for Australian Parliaments. Unfortunately there are difficulties which appear to be insuperable. The House of Commons system works satisfactorily in a House of over 600 members, where

the vote of a single member is rarely crucial. It is difficult to see how it could operate in a House the size of the South Australian House of Assembly. In a House of 47 members the government's majority tends to be small. It can easily happen that the government depends on a majority of one for its survival and for the passage of its legislation. It is not practical, in such circumstances, for a Speaker chosen from the government party to cease to be part of the government team.

It would be possible to appoint a Speaker who was not an elected member of the House, or who held a sinecure seat especially created for the purpose without voting rights, but such a person would be likely to lack familiarity with the procedures and conventions of the Parliament and may not command the respect of the elected members.

I do not think that the problems are insoluble, and an independent Speaker would go a long way towards improving the standards of behaviour and debate. I think it unlikely, however, that a body such as the proposed Convention will be able to solve the problems associated with such a reform.

*Powers of the Legislative Council:* If the Legislative Council is to be retained, questions arise as to whether its powers should be restricted. One suggestion is that it should be deprived of the power to defeat Bills passed by the House of Assembly, and that its power should be limited, as with the House of Lords, to the delay of such Bills for a period of, say, six or twelve months. This compromise is attractive to those who desire to retain the Legislative Council as a house of second thoughts and one in which the voice of minorities is heard, but who see the dangers of a government's legislative programme, or portions of it, being totally defeated in the second Chamber. A solution of this kind may prove to be attractive at the Convention, as a compromise between those who wish to abolish the Legislative Council and those who wish to retain it with its authority unimpaired.

A further topic is likely to be the power of the Legislative Council to withhold supply, thereby forcing the government to an election. Under the present Constitution all Bills, including money Bills, must pass both Houses of Parliament. The Legislative Council may not amend, but may reject, a money Bill.

Power of a second Chamber to reject supply has, of course, been a live topic ever since the 1975 crisis. Whatever may have been the merits of that particular crisis, it seems to me that it is difficult to justify a second Chamber's power to force an election by rejecting supply. Government is formed from the majority of members elected to the House of Assembly. To enable it to govern, the government must have the money necessary to carry on government. If an opposition in the Legislative Council, whether the official Opposition alone, or a combination of the official Opposition and minor parties or Independents, can refuse the supply of money for the ordinary services of government, it can prevent the government from governing and force an election at a time of the Opposition's choosing. This seems to me to go far beyond any reasonable function of a house of review.

This point receives greater cogency from the adoption in this State of a fixed four year term for the House of Assembly. This was introduced primarily to limit a government's power to call an election at a time of its choosing. There is no justification in those circumstances for an Opposition to have this power.

The compact between Mr Peter Lewis and the Labor Party provides that the Convention will consider a number of somewhat revolutionary proposals relating to the composition and functioning of the Legislative Council.

One such proposal is that all Ministers should be located in the House of Assembly. It is not clear to me how it is thought that this measure would improve the functioning of the Council as a house of review. It would certainly create some difficulties, although no doubt they could be managed. Some provision would have to be made for Ministers to attend sittings of the Legislative Council from time to time to explain and defend the proposed legislation, and perhaps to answer questions relating to their

departments. It is not clear how the management of government business in the Legislative Council would be undertaken. Presumably there would have to be an office similar to that of majority or minority leader in the United States Congress to do this.

A more radical proposal is to eliminate political parties from the Council. It is suggested that this would be done by requiring that no candidate may be a member of any political party registered with the Electoral Commission. Apart from the fact that this seems to infringe a somewhat basic democratic principle of freedom of association, it is difficult to see how it could be made effective. In every free Parliament in the world, members associate in political parties. People will always group with like-minded persons to achieve their ends. Even if members could not openly wear the badge of membership of a political party, they would undoubtedly, by various subterfuges, manage to carry on in the same way as if they were formally members of a party.

I will not discuss some of the other proposals, but I mention that one seeks to change the electoral system of the Council so that, instead of the State being treated as a single electorate, there would be only five members elected in that way, the remaining members being elected by and representing six regional electorates.

**Accountability, transparency and functioning of government**

The fourth question to be submitted to the Convention is: "What measures should be adopted to improve the accountability, transparency and functioning of government?".

A number of questions have been raised for consideration designed to achieve these goals. These proposals relate to the reform of question time in the Houses of Parliament, the functioning of both standing committees and select committees, the functioning of the Office of Ombudsman and also of the Auditor-General, and the operation of the Freedom of Information legislation. It has been suggested that all Acts of Parliament should contain a sunset clause.

Sunset clauses undoubtedly serve a purpose in some types of legislation, but the arguments against applying sunset clauses to all legislation seem to be overwhelming. The process of reviewing all legislation before it automatically lapses would create a great burden on the resources of the Parliament by considerably increasing its workload. Most legislation has a long-term operation, and the task of renewing it periodically would add a further unnecessary workload to the Parliament. The automatic repeal of legislation might give rise to crucial periods in which there is no operative law governing situations which require lawful regulation. I am not aware of any evidence to suggest that any evil exists which the universal operation of sunset clauses would remedy.

**Electoral systems**

The final question to be submitted to the Convention is as follows:

> "5.1 What should be the role of political parties in the Legislative Council and what should be the method of election to the Legislative Council?
>
> "5.2 What should be the electoral system (including the fairness test) and method of election to the House of Assembly?".

I have already adverted to the principal issues which have been raised under the first of these questions, and I will not pursue that topic further. The second part of the question raises important issues concerning the election of the House of Assembly. The House of Assembly is elected on the basis of 47 single member electorates, the member being elected by means of preferential voting. The boundaries of the electorates are determined by the Electoral Districts Boundaries Commission, there being a redistribution after each general election.

There is a one vote, one value rule requiring that electorates have the same number of electors with a tolerance of 10 per cent. An electoral redistribution is to be governed by two principal criteria: the first

is that it is to "reflect communities of interest of an economic, social, regional or other kind", and the other is what is called the fairness test. That requires that, as far as is practicable, the redistribution must be "fair to prospective candidates and groups of candidates so that, if candidates of a particular group attract more than fifty per cent of the popular vote (determined by aggregating votes cast throughout the State and allocating preferences to the necessary extent) they will be elected in sufficient numbers to enable a government to be formed".

There has, to my knowledge, been no suggestion of introducing proportional representation for the House of Assembly, and I think that it may be assumed that the single member system will continue. The controversial issue regarding the electoral system for the House of Assembly is the fairness test. It was introduced following a referendum in 1991 because of a belief that, although the system provided for one vote, one value, governments were sometimes elected with a minority of votes in the electorate, due to the concentration of voters supporting a particular political party in certain areas.

The fairness test has undoubtedly caused great difficulty for the Boundaries Commission. It requires the Boundaries Commission to make assumptions that voters who voted for a particular party at one election will do the same again, although public sentiment may have changed and the issues may be quite different. It requires the Boundaries Commission to make assumptions regarding voting patterns arising from shifts in population. It creates difficulties for members representing electorates with constantly changing boundaries, and may deprive them, at least partially, of the advantage of building up a personal vote by hard work in their electorates.

Against these difficulties must be weighed the reasonable expectation that a political party that gains a majority of the two party preferred vote at a general election should have a realistic prospect of forming government.

The ideal proposed by the fairness test provision can never be achieved perfectly, or perhaps even approximately. Nevertheless, it points the Boundaries Commission in the right direction, and directs its attention to a criterion which transcends the other criteria, which are focused on the individual electorates. Frequent boundary changes, which the application of the fairness test entails, are the price which has to be paid for the attempt to achieve a fair result at a general election.

**Conclusion**

In this paper I have attempted to provide something of an overview of the issues likely to arise at the proposed Constitutional Convention, and my own views about some of them. It is by no means exhaustive. A number of other issues have been raised in the discussion paper which will form the basis of the discussions, and yet other issues are already being raised at the meetings which are preceding the Convention. As I have already remarked, the whole process is experimental in nature. It differs fundamentally from all other constitutional reform processes of which I am aware. Quite apart from any recommendations which emerge from the Convention, the whole process will be watched with interest.

I conclude with the remark that much that is contained in this paper appears in the discussion paper. This is not due to plagiarism, but due to the fact that many of the views which I expressed at the meetings of the Expert Panel found expression in the discussion paper which emerged, expressed to a considerable extent in the language which I used. It will be no surprise to you, therefore, if you get to reading the discussion paper, to find that you are re-reading much of what has been said in this paper.

# Chapter Two
# The South Australian Constitutional Framework – Good, Bad or What?

Hon Trevor Griffin

The way we are governed frequently evokes passions, and even revolution and war. We see examples all around the world – Afghanistan and Iraq moving towards democratic systems; in Australia, fierce debate (but not war) over a republic versus a constitutional monarchy and, currently, the office of Governor-General; and, in South Australia, the debate is about the relative powers and the roles of the Legislative Council and the House of Assembly, the number of Ministers in the Legislative Council, the number of MPs (but, perhaps, not with the same intensity as that of the republic debate). Dramatic constitutional change comes in some countries as a result of revolution or war; in other countries and states with more settled and democratic systems, it evolves. Even in the non-government sector, the issues of governance and accountability and responsibility provoke significant debate.

The underlying issue is the exercise of power – whether it be over the lives of citizens, or in relation to property or the exercise of influence.

In Australia at all levels we are fortunate that change evolves. We have a long tradition of compliance with constitutional law and upholding of the rule of law. Our courts are free from political and corrupt influences. We have a long history of freedom of expression and, while we may question the responsibility of reporting, a press free from significant constraints. We have a focus on individual rights, even though there is constant debate about where those rights start and finish and to where the power of the State extends. Change to our governmental institutions evolves.

Much of the debate on our Constitutions focuses on whether or not they meet our needs in the 21st Century. The periodical calls for change sometimes appear to suit the views of a few pushing their own barrows. Regardless of the reality, those who promote proposals for change mostly describe them as "reforms", thereby seeking to suggest that the present situation requires change, and to create an aura of desirability around the proposals for change.

In South Australia, our system has evolved over the nearly 170 years since the Colony of South Australia was established. It has travelled from the establishment of the Colony in the 1830s, to responsible government in 1857, to Statehood as part of the Federation of Australia; and, along the way to the present, votes for women, full adult franchise for both Houses, and voluntary to compulsory voting have been addressed. The State Constitution identifies the major institutions which comprise our structure, but much of our constitutional practice relies upon conventions and practice.

Periodically, there are constitutional conventions and other *fora* which consider the current structures. The last State Convention was held over 20 years ago. At the State level the South Australian government has committed to another Constitutional Convention to discuss certain issues. That evolved from negotiations between the Labor Party and the now Speaker, Mr Lewis, as one of the conditions for support by Mr Lewis for the ALP, allowing it to form a minority government after the February, 2002 election.

One of the steps leading to the Convention was the formation of a Panel of Experts to develop a discussion paper on the five questions identified by a Steering Committee as those to be considered at the Convention. The Panel had two months to prepare that paper. Its members felt that to embark upon a consideration of constitutional change, particularly fundamental change such as that relating to our bicameral system and the powers of the two Houses and their relationship, it was important to try to

explain what is the current system and how it operates before considering proposals for change. We felt that a good understanding of what *is* was critical to a proper and informed debate about proposed changes and their effect – what is the current system, how does it actually work (as opposed to the perception and misrepresentations), and what are its underpinning features? Each held views on particular topics, and the discussion paper provided a means to ensure that arguments for and against particular proposals could be properly put.

There is some debate about the membership of the proposed Convention and the method of selection, the preparedness of those who may be selected to attend, and about topics not on the agenda, but these are not to be the focus of my attention today.

The five questions are:

1. Should South Australia have a system of initiative and referendum (Citizen Initiated Referenda), and if so in what form and how should it operate? (This is the subject of a later session at this conference, and probably is the question upon which many will be able to focus because of its specificity, but it should be considered with the knowledge of how our system really works at present, rather than how it is perceived to work).
2. What is the optimum number of parliamentarians in each House of Parliament necessary for responsible government and representative democracy in the Westminster system operating in South Australia?
3. What should be the role and function of each of the Houses of Parliament?
4. What measures should be adopted to improve the accountability, transparency and functioning of government?

5.1 What should be the role of political parties in the Legislative Council and what should be the method of election to the Legislative Council?

5.2 What should be the electoral system (including the fairness test) and method of election to the House of Assembly?

Each of these questions opens up wide vistas for constitutional debate. In considering several, may I give some background, particularly for those not from South Australia.

In South Australia we are governed by a Parliament comprising two Houses – the House of Assembly, with 47 members each elected by the electors in separate electoral districts (single member constituencies), and a Legislative Council of 22 members, half elected at each general election by the whole State by the system of proportional representation. Each House has identical powers except as to money Bills, which cannot be introduced in the Legislative Council and may not be amended in the Council, although it may suggest amendments.

Presently, the Government comprises fourteen Ministers, twelve (including the Premier) in the House of Assembly and two in the Legislative Council. The previous Liberal government, in its second term, had ten Cabinet Ministers (seven in the House of Assembly and three in the Legislative Council) and five non-Cabinet Ministers (four in the House of Assembly and one in the Legislative Council).

The Government presently holds a minority of seats in the House of Assembly in its own right, and depends on the support of Independent members to form government. So did the last Liberal government (1997-2002). South Australia has a history of minority Governments, when the major parties have had to rely on Independents for support to form government.

In the Legislative Council no government has had a majority in the past thirty years. At present, there are 9 Liberal, 7 ALP, three Australian Democrats and three of other minor parties and Independents.

A critical part of our constitutional structure is the court system – a Supreme Court whose decisions are subject only to appeal to the High Court of Australia, and other courts, independent of government and political influence but subject to the rule of law. While from time to time there is

criticism of the courts and someone suggests control over them, particularly in relation to sentencing of criminal offenders, and also in relation to so-called "activism", the preoccupation is with the Parliament and not with the courts. The Constitutional Convention does not have on its list any proposed changes to the courts.

While some argue that the States are of less relevance today than they were, with more power exercised by Canberra over our lives than ever before, there is still considerable power vested in the States. Look at the power/authority which can be exercised by a State over its citizens and those that operate within the State. First, there is the criminal law – that mass of laws which deals with relations between individuals and between bodies formed by people – homicide, assaults of any nature, theft and dishonesty, for example. Then there is DNA testing of its citizens, and what data can be kept on citizens and under what circumstances; planning law, under which the State can tell you what and where you can build and demolish; mining and exploration law; occupational health and safety (the conditions in which you can work or carry on a business); environment laws; and so the list goes on. The State controls water supply and services and the health system, as well as providing numerous other services. So the powers and responsibilities are extensive.

There is a move to greater uniformity across Australia in a number of areas, although that should, in my view, be critically assessed to determine the merits of such a move – uniformity overcoming significant problems created by disuniformity can be acceptable, but uniformity for the sake of uniformity ought not to carry the day.

In some cases powers are ceded by the States to the Commonwealth with various degrees of preparedness to do so, ranging from a headlong rush by some States to do so regardless of consequences, through to a considerable reluctance to do so by others except, perhaps, with strict limitations (for example, in the case of the corporations law).

Notwithstanding these sorts of moves, the State continues to have wide-ranging power over its citizens; this means that, in my view, extreme caution should be exercised when looking to give a government more power, or when proposing what, in effect, are reductions in the safeguards providing some protection for citizens from the exercise unnecessarily of excessive power by government over them and their activities. That is why, in the current debate on our State's Constitution, it is important that citizens who don't have day to day contact with Ministers, governments, Parliaments and Members of Parliament, and who don't live and breathe governance issues, should have available to them detail about the way our Parliament/ government work and the origins of their current powers and practices. They can then better make a judgment about the desirability and appropriateness of change, and what the consequences of change may be.

How does one make a judgment on issues relating to governance, and where does one obtain information about the options and the effectiveness of institutions, and get behind the perceptions created by those who skim across the surface of the issues? For that matter, by what criteria does one determine "effectiveness"?

Most people have to rely on the media for information, although in relation to the forthcoming Constitutional Convention the series of meetings around the State, even though only about one thousand people in total attended, was a good try to generate interest. And the use of the website is an important modern day contribution to providing information. But even through the media we find journalists, editors and commentators pushing particular barrows without a balance of arguments being presented.

The discussion paper prepared by the Panel of Experts is directed towards providing a sound basis for understanding where we are constitutionally, identifying the arguments for not moving radically and those for significant change.

Questions 2 and 3 are inter-related, and focus on the number of MPs and what should be the roles and functions of each of the Houses of Parliament. They require an examination of what is responsible

government and representative democracy, a huge challenge. Question 4 relates to the accountability, transparency and functioning of government. In respect of this, there is significance for the Parliament.

In my view, the power and role of the Legislative Council is the most important and fundamental issue before the State Convention. In examining questions 2 and 3, one should start by posing two questions:

1. What is wrong with the current constitutional structure? Do we need change, particularly with respect to the power and role of the Legislative Council vis-a-vis the House of Assembly?
2. If change is proposed and it is of a radical nature, what are the consequences for the State and its citizens?

Time will not allow exploration of all the arguments for and against an upper House. My position is that, because the State's Constitution has evolved over a century and a half, it ought not to be changed radically but, where necessary, by fine tuning. That is coloured by my own experience in the Legislative Council in both government and Opposition. I'm not an advocate for intemperate and false descriptions of our institutions, such as "useless" when directed towards the Legislative Council or akin to "rotten boroughs". I am a strong supporter of the Legislative Council and the existing balance between the Legislative Council and the House of Assembly, and assert that reducing the powers of the Legislative Council and significantly changing its role has the potential to open Pandora's box and, by virtue of the reduction in oversight of one House, a government will be less accountable and subject to less scrutiny. Such a move will also allow the government of the day even greater power than it has now to affect the lives of citizens unchallenged.

There are arguments that the will of the people is expressed in their vote for the House of Assembly, and that because governments are formed and broken in the House of Assembly, a government ought to have the power to put its programme into effect and not be frustrated by the Legislative Council. That ignores the electoral basis of the Legislative Council, and the fact that our structure does not give absolute power to the government of the day or to only one House of Parliament. Odgers on *Australian Senate Practice* has a concise description of the reason for a bicameral system, as follows:

> "The requirement for the consent of two differently constituted assemblies improves the quality of laws. It also safeguards against misuse of the lawmaking power, and, in particular, against the control of any one body by a political faction not properly representative of the whole community".

The principle is sound, but one may have differing views when minorities seem to hold disproportionate power. In the end, though, like most things to do with the political process, there have to be compromises to get one's legislative programme into effect.

South Australia is one of five States with a Legislative Council, all with similar powers. I doubt that the exercise by Queensland majority governments of their powers in its Legislative Assembly could be regarded as an advertisement for a unicameral system. The Queensland Electoral and Administrative Review Commission (EARC) in 1992 observed, in relation to the absence of an upper House in Queensland, that it:

> "….has had a profound impact on the ability of the Queensland Parliament to carry out its functions under the Constitution and conventions which require it to act responsibly and review the activities of the executive arm of government".

So, what's wrong with a bicameral system? Frankly, nothing, in my view. It provides some protection and, where both Houses are elected by the people, reflects the will of the people even though that may spread over two elections, to some extent smoothing the peaks and troughs of electoral fortunes.

As frustrating as it may be for governments to have to get their legislation through an upper House

they do not control (and some even have that difficulty with their lower Houses, or must accommodate the views of others where a government is in a minority), governments in South Australia manage largely to get their legislative programmes enacted, albeit with some modifications, and there is constant scrutiny of government activities.

In South Australia, as I have said, no government has had a majority in the Legislative Council for at least the past thirty years. This has meant that successive governments of both political persuasions have had to develop means of working with the Legislative Council for the passage of legislation. It has also provided an opportunity for Opposition and minority parties to have an impact on the final form of the legislation. Sometimes that has been good, sometimes not, depending on one's perspective.

Notwithstanding criticism of the Legislative Council that it frustrates a government's programme, in recent times in South Australia, for example in the 1998-99 session, only one Bill went to a deadlock conference where an agreement could not be reached and it was laid aside. The record in the 1999-2000 session is similar.

Going back to 1976, while a number of Bills have been amended by the Legislative Council and the government of the day has agreed to amendments, and Bills have been passed, only 23 Bills were laid aside because agreement between the Legislative Council and the House of Assembly could not be reached. The sorts of Bills where agreements could not be reached covered generally those relating to industrial and other issues on which there were sharp policy differences between Liberal and Labor.

In the last session before the 2002 election, the period from 4 October, 2000 to the end of 2001, 151 Bills were considered in the Legislative Council (99 originating in the Legislative Council, 52 in the House of Assembly) and 102 were passed (62 originating in the Legislative Council, 40 in the House of Assembly). To some extent that was a reflection of the portfolios held by two of the Legislative Council Ministers – they were generally busy Ministers with a normally heavy legislative workload. But it facilitated the work of the Parliament. If all had been introduced in the House of Assembly and had to be considered there first, the House of Assembly would have been relatively idle while the Bills ran the gauntlet of the Legislative Council's consideration of them – engendering even more animosity, unfairly, towards the Council.

While there were frustrations experienced by the Liberal government and individual Ministers where there was delay and there were amendments, controversial legislation to sell ETSA, Ports and TAB did pass the Legislative Council, as did changes to the Native Title legislation (although considerably delayed), and significant changes to the criminal law. Patience and persistence were required by Ministers to succeed.

In 1991 parliamentary committees were overhauled. Now, the Statutory Authorities Review Committee comprises only Legislative Councillors, the Economics and Finance Committee comprises only House of Assembly members, and there are five joint standing committees with the House of Assembly, as well as joint and Legislative Council and House of Assembly Select Committees. Because the Government does not control the Legislative Council, a larger number of select committees are, generally, established in the Legislative Council than in the House of Assembly, and the government generally does not control those committees. Would there be such committees established if the Legislative Council were abolished? I suggest, no. For an incumbent government that would be a satisfactory outcome, but would that be a desirable outcome?

It has been proposed, apart from abolition, that the Legislative Council become a "real" house of review, whatever that may mean. It has been proposed, also, that the powers of the Legislative Council should be reduced to allow it only to delay legislation for varying periods – three months to twelve months – but not to reject or, for that matter, insist on its amendments. Of course, such proposals ultimately lead to emasculation, if not abolition. The power to delay, for example, means no effective sanction against a government, which can just ride out the opposition to a Bill by the Legislative Council

for the required time and then require it to pass.

The connotation of the Legislative Council being a house of review is being coupled with the suggestion of no Ministers in the Legislative Council and, as a consequence, no government Bills (and, presumably, no private members' Bills either) being introduced there. It is, of course, up to the government of the day as to how many, if any, Ministers of its allowable number it will have in the Legislative Council, but the reality is that a government still has to get its legislative programme through both Houses. Having no Ministers in the upper House will mean no one representing the government will have the authority or the responsibility to guide that legislation through that House, thus potentially compromising a government's programme. For years, in Tasmania there was only one government Minister in its Legislative Council, and that was found to be grossly inadequate to ensure the government business was handled appropriately.

From some in the business community has come the criticism that the Council frustrates the programme of the government of the day, more muted now than during the Liberal government's term in office. Without being patronising, however, my experience is that many in the business community do not understand the division of power and responsibility between Parliament and executive government, and their criticism should more properly be directed towards government than Parliament. In reality, much can be done by executive government without it ever having to go to Parliament.

However, where a government may clearly identify a legislative policy as a key platform at an election, the issue of a mandate is raised. That is a vexed issue, particularly where there is a differently but democratically elected upper House, that I doubt will ever be resolved. Ultimately, "obstruction" can only ever be resolved by negotiation and compromise and public pressure. I should say in passing – and referring back to some of the legislation introduced by Labor governments relating to, for example, industrial legislation – business was only too ready to exhort the Liberal Opposition to use all its endeavours in the Legislative Council to reject, or, at least, heavily amend the legislation. In any event, no government can claim to be perfect and should not expect all its legislation to be passed without amendment.

If there were to be change of a radical nature to water down the powers of the Legislative Council, I have already referred to several consequences. It would change the balance of power and it would tip the power in favour of a government, with fewer protections for the wider community from the potential for abuses of power by a ruling majority in the House of Assembly. It would make a government even less subject to scrutiny and less accountable.

I do not wish to make extensive comment on the question of numbers of MPs. Some relate this to an assertion that we are over-governed, but I don't see this as relevant to numbers but more to the regulatory policies of governments, frequently reflected in their legislative programmes. As for numbers, I think that it is nigh on impossible to define what is the optimum number of MPs in each House. Everyone will have a view depending on his/her own knowledge and experience. Suffice to say that in the knowledge of what the electors use MPs for, and the workload of those, in both Houses, who really do service their electors, there is a good argument for more rather than less. Less is likely to result in more staff to handle the workload and, therefore, I suggest, a weakening of access to Members, and less representation and less rather than more access to the Member. To some extent, it does also depend on the role of the Legislative Council – if it is to undertake even more committee work, it cannot do that with existing numbers if it also has to consider legislation properly. So there is an argument for more Legislative Councillors.

I want to make several observations on the legislative work of MPs – there is a view that the more days that one sits the more "effective" the legislature would be. And there is a view that sitting to pass Bills is a measure of effectiveness. Both are simplistic views which ignore the complexity of the parliamentary system of democracy that we have in South Australia.

Encouraging governments to legislate as a measure of effectiveness is an inducement to governments to intrude even more into our lives, work and businesses than they do at the moment. There is no magic in the number of Bills passed. Such work should depend upon the substantive policy commitments of the government rather than the perception of busyness it may wish to present. This focus on numbers of MPs also ignores the wider role of MPs in the community, most of whom work hard for their constituents and constituencies. They are, to some extent, social workers, lobbyists, facilitators, watchdogs, legislators and, in some cases, Ministers or shadow Ministers.

Parliament also requires members to be involved in committees which do constructive work away from the high profile issues. In addition, the probing which occurs through question time and debate is a critical part of ensuring political accountability. So a balance is required – reasonable time in Parliament to fulfil these responsibilities, and out of it to ensure time for committees, research and electorate work and, if there is time, for family and personal responsibilities and activities.

As for question 4, I wish to make only passing comment. It relates to accountability, transparency and functioning of government. Parliament cannot ever be the Executive (as some seem to want it to be) as well as the legislator and watchdog, so there will always have to be compromises, leaving it ultimately to the political processes to resolve issues of real conflict and to ensure political accountability. It raises important questions about what we mean when we talk about accountability. Time does not allow me to develop comments on this important area.

In the time available it has not been possible to cover all arguments for or against each of the propositions to be considered at the Convention. Because we have had, generally, a stable system, I doubt that there will be large numbers of people who want to be involved – they are generally happy with the *status quo*. If that presumption is correct, then radical change is not on the public's agenda. But therein lies a danger, too. Too little interest may leave our Constitution in the hands of too few.

# Chapter Three
# The Advance of Direct Democracy

Professor Geoffrey de Q Walker

In 1994 this Society was kind enough to invite me to be the first speaker to address one of its conferences on the subject of direct democracy through the citizen-initiated referendum system (CIR).[1] This is the constitutional mechanism first introduced at the national level in Switzerland in 1874, and later adopted elsewhere, which enables a prescribed number of voters, by petition, to force the government to hold a binding referendum on whether a particular law should be introduced, retained or repealed. (Where it can be used only to repeal existing laws, not to introduce new ones, it is commonly called the "voters' veto".) The issue was later revisited at two conferences in 1995.[2]

In the nine years since the Society first debated CIR, the support for the system has continued to grow in Australia and abroad.

**Global progress**

By 1998, all the states of the German Federal Republic had introduced direct democracy. Bavarians have proved to be its most enthusiastic users, having voted on a total of 14 measures since 1967. The voters of North Rhine-Westphalia, Hessen and Rhineland-Palatinates have also invoked it, though less frequently.[3]

Bavaria's experience has already vividly demonstrated one of the referendum's advantages as identified by the 19th Century English constitutional scholar AV Dicey: that it enables the voters to distinguish between politics and personalities. They need not turn out of office a government of which they basically approve simply because they disagree with one of its legislative policies[4] (a great advantage from the politicians' viewpoint, incidentally). They can simply repeal the unwanted law by referendum and leave the government in power. A large majority of Bavarians, it seems, prefer to be governed by Christian Social Union, having re-elected it for many years, but they do not support all of its legislation. They have voted to reject some of its enactments, and on other issues the threat of a referendum has forced the CSU to moderate parts of its law-making program. CIR has not only provided a salutary check on an otherwise popular party, but has also facilitated the generation of compromise solutions.[5] The people thus have the best of both worlds: the government they want and the laws they want. Strikingly similar results as to consensus and compromise have followed the use of referendums in Switzerland and Italy.[6]

Improbable as it may seem to some, even Russia has now surpassed Australia in the advance towards direct democracy. Russia's Constitution requires a binding referendum if a petition bears the signatures of two million voters. The Greens recently collected 2.5 million on a petition relating to nuclear waste and restoration of the two environmental agencies abolished in May, 2000 by President Putin. But the Central Election Committee ruled 700,000 signatures invalid because of technical errors, such as failure to supply the voter's passport number. According to the scientist Alexei Yablokov, former environment adviser to Boris Yeltsin, this is largely because the security services remember, and resent, the role the Greens played in the collapse of the Soviet Union.[7] The Russian Supreme Court granted leave to appeal against the Committee's decision in 2001. In the end the appeal failed, but it seems unlikely that the Russian people, who are known for their patient perserverance, will be discouraged by this unsteady start from exercising their right to make their own laws in the future.

Another country now using CIR is Uruguay. Article 79 of the country's Constitution provides for

the CIR system, and in 1989 a measure was placed on the ballot by citizen petition for the first time. The initiative sought the repeal of a law, itself adopted by referendum under the Sanguinetti government, which amnestied human rights violations committed in the struggle against the Communist Tupamaros insurgency during the 1970s. The voters' rejection of the repeal measure effectively settled the debate on the amnesty issue, a striking contrast to Chile's continuing controversy over a similar problem. Since that beginning, Uruguayans have used the referendum system a further 12 times.

Still in Latin America, an unexpected resort to a little-known direct democracy measure is opening up the possibility of introducing democratic reforms in Communist Cuba. Article 86(g) of the 1976 Communist Constitution (amended in 1992) continues an earlier provision from the 1940 Constitution providing for a citizen initiative triggered by a petition bearing 10,000 signatures. Of course, it was clearly understood that persons seeking to activate s. 86(g) against the Castro regime could expect a short and painful life thereafter. But the decline of the Cuban economy, question marks over the succession to the elderly Castro, and reports that he is planning to anoint his hated brother Raul as his successor, have unsettled the regime to the extent that it is less confident about resorting to sweeping repressive measures. That prompted an engineer named Oswaldo Paya to co-ordinate a grassroots movement called Project Varela, after Father Felix Varela, an 18th Century anti-slavery campaigner. Paya and his supporters prepared a petition demanding a referendum on the introduction of free elections, free speech and other civil liberties, and an amnesty for political prisoners. The petition, which attracted 11,020 signatures, was presented to the National Assembly in May, 2002, despite harassment of some signers and attempts by government agents to introduce false signatures into the document.

Castro has not responded to the petition, and at the time of Cuba's single-candidate "elections" in May, 2003, he said it was not worth even discussing.[8] Still, he has not been able to make the movement disappear, such is the political and moral power of direct democracy. His government has in recent weeks imprisoned 78 dissenters for terms of up to 28 years for advocating democracy. But it did not feel strong enough to touch Project Varela's leaders, especially Oswaldo Paya himself, who won the European Parliament's Sakharov Prize last year and has been nominated for this year's Nobel Peace Prize. Project Varela could yet be the first instance of CIR's being used to dismantle a totalitarian regime.

Moving roughly north-west, we observe that two more US States, Kentucky and Mississippi, have adopted CIR. Their recruitment to the cause of direct democracy is significant, as the relatively hierarchical social structures of the old South had long helped political élites in those States to keep people power at bay. In the United States 28 States, plus the District of Columbia, now boast CIR. Meanwhile, New York's Governor George Pataki has renewed his call for CIR in that State as a way to "renew our allegiance to the sacred principle that all power ultimately rests in the hands of the people". He has sponsored a measure in the State Senate that would allow a citizen initiative system based on a petition signed by 5 per cent of the State's voters. The Senate passed the Bill in April, 2002.[9]

A similar movement in Texas evoked the support of the then Governor, George W Bush:

> "Initiative and referendum make government more responsive to its citizens, neutralize the power of the special interests and stimulate public involvement in State issues".[10]

Twelve members of the Convention that has been created to put forward new constitutional arrangements for the European Union have established a forum to advocate the incorporation of CIR in any future EU Constitution. At present EU institutions are so undemocratic (Eurosceptics speak of the "Fourth Reich") that the EU would not even satisfy the minimum democracy requirements that it imposes on applicants for EU membership. The CIR forum, whose members include the Bundestag delegate Jurgen Meyer and former French education minister Alain Lamassure, contemplate at least a mandatory constitutional referendum and a right of constitutional citizen initiative. They plan to put forward a concrete draft in the coming weeks.

The United Kingdom's direct democracy movement, led by Sir James Goldsmith, has not had a

high profile in recent times. Nevertheless, the UK's experience is relevant because of the way in which concepts – or rather slogans – borrowed from British constitutional orthodoxy are used by those who seek to block democratic progress in Australia. Until the 1970s, all referendums were considered unconstitutional in Britain on the ground that they conflicted with the dogma of absolute parliamentary sovereignty, an unchallengeable article of faith until recently.[11] Then in 1975 the Labour government, seeking a way out of a party split over Common Market membership, decided to hold a referendum on the issue. The move was a success, and the British people made it clear that they expected to be allowed to vote on other far-reaching proposals in the future.

Since then, Britons have voted in referendums on devolution for Scotland, Wales and Northern Ireland (1979 and 1997) and in Ulster on the Good Friday peace agreement (1998). They have been promised a referendum on adoption of the euro currency. In fact, the United Kingdom now seems likely to become a frequent user of referendums,[12] the "constitutional" objection to them having vanished.[13] The dogma of parliamentary sovereignty itself has been finessed out of existence because it could not be reconciled with EU supremacy. It survives only as a kind of conventional superstition[14] to be used in rearguard actions against human rights consciousness and people power. It would not be surprising to see calls for CIR gather strength in Britain now, especially if CIR is incorporated in the proposed EU Constitution. *The Economist* magazine is a consistent and influential supporter of the direct democracy movement.

**Thaw in the Frozen Continent?**[15]

Direct democracy has been publicly advocated in Australia since at least the 1890s, when Labor adopted the concept, not merely as policy, but as one of the founding objectives of the party. On the eve of World War I it seemed likely that Queensland would introduce CIR and that the rest of the continent would follow.

That promise faded after the war. In part, it was because Labor, after linking up with the Socialist International and later giving the dominant role in its workings to the union movement, became ambivalent in its attitude to democracy. In part also it was because, as the historian Bill Gammage has said, those killed in the war were disproportionately the generous, the brave, the public-spirited and the idealistic who believed that Australia could be made into a model democracy. Many of those who returned had become morose, haunted, uncommunicative. *The Sydney Morning Herald* wrote on the day after the 1918 armistice that:

> "The flower of this generation has perished. The men who promised great things in statesmanship, in science and the arts have gone, because their sense of duty was greater than that of their contemporaries. Their loss is irreplaceable ...".[16]

With the best men of their generation dead or broken, Australia sank back into a timid semi-colonialism which viewed British institutions as the perfect structure of government. When one remembers that in 1918 only half of British adult males, and no women, had so much as the right to vote (and then only for the lower House once every five years), it is obvious that the ascendancy of such a view would mean a major reverse for the dream of a truly democratic Australia. The Great War may have helped to forge an Australian nation, but it was a nation that had lost its sense of destiny.

It was not until the 1970s that the Democrats in the Senate resuscitated the idea of direct democracy, introducing the first of a number of bills to implement it. Since then, draft legislation to introduce CIR has been introduced or prepared in every Australian Parliament[17] except those of Victoria and the Northern Territory.

The most promising site for the possible introduction of CIR at present seems to be South Australia, where the Speaker of the House of Assembly, the Hon Peter Lewis, MHA last year introduced the *Direct Democracy (Citizen-Initiated Referendums) Bill.* This was foreshadowed as part of the "Compact for

Good Government" which Mr Lewis, as an Independent, entered into with the Rann government, which needed his vote in the House. A key element in the compact is that the government is to convene a Constitutional Convention to consider, and make recommendations to the Parliament on, several constitutional reform proposals, of which the first is the adoption of CIR. Although the government no longer needs Mr Lewis's vote in the House of Assembly, the Convention is to take place in July or August as planned. It will consist of 300 voters chosen at random from the electoral roll – rather like a very large jury – and will consider the issues and arguments, pro and con, as set out in a 53 page discussion paper prepared for the occasion.[18]

I venture to predict that the Convention will recommend some form of direct democracy for South Australia. If it does, there is a fighting chance that the required legislation could pass both Houses. At this point an unusual feature of South Australia's Constitution comes to the fore. One of the undemocratic aspects of the "Westminster system", which is found in most colonial-era Constitutions, is that even if a Bill passes through both Houses, the Premier or Prime Minister can still veto it by advising the Governor or Governor-General not to assent to it. This is particularly unsatisfactory as the executive government (the Premier and other Ministers, plus the Governor) is not directly elected. We can speak of "the elected government" only in a loose sense.

In South Australia, however, the position may be different. Under s.4 of the *Constitution Act* 1934 (SA), the Governor is not part of the State's legislature. Though Bills are submitted for his or her assent,[19] that assent may not be essential. A Bill could possibly become law simply by passing through both Houses of Parliament.[20] This considerably increases the chances that South Australia, which has a long tradition as a pioneer of democratic reforms, will now pioneer direct democracy for Australia. If it does, other State and Territory governments will have a harder time explaining to their electors why they are unfit to have the same degree of control over their own destinies. If there is one thing that incenses otherwise easygoing Australians, it is the suspicion that they are being treated as second-class citizens. The Commonwealth will be the last to follow the band, but eventually it will.

Another current proposal is the *Constitution (Citizen-initiated Referendums) Bill* and the related *Constitution (CIR) Referendum Bill* prepared by the New South Wales Christian Democrats for introduction in the State's Legislative Council. While the Bills have reasonable prospects of acceptance in the upper House, their passage through the lower House is perhaps more a matter for the longer term. Nevertheless, they remain a useful focus for discussion. Queensland's *Community - based Referendum Bill* 1999, though currently in limbo, is also a helpful source of parallels and comparisons.

**Will the Advance Continue?**

**Continuing factors**

There is every reason to conclude that the momentum acquired so far will continue and grow. In part that is because the factors that relaunched the movement three decades ago[21] are still at work, in particular public dissatisfaction with the way parliamentary politics have been distorted by rigid party discipline and the excessive influence of organized special interest groups. Ted Mack, MHR summed up the system's structural defects in his paper for the Society's 1995 conference:

> "The centralisation of power within the major parties, the overwhelming of parliamentary government by the rigid party system, the negativism and personal abuse inherent in adversary partisan politics, the domination of public decision-making by small élites, major party collusion depriving the public of choice, the now institutionalised 'broken promise syndrome', the failure of governments to be able to handle organised minority groups, and undemocratic electoral systems where only by chance, or usually in spite of devious manipulation, does the resulting government reflect the will of the people".[22]

The political establishment is not unaware of these defects. The problem is that it thinks it benefits by preserving them. It has therefore responded with an assortment of devices such as community Cabinets, precinct committees, community advisory committees and improved petition procedures[23] which allow people to think they are having an "input" into law and policy. But the whole point of such devices is that they allow the citizen's view to be ignored. They are cosmetic contrivances based on the paternalist goal of "bringing the government closer to the people", when what the people want is to bring the citizen into the government, or at least the legislative arm of it.

Another continuing factor is the remoteness of the political élites from the people. Dicey observed that representative government creates "a body of representatives with wishes and interests of their own".[24] Some career politicians actually hold up that perverse result as a political virtue. At Adelaide University's Constitutional Reform conference in August, 2002 a federal politician attacked direct democracy on the ground that it would introduce into the law-making process a competing source of political legitimacy – the people.[25] She could hardly have exposed the remoteness of the political class more clearly than that. Most of us are under the impression that the people *are* the source of political legitimacy. The idea that elected representatives could constitute a source of political legitimacy separate and apart from those they are supposed to represent is an inversion of the democratic ideal, especially now that the key posts, at least on the Labor side, are becoming hereditary offices. That the political élite holds such a view is itself a further argument for introducing direct democracy.

**Newer factors – empowerment and sovereignty**

*The decentralization of knowledge.* The years since the 1994 conference have witnessed a massive decentralization of knowledge and information that is empowering the individual and challenging élite control. In 1994 the Internet was still the province of computer geeks. The material available on it was limited in quality and quantity. In 2003, an estimated 30 per cent of the population now relies on the net for news and current affairs, enabling anyone to bypass the official media and discover a mass of information and opinion that the élite would prefer we did not know about.

This is a momentous development, as the mainstream media are now essentially an arm of government, manufacturing an appearance of consensus on behalf of the élite. They may favour one party rather than the other, but they are committed to the overall enterprise of keeping the people in their place and in the dark. But the net is making it harder for the media to set the agenda and define the limits of permitted debate. Of course, half the material on the Internet is false or absurdly biased, but the same is true of the official media, as witness the recent "Jakarta incident", in which ABC News took a truthful report filed by its Jakarta correspondent, Jim Middleton, and rewrote it to mean its exact opposite in order to embarrass the Prime Minister.[26]

The democratization of knowledge brought about by the Internet also strengthens the trend towards empowerment of the individual. The ocean of information, including primary sources, that anyone can search in an instant through directories and search engines gives everyone the equivalent of an army of research assistants – and unlike some parliamentary research assistants, it does not attempt to suppress or ignore materials that do not conform with its personal agenda. There are also, of course, websites dealing specifically with direct democracy.[27]

*Networking.* The interactive aspects of the net also enable people to disseminate their own ideas, freeing the human imagination and unleashing new creative energies. They make possible the linking of disparate forces that prove difficult for governments to control or suppress.[28] The net thus creates a forum for disenfranchised or alternative voices. In situations where political parties fail to represent new values or constituencies (or old ones for that matter), the net can reinforce CIR's role as an alternative "political

aggregator".[29] By facilitating networks, systems and associations of all kinds it encourages and stimulates decentralization in all spheres, including that of political action.

*Constitutionalizing the people.* Another important development since 1994 has been the legal recognition that the sovereign power of the Australian nation resides with the people. That had always been the underlying reality, both political and to an extent legal, of Australia's constitutional order, but it was overshadowed, or thought to be, by the residual suzerainty of the British Parliament. The Commonwealth Constitution was drafted by delegates directly elected by the voters to the 1897-98 Federal Convention. After élite support for federation waned after 1891, it was revived by a popular movement. The draft Constitution was approved by the people of each Colony in a series of referendums before being formally enacted by the British Parliament, which made only one change to the document, the preservation of appeals to the Privy Council.[30] It could be altered only with the approval of the people, voting directly in a referendum. The primary authority for the Constitution was its origin and acceptance by the people, not its endorsement by the Imperial Parliament[31] – which, though prudent and convenient at a time when Australia expected to remain part of the British Empire, may not have been strictly necessary.

One of the effects of the *Engineers' Case*[32] in 1920, however, was to enshrine until at least the 1990s a method of interpretation that overemphasized the Constitution's formal enactment as an Act of the British Parliament. Writing at the end of that period, Justice Paul Finn declared that:

> "The Australian people are the forgotten first cause of our system of government – Commonwealth and State – today. That the people are sovereign, that government and its institutions exist for them and to their ends, are ideas that exert only muted influence on the constitutional and political imagination".

To the politician, he observed:

> "There is the distinct English legacy of parliamentary sovereignty, itself probably a destructive historical inversion of popular sovereignty".[33]

After the *Australia Act* 1986, that began to change. By 1996 a majority of the members of the High Court had stated (and none had denied) that sovereignty now resides in the people and derives from them.[34] This, Justice Finn considers, is part of a more general reconceptualizing of the Australian polity, influenced by a type of re-emerging natural law that acknowledges the human person as being an object of worth in its own right.[35] But popular sovereignty is the key concept:

> "Through it, the Australian people are constituted the owners, not merely the beneficiaries, of our system of government".[36]

All power thus derives from the unassembled electorate, who can delegate it to representative bodies or reserve it to themselves.[37] So direct democracy is not a delegation of power from the Parliament to the people, but an exercise of the people's inherent right. It is clearly incongruous that the people are sovereign but are unable to enact or repeal the laws that govern them.[38] The onus of showing that they should be barred from doing so now lies on those who would deny the people their constitutionally recognized right.

**The latest studies**

Empirical research has always shown that the objectors' fears about the effects of CIR are unfounded.[39] The latest research and comparative studies confirm that conclusion. Elizabeth Gerber of the University of California at San Diego, in her 1999 book *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation*,[40] sets out to test the charge that CIR can become the tool of the wealthy. Assembling recent US data from the 1990s, she starts by pointing out that anyone seeking to have a law enacted or repealed by direct legislation needs to mobilize an electoral majority. To do that calls for two resources:

(1) money; and (2) personnel. Economic interests find it easier to raise money, but community organizations with individual members can more easily mobilize people.

These different comparative advantages lead to different campaign strategies. Community groups will rely more on labour-intensive methods using volunteer workers, while economic groupings make more use of costly media advertising. But even that financial advantage is not as great as it seems: "financial support from citizen interests translates more readily into votes than financial support from economic interests", she finds.[41] On the other hand:

> "..... contributions from economic groups are associated with a lower vote margin and a lower probability of success ..... Spending by economic interests signals to voters that the measure is contrary to their interests and leads them to vote against the measure".[42]

Professor Gerber notes that initiative States do not spend significantly more or less on education, health, welfare or law enforcement than non-initiative States, but legislative policies in initiative States reflect voter preferences more closely.[43] "[E]conomic interests are severely constrained in their ability to achieve direct modifying influence", but their low success rate under CIR is offset by their greater ability to lobby legislatures.[44] Where the ballot campaign comprises competitive arguments for both sides, voters cast informed votes and make good choices.[45]

A comprehensive study of direct democracy mechanisms and outcomes published in 2001 by Joseph Zimmerman, of the State University of New York at Albany, finds that direct democracy encourages voter participation and greater interest in the government process. It educates citizens about public problems and possible solutions, and upholds the key democratic tenet that sovereign authority lies in the unassembled electorate, who are "not apathetic, cynical or ignorant in their approach to the initiatives".[46] Without the right to CIR, representative government does not work well. Of the old adage that under representative government the voter is free only on election day, he finds even that degree of political liberty to be of dubious value in a system where citizens vote to select an élite that in turn exercises every other duty of civic importance:

> "To exercise the franchise is also unhappily to renounce it. The representative principle steals from individuals the ultimate responsibility for theory, values, beliefs and actions".[47]

A comparative study of direct democracy systems around the world by the London School of Economics scholar Mads Qvortrup reaches similar conclusions:

> "The referendum is not a panacea, yet the fears raised by its critics cannot be supported by evidence".[48]

In answer to the common prediction that citizens would use CIR to reintroduce the death penalty, flogging or other harsh practices, he points out that referendums have not been used to restore capital punishment in any country except the United States.[49] There, 38 States have reintroduced the death penalty since the 1970s. But in only three of the 38 was it done by referendum: in Oregon (which had previously abolished capital punishment by CIR in 1917), in Colorado and in California, where the death penalty was reinstated by the legislature but a voters' veto ballot to abolish it failed. Five US States that have CIR do not have capital punishment.[50] Flogging has not been reintroduced anywhere. Similarly, the Swiss have consistently rejected measures (5 since 1970) to restrict immigration.[51]

One could work through the whole catalogue of dire warnings about possible referendum measures with similar results, but the point is that in any case it would be illogical to judge CIR alone by whether one agrees with particular policy outcomes. No-one advocates abolishing representative government because of its legislative record over the past century.[52]

Contrarily to a common claim about direct democracy, Dr Qvortrup finds that it has proved to be a useful means of encouraging consensus and compromise, notably in countries such as Italy[53] where the spirit of political compromise had not previously been much in evidence. Democracy is an attitude towards other people, based on a mutual respect for the views of others.[54] Direct democracy strengthens

that mutual respect, thereby creating the conditions for accommodating different views. CIR prevents governments from ramming through legislation based purely on the party line or a consensus of the élite. It forces them to take seriously the views of others and engage in a real discussion with them, because the possibility of a referendum is always in the background. For that reason, while CIR does not block change or reform, it does make it more gradual and so accommodates the interests of majorities and minorities.[55] And people treat laws (even tax laws) with more respect because they have the tacit or explicit support of the majority.[56]

**The weakness of counter-arguments**

A further factor that will help to maintain the momentum for direct democracy is the transparent weakness of the case against it.

Direct democracy's opponents rely on two main lines of defence. The first is personal abuse and sweeping denigration. Those who favour it, we are told, are "insane", "loopy populists", "single issue loonies" and "political eunuchs". The people as a whole are stupid and must not be encouraged to think about government: "a high degree of apathy may be essential to the efficient functioning of a modern democracy".[57]

These compliments are reassuring in a sense, because such reliance on *ad hominem* attacks and prejudice is a sure sign that the speaker has no rational arguments. It shows that we have not overlooked any real problems with CIR.

At the same time, it is a refreshing change to read Dr Qvortrup's observation that:

> ".....even proponents of direct democracy have been remarkably modest or realistic in their defence of the referendum device".[58]

The other line of defence consists of simply ignoring the vast body of experience of and evidence for CIR over the past 150 years, and simply putting forward generalities and sweeping assertions. The most heavily used of these is Edmund Burke's remark from his 1774 speech to the electors of Bristol that:

> "You chuse a member indeed; but when you have chosen him, he is not a member for Bristol, but he is a member of Parliament .....Your representative owes you not his industry alone but his judgment; and he betrays, instead of serving you if he sacrifices it to your opinion".[59]

The first point to make about this élitist view of representative government is that the people have never accepted it: Burke lost his seat for that reason. The second point is that, even if that view had been adopted by the people, it in no way prohibits the use of direct democracy as a supplement to the indirect democracy of the representative system.[60] Indeed, if elected members see themselves as free agents in the way Burke said they should, the case for the safeguard of CIR is even stronger. And all the more so if the member is in practice a prisoner of the party line or falls prey to special interest lobbyists.

Another favourite assertion holds that CIR is inconsistent with the system of responsible government. But, as with Burke's assertion, nothing in the theory of responsible government prohibits the use of CIR as a supplement. Further, one reason why CIR is needed is that responsible government ceased to work over a century ago, when party discipline made the Executive supreme over the legislature instead of the reverse. That is one reason why the term "responsible government" itself has been largely abandoned in favour of the more nebulous phrase "Westminster system" (another reason may be to avoid provoking Australian sardonic humour). The definition of the Westminister system is highly elastic. We have noted the quiet demise after 1975 of the confident proposition that any referendum would fundamentally violate the British Constitution. Since then, the crucial concept of parliamentary sovereignty has also had to be abandoned, in light of EU supremacy.[61]

These and similar general objections to direct democracy are all aired in an empirical vacuum, as if CIR had not been operating in its present form since 1874. All the evidence of how the system has

actually worked (including the adjustments made to remove problems that have cropped up) is at best ignored or at worst misrepresented.[62] Most political scientists are parties to this suppression of evidence. That may seem odd if one assumes that they have a professional interest in discovering how political institutions work in reality, and which ones produce the best outcomes for ordinary people. But it seems that most political scientists are less interested in real people and real outcomes than in the mysteries of power and how it is wielded.

> Professor Vernon Bogdanor of Oxford delivers a true verdict on the case against direct democracy: "In the last resort, the arguments against the referendum are also arguments against democracy, while acceptance of the referendum is but the logical consequence of accepting the democratic form of government".[63]

**Key practical issues**

Once we are at least interested in some form of direct democracy, we face five basic questions.

1. *Which type or types should be adopted?* Should the system allow for the adoption of new laws or constitutional amendments, or should it be confined to repealing existing laws only?

The most conservative approach is to adopt only the voters' veto or "abrogative initiative", the power to repeal existing laws. Politically it is the easiest to advocate, because it is so uncomplicated, and because alarmist prophecies about CIR bringing back the gallows or the birch are impossible if CIR can only be used to repeal existing laws. There is no respectable argument against the voters' veto, even in theory. One cannot argue that the people should be subjected to laws that a majority of them reject, without arguing against democracy itself.

At the same time, as Italy's experience shows, even the voters' veto by itself is a very effective tool of people power.

The Hon Peter Lewis, MHA's Bill contemplates both the enactment of new laws and the repeal of existing ones.

2. *How many signatures should be required?* At present the percentage of the electorate who must sign the petition in order to trigger a referendum ranges from about 2 to 4 per cent of the voters in Switzerland (actually they use fixed numbers, 50,000 for some purposes and 100,000 for others), to 5 per cent in California, to 8 per cent in the German state of North Rhine-Westphalia, 10 per cent in Bavaria and Rhineland-Palatinates, and an impossible 20 per cent in other German states. Experience suggests that anything over about 7 per cent makes the system unusable, but apparently German efficiency is sometimes able to overcome that barrier.

The 1999 Queensland Bill opted for 5 per cent, while Mr Lewis's draft proposes 5 per cent of the total number of enrolled voters, or 15 per cent of at least 7 electorates if at least 5 of them are non-metropolitan. There is an 18-month time limit for collecting the signatures, a fairly standard requirement.

Queensland would also make matters easier for country residents by reducing the trigger to 2 per cent where it is obtained in a majority of electorates.

Contemporary Bills permit the electoral authorities to certify the signatures by accepted statistical sampling methods, following overseas practice.

3. *When should the ballot be held?* The cost of holding the referendum can be reduced to minimal levels by arranging for the ballot to coincide with a general election. The South Australian Bill provides for holding the vote at the next House of Assembly election, while the Queensland version envisages making use of federal elections as well. Local government elections held on a statewide basis could also be used, and this might carry the bonus of enhancing public interest and participation in local council elections.

A subsidiary question is whether voting should be compulsory. Presumably the case for forcing

people to vote on a specific question is weaker than in relation to parliamentary elections. Voluntary voting might also lessen the risk of the referendum's being used to record a protest vote against the government.

4. *What majority should be required?* Given that only a simple majority of those voting (i.e., 50 per cent plus 1) is required for amending the entrenched provisions of State Constitutions, the same should be enough for an initiative measure. Some direct democracy advocates believe, however, that in order to allay the fears (unfounded in my view) of rural voters it is necessary to add a double majority requirement, i.e., a majority of voters in a majority of electorates. The South Australian Bill so provides. On the other hand, both the Queensland Bill, and the New South Wales Bill to be introduced by the Christian Democrats, state that where the initiative does no more than repeal an existing law, a simple majority suffices. Anything else, I would suggest for the reasons already given, would countenance blatant minority rule.

5. *Once enacted, how may an initiative measure be amended or repealed?* Unless the legislative change brought about by the referendum can be protected in some way, there is nothing to prevent the Parliament from repealing it a week later, or re-enacting a law the people have just repealed.

While that may seem cynical to some, one must bear in mind that, by definition, a citizen initiative will only succeed if the Parliament has not been faithfully representing the electors. Some governments may be willing to accept the odium of thwarting the people's expressed will if the next election is anything up to three years away, by which time the voters will have other worries on their minds.

Mr Lewis's Bill proposes that amendment or repeal should, in accordance with the practice in California, itself be by referendum. There is a proviso, however, allowing the Parliament to amend the law within the first 12 months if a majority of the 400 original petitioners agree. Presumably this is to permit rectification of unforeseen problems.

Another approach is to allow amendment or repeal either by referendum, or by a two-thirds majority of both Houses during the first 7 or 10 years. After that, simple majorities would suffice. But, clearly, some effective protection is essential if the process is not to be thwarted.

**Key to democratic renewal**

The citizen-initated referendum system would be a powerful re-assertion of democratic principles at a time when political globalization is giving rise to a widely acknowledged and growing "democratic deficit". Sir Anthony Mason, former Chief Justice of the High Court, has pointed out that, just as in the past the States came under pressure to yield power to the Commonwealth, now Canberra in turn is under pressure to cede power to international institutions. An increasing amount of decision-making already occurs at the international level, and as Sir Anthony suggests:

> "Ratification of international and regional [treaties] by Australia ... can result in a so-called contraction of national sovereignty and a democratic deficit".[64]

More and more power is being concentrated in fewer and fewer hands. The people wielding these powers are elected by no-one, and in practical terms are accountable to no-one.

National governments and international organizations are not the only sources of democratic deficit. A recent oblique reference by *The Economist* of London to "the shadowy power-brokers of the Bilderberg Group", and similar comments by the BBC,[65] highlight the concerns being expressed in a growing literature about the major part played in government policy-making by semi-secret bodies such as the Bilderberg Group and the Round Table.

Most Australians have never heard of these organizations, and their existence, membership or activities are seldom, if ever, mentioned in our mainstream media. But momentous policies, such as the creation of the *Treaty of Rome*, the *Maastricht Treaty*, the single European currency and, earlier, the partitions

of India, Palestine and Ireland were formulated and promoted by these groups, and not, as most people imagine, by the political parties or the public service bureaucracy.[66] The influence of these bodies behind the scenes further weakens government's accountability to the people and strengthens the case for direct democracy.[67]

Introducing direct democracy into the Australian States would help to offset democratic deficit in several ways. It would showcase the principle of self-government in a way that would make it harder for international bodies to ignore and for Canberra to override. It would tap the creative potential of the people at large and provide a diversified alternative to distant, shapeless, unresponsive government. And it would give the people a genuine and substantive attachment to their State's Constitution that would make them vigilant against attempts by globalizers or others to dilute the ideal of popular government. Politics and law-making should be something that is done by us, not to us.

In all, it is hard to exaggerate the legal and constitutional consequences that would flow from the enactment of such a measure. Once direct democracy is operating in one State it will become impossible for other Australian governments to pretend that "it would never work here". It will provide a wonderful opportunity for democratic advancement and constitutional renewal for the nation as a whole.

Popular choice enhances democratic participation and involvement in politics. That is a benefit in itself – in a democracy, process is just as important as outcome, because it keeps the people in training for the demands of self-government.

At the centennial meeting of federal Parliament in Melbourne in 2001, both the Prime Minister and the Opposition leader made a special point of deploring what they saw as the widespread popular cynicism about our institutions of government. The parliamentarians of South Australia are being presented with an historic opportunity to change that, to revitalize the democratic spirit and launch a comprehensive renewal of Australian political life. Experience overseas shows that, if they take up that challenge, they are assured of an honourable citation in the history books and a warm place in the memory of a grateful people.

**Endnotes:**

1. G Walker, *Direct Democracy and Citizen Law-Making*, in *Upholding the Australian Constitution ("UTAC")*, Proceedings of The Samuel Griffith Society, Volume 4 (1994) at 281.

2. Ted Mack, *Beyond Representative Government* (1995) 5 *UTAC* 167; Harry Evans, *Citizen Initiated Referendums: Adjunct or Antithesis to Constitutional Government?* (1995) 6 *UTAC* 175; Patrick O'Brien, *Sovereigns not Subjects: The Need for More Direct Democracy* (1995) 6 *UTAC* 197.

3. Mads Qvortrup, *A Comparative Study of Referendums: Government by the People*, Manchester University Press, Manchester, 2002, 145.

4. AV Dicey, *Ought the referendum to be introduced into England?* (1890) 57 *Contemporary Review* 489, 496.

5. Qvortrup, *op. cit.*, 145.

6. *Ibid.*, also 142-43.

7. *Chilled greens*, in *The Economist*, January 6, 2001.

8. *It's Cuban liberation, for God's sake*, in *The Weekend Australian*, May 18-19, 2002; *Castro to maintain the rage*, in *The Australian*, January 21, 2003.

9. www.state.ny.us/governor/refreport/referendum_frame.html.

10. www.initiativefortexas.org.

11. Qvortrup, *op. cit.*, 1.

12. *Ibid.*, 1, 110, 119.

13. *Ibid.*, 1.

14. G Walker, *The Unwritten Constitution*, (2002) 27 *Australian Journal of Legal Philosophy*, 144; see also Mark Walters, *Common Law, Reason and Sovereign Will*, (2003) 53 *University of Toronto Law Journal*, 65.

15. "The frozen continent" was Geoffrey Sawer's description for federal-State relations in Australia. Its use in the present context is more apt and accurate.

16. Quoted in Bill Gammage,*The Broken Years: Australian Soldiers in the Great War*, ANU Press, Canberra, 1974, 24. See also pp. 263, 278 and esp. 275, and Les Carlyon, *Gallipoli,* Macmillan, Sydney, 2001, 533.

17. For a detailed tabular analysis of Australian direct democracy Bills up to 1994, see Peter Reith, *Review of Australian Direct Democracy Initiatives*, in *Direct Democracy: Citizens Initiated Referendums*, Constitutional Centenary Foundation, Carlton, Vic, 1996, 43.

18. Government of South Australia, *Constitutional Convention Discussion Paper,* Adelaide, 2003.

19. See ss 8, 56.

20. Under the *Australian Capital Territory Self-Government Act* 1988 (Cth), there is no such requirement for assent in the Australian Capital Territory. A bill becomes law when it has passed through the Legislative Assembly: see ss 8, 25.

21. Qvortrup, *op. cit.*, 20.

22. Mack, *op. cit.*, 174-75.

23. George Williams, Geraldine Chin, *The Failure of Citizens' Initiated Referenda Proposals in Australia: New Directions for Popular Participation?*, (2000) 35 *Australian Journal of Political Science* 27, 41-45.

24. Qvortrup, *op. cit.*, 61.

25. The proceedings of that conference are expected to be published shortly. The same argument is advanced, however, by Williams and Chin, *op. cit.*, 46.

26. Mark Day, *Massacre of ABC funding hopes?*, in *The Australian*, March 20, 2003, Media 6. The case is a particularly telling one, as the usual excuses for journalistic misrepresentation – deadlines, pressure from advertisers, proprietors or government – can have no application.

Some in the media have noticed the public's drift away from the official news media to the Internet and have expressed rising alarm about it. One columnist, following the Jayson Blair episode at *The New York Times*, lamented that "the whole authority structure of mass media is being undermined", and predicted dire results if people started thinking for themselves: J Alter, *An erosion of trust*, in *The Bulletin*, May 27, 2003.

27. For example: www.iandrinstitute.org; www.iri-europe.org; www.initiativefortexas.org; www.ballot.org.

28. Ray Grasse, *Signs of the Times: Unlocking the Symbolic Language of World Events*, Hampton Roads Publishing Co, Charlottesville, Va, 2002, 84, 123, 126.

29. Qvortrup, *op. cit.*, 89.

30. Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government*, Cambridge University Press, Cambridge, UK, 25-27.

31. *Ibid.*, 24.

32. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129; see G Walker, *The Seven Pillars of Centralism: Federalism and the Engineers' Case* (2002) 14 *UTAC* 1; (2002) 76 *The Australian Law Journal* 678.

33. Paul Finn, unpublished paper quoted in Galligan, *op. cit.*, 29-30.

34. *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106, 137-38 (Mason CJ); *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ); *Theophanous v. Herald and Weekly Times Ltd* (1994) 182 CLR 104, 180 (Deane J); *McGinty v. Western Australia* (1996) 134 ALR 289, 343-44 (McHugh J).

35. Paul Finn, *A Sovereign People, a Public Trust*, in PD Finn (ed.), *Essays on Law and Government*, Vol. 1, Law Book Co, Sydney, 1995, 1, 7-8.

36. *Ibid.,* 5.

37. *City of Eastlake v. Forest City Enterprises* (1976) 426 US 668, 672.

38. Joseph F Zimmerman, *The Referendum: The People Decide Public Policy*, Praeger, Westport, Conn, 2001, 258.

39. G Walker, *Initiative and Referendum: The People's Law*, Centre for Independent Studies, Sydney, 1987, ch. 3.

40. E Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation*, Princeton University Press, Princeton, NJ, 1999.

41. *Ibid.*, 108.

42. *Ibid.*, 110.

43. *Ibid.*, 125, 136.

44. *Ibid.*, 138, 140.

45. *Ibid.*, 145.

46. Zimmerman, *op. cit.*, 235.

47. *Ibid.*, 227, quoting Benjamin R Barber.

48. Qvortrup, *op. cit.*, 158.

49. *Ibid.*, 75.

50. Gerber, *op. cit.*, table 7.2, p. 127; cf. table A.1, p. 147.

51. Qvortrup, *op. cit.*, 15.

52. *Ibid.*, 157, quoting S Bowler and T Donovan.

53. *Ibid.*, 142.

54. *Ibid.*, 7.

55. *Ibid.*, 94.

56. *Ibid.*, 66, 139.

57. These comments and others are quoted by Evans, *op. cit.*, 189; Mack, *op. cit.*, 170-72.

58. Qvortrup, *op. cit.*, 153.

59. Quoted and discussed in Walker, (1987), *op. cit.*, 31.

60. Qvortrup, *op. cit.*, 8.

61. Walker, (2002), *op. cit.*; *Factortame Ltd v. Secretary of State for Transport (No. 2)* [1991] AC 603.

62. Thus, the political columnist Laurie Oakes in *The Bulletin*, July 26, 1994, claimed that CIR had become unworkable in California because, at the 1998 polls, citizens were faced with 29 CIR questions. In fact, there were 12 (indeed a larger number than the usual average of 2.7), the other 17 being government measures proposing minor amendments to the State Constitution or seeking approval for bond issues. Nor, contrarily to Mr Oakes's assertion, did "three-quarters of Californian voters in a survey on the State's referendum system believe[d] it had got out of hand". On the contrary, 73 per cent still supported CIR, though a similar majority did favour some minor procedural changes. And CIR supporters still outnumbered its opponents by 10 to 1: *Initiative and Referendum: The Power of the People*, Spring 1989, Winter 1989.

63. Vernon Bogdanor, *The People and the Party System: The Referendum and Electoral Reform in British Politics*, Cambridge University Press, Cambridge, UK, 1981, 93.

64. Sir Anthony Mason, *The Constitution in a Contemporary Context*, in *Selected Proceedings of the Federation into the Future: Government in a Global Era Convention*, Committee for Economic Development Australia, 1998, 2; G Walker, *Why Sovereignty Matters*, in *National Observer*, No. 51, Summer 2002, 33.

65. *The party's over*, in *The Economist*, February 1, 2003. The BBC's comments are on its website: Emma Jane Kirby, *Elite power brokers' secret talks*, www.bbc.co.uk, May 15, 2003.

66. The Bilderberg Group reportedly comprises senior representatives of politics, finance, the media and European royalty. It consists of an outer circle which is largely a talking-shop for eminent persons, and an inner committee which apparently does the "power-broking". Prime Minister John Howard attended the annual meeting of the outer circle in Portugal in 1999. Selected journalists are invited to these meetings on condition that they do not report anything about them. George McGhee, former US Ambassador to West Germany and himself a Bilderberger, acknowledged that "the *Treaty of Rome*, which brought the [European] Common Market into being, was nurtured at Bilderberg meetings". Likewise the euro currency: J. Marrs, *Rule by Secrecy*, Harper-Collins, New York, 2000, 42; and see generally 39-44.

    The Round Table network has a similar two-tier structure: JE Kendle, *The Round Table Movement and Imperial Union,* University of Toronto Press, Toronto, 1975, 165, 305; Marrs, *op. cit.*, 85-89; Carroll Quigley, *Tragedy and Hope: A History of the World in Our Time*, Macmillan, New York, 1966, 131-32. The inner group was established in 1891 by Cecil Rhodes, Alfred (later Lord) Milner, Lord Esher, WT Stead, Arthur (Lord) Balfour, Victor (Lord) Rothschild and Albert (Lord) Grey, while the outer circle came into existence in 1908-1911 (Quigley, *op. cit.*, 131-32, 950-55).

    One of the Round Table members' projects from 1884 to 1915 was to federate the British Empire, and ultimately the English-speaking world including the United States, in a single entity, perhaps with Washington as capital of the whole organization. The Round Table abandoned that idea in 1916 and later gave the chief impetus to transforming the Empire into the Commonwealth of Nations (Quigley, *op. cit.*, 133, 144-48). British support for the Australian federal movement was apparently seen as part of the Imperial union project (Quigley, *op. cit.*, 133), but for some reason that project envisaged separating Western Australia from the Australian federation (Kendle, *op. cit.*, 306).

    The eminent historian Professor Carroll Quigley of Georgetown University (whom President Bill Clinton described as his "mentor"), who had close links with the Round Table's offshoots in the United States, wrote in 1966 that:

> "The power and influence of this Rhodes-Milner group in British imperial affairs and in foreign policy since 1889, although not widely recognized, can hardly be exaggerated. ...[T]he whole group was so secretive that, even today, many close students of [Empire and Commonwealth affairs] are not aware of its significance" (Quigley, *op. cit.*, 133, 146).

    For example, the Round Table prepared the draft proposals for Indian self-government and sent them to Lord Chelmsford, at that time Governor of New South Wales. Chelmsford believed the proposals had come from an official committee of the India Office. After he accepted the proposals, he was made Viceroy of India in 1916, and the proposals became the *Government of India Act* 1919 (UK) (Quigley, *op. cit.*, 165-66).

    The Round Table also provided the main impetus for the partitions of Ireland, India and Palestine (Quigley, 1049). The strife caused by those partitions continues today, as does the Round Table itself.

67. It is not necessary to take a conspiratorial view of these organizations. Lord (Denis) Healey, a

former UK Chancellor of the Exchequer and a founding member of Bilderberg, made that point in a recent interview: "That isn't a conspiracy! That is the world. It is the way things are done. And quite rightly so". See *Who pulls the strings?*, in *The Guardian*, March 10, 2001 (extract from Jon Ronson, *Them: Adventures with Extremists*, Picador, London, 2001). It is the secrecy in which these bodies are able to exert their influence that is of concern to advocates of democratic government.

# Chapter Four
# Let's Give Democracy a Chance: Some Suggestions

Hon Peter Reith

I appreciate the opportunity to deliver a paper to this conference. I attended the inaugural conference of The Samuel Griffith Society and I consider it an honour to be asked to present a paper today.

I was to have delivered a paper to your conference on 31 July, 1994, but three days before, on 28 July, 1994 I had spoken at a seminar in Canberra on direct democracy that I had organised with a number of parliamentary colleagues. As a result there was a lot of political controversy within the Coalition Opposition about my views on participatory democracy, and I was prevailed upon not to make my presentation to your society.

You can imagine that I was therefore appreciative when John Stone rang me earlier this year and said, "Why don't you present that paper that has been sitting in your drawer since 1994?". So here it is – living proof that the best speeches should remain in the bottom drawer! Of course, I have amended the original but, as is usually the case with constitutional debates, some things do not change, and so my paper still reflects the views that I held and the speech that I had drafted then. Since those days, I admit to have been influenced to some degree – perhaps "mellowed" might be a better word – by my experiences in government, but not fundamentally.

As my paper implies, it is my view that civic engagement in all its forms, including the formation of think tanks, discussion groups, societies and the like, to promote interest in public issues and to evidence a commitment to public causes, is fundamental to the nature of our society. I don't think it overstates the matter to say that organisations like The Samuel Griffith Society are not merely symbols of our democratic society, but they are also the building blocks of our democratic society.

I want to start today by recognising the significance of our Constitution, to proclaim my pride in the Australian Constitution, and to say that the Founding Fathers, who spent years making sure it was right, drafted a first class Constitution. It is one of the best Constitutions in the world. It establishes the institutions and the framework which safeguard our freedoms.

It has been a great success in providing Australia with a system of stable and democratic government. It transformed six separate Colonies into States in a great federation, and it established our federal parliamentary democracy. It established the High Court, which for most of its time deservedly has had the reputation as one of the premier courts in the world.

Australia has one of the most successful political systems in world history. Pivotal in the structure conceived by the Founding Fathers was a Senate with near equal powers to the House of Representatives. The establishment and the evolution of the Senate as a barrier against the use of excessive powers by the Government were to be master-strokes of those early Australians. The Founding Fathers saw very clearly the dangers of too much political power in the hands of too few. In those parts where checks and balances are incorporated in our Constitution it embodies principles of enduring relevance.

However, in other aspects, it is also fair to say that our Constitution has been buffeted by our changing circumstances. For example, in the 1890s the United Nations was not even contemplated and the Founding Fathers did not foresee the impact of international treaties, and yet their very existence now has significant implications.

Further, in the last 100 plus years, power has drifted to the centre of the political system. This has fostered a political climate wherein the public feel a sense of alienation from the political process. This is probably less so with John Howard as Prime Minister because he is genuinely consultative. But a

Constitution needs less to be drafted in fear of good Prime Ministers; rather it needs to function when the likes of a Paul Keating are ensconced in the Lodge.

Whilst the electorate is better educated and better informed than it was in the 1890s, and demands a greater say in the affairs of the nation, some politicians and parts of the political process are more élitist and centrist than ever. John Howard says voters are no longer rusted on to political parties as they once were. I agree, and the reason is that the public are more inclined to form their own view than accept the views of their party or local MP.

In my opinion we should always strive to improve our Constitution. So I am not a constitutional conservative, I'm a constitutional reformer, and I think it is healthy to debate the options. So today I will argue for reforms to make our democracy better.

I should also say at this point that there seems little public interest today in constitutional reform. Most of my former colleagues would oppose any reforms. But that is not to say that they are right, and I would encourage them to remember that there are a lot of reforms and policies implemented by the Howard government that were only pursued because they were the right thing to do, not because they were popular.

The process by which we consider reforms is vital from start to finish. So before coming to the substance of the reforms I want to make two points about the process. The first is to suggest the need for some reforms to the "nuts and bolts" of the process by which the Constitution is reformed, and the second is to propose the establishment of a new National Institute to better inform us about politics.

The four referenda in 1988 were defeated with the largest "No" votes ever recorded. One of the factors in this record rejection of Labor's proposals was that the public thought that the process surrounding the referenda was unfair or unreasonable, or biased to promote a "Yes" vote. (I believe concerns about the process also played a role in 1999, albeit the electorate were less concerned then about bias due to the Howard government's exemplary fair play.)

For example, in 1988, Question 1 on the proposal for four year terms did not disclose that there was no guarantee that elections would be held every four years. The question also failed to disclose that the current fixed six year term for the Senate would have been abolished. The Coalition opposed the four year terms for this reason, amongst others.

Questions should be framed to ensure that, as far as practicable, voters are able to make an informed decision. This could be achieved in a number of ways – but there is no doubt that the public must be satisfied that the process is fair.

In 1988 our campaign slogan was, "There is more to this than meets the eye". It was very effective. It might have to be used again unless the process is not only fair but also seen to be fair.

The second thing I want to say about process is that it is surprising how little empirical and quantitative research is undertaken in Australia into the operation of our democracy. We are not as well informed as we should be.

I have no pretensions to be a political scientist. I am an ex- politician. I am now a mere observer, not a theorist. Generally speaking, politics is not a boiling cauldron of new ideas, but rather a process by which society reconciles the irreconcilable. I believe that politics is the art of the possible.

This is not a grubby concession to the lowest common denominator, but rather a proper recognition that in society there are competing interests, and these interests must be given due weight and consideration. This is not to suggest that politicians should not strive to achieve ideal outcomes. I even supported advocating a new tax before an election – not once but twice! The pursuit of ideas is central to politics, so we should never be embarrassed to be ideological. I am still proud to have been associated with fighting for a grand plan and good ideas. Politicians should be ideological, although ideology must be tempered by commonsense, and politicians need to be well informed.

Our political system can benefit from constant scrutiny, analysis, discussion and the advocacy of

reform. Not all proposed reforms will succeed, but debate is healthy. If necessary reforms can improve the system, then tangible benefits for all Australians will flow.

Political science has become more popular with students in recent years, but it is still a relatively minor discipline in Australia. For example, when I first researched this speech, I found that in 1992 political scientists received a lot less from the Australian Research Council than psychology researchers, even though government is the biggest business in the nation. I also understand that, throughout the 1990s, it has been difficult to obtain adequate funding for research into political behaviour.

The word "science" suggests a quantitative approach, yet, according to one political scientist, "Australian political science has been chronically weak in quantitative studies". This situation is unsatisfactory.

We should not take our democracy for granted. We have built a very successful political system in Australia, and if it is to continue to be relevant we have to work at it. If our democracy is to be able to meet the demands of the electorate for the new Century, then we need to be better informed about how it works. We need to be better informed about the values and expectations of our citizens.

I propose therefore that the federal government should promote the establishment of a "National Institute for Democratic Values". The objective of the Institute would be to study political behaviour in Australia and, in particular, to encourage empirical and quantitative research. I believe this project could yield positive results for our democracy. It should be established in conjunction with the Australian National University in Canberra. This would put it close to national politics, politicians and the party machines, which should be encouraged to take a keen interest in its work. Obviously, it would need studiously to avoid becoming embroiled, in any way, with contemporary politics. This will be a challenge in itself.

So let me recap on my introduction by drawing an analogy. The Constitution is like a substantial public building. Our Constitution has served us well, some internal renovation would modernise it, and there are available some technologies and fibre optic cables that would improve it. Only a vandal would tear it down.

The machinery of reform needs reform. And we should establish a National Institute to promote research so that we are all better informed.

Before proceeding, I also make the point that reform should not be confined to the Constitution. Legislative reform, and reform of the many practices of the political process, can play their part in improving our democracy. All need to be addressed.

Let me now turn to substantive issues.

I thought I should start with the issue of the republic because I addressed it back in 1994, and today the call for a republic is a possible trigger to introduce a genuinely participatory element into our Constitution through the election of a Head of State.

**An elected Head of State**

The referendum on the republic failed because there were no additional rights for citizens in the proposal. It will fail again unless this fundamental flaw is remedied. That is not a guarantee that a new referendum will succeed, but it is a precondition for success. The history of referendums in Australia is that the public will nearly always vote "No" to propositions to enhance the power or standing of the central government. Nearly all referendums since 1901 have tried just that, and so have failed.

The proposal for a republic needs to match the constitutional temper of the Australian people. In my view, the Australian people would support a change to a republic if they could decide who got the top job. Many Australians would see that a referendum that gave the public that responsibility was worthy of their support, and a change, that justified the holding of a referendum. It would be a big change, even if the referendum intended that the role and powers of the Head of State would be no different from the

practices of the Governor-General as they have developed to this point in time.

Let me make four points.

Australia is barely a constitutional monarchy, as the Monarch is hardly ever in Australia. It is not a monarchy. Personally I am not pro-monarchy. I am a federalist and a constitutionalist. The monarchical tradition was never adopted by the Founding Fathers, although they were politically astute enough not to say so. If anything Australia is a constitutional Governor-Generalship, although that terminology is a bit odd.

In the Oxford English Dictionary, "republic" is defined as:

"A State in which the supremacy of the people or its elected representatives is formally acknowledged".

In Australia, political authority rests ultimately with the Australian people. This was established by the fact that the Constitution only came into effect after the vote of the people, and politically can only be formally changed by the vote of the people. In this sense we are a republic already. But do not be deceived. Many of today's republicans are not the rightful heirs to Australia's federal traditions. They are the descendants of yesteryear's anti-Senate, anti-British, anti-monarchy, anti-federal, mainly Labor and pro-centralist republicans.

Secondly, nationalism is a strong emotional force. Nationalism is not always a positive force – it beset the world with many problems in the last Century. Nationalism was Mr Keating's only card. It is the populist's favourite. But we should recognise that, since 1900, Australian nationhood has matured and we have become more independent. Whilst retaining cultural and other links, we have through World War I, the Depression, the Statute of Westminster, World War II, and the *Australia Act* 1986, slowly cut our formal, legal ties with the United Kingdom, until only one significant tie remains. It may never be cut if we cannot achieve consensus about the means of converting to a republic. But I can understand why the public believes that ultimately Australia will become a republic, and why many believe that it is part of our nation's development that, eventually, we will assert our nationalism by cutting that tie with the United Kingdom.

Our Queen is British. To make this statement is not to disown the Crown, but rather to acknowledge the facts, just in the same way that I acknowledge, rather than disown, the fact that my paternal grandfather was a Scot and I am Australian. The fact that the Queen is the Queen of Australia is immaterial to her nationality, just as the ridiculous attempt made a few years ago to have the Queen declared the Queen of Queensland could not have succeeded in making Her Majesty a Queenslander. Our monarch is not an Aussie.

This brings me to my third point. In July, 1994 Paul Keating said:

"The change is not about a change in the way our system of government works".

And he also said:

"Let me tell you this – seriously and jocularly – there would be no way whatsoever, no matter what the outcome is, that there is more power for the Government, or for me, in this".[1]

Now that was not true. Perhaps that is why he suggested his statement was a joke! It was a repeat of the original Greiner line that a republic could be created with minimal change. Even Malcolm Turnbull admitted that a minimalist change was not possible,[2] and at the same time Paul Keating publicly admitted that he'd like to re-write the whole Constitution.

In his July '93 speech in Corowa, Mr Keating was more honest about his real views. After admitting that the republican push was a "manifestation" of his own ambition, Mr Keating made it perfectly clear that minimalist change was not on his real agenda. How could it have been? He wanted to change Australia, he wanted this change to be symbolised by a new flag, and his republic was to be the vehicle for delivering "a new sense of unity and national pride". To emphasise the revolution he proposed, I quote from his speech:

" … our Constitution should be re-made to reflect our national values and aspirations, evoke pride in our Australian heritage and confidence in our future, and help to unite us as a nation.

"We want Australians to consider the strengths and weaknesses of their Constitution".

And he said that the republic:

"... can deliver a re-cast Australian identity defined by the commitment of Australians to this land above all others, which will say unequivocally to the world who we are and what we stand for".

These goals for a republic are not going to be achieved by minimal changes. Major changes would be necessary. For this reason, it would be, as conceded by the national president of the ALP, Mr Barry Jones, a recipe for "political paralysis" to abandon our existing system without knowing what form a new system would take.[3]

Mr Keating has said there were two steps to his republic. Firstly, declare for the republic and renounce the existing Constitution; and secondly, work out how the new system would operate. This proposal was grossly irresponsible. No one in their right mind would abandon a practical system with a good record before agreeing on a new system.

An elected Head of State would represent a big change, and the public would see it as worthwhile and not just a grab for more power by the politicians.

By allowing the Australian public to vote for the Head of State, a proposal to establish a republic would have real meaning and relevance. I don't think Australia will ever be a republic until this is accepted.

My last point is about timing.

Four referendums were held in 1988, Australia's bicentennial year. The Government's strategy then was to cash in on the euphoria of the nation's celebrations to make "simple" changes to our Constitution. The referendums were defeated heavily. Six years later, the strategy was to cash in on the expected euphoria of the celebration of the Centenary of federation in 2001. That did not happen either. The only substantive event which could trigger a change, in my opinion, would be the death of our current Monarch. But for that to happen, it would be better if it were said now and if plans were put in place accordingly. The republican movement has a big job ahead of it – so the sooner it enlivens its approach, the better.

**State initiated referendums**

My second possible reform to the existing system would be to require the conduct of a referendum on a constitutional amendment proposed by a majority of the States.

This proposal was supported by a majority of the delegates at the 1985 Brisbane Constitutional Convention. The ALP delegates were split on the issue. The Federal ALP delegates were strongly opposed, for reasons expressed by Senator Michael Tate, who said:

"I, for one, do not lack faith in the national Parliament as the proper forum to decide what questions should be put to the Australian people. I do not believe the Australian people wish to put the referendum process to the mercy of some conglomeration of State parliamentary majorities, none of which is ultimately responsible for the conduct of Australian national affairs".

Of course, it is the people directly who are ultimately responsible for the conduct of national affairs, and not a Labor or Liberal caucus or Executive, although I have no doubt that a large majority of federal MPs today would strongly agree with the Tate sentiments.

Over time, opening up the Constitution to reform from other than the centralising vested interest of federal politicians could be a very significant move. It is unlikely ever to be supported by federal MPs, or federal parliamentary journalists, who also have a vested interest in the importance of the federal Parliament – but I still think it is a good idea.

**Elections consequent to Senate blocking**

Another area that should be carefully examined is the proposal sometimes referred to as the Court proposal. It requires the Senate to face an election when, as a consequence of the Senate's action, the House of Representatives faces an election. The Labor Party does not like this proposal because it recognises the power of the Senate in circumstances like 1975. For the Labor Party to support this proposal, it would have to admit that the Governor-General was right in 1975 to require that an election be held. Many in the ALP would prefer an alternative approach, perhaps because it is now accepted that the events of 1975 could be repeated in the future.

In his maiden speech, former Senator Evans said that the way to abolish the Senate is to white-ant it from within. Paul Keating made the point very clear when he said:

> "We shouldn't have a Senate basically. It's an impediment to the smooth operation of the parliamentary system".

But despite Labor's opposition to the Senate, the Court proposal is a sensible one. Fortunately, in 1975 there was a bank of double dissolution triggers available to resolve the impasse. If the trigger had not been available, then Australia could have faced a crisis. If the powers of the Head of State need to be spelt out in the Constitution, then the issue will need to be confronted. Having an election to settle a constitutional impasse is not a bad idea, so I think the Court proposal should be discussed again. It would ensure that the public are to be the final arbiters of such a conflict, and it is a practical proposal to remedy a genuine deficiency which has been exposed.

**Four year terms**

I still think a four year parliamentary term is a good idea. Admittedly, it seems out of place for an advocate of more participation (and intuitively, even more elections!) to support longer terms, but we do have a lot of elections in Australia and the public sometimes turn off because there are too many. It is still Liberal Party policy, and I believe that the Labor Party still favours a four year term.

The issue has gone quiet in recent years, partly because John Howard does not favour early elections and so we have had less elections.

Back in March, 1991 Prime Minister Bob Hawke wrote to the Leader of the Opposition saying that:

> "I am strongly in favour of this much needed reform and believe notwithstanding the failure of the 1988 referendum proposals, further efforts should be made to persuade the electorate of its merits".

The idea of a four year term for the lower House has been around since the 1890s. In fact, in my researches for this paper back in 1994, I came across unpublished minutes of a Committee to the Constitutional Conventions in the 1890s which had actually recommended a four year term for the House of Representatives. The Committee's draft Constitution with the four year term incorporated in its provisions was submitted to the 1897 Convention, where the four year term was amended to three years. Supporters of the four year term included Deakin, Downer, Forrest and Quick. The wisdom and foresight of these Founding Fathers has been confirmed by the success of our Constitution, so their arguments for a four year term should not be lightly dismissed.

There are strong arguments in favour of having a four year term. A longer term would enable governments to adopt a longer view, and would promote efficiency rather than expediency. It would enhance business confidence, because the private sector would be more able to plan in the knowledge that government policies would be in place for longer than has hitherto been the case. A longer term would reduce the frequency of House of Representatives elections, and the four year term would be more in line with most State Parliament terms.

The problem with achieving a four year term is not so much the problem of having a longer term

for the lower House; the real problem has been the impact of any changes on the term of the Senate. This was the problem in 1988. The Coalition was not opposed to the idea of a longer term for the House of Representatives in 1988, but we were implacably opposed to reducing the role of the Senate. Tucked away in the detail of the proposal for a four year term in 1988 was the plan to abolish the fixed term of the Senate, and establish a new system whereby the Senate's powers would be significantly reduced.

An alternative proposal would have been to provide that Senate terms would be equal to two terms of the House of Representatives. This is otherwise known as the simultaneous elections proposal, but as it has been previously rejected by the electorate on three occasions it seems pointless to put the proposal again.

In my view, the only way to achieve a four year term for the lower House is to introduce that reform only and leave the Senate term as it is. The Downer/Deakin committee was right.

The powerful simplicity of this proposal accommodates and appreciates that, in the past, four year term proposals have been rejected because of the impact on the Senate. The defenders of the bicameral system have been prepared to defend the Senate at the expense of a longer term for the House of Representatives. But with my much simpler proposal, supporters of the Senate would vote for it because, if anything, it would marginally enhance the independent status of the Senate. An independent Senate is a useful safeguard. I admit that does not seem the case today. From the perspective of the Constitution I strongly support an independent Senate.

Of course we do have a problem with the operation of the Senate. The Democrats have prided themselves on preventing the current Coalition government from implementing its promises.

The problem goes back to the time when the House was enlarged and, as a consequence of the nexus between the two Houses, the size of the Senate was increased. The practical result is that neither side of politics can win a majority and so be given a free hand to implement their mandate. This is not a problem all the time, but occasionally in the life of any nation you need to have a situation where, with a large mandate, a government can introduce a big reform programme. Victoria needed it when Jeff Kennett was elected in the early 1990s, and Australia needed it when John Howard was elected in 1996. This issue needs to be addressed by legislation, which is only ever going to be passed after a successful double dissolution initiated by the proponents of the legislation.

My proposal would set a maximum term of four years, not a minimum term. As a matter of logic, the government with a term of four years is likely to serve longer, because it will have longer to weather the results of unpopular longer term policies, and a longer period generally within which to gauge economic and other factors likely to have a bearing on election dates.

The crucial objective is to enhance government stability and so, therefore, if the cost of gaining longer terms for the House of Representatives and hence the government is an occasional separate Senate election, this should not be regarded as too high a price to pay. My proposal does not guarantee longer terms, but it should increase the average length of time between elections in the House of Representatives.

Since 1901 federal elections have been held on average every 2.3 years. The frequency of elections has increased since World War II. A two year House of Representatives term, when viewed against a 3/6 year Senate rotation system, is just as likely to result in numerous elections as my proposal of a maximum term of four years. My proposal is likely to result in some lengthening of the electoral cycle but, in practice, and judging from past experience, is unlikely to result in four year parliamentary terms. It is more likely simply to increase the existing average length of parliamentary terms, perhaps to three years. If this is the case, there is every likelihood of House of Representatives election dates coinciding with the dates of half Senate elections. Thus, under my proposal, there could be fewer half Senate elections in the future than there have been in the past, and fewer elections overall.

The idea of four year terms was also recommended in the Royal Commission in 1929, in the

Constitutional Commission in 1988 and on numerous other occasions. Over about a 30 year period the savings that would result from holding fewer elections, as a consequence of increasing the average term of the House of Representatives to three years, would be between 200 and 300 million dollars (as calculated in 1994!). These savings are worth having. A large majority of the Parliaments listed with the Inter-Parliamentary Union have terms of four years or more. This is a simple change that could be made, and I believe could earn bipartisan support. It would make our democracy work better.

**Direct democracy**

The Australian Constitution is not writ in steel, nor should it be. It is already subject to effective change. Change can be for better or worse.

In my view, the big change since 1901 has been the centralisation of power in the federal Government. Other changes, detrimental to the body politic, have also occurred. Within 20 years of the new Federation, concerns were expressed that the federal Parliament had become largely a rubber stamp. Today debate in the lower House rarely decides an issue.

Question Time is not what it used to be. Whoever the Prime Minister is at any point in time, if the PM is not in Question Time it lacks the sense of occasion which makes it important. Mr Keating treated Question Time with contempt. Behaviour in Question Time is much better now, but the public are not easily convinced that our side are better than the other lot although we are, by a big margin.

More fundamentally, our political system is awash with apathy and indifference. Discussion about political philosophy is nearly non-existent. Ignorance of our Constitution is widespread, and many politicians are obviously unaware of the history of the development of our political traditions.

In Australia today, the Executive is all powerful. It was not always intended to be so. Historically, the Parliament created an Executive as a means of controlling the power of the Monarch. Today in our system, the Monarch is irrelevant, the Executive controls the Parliament, and the Governor-General is the last check against the excesses of the Executive if all else fails. In its turn, the Executive is as much influenced by party machines, and in the ALP's case, the unions, as it is influenced by members of Parliament.

Meanwhile, the High Court has interpreted constitutional provisions in such a way as to enhance the power of the central government. So significant has this development been that Labor has lost a lot of intellectual interest in constitutional reform, because it no longer sees the Constitution as a barrier to its centralist agenda. This is no surprise, as the Court's pronouncements on the external affairs power give constitutional jurisdiction to the federal Parliament over virtually any subject which is itself the subject of a treaty with a foreign power, entered into at the whim of the Executive.

Other developments, for example the adoption of uniform taxing powers by the Commonwealth, have also been significant. The Commonwealth's purse power is now so strong, and the States so used to fiscal mendicancy, that efforts in recent times to give the States greater responsibility have been opposed by the States themselves. So, I think we have a problem.

US President Woodrow Wilson reminds us that:

> "Liberty has never come from the government; liberty has always come from the subjects of government. The history of liberty is a history of resistance. The history of liberty is the history of the limitation of governmental power, not the increase of it".

I am opposed to too much power being accumulated in too few hands. The participation by citizens in the government of our society is the essence of our democracy, and the Constitution is an essential instrument to achieve our objectives.

Many people believe that political rights and society's political development will follow successful economic development. I think that is the wrong way round.

In my view, if you have the right institutions within a strong civil society, you'll end up with a

successful economy, a vibrant culture, innovative industries, and a flourishing community in every aspect of human endeavour.

These issues have been studied very carefully. In Robert Putnam's work *Making Democracy Work*, which examined the introduction of regional government in Italy over 20 years, it is said:

> "This is one lesson gleaned from our research: social context and history profoundly condition the effectiveness of institutions. Where the regional soil is fertile, the regions draw sustenance from regional traditions, but where the soil is poor, the new institutions are stunted. Effective and responsive institutions depend, in the language of civic humanism, on republican virtues and practices. Tocqueville was right:
>
> > 'Democratic government is strengthened, not weakened, when it faces a vigorous civil society'.
>
> "On the demand side, citizens in civic communities expect better government and (in part through their own efforts) they get it. They demand more effective public service, and they are prepared to act collectively to achieve their shared goals. Their counterparts in less civic regions more commonly assume the role of alienated and cynical supplicants.
>
> "On the supply side, the performance of representative government is facilitated by the social infrastructure of civic communities and by the democratic values of both officials and citizens. Most fundamental to the civic community is the social ability to collaborate for shared interests. Generalised reciprocity (not 'I'll do this for you, because you are more powerful than I', nor even 'I'll do this for you now, if you do that for me now', but 'I'll do this for you now, knowing that somewhere down the road you'll do something for me') generates high social capital and underpins collaboration.
>
> "The harmonies of a choral society illustrate how voluntary collaboration can create value that no individual, no matter how wealthy, no matter how wily, could produce alone. In the civic community associations proliferate, memberships overlap, and participation spills into multiple arenas of community life. The social contract that sustains such collaboration in the civic community is not legal but moral. The sanction for violating it is not penal, but exclusion from the network of solidarity and cooperation. Norms and expectations play an important role. As Thompson, Ellis and Wildavsky put it:
>
> > 'Ways of life are made viable by classifying certain behaviours as worthy of praise and others as undesirable, or even unthinkable'.
>
> "A conception of one's role and obligations as a citizen, coupled with a commitment to political equality, is the cultural cement of the civic community".

This research, described by *The Economist* as "a great work of social science", concluded that the form and practice of civic community is the most important factor in determining the success of democratic self-government and a region's capacity for economic growth. To me, intuitively, this makes a lot of sense.

So I'm in favour of change, not for the sake of change, but because I believe we can make our democracy work better for a more democratic Australia. At the risk of being criticised for merely mouthing rhetorical flourishes, I believe that Australians can be the world's leading democratic practitioners. We could set a standard for others to follow for a century or more.

There are two factors at work. There is a sense of alienation in our citizenry that needs to be overcome. But a more positive factor is creating a new opportunity by building on the strong civil society we have today, and the egalitarianism we have nurtured.

In my view, in the future, citizens will demand a greater say in the conduct of their own affairs. In their capacity as economic agents, citizens, through the strength of market forces, can make governments largely irrelevant. The world's capital markets demonstrate this new force on a daily basis. They don't

recognise national boundaries.

This globalisation of economics will continue to be a major feature of the world in the Century ahead. But this is not the only way in which the world is going to continue to change. The public will be better educated. In turn this will encourage a greater appreciation of political issues. And the growth of sophisticated and rapid communication systems, the information superhighways, will give the public an unprecedented power to make informed choices and to relay their views back to the decision-makers.

These developments have not escaped the attention of others, either locally or internationally. A survey of the future by the respected *Economist* enthusiastically endorsed the idea of direct democracy. Associate editor Brian Beedham argued that the "arrested development" of representative democracy and a better educated electorate would pave the way for direct democracy.[4]

Direct democracy is a process that enables the public to initiate and then make or repeal laws by referendum. Such a process is undeniably democratic. It should be embraced more fully at local, State and federal levels of government in Australia. It would encourage a more transparent political system by encouraging debate. It would make it hard for the politicians to sweep issues beyond public view. It would motivate public interest in political issues and so erode apathy. Successful referendums reflect the views of the otherwise silent majority, and are thus a counter to noisy minority groups who sometimes can have undue influence. By giving the public an opportunity to directly influence law-making, the system would also thereby improve the integrity of the law. And it would be very popular with the electorate, as it is in the US, where its support consistently rates about 80 per cent with the public. It has attracted growing support in Australia.

I favour direct democracy for legislative initiatives, but as a safety valve system and as a supplement to our existing system, rather than as a substitute.

The key features of a proposal for direct democracy at the federal level could include:

(a) A requirement of about 350,000 signatures for a petition to trigger a referendum. This is a high trigger. It means that we would not have to live out the satire of *The Rise and Rise of Michael Rimmer*. It is equivalent to about 3 per cent of votes at a general election. Based on American evidence, there is no doubt that this requirement would ensure that only referendums with wide support would be initiated;

(b) Referendums to be held on the same day as elections to keep down the cost;

(c) A parliamentary Committee to publicly examine any proposal; and

(d) Federal court jurisdiction to give legal opinion on a proposal prior to the vote.

These latter two measures would enhance the publicly available information, and ensure that the public was well informed on referendum issues before they went to the polls. There are other features, such as regulations requiring the disclosure of donations, and a provision to allow the Parliament to place an alternative proposal on the ballot paper, which could also be added. An examination of overseas experience reveals many other options.

In modern times, the concept of citizens' initiated referendums originated in Switzerland. It has now spread worldwide. It is practised in 28 of the States of America and is very popular with the US electorate. In Europe recently, referendums have been conducted on significant policy issues in Italy, France, Denmark and Ireland.

Of course the concept is not new to Australians. Kingston's 1891 draft of the Constitution included a form of voters' veto, and the referendum concept was accepted by incorporation of the Swiss model into Australia's Constitution in 1901 for the purposes of securing public consent to any proposal to amend the Constitution.

(Kingston's draft was dated 26 February, 1891 and was printed in Adelaide by the Government Printer. A copy is included in Griffith's volume *Successive Stages*. The proposal was that no Bill could be assented to until after a referendum, if that were demanded within three months by one-third of the

members of either House, or both Houses of any two State Parliaments, or 20,000 qualified electors. The referendum would be decided by a simple majority of votes.)

Since then most Australian politicians have recoiled at the suggestion of actually giving the public a say on the big issues that confront our society.

Before proceeding, let me make it clear that while I support direct democracy, I do not advocate regular federal referendums. To me the value of the concept is not to have a vote every second Saturday, but rather to have a safety valve in the system. A high trigger of 350,000 signatures ensures that frivolous proposals would not qualify. So the proposal is designed to be used sparingly, although the mere fact that it is available helps to keep the politicians in line.

In my time in politics the most likely issue to have generated a referendum campaign would have been the Australia Card controversy. In that case the Government's legislation was twice rejected by the Senate and that rejection was used to trigger the 1987 federal election. After the election the ALP falsely claimed to have a mandate to keep a computer file on every citizen. When the public became aware of the full implications of Labor's plans there was widespread outrage.

But for the legal genius of the late Ewart Smith, the ALP's scheme would have proceeded. If it had proceeded, and if we had had a form of direct democracy, a widespread campaign to support a referendum to repeal Labor's legislation would have been the only chance to stop it. Such a campaign would probably also have prevented the bureaucrats from inventing the alternative tax file numbering scheme which has since been instigated.

The only other political issue that could have generated a sufficiently strong public reaction would have been a move to change our flag without reference to the public.

The opponents of direct democracy claim otherwise. Laurie Oakes has suggested that petitions to overturn anti-discrimination laws, or to return the death penalty, would be quickly initiated.[5] He says, rightly, that in the US there is an example of the death penalty being introduced, but he forgot to mention that there is also an example of the death penalty being abolished through this process. To my knowledge, 31 US States have reintroduced the death penalty. Of these, in 29 cases the reintroduction was by ordinary parliamentary legislation.

US experience is interesting but can't be conclusive. Likewise the Swiss experience is interesting but not conclusive. They have voted for trans-Alpine freight to be limited to rail, they have voted against the disbandment of their armed forces and, in 1993, they voted for a Goods and Services Tax. To suggest that the process would open the door to prejudice and intolerance is contradicted by the evidence.

In Australia, the Communist Party dissolution referendum and the Aboriginal rights referendum were both about the rights of minorities, and suggest that Australian voters are quite capable of making decisions that meet Mr Oakes's requirements. Anyway, the Canberra Press Gallery is well known for its tolerance, honesty, fairness and impartiality, and can be relied upon to continue to censure intolerance.

A free press can also help ensure that Australia would mirror US experience, where it is generally agreed that money can't buy a new law by referendum. In one case the opponents of a referendum to legalise marijuana spent only $5,000, but defeated the supporters who spent $214,000. In another case, the tobacco industry outspent its opponents 10 to 1 but was still beaten.

In North America, the systems in the States vary considerably, although there is a fairly consistent pattern in the response of voters. Political analyst Arthur Ranney has surveyed the US experience from 1945 to 1976. He concluded that the "pattern is consistent with the widely held view that American voters are predominantly liberal on economic issues and conservative on social issues".

At the turn of the century Australia led the world with innovations to enhance our democracy. Today the public is disenchanted with politics. The need for reform is obvious, but the path to reform could be blocked by existing political élites.

The immediate task must therefore be to foster public support. In time, this public support, and

changes in society, will generate the required political pressure to persuade the politicians to give the public the right to vote on a proposal for direct democracy.

Support for the concept of direct democracy in Australia – which was originally ALP policy – has come from a diverse group, including Professor Geoffrey de Q Walker, most Liberal Party State Councils, the Deputy Chairman of the Constitutional Centenary Foundation, Professor Cheryl Saunders,[6] the Australian Democrats, the Queensland National Party, the Hon Frank Walker, Mr Ted Mack, the Advisory Committee on Individual Rights (Constitutional Commission, 1988),Mr Tom Keneally, Mr Bryce Courtenay, Mr John Hyde (former Director of the Institute of Public Affairs) and many others. The day will come when direct democracy will play a bigger part in our democracy, and Australia will be a better place for its introduction.

**Endnotes:**

1. *The Age*, 12 July, 1994.

2. *The Age*, 22 July, 1993.

3. *The Age*, 25 July, 1994.

4. *The future surveyed – 150 Economist years*, in *The Economist*, 11 September, 1993.

5. *The Bulletin*, 26 July, 1994.

6. *The Australian*, 22 July, 1994.

# Chapter Five
# South Australia and Federation

Professor Peter Howell

When the Centenary of Australian Federation was being commemorated in Adelaide, public figures as different as Geoffrey Blainey and John Bannon pointed out that, in the great referendum of 1899, almost 80 per cent of the enfranchised South Australians who had expressed an opinion on the draft Constitution for an Australian Commonwealth had voted "Yes". Yet in their enthusiasm for celebrating the anniversary of what many regard as the birth of the Australian nation, virtually all speakers at Centenary of Federation activities in this part of the country either neglected or overlooked two important considerations.

First, as everyone should know, at the end of the 19th Century the people had voted for federation, not unification. Second, and this is less well understood today, disenchantment with what had been done set in very quickly in South Australia. Both phenomena merit attention. A third object of the present paper, included because I believe it helps illuminate the others, is to give an indication of some of the contributions South Australians made to the creation of the Commonwealth.[1]

In the last decades of the 19th Century, South Australians exhibited little of the anxiety Queenslanders felt about the establishment of a German colony in New Guinea. Nor did they share the paranoia many people in Melbourne and Sydney developed about the possibility of an influx of thousands of expirees and escapees from the French penal settlement in New Caledonia. For most South Australians, the main attraction of Federation was the prospect of free trade between the Australian Colonies.

Victorian protectionists had imposed a tariff of up to 450 per cent on South Australian wine, to compel all but the wealthiest of Melbourne's wine-lovers to imbibe nothing but their own Colony's product. Large-scale South Australian engineering works, such as Martin's at Gawler and Shearers' at Mannum, were securing significant sales of their locomotives and farm machinery to buyers in the other Colonies. Everyone having some connexion with those industries expected yet greater prosperity if the intercolonial tariff walls came down. It was also widely believed that, without Federation, if New South Wales should turn protectionist like Victoria, and then build its own railway line to Broken Hill, South Australia's very valuable trade with that promising new city would be lost.

For these and similar considerations, in 1888 the South Australian branch of the Australian Natives' Association, under the presidency of former Premier Sir John Bray, made the effort of persuading that organisation's branches in other Colonies to agree to the holding of an Australian Conference of ANA delegates to consider the best scheme for establishing a federal government and Parliament. Thus South Australians initiated Australia-wide discussions leading to a national conference (chaired by Bray) on the provisions that ought to be in a federal Constitution. They took this important step eleven months before Sir Henry Parkes, still revered in other places as "the Father of Federation", made his first moves along similar lines in New South Wales.[2]

Likewise, at a later gathering, the crucial Australasian Constitutional Convention of 1897-98, which settled most of the essential features of the draft constitutional instruments subsequently put to the voters in each Colony, all the delegates were for federation. Not one advocated unification. Indeed, it was resolved, without dissent, that the first condition for the creation of an Australian Commonwealth was:

"That the powers, privileges, and territories of the several existing colonies shall remain intact,

except in respect of such surrenders as may be agreed upon to secure uniformity of law and administration in matters of common concern".[3]

The ideas embodied in this resolution remained a central theme throughout the preparation of the Constitution. They show that when present-day Premiers claim that the federation process created a concept of States' rights, they are not guilty of "rewriting history", as Mr Paul Keating used to claim, but simply stating a fact.

Even the most militantly left-wing of all the Constitution-makers, South Australia's Dr John Cockburn, maintained that the preservation of States' rights "was the best guarantee of democracy", because "Government at a central and distant point can never be government by the people".[4] The founders of what became the South Australian branch of the Australian Labor Party shared his views. The first election manifesto issued by what was initially called the United Labor Party declared:

"With the idea of a federated Australia now so prominently before us we are in full sympathy".

It is worth noticing that in the next sentence of that document its authors went on to stress:

"No scheme proposed for the achievement of the great idea will receive our support unless the interests and principle of local self-government for South Australia are protected and conserved".[5]

Because the thinking of everyone participating in the Constitutional Convention of 1897-98 paralleled this, the Constitution of the Commonwealth gave the federal Parliament defined and limited powers. Only a very few of these, such as the power to levy customs and excise, and the power to coin money, were granted exclusively to the Commonwealth. The majority of the powers conceded, called concurrent powers, could be exercised by the State Parliaments as well, and in some fields, such as marriage and divorce, half a century passed before the federal legislature began to act. The new Constitution, however, provided that if an inconsistency emerged between federal legislation, on a matter duly within the Commonwealth's ambit, and State legislation on the same topic, the Commonwealth law would prevail (s. 109).

Because authority to legislate on everything else, such as

hospitals,
housing,
factories,
the pastoral industry,
schools,
roads,
wharves and jetties,
bridges,
government-owned enterprises such as saw-mills and railways,
other modes of transporting people and goods,
exploration for and the mining of metals, petroleum, coal and other minerals,
fisheries,
forests,
sewerage,
crime,
electricity and gas supplies,
most industrial matters,
the learned and other professions,
universities, and
national parks, public libraries, museums and art galleries,

remained with the States, the Commonwealth government was expected to be a relatively small operation.

As late as 1932, when delivering his judgment in the first *Garnishee Case*, Mr Justice Evatt claimed:

"The States have exclusive legislative authority over all matters affecting peace, order, and good government as far as such matters have not been made the subject of specific grant to the Commonwealth. And the authority of the States covers most things which touch the ordinary life and well-being of their citizens".[6]

That had certainly been the founders' intention. Yet this quotation shows that, even when he was a High Court Justice and still in his thirties, Evatt was not a source to be relied upon, for the point made in the first of those sentences had already ceased to be true. In 1929 a Royal Commission on the Constitution of the Commonwealth had found that federal authorities were already interfering in matters the Constitution had left to the States. For example:

- The Commonwealth had used its power to tax to pass an Act intended to bring about the subdivision of large estates;
- It had invoked its power to legislate on trade and commerce with other countries to claim a right to prohibit the export of goods unless they are manufactured according to conditions it approves;
- The Commonwealth could admit goods purchased by, and therefore the property of, State governments on condition that they be used in a manner prescribed by the Comptroller-General of Customs, and it could enforce such conditions by a bond;
- Using its power to legislate with respect to conciliation and arbitration, the Commonwealth had set up a Court which could override State laws and fix standard wages and hours;
- The Commonwealth had imposed unwelcome conditions on a loan to the State of South Australia for forestry purposes; and
- Believing its defence or its trade and commerce powers gave it sufficient authority, the Commonwealth had influenced policy in all the States by attaching a string of conditions to grants made under its *Federal Aid Roads Act* 1926.[7]

Those precedents, so strongly complained about in the 1920s, have been followed *ad nauseam*. This scarcely needs illustration, but one instance has given special annoyance in Adelaide: although the Constitution left mining exclusively to the States, the Commonwealth has used export controls and foreign investment rules to exert a major influence on the development of South Australia's mineral resources, especially in relation to uranium.

At the present time, there are hardly any areas left where the States can be said to have "exclusive legislative authority". Canberra has asserted power to regulate, to a greater or less extent, most of the matters which the makers of the Constitution, and the people who voted for its adoption, thought they had reserved to the States. Many federal politicians have claimed that the national interest demands centralised decision-making on all important matters. They also say that technological advances in transport and communications, together with a growing sense of national identity, legitimize the Commonwealth's rise to a dominant position.

Their pleas have been countered by complaints that the people of each State have already lost too much of their former capacity to manage regional affairs in their own way. Before the Australian federation was fifty years old, the second South Australian Premier to bear the name Thomas Playford (he was the one who held that office from 1938 until 1965, and who became Sir Thomas Playford, GCMG), drew attention to the problem in a dramatic way. In an address to the fifteenth Summer School of the Australian Institute of Political Science, meeting at Albury in January, 1949, he declared that the shift in the balance of the Constitution had:

"… gone beyond anything contemplated by those who created the Federation. It has gone to such an extent that the States, though still as a matter of law sovereign bodies within their appointed sphere, have, in fact, become completely subservient to the Commonwealth. The organisation which the States created is now devouring them. Australia is ceasing to be a federation of independent groups of people, and is being changed into a unitary State".

Playford offered many illustrations of these propositions, noting that federal politicians of all parties, with the support of the High Court, had shared in exploiting the central Parliament's powers, and seizing additional ones, to a degree no one had foreseen, with the result that they were "destroying our Federation". He was especially annoyed that prominent right-of-centre members of the House of Representatives, including Opposition Leader (Sir) Arthur Fadden, (Sir) Eric Harrison and Sir Frederick Stewart, plus four Opposition Senators, had assisted in passing the Curtin Labor government's legislation which gave the Commonwealth government a monopoly of collecting income tax. Curtin's was the federal Ministry that, during World War II, had raised the top marginal rate of income tax to nineteen shillings in the pound, that is, 95 per cent, thus making it politically impossible for the States to continue raising their own income taxes.[8]

Playford's complaint, uttered more than three years after the war had ended, was that Curtin, with his Treasurer and successor Ben Chifley, had not only contributed to the States' receiving a substantially smaller portion of the total revenue from taxation, but had also reduced the States' capacity to make their own decisions about spending. This second element in the diminution of regional independence had been achieved by extension of that practice of making loans, grants and subsidies to the States for specific purposes, and by making these handouts subject to conditions laid down unilaterally by the federal authorities.[9]

Many can recall Playford's grandstanding about the States' loss of their financial independence. Even more will recall our journalists' description of Premiers' Conferences as the annual performance of the Beggars' Opera. Yet Dr AJ (Jim) Forbes, a former University of Adelaide political scientist who became a Minister in the Menzies, Holt, McEwen, Gorton and McMahon federal governments, has illustrated the other side of the coin. He has reminisced:

> "It was Playford who developed into an art form the techniques of power without responsibility – [the] when-in-doubt-blame-the-Commonwealth syndrome – the very antithesis of the responsibilities which should be borne by a so-called sovereign State. Since Playford, it has become mandatory for successful Premiers to behave in the same way. Nothing has done more to undermine responsible government in Australia, and with it the status and standing of the political process and those who practise it".[10]

It must be added that some State Ministers have been too ready to abandon rational policies whenever a Commonwealth carrot has been offered them. Former front-benchers from both sides of politics have told me that they believed the rules South Australia's Parliament had approved for speed limits for cars on country highways (110 kph) and blood-alcohol levels for adults possessing an unrestricted driving licence (0.08) were not just eminently reasonable but, as far as they could tell, had been considered appropriate by most of their electors. Yet it took only a very modest (and in annual budgetary terms, an insignificant) financial inducement from Canberra for South Australian Ministers to agree to abandon those defensible home-made rules and conform to the lower limits deemed appropriate in the more densely populated eastern States, where highways are more congested.

Meanwhile, there are many fields where State Ministers have foolishly allowed Canberra to assume a large share of responsibility for raising and allocating the necessary funding for local institutions, such as hospitals and universities. I use the word "foolishly" because, in becoming dependent on loan and grant monies raised by another level of government, those Ministers have known full well that he who pays the piper calls the tune. The practice has also led to indefensible extravagances. In the case of South Australia, for example, it has yielded the absurdity of a State with little more than a million people having two fully fledged medical schools, two law schools and three engineering schools.

After thirty-five years of whingeing about the loss of the States' right to tax incomes, the Premiers were invited by Prime Minister Malcolm Fraser to resume that power in the late 1970s. Our then Premier, Don Dunstan, and all but one (Western Australia's Sir Charles Court) of his counterparts

elsewhere were not interested. While they managed to find all manner of excuses, their responses made it clear that, while they enjoyed being able to spend money, they did not want either the responsibility or the odium of having to raise most of it themselves. Twenty years later, their successors agreed to accept the proceeds of the federal government's Goods and Services Tax.

The result has been that Australia offers a stark contrast to Canada and the United States, in that our States are dependent upon handouts from Canberra for more than half their expenditure. The States and Provinces in North America still manage to raise more than 80 per cent of their annual budget outlays by their own revenue-raising measures. As well as giving the regional governments in those countries a far greater degree of autonomy, it makes them far more accountable to the people than our State governments are. Moreover, the only "growth" taxes left to the Australian States have been regressive forms of taxation, such as pay-roll tax (which has served not only to limit the competitiveness of Australia's exports, but also to discourage many employers from expanding their businesses if it means taking on more staff), and those most regressive of all taxes, the taxes on gambling, which economists have demonstrated impact most severely on the poor.[11]

It is a long time since South Australia produced a statesman. Matters stood very differently in the 1890s. Although, financially, that was an era of deep depression here, politically it was a golden age. This explains why, in the drafting of the Constitution of the Commonwealth, South Australia's representatives had a most significant impact, exercising an influence that was out of all proportion to their province's wealth and population. Their ascendancy sprang from their wide experience in public affairs and their involvement in previous movements towards Federation. Many of their achievements have been of lasting significance.

For example, the Thomas Playford who was South Australia's Premier in 1887-1889, and again in 1890-1892, secured an acceptable solution to what had seemed an irresolvable conflict between the more populous and the less populous Colonies on the vexed question of the Senate's powers when handling money Bills. Without that compromise the movement for Federation would have foundered.

Playford's protégé, Charles Cameron Kingston, QC, Premier from June, 1893 until December, 1899, had been one of the very first people to produce a draft for a federal Constitution. It was based on one from the pen of Tasmanian Attorney-General, Andrew Inglis Clark. Eighty-six provisions in Clark's draft found recognizable counterparts in the final Constitution. But Clark's expression was rather verbose and sometimes convoluted. Kingston's was relatively terse and straightforward. Thus it was his rewriting of many of Clark's proposals that ended up usefully in the Constitution as finally promulgated.[12]

But Kingston also introduced additional clauses. These, for example, gave the federal Parliament power to legislate on lighthouses, beacons and buoys; to make paper money legal tender; and to give federal judges original jurisdiction to determine disputes about property that involved the laws of more than one State. More importantly, he took up the ANA's idea that federal ministries be obliged to operate under the system of responsible government, and secured the constitutional provision ordaining that no one could be a federal Minister for more than three months without also being a member of the federal Parliament.

Kingston chaired the Constitutional Convention of 1897-98. Thus he could not participate in the debates at its plenary sessions. Yet he was especially active in the Committee stages (when his fellow South Australian, Sir Richard Baker, was in the chair), where the detailed clause by clause debates and decisions took place. In 1900 he went to London with Deakin (Vic), Barton (NSW) and Fysh (Tas) to ensure that the *Commonwealth of Australia Constitution Bill* was enacted by the Imperial Parliament with the least possible alteration. In 1901 he became the Commonwealth's first Minister for Trade and Customs. In that role he was responsible for two things which reflected the spirit of that age: he was the originator of the White Australia Policy and the architect of the protective tariff.

Sir Richard Chaffey Baker succeeded in inserting, in s.24 of the Constitution, the provision that the

membership of the Senate should in perpetuity be half that of the House of Representatives. This has often irked centralists, but it has been of great benefit to the people of the less populous States. Publicly, most Senators have failed to fulfil their expected role of championing the interests of the States they serve. Their performance behind the scenes has been rather better. In ministries of all colours, beyond the closed doors of the government's party room, the Senators from the less populous States have often been able to ensure that their constituents' needs are neither submerged nor neglected.[13]

President of South Australia's Legislative Council from 1893 to 1901 and appointed a QC in 1900, Baker was elected the first President of the Senate, and in the course of the next five years did a great deal to shape the way it has gone about its business ever since. Not satisfied with the Standing Orders that governed proceedings in the House of Lords or colonial upper houses, he won support for having his own presidential rulings accepted as the supreme common law governing Senate procedure. He resolved many problems by reference to the rationale for the Senate's existence. Because it was intended to be the States' House, he held that it had a higher responsibility than did second Chambers elsewhere in the Empire, and was therefore entitled to depart from their rules and practices. For these and similar achievements, the present Clerk of the Senate, Mr Harry Evans, has accorded him heroic status.[14]

Dr (Sir) John Cockburn,[15] who had been Premier for fourteen months in 1889-1890, firmly believed that the people must be sovereign. It was he who first insisted that the legitimacy of the proposed Constitution should be established by its being endorsed in a referendum. Furthermore, he was successful in arguing that the people must remain in control once the Constitution was promulgated. As a result, whenever federal governments seek to amend the Constitution, all who are enfranchised are allowed to express their views directly, without being obliged to delegate their power of voting to anyone else. Cockburn rejoiced that in South Australia women had gained the right to vote in 1894, and that, in the same decade, missionaries had been busily encouraging Aborigines to get on the electoral rolls. Cockburn argued that both these groups should carry those rights into the federal arena.

Yet it was Cockburn's fellow South Australian, (Sir) Frederick Holder, Premier in 1892 and again in 1899-1901, who must have the credit for overcoming vigorous opposition and succeeding in inserting what became s.41 of the Constitution. It enfranchised, for federal elections and referendums, and from the moment the Constitution came into operation, everyone who had a right to vote for the lower House of their State Parliament. Holder was elected the first Speaker of the House of Representatives. He did a superb job in that role until his sudden death (which abruptly terminated an all-night sitting) in July, 1909. It was a period when the Parliament was at least as fractious as it has ever been since. Nevertheless, in contrast to present practice, he was respected by all seven federal governments that held office in that time: the Barton and Deakin (2) Protectionist Ministries, the first two Labor Ministries, led by Watson and Fisher, the Reid-McLean Free Trade-Protectionist Coalition, and Deakin's third Ministry, a Protectionist-Free Trade-Tariff Reform fusion. Holder had been appointed KCMG in 1902.

Sir John Downer, QC, the son of an immigrant tailor, through brightness and application to study had won free secondary schooling and training for the legal profession. He served as Premier in 1885-1887, and again for eight months in 1892-93, accepting a KCMG when representing the Colony at Queen Victoria's Golden Jubilee celebrations.

As I mentioned briefly in a paper presented at this Society's seventh conference (June, 1996), as a Constitution-maker Downer played a major role in scotching a proposal that, in filling the office of Governor-General of Australia, the Monarch should be obliged to commission someone elected by the Australian people instead of a person recommended by a Minister. He realized that each candidate for election to the office would be asked to offer a policy, and that the successful person would consequently have a commitment to honour it. Thus an elected Governor-General, possessing a mandate from the people, could become a rival to the Prime Minister, developing pretensions to real power and authority instead of always acting on the advice of Ministers. This would militate against the *de facto* Head of State's

serving as the dignified element in the Constitution. The holder of the office should be someone who is, or who accepts that he or she is obliged to rise, *above* politics and be able to act as an impartial umpire if one is needed.

Downer's argument carried the day by thirty-five votes to three. Precisely the same concerns became central to debates at the Constitutional Convention held in Canberra 107 years later, about the appointment, role and powers of the President, if Australia were to become a republic. Downer was one of the three members of the Drafting Committee appointed at the Convention of 1897-98. Chaired by his friend Edmund Barton, it did its work in Sir John's North Adelaide home, which is now part of St Mark's University College.

James Howe had served as a Minister in the Downer and Cockburn governments. After a long struggle, which continued through the Adelaide, Sydney and Melbourne sittings of the Convention of 1897-98, he secured the insertion, in s.51 of the Constitution, of a clause empowering the Commonwealth to provide invalid and old-age pensions. He pointed out that a national government alone could meet the needs of the tens of thousands of mining, pastoral and fruit-harvesting workers, who had to move from Colony to Colony in pursuit of employment. Their migratory habits would continue to prevent them from acquiring pension entitlements within any one Colony or State.[16] His persistence in arguing along these lines finally won acceptance of his proposal.

At the time of Federation, South Australia was more than twice as large as it is today, because the region we call "the Northern Territory" had long been part and parcel of the central Colony. Its adults had been entitled to vote for both Houses of the South Australian Parliament. For more than fourteen years one of its two representatives in the House of Assembly was Vaiben Louis Solomon, the only Jew who has ever headed a Ministry in Australia, albeit briefly, in 1899. Since 1863, Empire-building parliamentarians in Queensland and New South Wales, coveting the tropical portion of South Australia, had kept airing doubts about the validity of the instruments by which the Queen had transferred control of it from Sydney to Adelaide.

To settle the matter once and for all, Solomon managed to have inserted into the definition of "the States", in what became s.6 of the *Commonwealth of Australia Constitution Act* 1900, a declaration that "South Australia" includes "the northern territory of South Australia".[17] The promulgation of this definition within the text of an Imperial statute put an end to all controversy on the point before the Commonwealth was inaugurated. Solomon also helped to shape the provisions for altering the Constitution by referendum (s.128) and for dealing with parliamentary deadlocks (s.57).

The youngest of the South Australians elected to the Convention of 1897-98 was a Catholic barrister, Patrick Glynn. He was dubbed "the encyclopaedia of the Convention", for sharing his learning not pompously but with wit. He is chiefly remembered for the insertion of a reference to Almighty God in the Preamble to the *Commonwealth of Australia Constitution Act*. However, he also merits honour for joining Kingston in helping to save, by the barest of majorities, Playford's celebrated compromise about the Senate's powers regarding money Bills, without which all hopes of Federation would have been wrecked for at least a generation.

(Sir) Josiah Symon, QC, leader of the South Australian Bar and a thorough conservative, chaired the Convention's Judiciary Committee, which prepared the constitutional provisions permitting the federal Parliament to set up a High Court and to restrict appeals to the Judicial Committee of the Privy Council in London. He contributed to the solution of many contentious issues, and fought a great battle to secure South Australia's right to a share of the waters of the Murray and its tributaries (after delegates from New South Wales had insisted that they were entitled to impound "every drop" of rain falling on their territory).[18] However, all that the South Australians could managed to achieve on this topic was a constitutional right to "the reasonable use of the waters of the rivers for conservation and irrigation" (s.100). Symon was also very active, as South Australian and federal president of the Federation League,

in campaigning for a "Yes" vote when the Commonwealth Bill was put to the people. He was appointed KCMG on the day the Commonwealth was inaugurated (1 January, 1901), served as a Senator from 1901 until 1913, and was Attorney-General in the Reid-McLean Ministry.

The South Australian delegates played an important role in ensuring that each State should continue to have a Governor. The Imperial government's then Secretary of State for the Colonies, Joseph Chamberlain, hoped that Federation would mean that in future he would only have to deal directly with one person in Australia, the Governor-General. Meanwhile, some Australian politicians had seen Federation as an opportunity of downgrading the importance of Governors by following the Canadian model and having them, not just redesignated "Lieutenant-Governors", but also commissioned by the Governor-General instead of by the Queen.

The radical liberals, Cockburn and Kingston, united with the conservatives, Downer and Symon, in vigorously opposing such a development. They supported an observation Sir Samuel Griffith had made in 1891, when he was still Premier of Queensland, that the title "Governor" should continue to be used because it was "the proper term to indicate that the States are sovereign". The South Australian Constitution-makers stressed that the Governors must not in any way be representatives of the Governor-General or subordinate to the national government. They should remain entitled to communicate directly with Imperial authorities. This would underline their independence from federal Ministers. Moreover, as in the case of the Governor-General, to save them from the Scylla of becoming dangerously powerful within their domain and the Charybdis of being mere party puppets, they must continue to be appointed, not given any mandate by being elected by the people. The Convention of 1897-98 accepted these propositions by very decisive majorities.[19]

Equally interesting was the South Australian response when the matter was re-opened in the early 1970s by Gough Whitlam. One of the many things that Labor Prime Minister did to upset all State governments was to hold unilateral discussions with what he used to call "the Palace" about Australian relations with the Crown. He suggested that the Queen should assign to the Governor-General her prerogative power to appoint State Governors. Another idea he canvassed was that, when advice on a State matter was being sent to the Queen, it should be forwarded neither through British Ministers (the former practice), nor directly to her (the present practice), but through federal Ministers.

Don Dunstan, who was Premier of South Australia at the time, was, just as much as his predecessors in that office had been, utterly opposed to State Governors being made subservient to anyone in Canberra. As for Whitlam's proposals regarding the line of communication with Her Majesty, Dunstan later reminisced:

> "This, of course, provoked a bitter reaction, and so it should. Since the executive powers of Government are divided between the States and the Commonwealth, it would be quite improper, and would make the Westminster System impossible to operate in the States, were the Federal executive to be privy to and advise consent to or refusal of the recommendations of the State executives".[20]

It must be acknowledged that, while South Australians achieved many worthwhile things during the inter-colonial debates of the 1890s, several of their contributions to the framing of the Constitution of the Commonwealth had disappointing outcomes. (Sir) John Gordon, sponsor of the *Women's Suffrage Bill* enacted in 1894, served in four Ministries before Federation.[21] As a Convention delegate his special interest was interstate trade. He initiated the moves which led to the inclusion in the Constitution of the Commonwealth of ss 101-103. They authorized the setting up of an Inter-State Commission, with wide powers to administer the trade and commerce provisions of the Constitution and all laws made under them. His intention was that the Commission would enforce the principles of equality of trade, regulate the river trade, and adjudicate disputes about railways and freight rates, not only to promote fair dealing, but also to ensure that the development of transport patterns took account of national considerations.

It was a very sensible idea, but one that was to be stymied, root and branch, by the High Court of Australia. In *New South Wales v. The Commonwealth* (the *Wheat Case*) (1915), handing down one of its most regrettable decisions, the Court by a majority of two (Justices Barton and Gavan Duffy strongly dissenting) so effectively emasculated the Inter-State Commission that it was allowed to become defunct when the terms of its original members expired in 1920.[22]

The majority judgment was the fruit, not of the Constitution-makers' intentions, but of the adoption, by three of the Court's newer Justices – (Sir) Isaac Isaacs, (Sir) George Rich and (Sir) Charles Powers – of the 18th Century Baron de Montesquieu's conceit that it was desirable to have a complete "separation of powers". As the best legal historian we have had in Australia, Professor Geoffrey Sawer, noted:

> "There is no evidence that the Federal Fathers in general had the slightest desire to imitate the French theory of separation of powers, which was based upon a misinterpretation of English practice, nor the American theory which was based upon a misinterpretation of the French".[23]

That conclusion has been cited with approval by a more recent law Professor at the Australian National University, Michael Coper.[24]

It should have been obvious to the majority on the bench, as it was to Justices Barton and Duffy, that any notions about a separation of powers were not merely contrary to the thinking of those who framed the Constitution, but also alien to the historical development of the Australian variety of democracy. It is, for example, of the essence of "responsible" government that most members of the Executive must be members of the legislature. Likewise, Supreme Court judges had sat in the upper Houses of the Tasmanian and New South Wales Parliaments, just as senior members of the judiciary still sit in the United Kingdom's House of Lords. Moreover, law-making has never been confined to Parliaments. Since the *Wheat Case*, the High Court itself has been an increasingly productive fount of judge-made law.

It should also be remembered that through the decades when Sir Alfred Stephen had served as Chief Justice and President of the Legislative Council of New South Wales, he had – in his third capacity as Lieutenant-Governor – presided in the Executive Council whenever the Governor was absent or ill. In the course of the 20th Century, many other individuals were to hold office concurrently as a State's Chief Justice and Lieutenant-Governor. Indeed, one long-serving judge, Sir Mellis Napier, showed such a nice contempt for the theory that judicial and executive power should never be exercised by one person that, between 1942 and 1967, he administered the government of South Australia on 126 occasions, totalling seven years.[25] And until 1996, every Governor of South Australia was required, on assuming office, to take the judicial oath as well as the oath of allegiance. But leaving aside the alien notions Isaacs, Rich and Powers tried to read into our fundamental instrument of government, the High Court's decision in the *Wheat Case* did more than nullify part of the Constitution. It limited the Commonwealth's capacity to ensure that national considerations were given adequate attention as transport patterns evolved.[26]

Again, the implementation of James Howe's hopes for an aged and invalid pensions scheme went awry. The contest about his proposal had not been about the desirability of giving pensions to the sick and the aged, for that was already being done at the colonial level, but whether such a power ought to be left to the States, as a branch of their charitable systems, or given to the national legislature, as was the case in Germany, where there were some 12,000,000 contributors to a national insurance scheme. Howe had argued for emulating the German model, submitting that it was the only effective means of ensuring that Australians "need never fear the pauper's lot". He declared:

> "I would compel every able-bodied man, in the heyday of youth, when he has the means, to make a compulsory contribution towards a fund, out of which provision would be made for his old age. That is another reason why the Federal authority should take it instead of the State, because within the boundaries of Federated Australia a law can be enacted compelling that individual, who is to

receive the benefit, to contribute to the fund in which he is to participate".[27]

As it happened, when the Commonwealth exercised its power to introduce a pension scheme, Prime Minister Alfred Deakin decided to play Santa Claus and fund it from the Commonwealth's surplus revenue, rather than by implementing Howe's plan that everyone who had an income should be required to contribute to a national insurance scheme.[28] The result was that Australian aged and invalid pensions have always been means-tested and very modest.

There were other disappointing outcomes. As chairman of the Finance Committee at the Convention of 1897-98, Holder had been the principal author of the crucial constitutional clauses governing the Commonwealth's financial arrangements. In the first years of Federation, many South Australians thought these provisions a great achievement. Subsequent events have given a different perspective. By 1961 a South Australian Crown Solicitor, Albert Hannan, QC, could brand the financial clauses:

> "… a fatal flaw in the Constitution ... a tragic error, fruitful of much avoidable hostility between the Commonwealth and the States, and leaving a serious maladjustment in their financial relations".[29]

Why the change in opinion? Customs and excise duties had been the major source of revenue for the colonial governments. To achieve uniformity in them, and the still greater goal of intercolonial free trade, the Convention delegates had agreed that those duties would in future be set by the federal Parliament and collected by the federal Government. All the Constitution-makers believed that the resultant revenue would be far greater than the central administration would need. They had also agreed that there must be some mechanism for preventing federal extravagance. Moreover, it was clear that the States could not continue to fulfil their obligations if deprived of most of their income.

Proposing that the Commonwealth should return to the States a minimum percentage of the customs duties collected, Holder initiated what became s.87 of the Constitution. His suggestion was that the proportion to be handed over should be 70 per cent. That was accepted at the Adelaide session of the Convention of 1897-98. At the next session, in Sydney, Tasmanian Premier Sir Edward Braddon, strongly supported by Holder (whose Finance Committee had by then completed further work estimating the federal government's financial needs), succeeded in lifting the States' minimum share from 70 to 75 per cent. Political leaders and journalists in New South Wales, which had the lowest tariffs, consistently attacked this clause, rightly fearing it would prompt federal politicians from other States to set the required uniform tariff higher than the people of New South Wales would wish. But, because of Sir Edward's amendment to it, they now dubbed it "the Braddon Blot".

In the campaigning leading up to the first New South Wales referendum on the draft Constitution, this clause was the main target of criticism from the "Anti-Billites" in that Colony. The result was that the number of "Yes" votes, although a majority of those cast, did not meet the target prescribed by the New South Wales Parliament. When the Premiers met in secret conference in Melbourne early in 1899, to consider what to do in view of the outcome of the New South Wales poll, South Australia was represented by Kingston. He went along with those who held that Premier Reid should be pacified by limiting the compulsory operation of s.87 to the first ten years of the Commonwealth's existence. After that, it would be up to the federal Parliament to decide what to do with the customs and excise revenue.

After Federation, Liberal and Labor Prime Ministers began thinking about ways of currying favour with electors by using the revenue for their own, Commonwealth, purposes. To help meet the problems which a loss of the States' entitlements, after 1910, would cause, especially in the less populous States, in 1899 the Premiers had inserted a new clause, which became s.96 of the Constitution. It authorized the federal Parliament to "grant financial assistance to any State on such terms and conditions as the Parliament thinks fit". These two changes removed the principal constitutional guarantee of each State having the financial resources to continue to be able to settle local matters in its own way. But everyone

who queried the Premiers' alterations, before the final round of referendums was held, was told that the Senate would ensure that a federal distribution of power and resources would always be upheld. The South Australian whose reputation must bear some responsibility for the unhappy long-term outcome of s.87 was clearly not Holder, but Kingston.

The second string to Holder's bow had been to secure acceptance of what became s.94 of the Constitution, authorizing the monthly payment to the States "of all surplus revenue of the Commonwealth". This led State governments to believe they had a constitutional right to receive regular distributions of all federal revenue not actually expended for Commonwealth purposes. But by 1908, Prime Minister Alfred Deakin and his Treasurer, Sir William Lyne, perceived that there was a way of evading the obligation. In that year they managed to persuade the federal Parliament to pass a *Surplus Revenue Act*. This purported to permit the Commonwealth's surplus revenue to be put aside into a trust account, with the object that it would ultimately be used for federal rather than State purposes, that is, for Deakin's aforementioned invalid and old-age pensions. The validity of the *Surplus Revenue Act* 1908 was immediately challenged in the High Court, but the Justices upheld it. They all agreed that putting money aside in a trust fund was "expenditure". Consequently, that device has been in use ever since.

In the first eight years of Federation, South Australia had received, on average, 80 per cent of the customs and excise revenue that the Commonwealth collected in the State. For the next two years, each State's share fell to the minimum specified in s.87. That reduced allocation amounted to 50 shillings per head of population. Thus it had remained a significant element in the State's budgeting. The Price-Peake Labor-Liberal Coalition Ministry in South Australia became as anxious as all the other State governments about what was to happen after 1910.

By March, 1909, when the Premiers met in Hobart for what had by then become their annual conference, they had the purpose of organizing resistance to what they called "the encroachments of the Commonwealth". Andrew Fisher, heading the second Labor federal government, reassured them that it was not his intention to seize the whole of the customs and excise revenue when the Braddon Clause expired. But he would give no clue as to what he had in mind, and left early. This stirred the Premiers to reach the first definite proposal they had been able to agree upon since Federation. Five of them were Liberals, as was Peake, representing South Australia as Acting Premier. They demanded that the States should receive a fixed proportion of the customs and excise revenue after 1910, but proposed that it should be not 75 but 60 per cent. Their modesty was an acknowledgment that their responsibility for social welfare had been diminished by the Commonwealth pension scheme.

When the Premiers next met in conference, in August, 1909, Deakin was again Prime Minister and Peake had become the Premier of South Australia. Deakin offered a grant of 23 shillings a head. After much haggling, the Premiers were given no option but to settle for 25 shillings, only half the amount they had been receiving since the passing of the *Surplus Revenue Act*. Deakin represented that without this savage cut, the new Commonwealth pensions system could not continue in operation. He threatened that, unless the Premiers yielded, the onus of providing those pensions would be thrown back upon the States – South Australia having been one of the three that had only ever paid pensions to retired judges and certain other people who had been on the public pay-roll.

Now that the eligible needy had been led to expect that they had a right to a pension, the Premiers had no wish to take up the burden of satisfying those expectations. Nor did they want to be seen as having precipitated a termination of a popular social welfare measure. Fear for their own political futures led them to abandon all further efforts to preach the merits of Howe's plan that pensions should be funded by a compulsory contributory national insurance scheme. Thus they accepted Deakin's offer, and the federal Parliament approved the deal.

The second of the Premiers' Conferences held in 1909 can be regarded as the commencement of what advocates of States' Rights call the era of coercive federalism, with all handouts from the

Commonwealth being offered on a take it or leave it basis. It was soon followed by the Commonwealth's entry into the fields which had provided the States with their other main sources of revenue – land tax, income tax, and the taxing of deceased estates – which most of the Constitution-makers had presumed would remain State preserves. Federal Ministers ignored State protests about this development, and Senators lent no support to the representations from all the Premiers. A decade later the attaching of conditions to handouts from federal funds commenced.

The resultant position was nicely encapsulated in an often-told story about Prime Minister Chifley. He is reputed to have ruled, after a vote on one of his proposals at a Premiers' Conference in the 1940s: "Ayes 1. Noes 6. I think the Ayes have it!".

It is ironic that all those talented South Australians who had shared in the framing of the Constitution of the Commonwealth had believed, so far as one can discern from their public statements, that the States, collectively, would be the dominant partners of the Federation, able to curb Commonwealth profligacy. Yet Kingston must have grasped the long-term implications of what he had agreed to at the secret Premiers' Conference of January, 1899, especially after the alarm bells the proprietor of the Adelaide *Advertiser*, Sir Langdon Bonython, rang when the outcome of that meeting became known. For nine decades after 1909, the pre-Federation Premiers' time limitation on the compulsory operation of Holder's and Braddon's s.87, and the Deakin-Lyne device for evading the intent of s.94, were widely regarded as the underlying source of most of South Australia's periodic financial difficulties.

From our various individual perspectives, we are all aware that there are flaws in the way Australian federalism operates at the present time. What has almost completely faded from the public consciousness is the reality that most South Australian voters became disenchanted with Federation even more quickly than did State politicians. It seems that no one – with, once again, the probable exception of Kingston – had anticipated that the first federal Ministry would impose so high a protective tariff on goods imported from overseas.

The price of hundreds of basic commodities, from clothing to pots and pans, matches, rainwater tanks, wire netting and fencing wire, rocketed. Everyone resented the introduction of a far higher impost on tea. And from 1902 onwards, South Australians had to pay more than six times as much for their sugar as they had been used to paying for sugar imported from Java. That startling new impost was the price Queensland's sugar producers had exacted for agreeing to the repatriation of the South Sea Islanders who had been working on the northern canefields. Even so, it was another twenty years before the output of Australia's sugar producers could meet domestic demand. As a result, sugar still had to be shipped in from overseas, but the tariff meant that private consumers now had to pay dearly for it. In this way, the federal Parliament compelled southern families to subsidize the canegrowers and, more particularly, the white cane-cutters who, through industrial action, were most successful in obtaining wage increases.

As Adelaide's foremost creative writer, C J Dennis observed, the burden of that first batch of new imposts fell most heavily on the poor. He was moved to pen a lament expressing second thoughts about Federation. It began:

"When I went fer Federation I was led to understand,
If the States into a Commonwealth was turned,
It was sure to make Australier a peace an' plenty land
An' a sorter paridise fer all concerned.
There's some sees the advantage uv the union, I suppose,
But all thet Federation's done fer me
So fur as I kin see it, is to 'ave the dooty rose
On me baccy an' me sugar an' me tea.

CHORUS

Then it's hi for Federation!
An' a dooty on yer weed,
An' it's one united nation!
An' a tax on all you need.
Oh, it's fewer smokes o'nights!
An' it's drinkin' tea that bites
An' it's raise the price o' lights
With Federation".

With characteristic hyperbole, Dennis went on to suggest that white pastoral workers would be reduced to going about carrying firesticks and smoking gum-leaves. But there was some seriousness in his complaint that "they've done me fer me pleasures, an' it's gettin' past a joke".[30]

In 1902, Patrick Glynn, who had become a Member of the House of Representatives, observed that if the people were again asked to vote on the question of Federation, after twelve months experience of it, it was likely that there would be a majority against it. Lady Tennyson, the wife of the State Governor, in a letter to her mother written in March, 1902, reported several persons telling her more forthrightly that if electors could be allowed an opportunity of reconsidering the matter, "there would not be one single vote in favour" of the Commonwealth. "The people", she added, "say they have been entirely deceived & that Federation is absolutely different from what they were promised".[31] When general elections for the second federal Parliament were held in December, 1903, only 32 per cent of the South Australians on the rolls voted, a sharp difference from the 52 to 53 per cent who voted in Victoria and New South Wales, the States where secondary industry had burgeoned enormously under the protection afforded by the new tariff.

Minority groups were disadvantaged too. A new *Posts and Telegraph Act* 1901 decreed that "only white labour shall be employed … [in] the carriage of mail". There was no attempt to mask the racism that inspired this piece of discrimination. It slipped through both Houses without remark. It slighted not only Aboriginal Australians, but also the Asian camel drivers who had done so much to open up communications in the outback. From Hergott Springs (now Marree, the starting point for the still-famed Birdsville track) alone, they were still operating teams totalling over 2,000 camels in 1901. Even more worked from the northern railhead at Oodnadatta. We can only assume that the Postmaster-General, Queenslander Jimmy Drake, was unaware that one outstanding cameleer and mailman, former Indian Army Sergeant Bejah Dervish, had lately been honoured with a reception and presentation at Adelaide's Government House for his heroic exploits – which had included saving the life of Penola-born white explorer Lawrence Wells – in the Western Desert.

I have mentioned Holder's insertion of s.41 of the new Constitution, guaranteeing the federal franchise to everyone who had a right to vote for the lower House of their State Parliament. Nevertheless, after the first federal election had been conducted – by the States' electoral officers, as the Commonwealth had none at that stage – the Commonwealth's first Solicitor-General, (Sir) Robert Garran, ruled that s.41 meant that only those Aborigines who were actually registered on the electoral rolls on 1 January, 1901 could vote in future federal elections. He ordered that no additional Aboriginal people were entitled to have their names added to the lists. The matter rested there until the 1940s, when the Chifley Government legislated to confirm that Aboriginal people had the right to enrol and vote in federal elections. By that time, of all the "full-blood" Aborigines who had possessed the federal franchise from 1901, there was only one (a South Australian woman) left alive.

For reasons that need not detain us here, the British Empire's supreme appellate tribunal, the Judicial Committee of the Privy Council, was going through a bad period in the 1890s. Sir Josiah Symon was the most outspoken of those who had believed that a better final court of appeal could be established

in Australia. He was bitterly disappointed at the outcome. The first High Court was full of contradictions. Its Justices veered dramatically from a strict legalism that had almost no precedents in Australian judicial practice – thus resulting in judgments of the State Supreme Courts being set aside left, right and centre – to a subjective reliance on their personal understanding of the essential nature of the Constitution they had shared in drafting. This threw, not just State judges, but also the nation's barristers into turmoil and confusion for several years.[32]

Symon believed that too many of the new Court's judgments were wrong. He was especially upset when, in 1911, it determined the long-running dispute about the boundary between South Australia and Victoria. In that case the Justices held, to the astonishment of most of the nation's lawyers, that a boundary defined as a meridian of longitude has no meaning until it is marked on the ground. Hence, they maintained, the line the early surveyors Wade and White had erroneously marked, several kilometres to the west of the boundary specified in two Imperial statutes, two Imperial Orders in Council, and Royal Letters Patent, was the true boundary. Ever since, many have thought that this reasoning was bizarre and indefensible.

By the early 1910s, South Australia's then Governor, Sir Day Bosanquet, an elder brother of leading British moral and political philosopher Bernard Bosanquet, was reporting to the British Secretary of State for the Colonies that, because the High Court's Justices' States of origin could affect their perception of federal issues, justice might be done, but it was unlikely to be seen to be done whenever the State of South Australia failed in any litigation against its eastern neighbours or the Commonwealth, until such time as a South Australian had a seat on the High Court.[33] More than ninety years later, similar grumbles can still be heard, because no South Australian has ever gained a place on that tribunal.

Many parliamentarians who, in the 1890s, had striven earnestly to uphold the principle that everything that could be managed locally ought to be managed locally, became centralists after their move to the federal arena. And as a result of the dominant position federal governments have asserted, centralism has yielded a long list of broken promises. Since 1903, federal politicians have tended to look first to their particular party's interests, which they all too easily claimed were the nation's interests, rather than to their constituents' needs and interests. Meanwhile, others have displayed a genuine though sometimes excessive concern about national interests. Sir John Downer affords a striking example.

After three years in the Senate, Downer returned to South Australia and served as a Legislative Councillor from 1905 to 1915. His performance in that role showed he had been profoundly influenced by his time in the federal Parliament. The change was clearly apparent, for example, in his attitude towards an obligation the Commonwealth had entered into regarding completion of the Transcontinental Railway, to link Adelaide and Port Darwin. In 1907, when South Australia's first Labor Premier, Tom Price, negotiated a transfer of the Northern Territory to the Commonwealth, it was written into the agreement, and into the subsequent South Australian and federal legislation ratifying the transfer, that the Commonwealth would pay the full cost of finishing the construction of that link, by building a line either from Oodnadatta (1,107 km by rail from Adelaide), or from Hergott Springs (further south, but closer to the New South Wales border) to Pine Creek (235 km by rail from Palmerston – the town that was renamed Darwin in 1911).

South Australian Ministers had tried very hard to have written in to the agreement a date for commencement of the work, for they were well aware that construction of the long-promised Trans-Australian Railway (across the Nullarbor, to link Kalgoorlie to Port Augusta) had still not commenced.[34] Prime Minister Deakin, however, refused to be bound to a starting date. The consumptive Tom Price accepted this, in defiance of a House of Assembly resolution that he should not.

Most Legislative Councillors responded by expressing such indignation that it seemed certain that their Chamber would veto the whole package. But Downer delivered an impassioned and remarkably sentimental speech in defence of the Premier's conduct. He suggested that safeguarding South Australia's

interests was less important than letting the "Federal spirit" shape the local Parliament's decision-making. State legislators had no right to dictate terms to a government which must consider the needs of the whole continent. If the Commonwealth accepted the burden of completing the Transcontinental Railway, it must be allowed to choose the starting date in its own good time. He went so far as to insist that people "must trust" the federal government. "It was upon the good faith of the Commonwealth that they had to rely", said Sir John. The Premier's agreement with Deakin was "a national engagement founded on honour". It should be assumed that "honour would be preserved!".

Fatally for the many who wanted the railway, two of Downer's fellow Legislative Councillors accepted his reasoning without perceiving its naivety, and so the legislation scraped through. That was in 1907. Downer must have eaten his words before he died in 1915. The Commonwealth did not commence any work on the railway until 1927. The section from Oodnadatta to Alice Springs was completed in August, 1929, but the Depression then became the excuse for proceeding no further.

While serving on a national committee in 1979-81, I drew the relevant documents recording the State's surrender and the Commonwealth's acceptance of the transfer of power to the notice of our chairman, Mr Justice Rae Else-Mitchell, who also headed the Commonwealth Grants Commission. He took up the cause with zest, and in the Commission's next report he urged that the line must be completed. In 1983, Prime Minister Malcolm Fraser managed to accept that the Commonwealth had a legal as well as a moral obligation to finish the job, but he lost office shortly afterwards. Now that the railway is at last being carried forward north from the Alice, the Howard Government is contributing a mere 10 per cent of the cost – a very strange way indeed of fulfilling "a national engagement founded on honour".

Sir John Downer's main fault had been to assume that a significant number of those who had served with him in the federal Parliament shared the high standards he had set for himself. Sadly, in the century that has elapsed since he left the Senate, not enough have done so.

At the beginning of the 1990s, many citizens who had always preferred federalism to centralism were dismayed when levels of ministerial corruption we had never previously witnessed in this country became manifest in the governments of several States. That era of disillusionment stimulated some healthy reactions, but South Australia's recovery has been painfully slow in many areas. Despite all the faults that can still be found in the operation of Australia's present constitutional arrangements, I believe the federal character of those arrangements should be maintained. The reasons are:

- Our federal system more than adequately sustains national unity;
- There is no alternative constitutional arrangement which would permit the same degree of diversity, flexibility and experimentation in public policy as a federal system does;
- The Commonwealth's financial dominance not-withstanding, the States have remained strong enough to be the most effective available organs for defending the needs of the people each State serves;
- Any new system of regional governments (such as the one proposed by former Prime Minister Gough Whitlam), which possessed only such functions and authority as might be delegated to them by a central government, would mean that those new subordinate governments would have nothing like as much bargaining power as the present State governments can exert in policy making and the distribution of resources;
- Because they are closer to the communities they serve, the States are more responsive to local needs than any national government can be, and they have been less susceptible to domination by powerful interests indifferent to the welfare of small to medium-sized businesses, let alone the welfare of individuals.

I am glad to be able to add that in 1996, when I was chairing the South Australian Constitutional Advisory Council, a broadly representative body of people from a variety of ethnic backgrounds and a

variety of occupations, all but one of its members agreed with these propositions.[35]

**Endnotes:**

1. Several of the matters canvassed in this paper are explained more fully in the author's recent book, *South Australia and Federation*, Wakefield Press, Adelaide, 2002.

2. Janet Pettman, *The Australian Natives' Association and Federation in South Australia*, in *Essays in Australian Federation*, ed. A W Martin, Melbourne University Press, 1969, pp. 122-36.

3. *Official Report of the National Australasian Convention Debates, 22 March to 5 May 1897*, Government Printing Office, Adelaide, 1897, p. 17.

4. *Ibid.*, pp. 338-45.

5. *The Advertiser*, 25 April, 1891.

6. 46 CLR 155.

7. *Report of the Royal Commission on the Constitution*, Government Printer, Canberra, 1929, pp. 86-7.

8. It seems an astonishing impost now, but they got away with it on the ground that it was necessary to help fund the costs of the war with Japan, on which Canberra was spending the then staggering sum of a million pounds a day. If one takes into account the rise in average wages since 1942, that federal expenditure is equivalent to $90 million a day at the present time.

9. T Playford, *The Case for Restoring the Balance of the Federal System*, in *Federalism in Australia*, ed. G S Reichenbach, F W Cheshire, Melbourne, 1949, pp. 64-88.

10. Stewart Cockburn and John Playford, *Playford: Benevolent Despot*, Axiom Books, Adelaide, 1991, p. 151.

11. *The Australian Financial Review*, 13 September, 1996; *The Advertiser*, 16 November, 1996.

12. A C Castles, *Two Colonial Democrats*, in *An Australian Democrat*, ed. Marcus Hayward and James Warden, University of Tasmania, Hobart, 1995, pp. 19-36.

13. Sir Percy Joske, *Australian Federal Government*, Butterworth & Co, Sydney, 1967, pp. 90-1.

14. *The Biographical Dictionary of the Australian Senate*, Vol. 1, ed. Ann Millar *et al.*, Melbourne University Press, 2000, pp. 2-3.

15. Cockburn was appointed KCMG in 1900, when serving as South Australia's Agent-General in London.

16. *Official Record of the Debates of the Australasian Federal Convention Second Session, 2 to 24 September 1897*, Government Printing Office, Sydney, 1897, p. 1086.

17. On the use of lower case letters for "northern territory", see the author's *South Australia and Federation*, pp. 181-2. Section 6 of the *Commonwealth of Australia Constitution Act* has never been amended, although South Australia's northern territory was transferred to the Commonwealth in 1911.

18. *Official Record of the Debates of the Australasian Federal Convention third session, 20 January to 17 March 1898*, Government Printing Office, Melbourne, 1898, Vol. 2, pp. 50-2 and 135.

19. *Official Report of the National Australasian Convention Debates,* Adelaide, 1897, pp. 993-7, and *Official Record of the Debates of the Australasian Federal Convention third session,* Melbourne, 1898, Vol. 2, pp. 1706-15.

20. D A Dunstan, *The State, the Governors and the Crown*, in *Republican Australia*, ed. Geoffrey Dutton, Sun Books, Melbourne, 1977, p. 208.

21. Gordon was appointed QC in 1900, and was knighted in 1908, a quarter of the way through his twenty years' service as a Justice of the Supreme Court of South Australia.

22. *New South Wales v. The Commonwealth*, (1915) 20 CLR 54. G Sawer*, Australian Federal Politics and Law*, 1901-1929, Melbourne University Press, 1956, pp. 153 and 193 n. 81. Under fresh legislation passed by the last Whitlam Ministry in 1975, but not proclaimed during the Fraser years, the Inter-State Commission was reconstituted by the Hawke government in 1983-84, but killed off again – this time by Paul Keating – five years later. M Coper, *The Second Coming of the Fourth Arm: the role and functions of the Inter-State Commission*, in *Australian Law Journal*, Vol. 63 (1989), pp. 731-750.

23. G Sawer, *Australian Federalism in the Courts*, Melbourne University Press, 1967, p. 152.

24. Michael Coper, *Encounters with the Australian Constitution*, CC Australia LAW, Sydney, 1987, p. 90.

25. Sir Mellis retired from the bench in 1967. By the time he also relinquished the Lieutenant-Governorship, in 1973, he had administered the government on a further 53 occasions, making his total service as South Australia's acting Head of State nearly nine and a half years – longer than any Governor of the State.

26. U R Ellis, *Trade, commerce, transport and the Inter-State Commission*, in *Rural Research*, Canberra, 1957, p. 2. C A Maskell, *Changing perceptions of the Australian Inter-State Commission*, Centre for Research on Federal Financial Relations, Canberra, 1982, pp. 26-43.

27. *Official Record of the Debates of the Australasian Federal Convention third session*, Melbourne, 1898, Vol. 2, p. 1992.

28. A contributory national insurance scheme, to fund the payment of social services, was made part of the policy of the Liberal Party and its successors from 1913 onwards. The necessary legislation was finally enacted in 1938, when RG (afterwards Lord) Casey was Commonwealth Treasurer, but it has never been proclaimed – initially because the Lyons Cabinet decided that the then threatening international situation meant that defence preparations must have top priority. Robert Menzies resigned from the Lyons Ministry in protest at the postponement. However, on the death of Lyons, Menzies agreed to say nothing more about national insurance as a condition of his becoming the new Prime Minister. G Sawer, *Australian Federal Politics and Law, 1901-1929*, Melbourne University Press, 1956, p. 111. G Sawer, *Australian Federal Politics and Law*, *1919-1949*, Melbourne University Press, 1963, p. 102.

29. A J Hannan, *Finance and Taxation*, in *Essays on the Australian Constitution*, ed. R Else-Mitchell, 2nd edn, Law Book Co, Sydney, 1961, p. 249.

30. Published in the *Critic*, Adelaide, 19 October, 1901. As far as I can ascertain, it had never been reprinted before I came across it in 2001.

31. *Audrey Tennyson's Vice-Regal Days*, ed. (Dame) Alexandra Hasluck, National Library of Australia, 1978, p. 207.

32. J M Bennett, *Keystone of the Federal Arch*, AGPS, Canberra, 1980, pp. 25-9.

33. I came across this passage in the Public Record Office, London, in September, 1976, when reading the private, secret and confidential despatches Bosanquet had written in 1909-1915 to the Earl of Crewe and Lewis Harcourt at the Colonial Office. Sadly, as it had no relevance to the matters I was investigating at that time, I did not note its date.

34. It was not built until 1912-1917.

35. The South Australian Constitutional Advisory Council, *Second and Final Report: The Distribution of Power between the Three Levels of Government in Australia, and the Importance of Education and Consultation in Constitutional Reform*, AGPS, Adelaide, 1996, pp. 30-1.

# Chapter Six
# John Latham in Owen Dixon's Eyes

Professor Philip Ayres

Sir John Latham's achievements are substantial in a number of fields, and it is surprising that, despite the accessibility of the Latham Papers at the National Library, no-one has written a biography, though Stuart Macintyre, who did the *Australian Dictionary of Biography* entry, has told me that he had it in mind at one stage.

Latham was born in 1877, nine years before Owen Dixon. As a student at the University of Melbourne, Latham held exhibitions and scholarships in logic, philosophy and law, and won the Supreme Court Judges' Prize, being called to the Bar in 1904. He also found time to captain the Victorian lacrosse team. From 1917 he was head of Naval Intelligence (lieutenant-commander), and was on the Australian staff at the Versailles Peace Conference.

Latham's personality was rather aloof and cold. Philosophically he was a rationalist. From 1922-34 he was MHR for the Victorian seat of Kooyong (later held by R G Menzies and Andrew Peacock), and federal Attorney-General from 1925-29 in the Nationalist government, and again in 1931–34 in the Lyons United Australia Party government. In addition he was Deputy Prime Minister and Minister for External Affairs from 1931-34. He resigned his seat and was subsequently appointed Chief Justice of the High Court (1935-52), taking leave in 1940-41 to go off to Tokyo as Australia's first Minister to Japan.

Latham was a connoisseur of Japanese culture. He fostered a Japan-Australia friendship society in the 1930s, and in 1934 he led an Australian diplomatic mission to Japan, arranging at that time for the visit to Australia of the Japanese training flotilla. Through Latham, Dixon met the senior Japanese officials in the legation here, and they were still socialising with these officials two weeks before Pearl Harbor.

Already in the 1920s Dixon knew Latham quite well, sitting with him on the Victorian Bar Council, for example. They differed on aspects of constitutional interpretation. Dixon's 1927 submission on behalf of the Victorian Bar Council to the Royal Commission on the Constitution of the Commonwealth foreshadows three or four of his later judgments, most importantly that in the *Boilermakers' Case* (1956).

In his evidence to the Commission, Dixon argued for a strict interpretation of the doctrine of the separation of powers, and referred to the Commonwealth Court of Conciliation and Arbitration, which had been vested with non-judicial (arbitral) as well as judicial powers. This, he stated, "might lead to difficulties . . . but no one has hitherto been courageous enough to pursue this argument". In Dixon's view the necessity of preserving a completely independent judiciary in a federal system may be said to be absolute:

> "Whether it is possible or not to confer non-judicial power upon the High Court or any other Federal court created pursuant to s.71 or s.72 is by no means clear, but we are of opinion that it should not be possible to confer such power".[1]

Here the decision (upheld by the Privy Council) in the *Boilermakers' Case* is anticipated by almost thirty years.[2]

A later letter of Dixon's clarifies his position on this question in 1926-27. Writing to Lord Simonds (Lord Chancellor, 1951–54) in 1957, he pointed out that in 1926 he had warned Latham on the matter – as federal Attorney-General, Latham was the author of the amended *Conciliation and Arbitration Act* of 1926. "But I don't think he really understood", Dixon wrote, "and of course as it was a political matter

with him his legal perception was not at its highest point".[3]

Dixon's principal concern in 1956, he told Lord Simonds, was "the length of time during which the provision had been allowed to stand" – because the power was derived from an Act Latham had introduced as Attorney-General, Latham would have fought hard to preserve it during his tenure as Chief Justice.[4] As Dixon told Felix Frankfurter, Latham "knew that I harboured ideas about the invalidity of his measure, and often on the Bench when I thought of insisting that the matter be argued, I refrained from doing so out of deference to him".

On 13 January, 1929 Mr Justice Higgins died at the age of 77, and ten days later Dixon received a letter from Attorney-General Latham:

> "My dear Dixon,
>
> I wish to know whether you would be prepared to accept a seat upon the High Court bench if you were asked to do so. I have not offered the position to anyone else.
>
> I sincerely hope that your answer will be in the affirmative. I need not emphasise to you the importance, the responsibility, or the interest of the work. You would render a service to the people of Australia by undertaking it. I am sure that your appointment would be welcomed with unqualified approval, alike by the profession and the public.
>
> It is because I know that you possess the necessary qualities of character knowledge and temperament that I have pleasure in writing this letter and in awaiting what I hope will be a favourable reply.
>
> Yours
>
> J G Latham"[5]

Latham told Zelman Cowen that his success in persuading Dixon to accept the seat "was his finest achievement as Attorney-General".[6]

The High Court Dixon joined was riven by conflicts of personality, and by the end of 1934, and probably much earlier, he was looking for an opportunity to resign, though it no doubt occurred to him that, from the position of Chief Justice, it might be easier to improve the Court's tone and harmonise some of the discord. First, though, the octogenarian Frank Gavan Duffy, who had succeeded Isaacs in early 1931 on a "Depression" Court of six rather than seven members, would have to retire and the right appointment be made. That would not be Rich, nor would it be Starke, and as for Dixon no member of the Court had ever been appointed Chief Justice over another, though that did not mean it could not happen.

The next Chief Justice, however, was destined to come from outside. In 1934 John Latham resigned as Lyons's Attorney-General – or, as Sir John Higgins (who was close to members of Cabinet) told Dixon, "was dragged screaming from the perch"[7] (alluding to Latham's high-pitched voice) – in favour of Robert Menzies, who took Latham's Kooyong seat, moving from Victorian to federal politics.

This move, in the period leading up to the 1934 elections, was probably engineered by a small group of people concerned at Latham's lack of popular appeal, and with the intention of positioning Menzies to take over from Lyons after a short time. The circumstances are obscure. Latham returned to the Bar, with tacit assurances, it was said, that Gavan Duffy's seat would soon be his.[8] On the other hand, should the Lyons government fall at the next elections, in 1937 or earlier, and Gavan Duffy not retire until after that, then Evatt would probably be Labor's choice for the position. These were among Dixon's and Evatt's preoccupations through the summer of 1934-35.

Later in 1935 Dixon decided that he would not accept the Victorian Chief Justiceship, which some people thought might be offered to him, telling Latham this on 6 September, when he was invited to the latter's home to meet the Japanese Consul General, Kuramatsu Murai. Latham took Dixon aside:

> "… to implore me not to accept the Vic CJ if offered. [I] Told him it had not been & would not although some time ago I was sounded. He said it would be the end of the HC. I said if he became

the CJ of the HC to see me at once. He wd be horrified. But he said that if I wished to be CJ of it & the government would offer it, he would withdraw. I said it was very kind. But if he took the unthankful job I would support him to the full".[9]

Dixon could hardly indicate an interest in the Chief Justiceship unless he knew that Menzies, as Attorney-General, would back him for it, but Menzies had not sounded him out. On 19 September Dixon saw his close friend Sir John Higgins, who occasionally saw the Prime Minister, and was told of a recent discussion in which Lyons had told Higgins that if Latham were not to be appointed, the Ministry would be regarded as breaking faith, but that he personally thought Latham unsuitable, and would not be sorry to see Gavan Duffy hang on. Menzies, he said, was anxious to appoint Latham.

That night Dixon took the express to Sydney, where all sorts of rumours about the Chief Justiceship were flying around: that Earle Page, Leader of the Country Party, was opposed to Latham, that Menzies had said no one should go from politics to the bench, even that Menzies was sick of the question and would take the position himself.[10] Then on 10 October Dixon learned from Rich that Latham had been appointed.

In Dixon's mind Latham was a usurper, and that view would colour their relationship for the future. The swearing-in was on the 17th – "Menzies saw me afterwards", Dixon noted, "& I was very curt". Latham began his new career with a cutting comment to Rich, who was explaining his failure to send written congratulations. "Excuse accepted", Latham replied. "It is not an excuse", Rich protested, "it is an explanation".[11] Starke forced a re-argument in one case, threw a fit of pique in another[12] – it was business as usual in the "new" Latham Court.[13]

Dixon thought politics unfitted a man for judicial office. When Robert Menzies entered the Victorian Legislative Council in 1928 Dixon told him, only half-jokingly:

"Well, Menzies, it is quite easy, I am told, to convert a good lawyer into a good politician. But reconversion is impossible".[14]

On the way home for the weekend Dixon ran into Menzies on the platform at Albury – "made some trivial civil observation & did not see him again".[15] It would be months before Dixon would once more think of Menzies as a good friend. With rumours flying in all directions, Menzies might have said something without impropriety. But thirty years later, in the period immediately preceding Barwick's appointment, there would be the same silence.

Dixon's integrity and seriousness of purpose, combined with his clarity of thought, led to repeated internal tensions as he perceived how frequently his expectations were let down, not just by other judges but by politicians, including Menzies. Menzies was an egotist in a way that Dixon was not: Menzies was concerned above all with his own advancement, and he frequently let Dixon down accordingly. Dixon's overriding concern was that people and institutions, and the courts especially, should act with propriety and rationality so as to discharge their duties honourably and correctly. In this context it is not surprising that he frequently resorted to the classics, and especially to Greek literature, as a refuge from deep disappointment provided by such actions and events.

Latham proposed to hold regular conferences on important cases, and Dixon makes a few references to them in the diaries.[16] But unlike the informal and frequent conferences Dixon would later convene as Chief Justice, they turned out to be irregular, and were not held on many important cases.

An interesting case of the mid-1930s shows Dixon's and Latham's different approaches to the question of criminal insanity, something that interested Dixon greatly. This was the appeal of Arnold Karl Sodeman, who had been convicted and sentenced to hang for the rape and murder of a girl aged 6, two aged 12 and one aged 16. Without going into this case here in any detail, it suffices to say that Dixon was highly critical of Latham's handling of the appeal.

The matter was heard over three days from 30 March to 1 April, but on the first day, "It seemed apparent that Latham had made up his mind on grounds of public policy to dismiss the appeal". Dixon

took Latham and Evatt to lunch at Menzies Hotel; then, after Court, when Evatt drove Dixon to the Glenferrie Road tram, Evatt mentioned that Latham had been referring to the "public danger".[17] By the following morning Dixon had decided provisionally that leave to appeal should be granted and told Evatt. On assembly, Latham was full of the need to adjourn the Sydney sittings, originally scheduled to commence that week, in order to give the Sodeman appeal "full consideration", but then Dixon learned from Alan Brooksbank that Latham had in fact dictated his judgment before assembling. "Of course this explains his complete lack of interest in my views of the case", he noted, adding that "Starke was terrible – sadism". That day Dixon had lunch with Justices Charles Lowe and Russell Martin, both on the Victorian Supreme Court with Charles Gavan Duffy, learning from Lowe that Gavan Duffy had apparently thought Sodeman irresponsible, but that the Victorian Cabinet had told him "at once" that "the public wd never stand for a reprieve".[18]

On 1 April the Court finished hearing the application. Dixon complained to Latham that Starke "had given no judicial consideration to the case", while for his part Latham appeared "quite unmoved by my attempt at legal reasoning". Dixon began writing his judgment that afternoon, having just learned from Evatt that the real reason Latham had adjourned the Sydney sittings had been his desire to attend the University Commencement that coming Saturday. Dixon's long and careful judgment was not completed until late that night, in chambers, after which he and Brooksbank walked through the cold and empty streets to Flinders Street station in time to catch the last train home.[19]

The judgments were read to a crowded courtroom the following morning. Latham's persuasively emphasised what does seem a fatal flaw in Sodeman's claim of sudden unawareness of his actions at the point of assault, namely the evidence of "planning and deliberation by the accused, choice of a secluded spot, and immediate arrangement of an alibi – all of which tended against the plea of insanity", and went on to argue that:

> "The refusal to recognise a defence of uncontrollable impulse *per se* doubtless looks for its justification, not exclusively to opinions (often differing) in scientific theory or moral doctrine, but to the interests of society and to practical considerations affecting the security of the community".[20]

Latham strongly, and I think effectively, criticised the M'Naghten rules, formulated in the mid-19th Century, which set out the grounds for establishing insanity and hence irresponsibility. In Latham's considered view these rules relied on "an abandoned system of faculty psychology which divided the mind into almost unrelated functions each existing in a separate compartment".[21]

Latham and Starke were already concerned at Dixon's strong influence on the Court, and as Evatt increasingly joined in Dixon's judgments, Latham vainly tried to rein in that influence. Dixon noted in September of that year:

> "On going to Latham's room for dinner he said he had had a long talk with Starke. There is, I think, a desire in both of them to stop my writing judgments. Latham said E[vatt] should not join in my judgments. I agreed but said why should I refuse to let him when he asks".[22]

In fact, Dixon believed at this stage that ideally every judge on the Court should write a judgment for each case on which he sat,[23] and for twenty years (as he later told Lord Morton) he did just that.[24] In certain areas of the law, however, he believed that, if possible, a Court should speak with a single voice – for example, in certain criminal cases, in order to avoid confusion at the trial level. His hand is evident in many of the High Court's joint judgments through the 1930s, and his influence on Evatt and McTiernan in particular (to say nothing of Rich) continued to grow, Starke complaining to Latham in several letters that, in his view, Evatt and McTiernan habitually "parroted" Dixon with his active encouragement:

> "Dixon may be right but let an independent majority say so. I was disgusted with the result of *Phillips and E.S.A. Bank*. Every one agreed with the view that you and I took at the close of the argument. Then Dixon suddenly alters his mind and to me a most confused judgment and the

parrots at once agree".[25]

It could hardly have been to Latham's liking that it was Dixon and not he who was now dominating the Court. Starke rubbed it in:

> ". . . it must be obvious to you as to others that the High Court is becoming more and more dependent upon the opinion of one man. It is a new development in the High Court and much to be deplored.
>
> "I don't accept your generous view that the result is distasteful to that one man. He plays up to it and really encourages it".[26]

Of course, the reason why Dixon was by now so dominant on what, without much distortion, may be termed "the first Dixon Court" was too unpalatable for Starke to mention.

In the closeted world of the High Court, Latham's manner was becoming increasingly familiar and he regularly dropped his guard. A "much talking judge", as Sir Zelman Cowen has observed, in private Latham "talked incessantly and mostly about himself".[27] Dixon appears to have had little respect for his judicial abilities, commenting on his "great ignorance" in one case and on how "extremely stupid" he appeared in another,[28] but he was more critical of Latham's personality – more so even than he was of Starke's.

There were qualities of sensitivity and honour about Starke which Dixon respected, even admired. In fact, Starke's sense of honour contributed to his intolerance of others' frailty and made him hard to work with. He exercised an independent judgment in most cases, preparing his own reasons in a tight and lucid style. His knowledge of the law was extensive.[29] Latham (who had been Starke's pupil on coming to the Bar) was not his equal in any of these respects.

Politics seemed to have coarsened Latham's sensibilities. His comments over the trial of Seaforth Mackenzie were an example of this. August, 1936 had seen the trial in Melbourne of Mackenzie, former Judge of Appeal at Rabaul and, from 1922, Principal Registrar of the High Court, a position within the Attorney-General's department. Mackenzie had run up huge debts to the Commonwealth on plantations bought in New Guinea, and had been charged with forging and uttering seals of the High Court. He was convicted and sentenced to four and a half years' imprisonment.[30] Latham told Dixon that as Attorney-General he had not removed Mackenzie, because "his offences consisted only of (1) living with a woman not his wife 'which might happen to any one' (2) failure to pay his creditors and the usual consequences, which was common to the greater part of the service".[31]

There is no comment – in Dixon's diary these quotations don't require comment. For Dixon there were absolute moral standards. Without them, all was corruption and chaos. Dixon was essentially a kind man, and although he must often have found other people's efforts inadequate, it was not his habit to criticise or upbraid. He was very accepting of the deficiencies of those around him, but he became critical when he was presented with morally culpable behaviour – arrogance, the corruption of power, or a lack of proper diligence. There is much significance in those he admired: they were inevitably persons with a strong sense of duty. Sir Leo Cussen and Sir Wilfred Fullagar were the two Australian judges he most admired, men with a profound sense of duty and high standards of personal conduct.

One evening during the Perth sittings of September, 1937 Latham "nearly exasperated me with much talk of the corrupt political world the sickening atmosphere of which did not appear to offend his sensibilities". Three nights later they dined with Walter Murdoch, Professor of English at the University of Western Australia. Numerous indecent stories were told by Latham and "the evening was ill spent. Murdoch was confirmed I could see in an opinion that lawyers were low brow".[32]

Latham's general attitude to things depressed Dixon, even though the atmosphere on the bench "was more pleasant for his presence" in consequence of his affability.[33] At a dinner party at the home of the Chief Justice of New South Wales, Sir Frederick Jordan, Latham "dominated the conversation", dragging in "a reference to Roberts' case, the sadist murder" in which there had been an acquittal,

remarking, in the presence of women including the American wife of the Chinese Consul, "that 'all the ladies were reading it'!". However, Latham "went down" well with Dudley Williams, KC, Dixon noted disapprovingly.[34] Three days later, on Rich's seventy-fifth birthday, Latham named Williams as Rich's most likely successor.[35]

Probably the worst evening Dixon ever spent in Latham's presence was on 26 November, 1938, in Sydney, when he dined as one of Latham's party in the Kent Room of the Hotel Australia. Guests included New South Wales Justices Reginald Long Innes, Colin Davidson, Kenneth Street, Allan Maxwell and Milner Stephen, as well as Rich and McTiernan. From what Dixon could overhear (he was two places to the left of Latham), Latham's conversation "included much propaganda . . . to spread the view that he had reformed the Court: the great point being that we used to short circuit counsel & that he insisted on full argument: also he dissociated himself from particular decisions". It was "a disgusting evening for me", the Kent Room "very vulgar: ditto food", Latham "obviously vain & hostile: my end of the table reduced to low jokes & stories no doubt suited to our inferiority".[36] (He enjoyed Wilbur Ham's comment that Latham was ineffable and "wore ermine in his bath".[37]) A few days later the Chief Justice seemed to be "fighting for the husband" in a divorce case and "taking rather a low attitude over sexual relations".

Standards everywhere were sliding. After court that day Dixon took a long stroll through Centennial Park and down Oxford Street, noting closely the squalor produced by eight years of economic depression, the looks in the eyes of those idling about the streets, and the tenor of their conversation. "The conditions of life", he noted, "seemed to me very bad and to be producing a very low and dangerous class of youth and young women".[38]

Dixon believed that, as Chief Justice, Latham downplayed the Court's function of judicial review of challenged legislation, and I will end with two examples. The Chifley government's decision to nationalise the banks triggered the *Bank Nationalisation Case* (1948), the longest, costliest and most interesting case of the 1940s.[39]

The case was to begin on 9 February, 1948, in Melbourne. The Government tried to strengthen its hand in advance by endeavouring to get Webb back from Tokyo and, through Evatt as Attorney-General, making diplomatic overtures to the Chief Justice. Evatt met with Latham at 5 pm on 9 December, a meeting about which Latham chose to remain silent. Dixon learned of it independently, probably (like Rich) through his staff.

Discussing the matter with Dixon on the 11th, Rich thought it unlike Evatt to call without requesting to do so, wondering why the Chief Justice had concealed the visit (perhaps he suspected that Latham was prepared to be influenced by Evatt). Dixon replied that concealment was instinctual with Latham – it probably meant nothing. Next day he saw Latham on his return from the cricket, where he had met Evatt, who had said " 'all was set: affdts filed'[.] L. did not mention having seen him before".[40]

If it was not clear from this that the Government was fiddling with the Court, it became so on 29 January:

> "Latham rang up at noon to say that through DEA [Department of External Affairs] he had received decyphered a telegram from Webb saying that the PM had requested Gen Macarthur to enable Webb to return to Australia for the hearing of the Banks case & that it would be necessary for him Webb to resign from the War Crimes Tribunal & that Bks [Banks] should have chance of objecting. I said that he shd cable Webb that he was writing & to do nothing pending receipt of a lre [letter] & should air mail (sat [Saturday] to avoid DEAs reading it) a lre telling Webb he was not required & ought not to resign. L said [Solicitor-General Kenneth] Bailey had made an appointment to see him & he wd tell me what passed. I said he shd tell Bailey nothing except it was no business of the Government's. I also said if Webb came & his presence affected the result I would grant a certificate [allowing appeal to the Privy Council] & state the reason[.] In the evg at the Club L told me that he told B the Govt had no right to deal with the constitution of the Court,

plrly when a litigant. B said he came about the message which he had seen. L said he wd communicate with Webb but not through DEA & he 'authorized' B to show the copy of Webbs message to him to the PM & AG (though he knew they had seen them). B produced a cutting from *The Bulletin* (28/1/48 cabled additions) quoting from the *Chicago Tribune* about Webb's return in November [1947, a brief trip home] & said the Govt could not stand up to the consequences of Webb's resignation from the tribunal at this stage: that probably it would be decided on Friday that he should not be asked to do it: that the PM had not sought to recall him but only to ask Gen Macarthur to facilitate his return shd Webb wish to come (a lie). L said he did not ask B to tell him the result but of course he wd be interested. *Credat Judaeus Appella*".[41]

Had Dixon not pressured Latham so strongly on the matter, the Government might have gone ahead and engineered Webb's early return to the Court.

During the case Latham began to show his hand most unguardedly. On 23 February Frank Kitto, KC finished his "clear and acute" argument for the Bank of Australasia, Alan Taylor, KC for the same plaintiff followed him and finished, and Edward Hudson, KC began his argument for the State of Victoria. Dixon noted that Latham:

> ".....seemed openly to espouse the Govt & met every contention of the Bank with initial disfavour. It is not easy to understand; perhaps due to settling down upon his habitual bias for the Govt & antipathy to what he regards as the bias of Starke & Wms. Most of the points were disputable but he gave bad answers even to the good ones & before they had been formulated".

Latham found himself in a minority of two, with McTiernan also supporting the legislation. In the *Communist Party Case* (1950) he was in a minority of one. Again he seemed predisposed to support the Government, this time the Liberal Government. Like Dixon, Latham was unimpressed by Barwick's case for the legislation, but Latham nevertheless thought the Act valid. When he read to Dixon the opening section of a judgment he had been preparing, Dixon observed that, "It sickened me with its abnegation of the function of the Court & I said so".

Like Fullagar, who stressed it in his judgment, Dixon believed strongly in the doctrine of judicial review – the Court's right and responsibility, under a federal Constitution, to decide whether challenged Acts of the legislature were within power, a principle on which Latham was notoriously ambivalent.[42] It is interesting that when Latham circulated his judgment, Fullagar was concerned and upset by it, Kitto more concerned for Latham, "whether it meant that he had something wrong with him", while "Dudley Williams considered him mad".[43]

Dixon's comments on Latham as recorded in the private diaries should be received with some reservation, perhaps, for no doubt in many instances they represent exasperation at the end of a trying day. They should not be taken as Dixon's overall assessment of Latham. Nevertheless, they show us what Dixon thought of Latham's character, and of a number of his important judgments.

**Endnotes:**

1. Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence*, Part 3, Government Printer, Canberra, 1929, p. 782.

2. *R v. Kirby; ex parte Boilermakers' Society of Australia* (1956), 94 CLR 254; (1957) 95 CLR 529 (PC); [1957] AC 288.

3. Dixon, draft letter to Lord Simonds, 12 February, 1957, in *Correspondence, 1957-1959*, Owen Dixon, Personal Papers.

4. Owen Dixon to Lord Simonds, 15 April, 1956, in *Correspondence, 1955-1956*, Owen Dixon, Personal Papers.

5. John G Latham to Dixon, 23 January, 1929, in *Correspondence to end of 1946*, Owen Dixon, Personal Papers.

6. Zelman Cowen, *Sir John Latham and Other Papers*, Oxford University Press, Melbourne, 1965, p. 34 n.

7. Richard Searby (in conversation with the author) reporting Dixon reporting Higgins.

8. The original idea was said to have been that Gavan Duffy's son Charles would be appointed to the Victorian Supreme Court, Gavan Duffy would later retire from the High Court, and Latham would meanwhile retire from politics, move for a decent space of months to the Bar, then be appointed Chief Justice, while Menzies would win Latham's seat of Kooyong and be appointed Attorney-General in Canberra. As it happened, Charles Gavan Duffy was appointed to the Supreme Court of Victoria on 30 May, 1933, Latham retired from politics in 1934, but Frank Gavan Duffy decided to stay on. See Stuart Macintyre, *John Greig Latham*, in Bede Nairn and Geoffrey Serle (gen. eds), *Australian Dictionary of Biography*, Vol. 10, Melbourne University Press, Carlton, 1986, 5. See also Zelman Cowen, *op. cit.*, p. 31. Latham always claimed he retired from politics voluntarily, with no thought of taking the Chief Justiceship.

9. Owen Dixon, *Diary*, 6 September, 1935, Owen Dixon, Personal Papers.

10. *Ibid.*, 8 October, 1935, reporting second- and third-hand sources.

11. *Ibid.*, 17 October, 1935.

12. *Ibid.*, 18 and 15 October, 1935.

13. On the Latham Court generally, see Clem Lloyd, *Not Peace but a Sword! – The High Court Under J G Latham*, in *Adelaide Law Review*, 11 (1987–88), 175–202.

14. Robert Menzies, Address on Dixon's retirement, 13 April, 1964, CLR, 110 (1964), v–viii at vii. Dixon, as he told Richard Searby, had said the same thing to Latham in 1922 when Latham had come into Dixon's chambers to announce, rather pompously, that he was going into politics because he thought it his duty to do so. Richard Searby, in correspondence with the author.

15. Owen Dixon, *Diary*, 19 October, 1935, Owen Dixon, Personal Papers.

16. *Ibid.*, 22 October, 1935. An early example is the conference on the *Metal Trades Case* and the *Tramways Case* which took place between Rich, Evatt, McTiernan and Dixon on 15 November, 1935 (noted in Dixon's diary entry for that day). Among other examples, see the entry for 10 June, 1937: "In the afternoon we had a cfce about Riverina Transport & Dried Fruit where politics predominated"; and that for 29 November, 1939: '[Latham] [Evatt] [Rich] & I had a discussion over an appln for sp l [special leave] tomorrow in a custody case (*Evans v. Cleary*) where the fight is over religion".
Zelman Cowen's "understanding" (*op. cit.*, p. 34) that there "was no judicial conference" until Dixon became Chief Justice is incorrect. Latham's conduct of conferences on the *Banking* and

*Communist Party* cases of 1948 and 1951 is discussed in Lloyd, *op. cit.*, p. 187.

17. Owen Dixon, *Diary*, 30 March, 1936, Owen Dixon, Personal Papers.

18. *Ibid.*, 31 March, 1936. See also 3 April:

> "Lowe told me Starke had said his remark to me about Chas D. thinking Sodeman irresponsible had caused a lot of trouble. Lowe seemed inclined to minimise what he had said but on my saying he had told me that Chas thought Sodeman was irresponsible or ought to have been found so he appeared to agree".

19. Owen Dixon, *Diary*, 1 April, 1936, Owen Dixon, Personal Papers.

20. *Sodeman v. The King* (1936), 55 CLR 192 at 201, 204.

21. *Ibid.*, at 205.

22. Owen Dixon, *Diary*, 30 September, 1936, Owen Dixon, Personal Papers.

23. *Ibid.*, 10 October, 1937.

24. Dixon to Lord Morton, 25 November, 1959, in *Correspondence, 1957-1959*, Owen Dixon, Personal Papers.

25. Starke to Latham, 23 February, 1937, in Latham Papers, MS 1009/62. The case was *English Scottish and Australian Bank Ltd v. Phillips* (1937), 57 CLR 302.

26. Starke to Latham, 31 March, 1937, in Latham Papers, MS 1009/62, National Library of Australia.

27. Zelman Cowen, *op. cit.*, p. 35.

28. Owen Dixon, *Diary*, 2 October, 1936 and 12 April, 1937, Owen Dixon, Personal Papers.

29. See James Merralls, *Sword of Honour*, in *Victorian Bar News*, 95 (1995), 37-8; and Merralls, *Sir Hayden Erskine Starke*, in John Ritchie (gen. ed.), *Australian Dictionary of Biography*, Vol. 12, Melbourne University Press, Carlton, 1990, 53-4. As a barrister Starke had once been treated rudely in Court by Mr Justice Hodges, who later offered an apology in the lavatory of their club. Starke replied, "An insult offered in open court cannot be wiped out by an apology in a urinal". Quoted in Arthur Dean, *A Multitude of Counsellors: A History of the Bar of Victoria*, F W Cheshire, Melbourne, 1968, p. 180.

30. See Ronald McNicoll, *Seaforth Simpson Mackenzie*, in Bede Nairn and Geoffrey Serle (gen. eds), *Australian Dictionary of Biography*, Vol. 10, Melbourne University Press, Carlton, 1986, 304–5.

31. Owen Dixon, *Diary*, 27 August, 1936, Owen Dixon, Personal Papers.

32. *Ibid.*, 14 and 17 September, 1937.

33. *Ibid.*, 25 August, 1938.

34. *Ibid.*, 30 April, 1938.

35. *Ibid.*, 3 May, 1938.

36. *Ibid.*, 26 November, 1938.

37. *Ibid.*, 16 May, 1938.

38. *Ibid.*, 30 November, 1938.

39. *Bank of New South Wales v. Commonwealth* (1948), 76 CLR 1. On this case see, for example, Geoffrey Sawer, *Bank of New South Wales and Others v. The Commonwealth*, in *Australian Law Journal*, 22 (1948), pp. 213-16; S R Davis, *The Australian Bank Nationalisation Case*, in *Modern Law Review*, 13 (1950), 107-11; M G Myers, *The Attempted Nationalisation of Banks in Australia, 1947*, in *Economic Record*, 35 (1959), pp. 170-86; A L May, *The Battle for the Banks*, Sydney University Press, Sydney, 1968; and more general works, such as Leslie Zines' *The High Court and the Constitution*, Butterworths, Sydney, 1981 and later edns.

40. Owen Dixon, *Diary*, 11-12 December, 1947, Owen Dixon, Personal Papers.

41. *Ibid.*, 29 January, 1948. *"Credat Judaeus Appella"* – "the Jew Appella may believe it, I don't" (the last two words understood). Horace, *Satires*, I.iii.

42. Owen Dixon, *Diary* entries for the relevant dates, Owen Dixon, Personal Papers; and Fullagar's judgment, *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 at 262-3. The doctrine derives principally from *Marbury v. Madison* (1803) 5 US (1 Cranch) 137. The chief reasons why Dixon and the others, apart from Latham, found the Act invalid were that there was no threat of general war justifying recourse to the defence power, and that the Act did not provide against specific acts. It dealt only with bodies and persons, whose actions were then to be characterised by the legislature and the Executive. In this respect it differed from the legislation examined by the Dixon Court two years later in *Marcus Clark & Co Ltd v. Commonwealth.*

43. Owen Dixon, *Diary*, 2 March, 1951, Owen Dixon, Personal Papers.

# Chapter Seven
# *Teoh*: Some Reflections

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

It is now an established principle, in our legal system, that when a treaty is ratified, although it becomes binding on Australia in international law, it does not become part of the law of Australia unless it has been given the force of law by statute. Except in the case of a treaty of peace, which obviously can affect the rights of enemy aliens, a treaty not incorporated by statute does not affect the rights or liabilities of Australian citizens.

This principle has a sound basis. Treaties are made by the Executive in the exercise of the prerogative, and to give a treaty the force of law would allow the Executive to make law, contrary to the doctrine of the separation of powers.

Although the principle has been consistently stated by courts of the highest authority,[1] it is subject to some important qualifications. In the first place, it has been held[2] that the external affairs power in the Constitution is wide enough to allow the Commonwealth Parliament to legislate to implement the terms of an international agreement. This does not mean that legal force within Australia is given to the treaties themselves, but because the Parliament has power to legislate to give effect to the provisions of treaties, the Executive is enabled to enlarge the scope of the constitutional power, with the result that the balance carefully drawn by the founders of the Constitution between State and Commonwealth powers has been radically disturbed.

Secondly, the view has been asserted that international law, which of course is often expressed in the form of international treaties, may be used to resolve ambiguities in a statute,[3] or to influence the development of the common law.[4] On this view, judges may use treaties as the justification for making far reaching changes to the common law, and I have no doubt that the courts will be called upon to decide what are the limits, if any, to the judicial discretion in this regard. However, this is not the topic of my present discussion.

A third qualification was introduced by the decision of the High Court in *Minister for Immigration and Ethnic Affairs v. Teoh*.[5] Ah Hin Teoh was a Malaysian citizen living in Australia under a temporary entry permit. He was convicted of drug offences and sentenced to six years imprisonment. Application for a permanent entry permit was refused and it was ordered that he be deported. He had children living in Australia.

The Court held (McHugh J dissenting) that the ratification of the *United Nations Convention on the Rights of the Child* gave rise to a legitimate expectation that administrators would act in conformity with the Convention, and would treat the best interests of the children as a primary consideration. It was further held that if the decision- maker proposed to make a decision inconsistent with that legitimate expectation, procedural fairness required that the person affected should be given notice and an adequate opportunity of presenting a case against such course. It was held that there was a want of procedural fairness in this case, with the result that the decision to refuse the application for the grant of resident status was set aside, and the order of deportation was stayed until the Minister had reconsidered the application.

A number of strands of reasoning in this decision may, with all respect, be regarded as of doubtful correctness. The relevant provision of the Convention on which the Court relied provided that "in all actions concerning children … the best interests of the child shall be a primary consideration". The action in question – the review of decisions to refuse Teoh permanent residence and to order his deportation – no doubt had consequences for the children, but the action did not relate to them or

involve them. It is a question whether the action was one "concerning children", and whether the terms of the Convention were applicable in the present case. If the Court had not given the Convention this wide construction, it would not have been necessary, or possible, to expand the law regarding the effects of treaties, as it did.

It was not suggested that Teoh had an actual expectation that the Minister's delegate would act in accordance with the Convention, or even that he was aware of the existence of the Convention. It was held that it was enough that objectively an expectation would arise. The Court said:

> "Ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in accordance with the Convention and treat the best interests of the children as a 'primary consideration' ".[6]

Since the government did not in fact make a positive statement that all agencies would act in accordance with the Convention, this was, I suggest, only another way of saying that the agencies of government were required to act in accordance with the Convention, or to give notice that they did not propose to do so. In other words the Court, although acknowledging that a treaty does not become part of municipal law, regarded the Convention as having legal effect, for why otherwise would government officials be required to act in a particular way, on pain of legal sanctions if they did not do so? If the decision is not to be regarded as self-contradictory, it must have created a new exception to the general rule regarding the effect of treaties that have not been incorporated by statute in the law of Australia.

*Teoh's Case* has been followed in the Federal Court in a number of deportation cases.[7] In one case, *Perez v. the Minister for Immigration and Multicultural* Affairs,[8] the Court set aside an order for detention pending deportation of a Cuban national who had a long record of crimes of violence. Logically, it is difficult to see why the principle in *Teoh's Case* would not entitle a person convicted of say, murder, to have a legitimate expectation that the best interests of his children would be a primary consideration in deciding upon his sentence.

Potentially, the case has a wider significance, since it would seem to follow that any executive officer making a decision may be expected to act in accordance with the provisions of any treaty that may be relevant. There are many hundreds of treaties, and it would be unlikely that government officials would be aware of their existence, let alone their contents; and even if the rule in *Teoh's Case* would probably apply only to a small number of those treaties, the decision creates uncertainty as to what treaties would be relevant, and what their effect would be.

The decision in *Teoh's Case* was given on 7 April, 1995 and the government acted promptly in response to it. On 10 May, 1995 a joint statement was issued by the Minister for Foreign Affairs, Mr Gareth Evans, and the Attorney-General, Mr Michael Lavarch, stating (amongst other things) that entry into a treaty was no reason for raising any expectation that government decision-makers would act in accordance with the treaty. This was designed to take advantage of the words in the judgment which I have quoted, that ratification of the treaty is "an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary". After a change of government, Mr Downer and Mr Daryl Williams issued a similar statement on 25 February, 1997.

Some critics have contended that executive statements of this kind are legally ineffective, but two members of the Privy Council, in a dissenting judgment, have accepted that a government could clearly announce a change of policy to prevent legitimate expectations arising in the future.[9] This result would seem to be artificial, since the person affected would in many cases have no knowledge either of the Convention or of the government's announcement. However that may be, the Ministers' statements of 1995 and 1997 do not appear to have come to the notice of the Federal Court, since the decisions of that

court which I have mentioned, were made after 1997.

Also in 1995, the government introduced a Bill designed to overturn the decision in *Teoh's Case*. The Bill was read a second time in the House of Representatives. The Senate referred the Bill to a committee which, by a majority (some Democrat Senators dissenting), recommended that it be passed. However, the Bill lapsed when Parliament was prorogued prior to the holding of the 1996 General Election.

In 1997, the Coalition Government introduced a Bill which was similar to, although not in all respects identical with, that introduced by the Labor Government in 1995. Again the Senate committee recommended, by a majority, that the Bill be passed without amendment. However, most of the Labor members recommended that the Bill be amended. They considered that circumstances had changed since Labor proposed the 1995 Bill because, they said, fears that the *Teoh* decision might create administrative uncertainty had not come to fruition. It does not appear whether they had enquired into the possibility that the Appeal Tribunals were following *Teoh's Case*.

The Labor Senators thought it unnecessary expressly to provide, as the Bill did, that the fact that a treaty was ratified did not give rise to a legitimate expectation that administrators would act in conformity with it; rather they wished to provide that Australia's international obligations are given effect in domestic law only by an enactment of the Parliament or by the operation of the common law. Senator Cooney and the Democrats were opposed to the Bill. However, the Bill was not adopted prior to the proroguing of Parliament before the 1998 election, and it too lapsed.

A Bill identical to that of 1997 was introduced in 1999. Labor again sought to amend it. It appears that since, in these circumstances, the passage of the Bill through the Senate would be likely to occupy some time, the government was not willing to give it the necessary priority. In the result, although both major political parties thought that a statute should be enacted to reverse the effect of *Teoh's Case*, no Act was ever passed.

That was not the end of the matter. *Teoh's Case* has since been considered by the courts. It was mentioned in the judgments of two cases in the Privy Council in 1998 and 1999 respectively,[10] but in neither case did the Board express a concluded view on the question whether a legitimate expectation could be founded on the provisions of a treaty which had not been incorporated by statute. In the latter of those two cases the Board said:

> "Even if a legitimate expectation founded on the provisions of an unincorporated treaty may give procedural protection, it cannot by itself, that is to say unsupported by other constitutional safeguards, give substantive protection, for this would be tantamount to the indirect enforcement of the treaty: see *Minister for Immigration and Ethnic Affairs v. Teoh*".[11]

However, their Lordships do not appear to have observed that the protection given to Teoh, although described as procedural, was in truth substantive.

The matter was considered again by the High Court in *Re Minister for Immigration and Multicultural Affairs ex parte Lam*[12] as recently as February this year. In that case, a Vietnamese citizen, who had been convicted of various offences, including trafficking in heroin, sought to quash the decision to cancel his visa and to prevent the Minister from deporting him. It was held that the applicant's argument that he was denied procedural fairness failed on the facts, but the Court did discuss at some length the principles relating to legitimate expectation and the effect of unincorporated treaties.

The expression "legitimate expectation" has been used in cases where a public authority has followed a regular practice, or has expressly or by implication promised to adopt a certain course of procedure; in such cases it has been held that the person affected has a legitimate, that is to say reasonable, expectation that the practice or course of procedure will be followed. In England, the notion has been extended beyond procedure to substantive benefits. Their Honours in *Lam's Case* indicated that a legitimate expectation can not give rise to substantive rights, and that if the doctrine is to be applied it

can have no more than a procedural effect. In any case, they said that there seems to be no need for any doctrine of legitimate expectation, since it is enough to enquire what procedural fairness requires in the particular case.

Their Honours went on to discuss the use in *Teoh's Case* of an unincorporated treaty. McHugh and Gummow JJ said:

> "If *Teoh* is to have continued significance at a general level for the principles which inform the relationship between international obligations and the domestic constitutional structure, then further attention will be required to the basis on which *Teoh* rests". [13]

They went on:

> "The judgments in *Teoh* accepted the established doctrine that [unenacted international] obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error. The curiosity is that, nevertheless, such matters are to be treated, if *Teoh* be taken as establishing any general principles in this area, as mandatory relevant considerations for that species of judicial review concerned with procedural fairness. The reasoning which as a matter of principle would sustain such an erratic application of 'invocation' doctrine remains for analysis and decision". [14]

Hayne J said:

> "It may also be that further consideration may have to be given to what was said in *Teoh* about the consequences which follow for domestic administrative decision-making from the ratification but not enactment of an international instrument".[15]

Callinan J pointed out that the non-enactment of the Convention into Australian law could well indicate parliamentary resistance to it, and said that:

> "… the view is open that for the Court to give effect to the Convention that it did [in *Teoh's Case*] was to elevate the Executive above the Parliament".[16]

These remarks indicate that the members of the High Court in *Lam's Case* entertained great doubts as to the correctness of the decision in *Teoh's Case*, and may have given the *coup de grace* to that decision, although it has not yet been formally overruled.

There are two observations which are suggested by these events. The first is that there is an obvious weakness in our parliamentary system when a law thought necessary by the major parties (that is, by a majority of members) cannot be passed. The Senate performs an essential role, not only in reviewing legislation passed by the House of Representatives, but also in providing a check on the power of the Executive, which normally can control the House and can ensure that the House passes whatever legislation the Executive wishes. The price that is paid for this valuable function, is that the Senate sometimes prevents the passage of desirable legislation for purely political reasons. The only remedy lies in the hands of the Senators themselves.

Secondly, *Teoh's Case* is only one example of the pervasive effects of international law on domestic law. Naturally, one would not wish Australia's standards of fairness and decency to fall below international norms, but it does not follow that it is necessary or desirable for every treaty to which Australia is a party to be incorporated verbatim into our municipal law.

For one thing, treaties are often expressed in terms of broad generalities, as indeed is the case of the *Convention on the Rights of the Child*. To apply their terms literally, and without appropriate qualifications, may have unfortunate consequences, as, one may be pardoned for thinking, was the result in *Teoh's Case*. Further, our law is not necessarily less fair and just than the law laid down by international treaties. Indeed, the English-speaking countries of the common law world have set a standard of liberty and democracy which most other countries have failed to attain.

Some argue that globalisation, as it is called, is a reason why Australia should make its law conform to international standards. The facts that trade has been liberalised, and communication and travel accelerated, do not mean that we should attempt to bring our law into harmony with those of every

country with which we trade and communicate and to which we travel, except, perhaps, so far as is necessary to facilitate trade, travel and communication. Perhaps the hankering for international norms indicates a lack of faith in our inherited institutions – a failing of post-modern attitudes.

It is, of course, quite another matter if Parliament, acting judiciously, considers it desirable to legislate to incorporate a treaty in our law. That would be part of the democratic process, whereas the adoption of a treaty by judicial *fiat* would encroach on the field which, in our democracy, is the province of the elected legislature.

**Endnotes:**

1. *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273, 286-7 and cases cited in note 32; *R v. Lyons* [2002], 3 WLR 1502.

2. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168; *Victoria v. Commonwealth* (1996) 187 CLR 416.

3. *Chu Kheng Lim v. Minister for Immigration* (1992) 176 CLR 138 and cases noted in note 88; *Reg. v. Home Secretary; Ex parte Brind* [1991] AC 696, 747-8.

4. *Mabo v. Queensland (No 2)* (1992) 175 CLR 1, 42; *Dietrich v. The Queen* (1992) 177 CLR 292, 306, 321, 360; *Azzopardi v. The Queen* (2001) 205 CLR 56, 65.

5. *Supra*, note 1.

6. 183 CLR 273, 291.

7. *Perez v. Minister for Immigration and Multicultural Affairs* (2002) 191 ALR 619 and cases there cited.

8. *Supra*, note 7.

9. *Fisher v. Minister for Public Safety (No 2)* [1990] 1 WLR 347, 363.

10. *Fisher v. Minister for Public Safety (No 2)*, *op. cit.*; *Thomas v. Baptiste* [1993] 3 WLR 249.

11. [1993] 3 WLR 249, 262-3.

12. (2003) 77 ALJR 699.

13. *Ibid.*, 716.

14. *Ibid.*, 717.

15. *Ibid.*, 720.

16. *Ibid.*, 725.

# Chapter Eight
# Voluntary Voting

Hon Senator Nick Minchin

Thank you for your invitation to address your conference here in my home town of Adelaide. I am proud to be a member of The Samuel Griffith Society, and to have worked hard with so many of you to preserve our current constitutional arrangements during the 1999 referendum on a Republic. That was a stunning victory for those of us who fervently believe there is no republican model that can serve us better than our constitutional monarchy.

Speaking of Republicans, I heard a wonderful story about Republicans of the American kind, and their political opposites, the Democrats, which has an Australian resonance which I think you'll appreciate.

A woman in a hot air balloon realised she was lost. She lowered altitude and spotted a man in a boat below. She shouted to him, "Excuse me, can you help me? I promised a friend I would meet him an hour ago, but I don't know where I am". The man consulted his portable GPS and replied, "You're in a hot air balloon approximately 30 feet above a ground elevation of 2,346 feet above sea level. You are 31 degrees, 14.97 minutes north latitude and 100 degrees, 49.09 minutes west longitude". The woman rolled her eyes and said, "You must be a Republican". "I am", replied the man. "How did you know?". "Well", answered the balloonist, "everything you told me is technically correct, but I have no idea what to make of your information, and I'm still lost. Frankly, you've not been much help to me".

The man smiled and responded, "You must be a Democrat". "I am", replied the balloonist, "How did you know?" "Well", said the man, "you don't know where you are or where you're going. You've risen to where you are due to a large quantity of hot air. You made a promise that you have no idea how to keep, and you expect *me* to solve your problem. You're in *exactly* the same position you were in before we met, but somehow now, it's *my* fault."

Applied to Australian Republicans and Australian Democrats, that story is remarkably apt.

John Stone has asked me to speak about Voluntary Voting, a subject on which I'm happy to speak any time, any place.

John's invitation suggests to me that apparently if I'm known to stand for anything, it's for voluntary voting, which to some may seem a peculiar fixation.

It's true I have a passion for the issue. It reflects my political origins as a libertarian. In my formative political years, especially my five years at the Australian National University in Canberra, I was an avowed libertarian, with a detestation of government interference in people's lives.

A significant influence on my youthful political predilections was the year I spent in the USA doing final year high school on an AFS scholarship. One of the things I particularly admire about Americans is the value they place on liberty.

The first party I joined was John Singleton's ill-fated Workers Party, which was in truth a Libertarian Party in disguise – indeed, I handed out how to vote cards for that party in 1974.

As political maturity has set in, I have become more and more a political conservative. On matters involving the Constitution and issues that go to the very moral foundations of a civilised society, I am a rusted-on supporter of the conservative cause. I have exercised my conscience vote in the Senate to oppose euthanasia and embryonic stem cell research.

But on those issues involving people's personal behaviour and ordinary conduct that do not raise

fundamental moral questions, I uphold the virtues of liberty and choice. In relation to these issues, Governments should only act to restrict liberty and choice to the extent necessary to preserve civil order and minimise harm to others.

Thus it is that in relation to the most important single manifestation of democratic will, the act of voting, I profoundly detest Australia's denial of individual choice. It seems to me that an essential part of a liberal democracy should be the citizen's legal right to decide whether or not to vote. The denial of that right is an affront to democracy.

I do say that citizens should vote – but I say with equal passion that citizens should not be compelled to vote. It is a threat to the concept of liberty to convert a generally-held preference as to good behaviour into a legally compellable action. Yet in this country you are breaking the law if you choose not to vote in a federal or State election.

Compulsory voting is an embarrassment in a nation like ours, which is otherwise a shining light of democracy and civil liberty in a world still darkened by authoritarian rule in so many countries. The overwhelming majority of the world's democracies uphold and protect their citizens' legal right to choose whether or not to vote, a right we are denied in Australia. How did we come to such a sorry position?

Many Australians believe compulsory voting is entrenched in our Constitution. As you all know, our Founding Fathers had much stronger democratic instincts than to stoop to such an intrusion on civil liberty.

However, our Constitution does give the Commonwealth Parliament the authority to determine the method of election of Senators and Members of the House of Representatives.

For the first quarter century of our nation's existence, Australians had the legal right to choose whether or not to vote – and they freely exercised that right in our first nine federal elections. Then in 1924 the Commonwealth Parliament used its constitutional authority over elections to pass a law making it compulsory to vote in federal elections.

The Parliament's decision to deny us the legal right to choose whether or not to vote happened in remarkable circumstances. A backbench National Party Senator by the name of Payne introduced a private members Bill to amend the Commonwealth *Electoral Act* to make voting compulsory.

Only five Senators and three Members of the House of Representatives spoke in the Parliamentary consideration of the Bill. Not one Party leader contributed to the debate. One of our most eminent constitutional lawyers, Professor Geoffrey Sawer, has written that:

"No major departure in the Federal political system has ever been made in so casual a fashion".

John Hirst wrote in *The Age* last November:

"It took only 52 minutes in the House of Representatives and 86 minutes in the Senate for compulsory voting to become law … in what sort of nation can compulsory voting be introduced without discussion or debate?".

It did happen, it has been sustained for 79 years, and all the States have followed suit. Only one jurisdiction, South Australia, has seen a serious attempt to end this travesty, when to its great credit the previous Liberal government in this State passed a Bill through the House of Assembly to repeal compulsory voting, only to have it defeated in the Legislative Council.

Why do we have it, and why is there no sustained push to end this illiberal feature of our democracy?

We have it, and probably always will, because the political parties find it convenient, and they're scared of a world in which voting is voluntary. The parties by and large love the certainty that 95 per cent of voters will turn up to vote, whether they want to or not. They love the fact that the authority of the State will save them the trouble and inconvenience of persuading their supporters to exercise their right to vote.

The Labor Party is a fierce defender of compulsion, because it is certain that it derives a partisan

advantage from compulsory voting. While the federal organisational wing of the Liberal Party has passed a resolution to end compulsion, the federal parliamentary Liberal Party has never adopted that as policy.

Supporters of compulsion cite public opinion polls which do indicate popular support for compulsory voting. In my view such polls reflect two factors. Most people quite properly think we should exercise our right to vote; but most people think their fellow Australians would not bother to vote if it were not compulsory.

I am saddened that Australians take such a dim view of their countrymen, and have such little attachment to liberty. And indeed they're wrong about voter turnout without compulsion – it averages around 70 to 75 per cent in democracies with voluntary voting. And as our government has just demonstrated in relation to Iraq, governments should be guided by principles, not polls.

Those of us opposed to compulsion have had one minor success in years of campaigning. As the responsible Minister, I managed to persuade the Cabinet and the Parliament that the 1997 national election of 76 delegates to attend the 1998 Constitutional Convention should be voluntary. That is the only voluntary national election held in this country in the last 80 years.

It is wise to go into politics knowing that even the smallest of personal victories must be cherished. If I achieve nothing else in politics, I cherish my success in ensuring that I could legally choose whether or not to vote in at least one national election in my life.

I did choose to vote in the election of delegates to the Constitutional Convention, as did 47 per cent or 5.5 million of my fellow Australians. If Labor – which voted against a voluntary vote for the Constitutional Convention – had had its way, the 6 million Australians who chose not to vote in that election would have been guilty of an offence and prosecuted.

By the way, the fact that 47 per cent of Australians chose to vote for an election of delegates to a one-off meeting of a body that could pass no laws or decide anything, suggests that the turnout for a federal election at which voting was voluntary would be at least 80 per cent.

At every federal and State election, thousands of Australians are penalised for choosing not to vote. A few brave and principled souls have actually ended up in prison for choosing not to vote, and then refusing to pay the fine.

This iniquitous and offensive law also gives a remarkable degree of discretion to federal and State bureaucrats to decide who to prosecute. After each election a revoltingly wasteful exercise is conducted to pursue every elector who fails to vote. Non-voters are invited to proffer excuses for their behaviour to the bureaucrats, who then decide whether or not to prosecute.

The NSW State Electoral Commissioner told the Sydney *Sun-Herald* in 2000 about some of the excuses that he thought were good enough to avoid prosecution for not voting in the 1999 State election:

> "One man in the bush said he was driving to the polling booth when a snake in the car wrapped itself around the gearstick, so he had to stop and wait for it to move. We gave it to him for originality.
>
> "A woman said she was in the garden shed when something fell against the door, locking her in, and she was still there when polling booths closed.
>
> "A man said he was out early in his sailing boat and got becalmed all day and he couldn't get back in to vote.
>
> "And one woman said she was in bed all day with her lover, and forgot all about voting and thought the fine was worth it".

So not only does compulsory voting deny us the legal right to choose whether or not to vote, it hands to bureaucrats this extraordinary authority to decide who to punish for their temerity not to vote.

A country where you can end up in jail for not voting is not a country that can truly call itself an enlightened liberal democracy.

I will continue to fight for Australia to join all the world's major democracies in upholding and

protecting the sacred right of every citizen to choose whether or not to vote. I look forward to The Samuel Griffith Society joining that quest.

# Chapter Nine
# Don't! You'll Just Encourage Them

Julian Leeser

There are many stories about Sir Frank Packer. One story goes that Sir Frank would march out of a dinner if they refused "to toast the Queen. 'No Queen, no Packer' was one of his more famous remarks".[1] It is a long time since a media proprietor has taken that sort of attitude towards the Crown in Australia.

Compare Sir Frank's remarks with those of Rupert Murdoch, proprietor of *The Australian* – an American who gave up the most precious gift Australia has to offer, its citizenship, for 30 pieces of cinema. Speaking in 1999, Mr Murdoch said:

> "The British monarchy has become irrelevant to this generation of Australians…It's not just a question of the monarchy, it's a question of whether Australia has any self-confidence".[2]

Remarks of this sort may have prompted Sophie Panopoulos to quip that:

> "Australia's independence …[is]…more at threat from the House of Murdoch than the House of Windsor".[3]

The performance of *The Australian* newspaper, indeed much of the press during the referendum, could not leave anyone with the view that Australia possesses an intelligent, independent and vigorous press. Despite a gushing campaign by the media, the republic was defeated in all six States, 72 per cent of federal electorates, and by 55 per cent of Australian voters.

When *The Australian* newspaper actually campaigned for the "Yes" vote, handing out "vote yes" stickers, the conduct of the media reached a new low. The press will never be held in high regard while its partisanship is so blatant. Rarely has there been a more demonstrable sign that the press and the electorate are living in two very different countries.

In November, 2002 a Newspoll result revealed that a majority of Australians still think that the republic is a distraction from our real problems.[4] However, *The Australian* continues to barrack for it. On 16 and 17 November, 2002 *The Australian*, in conjunction with Griffith University and the Australian Republican Movement, held a conference "to restart and broaden debate about the kinds of public institutions which Australians need for the coming century".

Like a constitutional "Packer Whacker" the conference, called *Australian Constitutional Futures: The nature of our Nation,* tried to bring the republican corpse back from the dead.

Registration for the event was free but, as usual with any republican event, "suggested accommodation options" had been negotiated with a 5-star hotel in Brisbane. You can't create a people's republic if you spend the night in a Best Western!

The conference comprised 22 papers[5] and seven sessions. These were:

- Republicanism in its Global and Historical Context.
- Imagining a Republic and Republicanism.
- A Responsive Republic.
- We the people = All the people.
- Australian Constitutional Futures: Visions for the Australian polity in 2020.
- Options for an Australian Head of State.
- A New Path: What kind of Process should be adopted to achieve Constitutional Change?

Despite the promise of a "new path", the conference appears to have been the same old faces and

the same old thinking. None the less, the size and scope of the conference, and the level of public exposure *The Australian* attempted to give it, made this effort the most significant attempt by republicans to revive their cause since the 1999 referendum. As such, it is deserving of close scrutiny by a Society dedicated to upholding the Constitution, both for what it proposed, and what it revealed about the contemporary state of republicanism in Australia.

I have called my paper *Don't! You'll Just Encourage Them* as a plea to *The Australian* to reconsider its stance on republicanism. Every time it sponsors these sorts of events, it gives republicans comfort for the view that the Australian people want another divisive debate about a problem that does not exist. Every time such groups get together and agree with each other on this proposition, they run a grave risk of coming away from the gathering in the belief that it is true. So to the management of *The Australian*, I say "Don't! You'll just encourage them".

Developing this theme, I have divided my paper into three parts which reflect the challenges for Australian republicans:

*Don't! It's too hard* – a discussion of the divisions among republicans, and their inability to draft and debate an alternative Constitution;

*Don't! It's too simplistic* – a discussion of why republicans think they lost in 1999, and how they think they will win next time; and

*Don't! You'll go blind* – an examination of republican reliance on symbols, sophistry and silliness.

**Don't! It's too hard**

Three and a half years since the referendum, republicans remain divided. The conference highlighted those continuing divisions, which have always existed among republicans but which have grown since the Constitutional Convention in 1998. Most branches of republican opinion were represented at the conference.

*Direct Election:* On the one hand, pragmatic direct electionists argue that consistent polling indicates that, in so far as Australians favour a republic, they overwhelmingly favour a directly elected President. Jenny Macklin is one such advocate who believes that:

> "Instead of lambasting the public for their decision … we who want a republic must find a way to make an elected Head of State work".[6]

For similar reasons *The Australian* now also supports direct election:

> "[T]he republic we need would be a people's republic, the creation of the nation's will. … Voters can be trusted to decide on a republic and who should lead it. That's surely not such a radical idea".[7]

Another pragmatic direct electionist is Will Fowles, former Victorian ALP Legislative Council candidate and "yoof" convenor of the Australian Republican Movement (ARM). He's happy to support whatever the ARM comes up with. He says:

> "I will support almost all the options on the republican continuum …What's important is that we select something that is politically achievable. It is for this reason that I support direct election".[8]

Other republicans support direct election because they see it as the logical model to approach after the failure of the 1999 referendum campaign. Professor George Winterton, one of few republicans to engage in the constitutional as opposed to symbolic debate, observes that:

> "After the defeat of the 'ConCon' model in the 1999 referendum, a directly elected presidency is certain to be on the agenda, at least for consideration".[9]

Professor Winterton apparently declared at the conference that "it's popular election or nothing".[10] Outlining the advantages of direct election, he argued:

> "It enshrines popular sovereignty, it creates public ownership of the office, it validates the Head of

State's role to represent the nation and it will limit the Prime Minister's executive dominance".[11]

While I disagree with his views on the republic, Professor Winterton's intellectual honesty is to be admired. Although a convert to direct election, he has also acknowledged that there are concerns with a popularly elected president He states:

> "The most worrisome aspect of a directly elective presidency is that the enhanced authority that will inevitably accrue to that office will destabilise and radically alter Australian government".[12]

This new ARM direct election proposal, with some inspiration from the Irish model, is also advocated by Professor Glyn Davis, who suggests that it is "a viable meeting point between the republican tribes".[13] This is despite the fact that both he and Professor Winterton were members of the Republic Advisory Committee, which found that there were some serious deficiencies with the Irish system, the success of which had been due to recent occupants of the office of President, not the system itself.[14]

*Minimalism:* In contrast to the direct election position is the minimalist position advocated by supporters of the referendum model or the McGarvie model. These republicans believe that direct election will be unsaleable as it is too much of a threat to the current system of government, or that it will not get bipartisan support. Amanda Vanstone for instance argued that:

> "Strong, simple numbers for an Australian Head of State didn't translate into a 'Yes' vote last time. Strong simple numbers for a direct election model will not necessarily translate into a 'Yes' vote next time…We should argue for the smallest possible change to become a republic".[15]

Peter Botsman drifted "back towards"[16] minimalism because:

> "The risk of the Parliament or the Prime Minister of the day making an unpopular decision about who should become President or Head of State to me far outweigh the risks of an unworkable political system of direct election".[17]

The ultra-minimalist Professor Greg Craven, who despite writing and authorising an advertisement bearing the slogan, "Who will you put first? Your family or The Royal Family?",[18] which appeared in the nation's press on referendum day, finds himself, a self – described constitutional conservative, uncomfortably consorting with the "constitutional left" by attending these conferences. Craven argues:

> "There is no point in expecting narrow and broad republicans readily to agree on a republican model on the grounds that they are all the same species. On the contrary, each group has distinctly different constitutional suppositions".[19]

In a warning against direct election, he says:

> "We cannot go from being alleged 'Chardonnay republicans' – those who devise republics in North Shore restaurants – to 'Cocaine republicans' – republicans who are just deeply, deeply deluded".[20]

*More than the President:* A third group of republicans want to use the republic as a stalking horse for a broader constitutional agenda. Greg Barns called for the republic to be combined with a new commitment to human rights, notably for asylum-seekers, a Bill of Rights and a rethink of federalism.[21] While Jenny Macklin reverts to a traditional ALP agenda of undermining the Constitution by supporting removal of the power of the Senate to delay or reject supply, "protection of the rights of the most disenfranchised", fixed four-year terms for the House of Representatives, simultaneous elections, and the removal of the spent provision in s.25.[22]

*American-style direct election:* An interesting point to note is that republicans seem to have rejected American-style direct election out of hand. Professor Winterton, for instance, has written that:

> "Notwithstanding the undeniable merits of the American system … its transplantation into the

present Australian constitutional environment would entail a reckless and unnecessary risk of radical and possibly undesirable constitutional metamorphosis".[23]

I believe that the American Republic is the one with which Australians most easily identify. It is the republic with which Australians are most familiar due to our shared heritage, the influence of American popular culture – and to some degree the constitutionalisation of that culture.

I say this for no Machiavellian purpose. I merely observe that republicans seem to be comparatively limited in their thinking about models. In the same way that, before the Con Con, the ARM declared that direct election was a "non-starter",[24] they have been too quick to declare the American system to be in a similar position. Save for Ted Mack, no one is seriously advocating an American style model. The preferred republican direct election model is based on the Irish system. While many Australians are of Irish descent, the political system of Ireland is, to most, an obscure one. A referendum involving the American system would give Australia a true choice involving something more substantial than the republic of simplistic symbols.

One participant in the republic debate recognised the advantages of the American system. Having examined polling data in 1993 that showed that 72 per cent of Australians wanted a "strong presidential figure", he noted:

> "[O]f course we can have a republic if a sufficient majority vote for it; if the Americans can run a republic for two hundred years with only one (very bloody) civil war, Australians could run two republics before breakfast….if you want me to nominate a republican system I would presently favour , it is the USA; we know it is safe and that it works, in its way, and has done so for over two hundred years".[25]

That person, you may be surprised to hear, is Justice Lloyd Waddy. However, he observed that the American system remains vastly inferior to our own. Anyway, I make the point that it is interesting that the republicans do not want to create an American system, given its potential popular appeal and relative familiarity with the electorate.

The discussion of all models reveals one thing. Republicans are united in their disunity. Beyond a desire to "kick out the foreign Queen", they have little in common. Other than the late Richard McGarvie, who was neither republican nor monarchist, and George Winterton, there are no republicans designing models and considering constitutional issues in any great depth.

There seems to be no real attempt to form a national congress of republicans to undertake the laborious and painstaking task of drafting alternative Constitutions and then debating their provisions.

The ARM has led the republic debate for years, but on no occasion has it sought to hold its own constitutional convention, complete with drafting and debate over provisions. It should not be up to the taxpayer to fund these initiatives. Republicans should be undertaking this task among themselves and trying to create a consensus on which model is the best alternative. I imagine that they have failed to do so because this task is not glamorous; it is difficult; it requires a level of patience, technical skill and knowledge that seems absent from many of the speeches and papers presented at republican conferences.

Yet it is only through this method that any sort of compromise may arise. The ultimate difficulty republicans face is that any referendum will involve putting a model up against one of the world's oldest continuous and most successful Constitutions.

One must expect that any model will be subjected to intense scrutiny. The Australian people are, as McGarvie says, "instinctively a wise constitutional people".[26] We are not going to be railroaded into changing a system that works for something that won't, or that has manifest inadequacies. Every referendum involves assessing a different model. Every referendum will see a number of republicans campaigning with monarchists against the particular republican model. Anything coming close to a republican consensus is unlikely to be created without a range of soundly drafted models and vigorous, technical debate. But that seems too hard for republicans to attempt.

**Don't! It's too simplistic**

While there was not much agreement on a republican model, republicans have a greater degree of agreement on why they lost in 1999 and, to a lesser extent, what they should do next time.

The republicans have a simplistic view about why they were beaten in 1999. Most lay the blame on one or more of the following:

The "No" campaign.[27]
The Prime Minister.[28]
Lack of education.[29]
The referendum question.[30]
The word "republic".[31]
Broadcaster Alan Jones.[32]
Peter Reith.[33]
(Surprisingly)the unsympathetic media.[34]
Republican disunity.[35]
The quality or focus of the "Yes" campaign.[36]
Lack of interest in the issue.[37]
The process of devising a model.[38]
Incompatibility of the republican model with our Constitution.[39]
Élites and the narrow focus of the ARM. (On this point Peter Botsman notes, "I think it is fair to say that the ARM started with the true believers and didn't get too far in advance of them".)[40]

There is not the space here to address these excuses. Suffice to say that Sir David Smith's papers to this Society, *The Referendum: A Post Mortem*,[41] and *A Funny Thing Happened on the Way to the Referendum*,[42] have previously dealt with a number of these claims in a devastating manner.

*Where to now:* Having listed republicans' complaints, it is useful to examine their strategies for the next referendum. Three and a half years after their loss, republicans have had a chance to reflect on what they should do next time. The current thinking is:

- Republicans are unanimous that they must be united;
- A future republic has to come from the people – popularise or perish; and
- The republic has to appeal to Australians who had not previously been inclined to support it .

In order to achieve their aims the ARM plans to pursue specific "target" groups and hold plebiscites.

The ARM has decided to target various groups, including: women, young people, Aboriginal people, people from a non-English-speaking background ("NESB"), and people living in regional Australia and outer metropolitan areas.[43] This strategy is simplistic and patronising. It assumes that people vote on a particular issue because they are young, or female, or from a NESB or indigenous or whatever. This is just not the case. Human beings make individual judgments on issues, on their merits, not necessarily on the basis of the social group with which they are identified. Furthermore, people inevitably identify with more than one social group, thus complicating the possibilities and rendering such analysis useless.

The ARM has tried this approach in the past. Their segmented campaign in 1999 was often patronising. For instance, Jason Yat-Sen Li's *Give an Australian the Head Job* T-shirt targeted at young people only served to bring ridicule on its promoter. Whether the ARM's latest targeted offensive is successful remains to be seen.

*Plebiscite:* The other major strategy is a plebiscite. On this point republicans also seem to be divided. It is possible that the plebiscite is an abrogation of leadership, as Amanda Vanstone has argued,[44] or that it just serves to mask republican divisions. Paul Kelly has presciently observed:

> "It is futile to think a plebiscite will solve the problem. This conflict is not just about models. It is about fundamentally different conceptions of the republic. It is a dispute about ideology and values. Many of these differences among republicans are greater than the originating dispute between monarchy and republic".[45]

Will Fowles gives specious reasons for why the ARM and the ALP want a plebiscite. A plebiscite, Fowles argues, will make the ARM feel better about itself:

> "From an organisational perspective, it …serves to give the ARM a tangible and achievable goal, the delivery of which can be claimed as a win".[46]

It will also make the ALP feel better about itself:

> "Labor's leadership debate, for as long as it distracts the federal caucus, can only serve to undermine Jenny Macklin's policy review. But Labor has an opportunity to deflect some of the focus on Simon Crean by getting stuck into the big picture stuff in the manner that republican hero Paul Keating did".[47]

His comments on a plebiscite and the Liberal Party are novel, to say the least. Peter Costello, so Fowles argues, has an opportunity:

> "… now, to take what pressure there is on Howard off him by promising a delayed succession attempt if Howard agrees to conduct a threshold plebiscite in conjunction with the 2004 federal election".[48]

At the moment the ARM does not have a comprehensive plebiscite policy. Mark McKenna has outlined his plan for a series of plebiscites and constitutional conventions, followed by a referendum to be supervised by a "Referendum Commission":

> "… which would ensure that the electorate had access not only to the propaganda supplied by the formal Yes and No Cases, but *also to information in which they could place their trust*".[49]

This sort of manufactured consent seems more at home with Robespierre's regime with its Committee for Public Safety than in the Australian polity (the Compliance Committee of the Australian Democrats notwithstanding).

Those advocating a plebiscite believe it ensures that "principle is decided before detail".[50] However, principle without detail is meaningless and simplistic. It ignores the important question – not whether a republic, but what sort? The major problem with a plebiscite is that it will de-legitimise the Constitution without putting anything in its place – what message might this send to an activist High Court? A plebiscite will not achieve constitutional change. It is only possible to change the Constitution by the procedure laid down in s.128. The problems of a plebiscite have been encapsulated by Professor David Flint in his paper to this society, *Mr Beazley and his Plebiscites.*[51]

The republican movement is still largely controlled by left-wing baby boomers and wannabe followers of the next generation. Their tactics are based on a patronising view of Australians, which was the hallmark of the social and cultural policy of the Keating era – a policy which has been comprehensively rejected by the electorate. If the ARM is going to convince Australians to embrace a republic, they will have to present their arguments in a more sophisticated way and stop treating Australians as fools. At the moment this seems unlikely as their campaign, and their view of Australians, remain too simplistic.

**Don't! You'll go blind**

This brings me to the final section of my paper. You can't have a republican gathering without lashings of symbolic hyperbole. This conference was no different. For instance, Jenny Macklin has argued that:

> "A decent job, effective telecommunications, a good education – these are some of the things basic to a truly democratic republic".[52]

Sorry, I thought that becoming a republic was about changing the Constitution.

Often the symbolic side of the republic debate is characterised by unoriginal rebellion, like sitting during a loyal toast, or being disappointed that the Queen didn't personally intervene in the Fiji coup[53] – two reasons advocated for being a republic by a Professor of Law, Charles Sampford.

Other views illustrate Paul Kelly's hypothesis that the Republic may be weighted down by too many dreams. Peter Botsman tried to argue that "an Australian republic is the most secure and safe form of government for all Australians in an age of global terrorism".[54] Mark McKenna argued that a republic should be entwined with reconciliation:

> "Our national identity ..... can only be genuinely transformed when we achieve the final separation from the motherland and restore Aboriginal people as the original owners of this country deserving of special rights".[55]

McKenna is very interested in the "cultural force of Constitution-making and the energizing effect this could have on the fabric of Australian democracy and our national self-confidence".[56] But becoming a republic will not make us more self confident. The only group which felt worse about themselves were elements of the media and the "Yes" campaign. Our economy has boomed since 1999. Australia hosted the "best ever" Olympics the following year. These arguments about confidence and symbols make no sense. I've yet to see any evidence whatsoever to support the view of Malcolm Turnbull that the result "broke the nation's heart",[57] or that of Greg Barns that it "made losers of us all".[58]

Republicans also like to use misleading language to create a view that the republic is more part of an Australian tradition than it actually is. While a classical republic is part of an Australian tradition, broad support for a republic in the context of the recent debate (i.e., republicanism meaning removing the Crown) has only a shallow tradition within our history. Greg Barns and John Warhurst have tried to make the argument that republicanism in the context of the current debate is quintessentially Australian:

> "Republican values are part of Australia's heritage. They are no strangers to our past ..... Australians are natural republicans. But it has taken us a long time to express those values loudly and publicly to ourselves and to our world".[59]

**Conclusion**

It is important to remember that the recent republican push did not have an idealistic birth. It began as the product of too much chardonnay on an afternoon in Woollahra.[60] It was then championed by Paul Keating as a cynical diversion from the economic problems that he was unable to deal with. It was often used as a political wedge and a diversion. Don Watson, Paul Keating's former speech writer, in *Recollections of a Bleeding Heart*, notes that the real reason Keating decided to announce that the "government was handing the republic process to the people"[61] was to create a story which was " big enough to at least partly smother anything emerging from [the release of the Hawke Memoirs]".[62]

If the republic was born of political expediency, nationalism was its midwife. The ugliest side of the republic has been the arguments of symbols and nationalism. Those opposed to a republic were accused of being less Australian or un-Australian. There was a real xenophobia relating to calls to remove the "foreign Queen". I was therefore amazed to read that Professor Sampford thought that the debate had been "largely devoid of strident nationalism".[63] Base appeals to nationalism by republicans constituted the ugliest feature of the republic referendum debate, along with the denigrating of our Constitution and our history.

It is almost 1,300 days since the most culturally significant event in recent Australian history. Since that time there remains a still active and potentially well-funded republican movement that should not be underestimated. However, that movement has failed to capture the hearts and minds of the Australian

people. People resent the republic because it is a distraction. The more attention the republic gets, the more it annoys Australians. As Don Watson observed:

> "For many Australians the republic was one of the more infuriating indications that their Prime Minister [Keating] was interested in everything except their concerns".[64]

Given the lack of interest in the debate, the solution seems to me not to encourage republicanism, but to encourage an interest and pride in our own Constitution and its history. Its history is long and unique and is worthy of study and celebration. No matter how much republicans profess to be selling a positive message, their inescapable premise is the constitutionally erroneous view, that something is wrong with Australia and needs to be fixed. This is why the republican movement has failed to inspire.

Australians don't believe the negative republican view of their own country. Perhaps the key to increasing the circulation of *The Australian* may be for it to adopt a position which is not reliant upon continually telling its readers that there is something innately wrong with a country in which they have justifiable pride.[65]

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# Chapter Ten
# Hindmarsh Island and the Fabrication of Aboriginal Mythology

Dr Geoffrey Partington

"Women's business" of various sorts was very common among Aboriginal groups: indeed, initiation rituals at puberty are almost universal among hunter-gatherers in every continent. To demonstrate the existence of such practices and related beliefs is in no way sufficient to establish the existence of "women's business" of the kind Doreen Kartinyeri claimed in 1994 existed in Hindmarsh Island.

Even though they generally held that their beliefs had remained unchanged since the Dreamtime, and though their way of life has often been regarded as the archetype of the "closed society", some Aboriginal groups changed their myths over the generations. The dingo was adopted as a totem animal by many Aboriginal groups and has a prominent role in many Dreamtime myths, but dingoes entered Australia long after the first Aborigines.[1] By 1852 the Ngarrindjeri story of the Pleiades told of seven men smoking tobacco. More recently, a clan on the Glynde River in Arnhem Land adopted a square-faced green liquor bottle as a totemic symbol.[2] After a mullock of copper rubble was formed by 19th Century mining on their traditional lands, the Ngulugwongga people became known as Mulluk Mulluk.

Some changes in myth and tradition had obvious political value. The Gunwinggu people became the dominant group at Oenpelli only in the 1950s, but they quickly established Dreamtime links with their new territory.[3] When the Parlamanyin of the Northern Territory died out as a separate group, the Kungarakany quickly laid claim to Parlamanyin territories and myths. When the Maranunngu found that there was rich potential value in lands to the north of their traditional territories, they rapidly made new land claims, backed by the assertion that they were familiar with the mythic lore of the northerly area.[4]

The rapidity with which myths can gain credence was demonstrated by the late Kenneth Maddock's study of six Aboriginal myths collected during the last forty years about the visit of James Cook to Australia.[5] In the Victoria River myth, the first white arrival was Ned Kelly. Ned was kind and gave the Aborigines horses and bullocks, but Cook came along, killed Ned and despoiled the Aborigines. There seems no doubt that the Aboriginal informants considered such manifestly mistaken accounts of relatively recent events to be historically factual.

**The Hindmarsh Island bridge**

In 1984 Binalong Pty Ltd, controlled by Tom and Wendy Chapman, began work on what they hoped would become a major marina complex on Hindmarsh Island. Their preparation seemed meticulous and environmentally friendly. The chairman of the Conservation Council of South Australia asserted that the Hindmarsh Island development was a model of how to proceed. The ALP government of John Bannon supported the project enthusiastically, but made it a condition for building the marina that a bridge be built to connect Hindmarsh Island to the mainland at Goolwa, so as to prevent interminable delays on the existing ferry if and when the marina and other developments were completed.

The first opponents of the marina, and then the bridge, included retired persons and people with holiday homes on the island, and environmentalists concerned about nesting grounds for birds, migration of feral animals, rabbit infestation, and pollution effects on the Coorong and Lower Murray. Their ranks came to include prominent SA Liberals, such as Ian McLachlan, Dean Brown, Michael Armitage, Legh Davis and Diana Laidlaw, as well as Greenpeace, the Australian Democrats, and union militants such as Davey Thomason of the Construction, Forestry, Mining and Energy Union.

Aborigines were absent from the early ranks of the opponents. The Chapmans were anxious that all known Aborigines in the area should be consulted, but this was by no means easy, since none had lived on Hindmarsh Island for many years. The Chapmans commissioned Dr Rod Lucas to investigate possible Aboriginal sites of significance. Dr Lucas reported in 1990 that there were no recorded mythological sites specific to Hindmarsh Island. This statement proved later to be an embarrassment to Dr Lucas when his wife, Dr Deane Fergie, became a central figure in Hindmarsh Island disputes.

Dr Lucas advised the Chapmans in 1990 that, like Norman Tindale in the 1930s and Catherine and Ronald Berndt during the 1940s and 1950s, he had found it difficult to construct genealogies and thus to know who should be regarded as traditional custodians of any Aboriginal sites there might be. His report recommended the Chapmans to "consult directly with the relevant Aboriginal representative bodies identified herein, and with any other Aboriginal persons chosen by these bodies".

The Chapmans consulted Henry Rankine and George Trevorrow, leading figures of the Raukkan (once Port McLeay) Community Council, the Coorong Consultative Committee, and the Ngarrindjeri Lands and Progress Association. George Trevorrow and Henry Rankine both knew considerable Ngurunderi lore. When controversies about the marina and bridge first arose, they made no objections on grounds of traditional beliefs or practices. Nor did Jean Rankine, Henry's wife, described later by Professor Cheryl Saunders as a "senior Ngarrindjeri woman". Nor did any members of the Campbell clan, who claimed to be the traditional owners or custodians.

Commissioned by the South Australian Department of Environment and Planning, Dr Vanessa Edmonds reported no evidence of any Ngarrindjeri or other Aboriginal beliefs about Hindmarsh Island, although she identified middens and burial places, which the Chapmans were very willing to protect, even though no Aboriginal interest had been shown in them in living memory. Dr Neale Draper, a senior archaeologist in the SA Department of Aboriginal Affairs, also found no Aboriginal burial sites or other cultural associations of sufficient importance to warrant a ban on a bridge rather than the barrages. His department gave the go-ahead to the contractors for the bridge.

Frustrated by the apparent progress of the marina and plans for a bridge, one local opponent, Bill Longworth, suggested to Davey Thomason, "Let's see if we can get some Aboriginals down from Murray Bridge to help us with our cause". During 1993 Sally Francis, an ardent conservationist with a weekend shack on Hindmarsh Island, persuaded George Trevorrow and Henry Rankine to join the coalition. Subsequently, both men denied that they had been consulted by the Chapmans about their plans, and George Trevorrow spread false rumours that the Chapmans had carted away "truckloads of Aboriginal bones", and that a Goolwa taxi driver had boasted of having a "boot load of boong bones".

A newly formed Lower Murray Aboriginal Heritage Committee (LMAHC), with George Trevorrow as Chairman and Doug Milera as Secretary, now declared that Hindmarsh Island had a sacred shape and a "spiritual character" that would suffer fatally if it were joined to the mainland. Next they decided that the proposed bridge might interfere with the "meeting of the waters", salt sea water and fresh Murray water. As yet, however, they made no reference to "women's business" in or near Hindmarsh Island.

The distinctively male Ngurunderi was the central figure in traditional Ngarrindjeri lore. Among other feats Ngurunderi had pursued and killed a gigantic Murray Cod with a spear, which may have been his phallus, and he created the Murray from his own urine, possibly supplemented by that of his wives. In another story his wives were disobedient and ate some bream, a fish forbidden to women. Ngurunderi was obliged to take revenge on his wives: they were drowned and became islands. These stories may not have seemed a promising basis for "women's business".

One anthropological source for Ngarrindjeri traditions, generally regarded after its publication in 1993 as highly authoritative, was *The World That Was: The Yaraldi of the Murray River and the Lakes, South Australia* by Ronald and Catherine Berndt. The Berndts were told by the Ngarrindjeri that the River

Murray was to them "like a lifeline, an immense artery of a living body". The body was "symbolic of Ngurunderi himself".[6] However, the Berndts gave no hints of significant "women's business" connected with Hindmarsh Island or Goolwa. One index entry is: "secret-sacred issues, absence of".

Steve Hemming of the South Australian Museum claimed in late August, 1994, in the presence of his colleagues Philip Jones and Philip Clarke, that Ronald Berndt had said the Lower Murray region bore some resemblance in Ngarrindjeri mythology to a woman's body. Clarke and Jones denied this claim and asked Hemming to provide a reference to substantiate it, but he could not do so.

In 1989 Peggy Brock edited a book entitled *Women: Rites and Sites: Aboriginal women's cultural knowledge,* which contained contributions by female anthropologists such as Catherine Berndt, Catherine Ellis and Linda Barwick, Helen Payne, Jen Gibson, Jane Jacobs, Luise Hercus and Fay Gale, who have scholarly interests in South Australian sites important to Aboriginal women. Several sites in South Australia are named in these essays as having special spiritual significance for Aboriginal women, but none in or around Hindmarsh Island or Goolwa.

**The Jacobs Report**

The Liberal government formed after the 1993 State elections was keen to scrap the bridge, but previous ALP governments had entered into contractual obligations, disregard of which might cost more than the bridge itself. Samuel Jacobs, QC, a retired judge of the Supreme Court of South Australia, was commissioned to make an inquiry. He confirmed the new government's worst financial fears, so that the decision was made to proceed with building the bridge. Samuel Jacobs wondered why Trevorrow and Milera had not raised their concerns about the shape of Hindmarsh Island earlier, and why it would suffer more if joined to the mainland by a bridge rather than by a ferry. Judge Jacobs was unimpressed by Dr Neale Draper, who criticised the shortcomings of earlier investigations, several of which he had himself conducted, and who raised totally new concerns about the spiritual character of Hindmarsh Island.

**Enter Sarah Milera and Lindy Warrell**

As Cheryl Professor Saunders noted of events up till 1993, "the Aboriginal women still had not been involved at this stage".[7] The first women to enter the drama were Sarah Milera, wife of Doug, and Linda Warrell. The Mileras were brought up from Murray Bridge to help the anti-bridge campaign. They were recruited by union officials and offered a house on Hindmarsh Island by anti-bridge campaigner Ann Lucas.

Sarah Milera knew little about Hindmarsh Island to start with, but began to remedy that deficiency by reading the Berndts' 1993 *The World That Was*. "Women's business" of various sorts was, of course, very common among several Aboriginal groups, and some in the north of South Australia had been studied by archaeologist Linda Warrell. She visited the bridge campaigners on 26 March, 1994. Lindy Warrell said to Aborigines Tom and Ellen Trevorrow, "It would be nice if there were some women's business".[8]

**The Onkaparinga**

In 1992, following disputes about building a marina at Sellicks Beach, Lewis O'Brien, a Kaurna Aborigine, and G Williams claimed that the mouth of the Onkaparinga River was an Aboriginal women's site. They suggested that a phrase used by German scholars Teichelmann and Schurmann in their 1840 dictionary of the Kaurna language was evidence that "the Kaurna people talked about body parts". They concluded that Aborigines could identify the internal sexual organs of women and had noted their similarity to the Onkaparinga estuary.[9]

The Kaurna (Adelaide Plains) Aborigines are an entirely separate group from the Ngarrindjeri, but this was probably the start of "women's business" at Hindmarsh Island. At a gathering of leading men in

the LMAHC, Chairman Victor Wilson showed Secretary Doug Milera an aerial photograph of Hindmarsh Island and said, "This is a woman, it's a creation of the Ngarrindjeri people and I'm going to Doreen Kartinyeri to explain it and to find out about it".[10] Wilson and Milera had been involved in the Onkaparinga dispute and were able to apply the vagina/river mouth analogy to the Murray mouth and Hindmarsh Island.

The article was in one important respect, however, damaging to later claims about "women's business" at Hindmarsh Island, since the beliefs asserted about the Onkaparinga were not regarded as secret. The maps of the Onkaparinga estuary and mouth, provided by courtesy of the Adelaide Street Directory and the South Australian Education Department, were of the very same kind which opponents of the bridge claimed later would be a sacrilege to display in public, as well as threatening to Ngarrindjeri women, physically and spiritually. Furthermore, any such belief associated with Hindmarsh Island would have been used openly by opponents of the Bridge long before June, 1994, just as Mr O'Brien did during the Onkaparinga dispute.

**Enter Cheryl Saunders**

When Professor Cheryl Saunders, of the Centre for Comparative Constitutional Studies, University of Melbourne, was appointed by Robert Tickner in 1994 to inquire into "women's business" at Hindmarsh Island, authorities she took as guidelines included:

1. Menham, who wrote in his report to the federal government on the old Swan Brewery area in Perth:

   "It is in my view sufficient to report to the Minister on whether the area is of significance to Aboriginal people in accordance with their traditions and to report on the evidence that touches upon the degree and intensity of belief and feeling that exists in relation to the area under discussion".[11]

2. Mr Justice Brennan, in *Commonwealth v. Tasmania,* the *Tasmanian Dams' Case*:

   "The phrase 'particular significance' in section 8 cannot be precisely defined. All that can be said is that the site must be of a significance which is neither minimal nor ephemeral, and that the significance may be found by the Aboriginal people in their history, in their religion or their spiritual beliefs or in their culture. A group of whatever size who, having a common Aboriginal biological history, find the site to be of that significance are the relevant people of the Aboriginal race for whom the law is made".

3. Hon J H Wootton's report on the proposed Junction Waterhole dam in Alice Springs:

   "The Act does not specify that any degree of antiquity must attach to the observances, customs and beliefs, which may obviously change over time, although the word 'tradition' in its ordinary meaning carried the notion of being handed down from generation to generation".[12]

Evidently, all that Professor Saunders needed to find was a "degree of intensity of belief". This was rapidly generated, and of some significance, even if not very "particular". The "ordinary meaning" of "tradition" could safely be disregarded and the term extended to cover claims never made until very recently. Two or three sincere believers, of an approved type, might be enough to determine State or federal legislation.

The Aboriginal Legal Rights Movement appointed Dr Fergie, a lecturer in the University of Adelaide and a friend and colleague of Doreen Kartinyeri, to act as a "facilitator" to support and advise the Aboriginal women objectors in their dealings with Professor Saunders.[13] Although she had no special knowledge of the Ngarrindjeri, Dr Fergie was an ideal choice. She had submitted her doctoral thesis with the injunction that it was never to fall into the hands of men, and had become well known as a champion of gender exclusivity, by the 1990s a most desirable attribute in an anthropologist. Dr Fergie was accepted by Professor Saunders as an authoritative interpreter of Ngarrindjeri culture and traditions,

although Judge Stevens found in her Royal Commission report:

> "Without any prior knowledge of historical or contemporary Ngarrindjeri culture, or of the significance ascribed by Doreen Kartinyeri to the area, Dr Fergie was at a serious disadvantage in making any assessment of the group of women present at Graham's Castle on 19 June, 1994. Any inferences or conclusions drawn from her observations of the women and their interaction are necessarily unreliable".[14]

Without consulting expert opinion in the Museum of South Australia other than that of Dr Deane Fergie, or checking whether the sources of traditional lore Doreen Kartinyeri assured her were authentic and unimpeachable, Professor Saunders soon recommended to Mr Tickner, who was anxious to hear just such a recommendation, that a complete and final stop be put to any bridge from Goolwa to Hindmarsh Island.

**Findings of the 1995 Royal Commission**

The findings of the 1995 Royal Commission were diametrically opposed to the recommendations of Professor Saunders. Judge Iris Stevens' principal findings were that there was "no suggestion" of "women's business" at Hindmarsh Island before 1993, and that these beliefs had been concocted in order to persuade the federal government to ban the Hindmarsh Island Bridge.[15] She was handicapped by the refusal of all but one of the Ngarrindjeri women opponents of the bridge to testify, and by the placement by Doreen Kartinyeri and Deane Fergie of their principal claims in sealed envelopes, later wantonly destroyed. However, Judge Stevens decided that:

> "Notwithstanding the lack of direct evidence relating to the more particular description of the 'women's business' contained in the Confidential Appendices, there has been a body of evidence out of which it has been possible to infer their contents".[16]

As far as I know, no one has ever challenged that the "women's business" in the envelopes claimed that:

1. Hindmarsh Island had been used during the 19th Century by Ngarrindjeri women as a place for aborting foetuses.
2. The Ngarrindjeri over many generations believed that the Lower Murray was shaped like a woman's internal sexual organs and had thus regarded it as sacred to women.
3. Building a bridge, as distinct from barrages or ferry ramps, between Goolwa and Hindmarsh Island would interrupt the "meeting of the waters" and destroy the fertility and perhaps the entire existence of the Ngarrindjeri people.

**The Matthews Inquiry**

Almost as soon as the Royal Commission Report was published, the Aboriginal Legal Rights Movement applied to Robert Tickner for a further order to prevent the Hindmarsh Island bridge from being built. This he granted, and appointed Justice Jane Matthews of the Federal Court to carry out an Inquiry.

Among evidence Justice Matthews found significant was that of George Trevorrow, who attributed great spiritual importance to the *ngatji,* defined by him before the Royal Commission as "each clan group's symbolic totem". He claimed that if the "totem area" were to be upset, "the place where these things breed, where they live, where they feed, all those things… you are upsetting everybody".[17] Trevorrow had then declined to link the *ngatji* to women or "women's business", but in her final report to Minister Herron in June, 1996 Her Honour suggested that one of the reasons for the cultural significance of the Goolwa channel was as the breeding ground for *ngatji.* She seemed to derive comfort from the thought that the *ngatji* would still breed even if the bridge were built.[18]

Daisy Rankine testified to Justice Matthews about the *mulyewongk* (sea monster) stories, which have long been recognised as part of Ngarrindjeri myth. Daisy told of a child that was taken by a shark

because her parents were lazy and negligent. In their search for the child, the parents entered the land of a hostile clan and were in danger. To save themselves, they transformed their shapes. The mother, transformed into a sea monster, sucked in the sea and opened the Murray, so that salt water and fresh water were mixed together.

Daisy Rankine added to earlier versions that had been recorded. She explained that the female *mulyewongk,* after creating the Murray Mouth, had sunk to the ocean-bed and "still lies there in the Goolwa channel where her child was taken, right under where the bridge would be built".[19] Justice Matthews told Senator Herron that if Daisy's *mulyewongk* story was really part of Ngarrindjeri tradition, that alone would make the Goolwa channel significant to Aboriginal heritage and might be enough to order a permanent ban on the bridge.

A few years later Daisy Rankine told American feminist anthropologist Diane Bell that two of her great-grandmothers, Louisa Karpeny and Pinkie Mack, were sorcerers and could brew a *muldarpi*, a spell that for maximum effectiveness needed hair, bones, and a bit of rag or pair of pants.[20] Whether this information would have strengthened or weakened Her Honour's confidence in Daisy Rankine I cannot say.

By this time of the Matthews Inquiry, Simons tells us:

> ".....to those in the know it was now clear that the answer to the injury and desecration question – the reason why nothing must lie between the sky and the water – lay in the secret women's business and the story of the Seven Sisters".[21]

Unfortunately, these could not be submitted to Judge Matthews. A Coalition Government had won office in Canberra, and the Aboriginal Legal Rights Movement demanded that the new Minister for Aboriginal Affairs, Senator John Herron, should appoint a female substitute to consider any reports relating to secret women's business at Hindmarsh Island. Senator Herron declined to abandon his constitutional responsibility.

Then, before Justice Matthews had submitted her report, the full Federal Court delivered its judgement in the crocodile farm case, and confirmed that natural justice required that confidential material deemed relevant to a case under the federal *Aboriginal and Torres Strait Islander Heritage Act* must be made available to developers and other interested parties. The Ngarrindjeri objectors decided to withdraw most of their evidence, including that relating to the Seven Sisters. Since, according to Justice von Doussa, there was no mention in Deane Fergie's sealed envelopes of the Seven Sisters, the current claim by Margaret Simons, Diane Bell and others that the Seven Sisters myth is the very heart of the case against a bridge at Hindmarsh Island provides an outstanding example of dramatic shift in appeal to mythology.

**Justice von Doussa**

Justice von Doussa presided in 2001 over a case for damages brought by the Chapmans. He extended his inquiry to include allegations that the women's business at Hindmarsh Island had been concocted. He criticised the Chapmans for their "high level of anger, hostility and suspicion which is borne by them against those who have played a role in events which have frustrated their ambitions". The Chapmans, he found, also "displayed a lack of objectivity".

The Chapmans had planned a marina on Hindmarsh Island, had been forced by the Bannon ALP government, as a condition of its approval, to bear most of the costs of a bridge, had their financial backing withdrawn by Westpac after Aboriginal organisations had threatened to withdraw all their funds from that bank, had been bankrupted, and had to sell their home and to live in a shed in the garden of one of their children. What had the Chapmans to be angry and suspicious about?

His Honour was very wrathful, too, with Ron Brunton, who had referred to Judge Stevens' findings as though they were "facts", whereas, His Honour explained, they were only "value judgements based on evidence led before a particular tribunal, and reached in the absence of other material that was then, or has since become, available". His Honour might well have mentioned that the reason the information supposedly available to Doreen Kartinyeri was not presented to the Royal Commission was that the lady and her allies refused to appear before it. I hope that His Honour will regard his own comments merely as "value judgements" made in "a particular tribunal", rather than "facts" that no prudent person who seeks to avoid contempt proceedings would ever seek to contest.

His Honour was less severe on Doreen Kartinyeri, who consented to appear before him, as she had before Justice Matthews. His Honour observed that, "at times her emotions were patent, and she reacted in an angry manner. But if she has been wrongly labelled as a fabricator these responses are understandable".

Obviously a culturally sensitive man, His Honour decided not to submit Doreen Kartinyeri to questions about the contents of the sealed envelopes, but she revealed that "part of the story of Hindmarsh Island is about the area being part of a woman's body". He was confident that a sufficient account of the content of the envelopes could be secured by questioning Doreen Kartinyeri's white female allies: Cheryl Saunders and her assistant Anne Mullins, Deane Fergie and former Tickner staff assistant Susan Kee. What these ladies told him was sealed up in its turn and as yet has not been made public. He regretted that the "original envelopes" containing "women's business" had been destroyed some years earlier, and felt it would be helpful if he knew what their contents had been. Did he ask all who appeared before him how and why they were destroyed?

Mr Justice von Doussa was not convinced that "women's business" had been fabricated. He advised that he had found four planks on which the Royal Commission had erected that finding, and he rejected each of them. Let us consider them in turn.

1. *Alleged late disclosure*: His Honour placed the issue of late emergence in the context of the consultation process, which he thought insufficient. Earlier investigators into matters concerning the Hindmarsh Island bridge, including Justice Samuel Jacobs in 1993, as well as Justice Iris Stevens, had considered that the Chapmans had sought to consult with Aboriginal and other relevant interests beyond the requirements of law, but Judge von Doussa found otherwise. Perhaps decades rather than years are sufficient for applications to build bridges in South Australia. His experiences of native title cases had evidently made His Honour well acquainted with "the phenomenon of eleventh hour disclosure". However, late disclosure in native title cases has often been linked to the physical isolation of eleventh hour applicants, whereas North Terrace, Adelaide, where Doreen Kartinyeri was engaged in mapping genealogies, is not vastly distant from Hindmarsh Island, and was less so from news stands with billboards announcing this or that crisis relating to the island.

The absence of Doreen Kartinyeri from Hindmarsh Island controversies until April, 1994 is surely remarkable. According to Margaret Simons, Doreen Kartinyeri "first heard a bridge was proposed for Hindmarsh Island in late 1993 or early 1994". If this is true it undermines any claim that she had a deep interest in Hindmarsh Island, let alone that she feared that a bridge there would imperil Ngarrindjeri fertility. Working as she was in Adelaide in the South Australian Museum, it seems incredible that she had never heard that a bridge was proposed to Hindmarsh Island or, if she knew of it, that she should have suppressed for so long information she deemed in 1994 to be sufficient to ban its construction. Deane Fergie claimed in 1994 that Doreen Kartinyeri "was in hospital in Adelaide in early January of this year when she heard about the proposed construction for the first time". Simons wrote that Kartinyeri "hadn't been well that year, or for several years before".[22] But neither Fergie nor Simons claimed that Doreen Kartinyeri had been in hospital, presumably in an isolation ward, for the previous ten years as

well.

2. *Alleged lack of pre-1993 anthropological evidence*: What His Honour heard from Deane Fergie, Diane Bell, Neil Draper and Steve Hemming had convinced him that there had been such pre-1994 evidence for the "women's business". His Honour certainly would not have found support for "women's business" at Hindmarsh Island from the standard authorities. However, he may have been impressed by anthropological information provided by some Ngarrindjeri women who appeared before him. Stella Newchurch told him that on February 1, 2000 she saw a "very striking photograph of the Murray Mouth" in *The Advertiser*. It reminded her of stories told her in her girlhood by Doreen Kartinyeri's Aunty Rosie.

Unfortunately, so Margaret Simons relates, "what Newchurch said is still subject to a suppression order". However, Simons was able to reveal that Newchurch "said that Aunty Rosie had claimed that Aboriginal women went to Hindmarsh Island to abort babies that they had conceived with white men, and that the Murray Mouth area had an association with the female form".[23] It seemed a pity that Mrs Newchurch had not remembered Aunty Rosie's words back in 1994-5. Another Ngarrindjeri woman, Iris Sparkes, told Justice von Doussa that when she was a child, a boy had persuaded one of her female friends to swim out to Hindmarsh Island, because no males were allowed there. Some might object, of course, that when Iris Sparkes was a girl a large number of males lived on Hindmarsh Island.

3. *The evidence of the "dissident" women*: Justice von Doussa adjudged that "one reason that could render it culturally inappropriate to pass on the information [about the "secret women's business"] would be that the member of the next generation was no longer interested in traditional practices and beliefs". His Honour agreed with Doreen Kartinyeri that the dissident women had never been entrusted with the secrets of women's business in Hindmarsh Island because:

> ".....they consider traditional Ngarrindjeri culture and practices as historical curiosities that are no longer a part of, or appropriate to, their current lifestyle as Christian members of a wider urban community".

If His Honour and Doreen Kartinyeri are correct in this, we all should pay tribute to the incredible foresight of Aunty Rosie, Nanna Laura and Grandmother Sally, Kartinyeri's three supposed informants, in picking out which of their granddaughters and nieces were likely to be converted to Christianity. An even greater difficulty with Doreen Kartinyeri's claim is that Aunty Rosie, Nanna Laura and Grandmother Sally, the three women she named as her informants, were all Christians.

Perhaps His Honour ought to have given more consideration to the highly restricted previous distribution of what Doreen Kartinyeri claimed in 1994 was "women's business"? In some cases there was a sharp clash of testimony. Dorothy Wilson claimed that, at the crucial Hindmarsh Island meeting, the other women present said that the stories were new to them. Before Judge von Doussa, Maggie Jacobs, Veronica Brodie and Isobel Norvill stated that they had known about the "secret women's business" before Doreen Kartinyeri told them about it. Maggie Jacobs added that she had told Dorothy Wilson that she knew of the stories.

Whoever was telling the truth or otherwise, one thing is certain: the overwhelming majority of a group of supposedly senior Ngarrindjeri women or Elders had not heard of Doreen Kartinyeri's "women's business" before. If the women's business was known to three other women as well as Doreen Kartinyeri, why was it not known to more or less the whole mature female Ngarrindjeri population? And in what way was Doreen Kartinyeri a special bearer of restricted tradition, if Maggie Jacobs, who had no close personal contact with Sally Kartinyeri, Laura Kartinyeri or Rose Kropinyeri, knew what only three or four others knew?

Dorothy Wilson, who became one of the most prominent of the "dissident women", testified before the Royal Commission that "Grandma Sally" Kartinyeri was one of three women Doreen

Kartinyeri claimed had transmitted secret women's business to her. According to Margaret Simons, Doreen Kartinyeri "denies that she mentioned Grandma Sally to Dorothy Wilson as one of her sources on 'women's business' ". Kartinyeri supposedly told Simons: "That is something I would never have discussed with Grandma Sally. She was a Christian". That is on page 155. However, on page 172 Simons gives us Doreen Kartinyeri's 1994 letter to Robert Tickner, which includes:

> "I have always known about the stories associated with Raminyeri and Ngarrindjeri Women's Business but until recently I didn't know the exact place that they referred to. My grandmother Sally Kartinyeri, my Great Aunt Laura Kartinyeri and my Aunty Rose Kropinyeri passed these stories about Women's Business to me".

It was to this letter that Judge Iris Stevens referred when she commented that "if Doreen Kartinyeri did not know the exact place to which her stories related, she could not have known of the 'women's business'. By its nature, the place was an inextricable component of the 'women's business' ".[24]

4. *Nonsensical claims about the potentially destructive effects of the bridge*.Justice von Doussa was irritated by arguments that it is nonsensical to believe that a bridge was likely to create destruction, since barrages had existed for decades without harm to Ngarrindjeri women or anyone else. He stated that:

> "….. spiritual beliefs do not lend themselves to proof in strictly formal terms. Their acceptance by true believers necessarily involves a leap of faith".

In 1994 no Ngarrindjeri women claimed that dire consequences to their health and fertility had resulted from building barrages on the Murray, although these had changed the landscape considerably and sometimes prevented any "meeting of the waters". The foundations of the Goolwa barrage alone required 4,770 timber piles of up to ten metres in length to be driven into the river bed. A central line of interlocked steel sheet piling, 10-12 metres in depth, acts as a cut off. The building of the ferry approaches required pylons to be driven into the riverbed, 30-40 metres from each side, to a depth of up to 18 metres. Many Aborigines helped build these barrages; John McHughes, the sole remaining Aboriginal resident in the Goolwa area by the 1990s, took a leading part in that work. He never heard of any objections or of "women's business" relating to Hindmarsh Island.

At first Doreen Kartinyeri and Deane Fergie praised the barrages, whilst condemning bridges. Doreen Kartinyeri even suggested that "in a sense, the barrages aid the proper functioning of the Lower Murray waters in modern conditions and drew an analogy with a 'pace-maker' ".[25] Some Aboriginal women told Dr Fergie that any bridge would "make the system sterile", because a bridge "goes above the water" and "is a shore to shore, direct and permanent link".[26] However, Hindmarsh Island and Mundoo Island were already joined together by a bridge. If the key point had been to ensure continued "meetings of the waters", bridges were surely preferable to barrages, which are built to restrict the free flow of tidal water in order to preserve fresh water up stream. Judge Stevens concluded that:

> "There is no foundation for any distinction between the construction of a bridge, a second ferry or the Goolwa barrage in the context of the 'women's business' ".[27]

Since 1994 Doreen Kartinyeri and her supporters have turned against barrages as well as bridges. Doreen Kartinyeri told feminist anthropologist Diane Bell in 1996 that the construction of the barrages "stopped the flow of water with the tides", and thus "destroyed the rushes the people used for weaving".[28] Although, of course, she could not "go into the details because of the sacredness of it", Kartinyeri revealed to Bell that Aunty Rosie, no longer around to contradict her niece, had once told her that when the jetty was built at Raukkan:

> "The women were in a lot of pain, young babies were dying and women were having miscarriages…There was crying. There was moaning. And the older women were rolling around just like they'd had a stake driven into their side".

Diane Bell looked up the diary of George Taplin and found a reference to the building of the jetty, but

none to the agonies of the women. Bell asked, "Could we expect him to have recorded it had he noticed?". It would be, she suggested, like asking "for evidence of the hell to which sinners go in order to acknowledge that following the Ten Commandments is a central Christian doctrine".

**Changes in Doreen Kartinyeri's accounts**

Doreen Kartinyeri was born in Raukkan in 1935, but at ten went away to school in Adelaide. Then she lived at Point Pearce and married there a non-Ngarrindjeri man with whom she had six children, before moving to the north of South Australia with a western desert man. She became interested and skilled in genealogies. However, before she realised what the future held for her, she admitted in a Rigney family history she wrote in 1983:

> "I didn't know much about the culture, customs and language but I do know the identities of the Point Pearce and Point McLeay people".

She obtained a modest position in the Family History Unit of the South Australian Museum, but soon her powerful personality enabled her to exert influence over her nominal superiors.

On 9 May, 1994 Doreen Kartinyeri claimed that the Hindmarsh Island was sacred because, during the 19th Century, Ngarrindjeri women had gone there to abort foetuses if they thought the fathers might be white. The preferred method was to place rocks on their stomachs to procure miscarriages. In many cases what she alleged was infanticide, not abortion. She told the women that one baby was killed if there were twins, although twin boys were both allowed to survive. She asserted that "women's business" began 40,000 years ago, although for much of that period there were no white men around to father mixed race children, and Hindmarsh island was not an island.

"Women's business" about Hindmarsh Island, Doreen Kartinyeri proclaimed, had been passed down to women, from mother to daughter, throughout the generation. She did not claim to have received the secret knowledge from her own mother, but named two other women as her informants: her grandmother, Sally Kartinyeri, and her aunt, Rose Kropinyeri. Later, in a letter to Robert Tickner of 12 May, 1994, Doreen Kartinyeri made a poor move and claimed as a further source her aunt Laura Kartinyeri. "Nanna Laura" was the daughter of Pinkie Mack, a midwife of the interwar years looked upon with veneration by many Ngarrindjeri women. Although the other two supposed informants had died many years earlier, Laura Kartinyeri was still alive and could be questioned.

Margaret Simons pinpoints as a "crucial moment" the incident on 9 May when, according to Dorothy Wilson, a leading Aborigine, Victor Wilson pointed to an aerial photograph of the Murray Mouth, Doug Milera compared the map to a "woman's privates", and Doreen Kartinyeri responded with, "Yes, I can see it now. I can see it". According to Tim Wooley, when interviewed by Margaret Simons, it was George Trevorrow who had pointed at the map and commented simply, "It's obvious, isn't it?", but there seems no doubt that one man or another pointed at the map. According to Simons, Tim Wooley and George Trevorrow told her there was no reference to female anatomy at all. Indeed, on the Simons version, which I take to be approved by Doreen Kartinyeri, the "women's business" now current includes little, if anything, about any similarity between women's sexual organs and the Murray Mouth.

According to Simons, Doreen Kartinyeri "was certain nobody would have mentioned a woman's privates in front of her: 'I would have smacked them in the mouth if they'd said that to me' ". Confidence in Kartinyeri's fastidiousness concerning language is, however, slightly reduced when we read later in Simons' book that she described Colin James, a journalist who had bent over backwards to please the militant Aboriginal lobby, as a "fucking white cunt", and advised him to "fuck off and never come back".[29]

Dorothy Wilson certainly worked very arduously and cunningly if she invented the supposed comparison between the Murray Mouth and a woman's sexual organs. In his interview with journalist Chris Kenny, Doug Milera claimed several times that the "women's business" was based at least in part

on supposed similarity between a woman and/or her sexual organs and the Murray Mouth.[30] Chris Kenny was in no doubt that Milera "corroborated Dorothy Wilson's version of events in the Mouth House". A letter from Rick Marshall, a non-Aboriginal supporter of Aboriginal causes, to *The Advertiser* had alleged that his grandmother told him of an Aboriginal legend with the Murray Mouth as the vagina.

At the next meeting of the Ngarrindjeri women at Graham's Castle, Doreen Kartinyeri herself displayed a small version of the aerial photograph of the Murray region, pointed to it, and described the parts of the body that the various bits of the landscape represented. In other words, she repeated the sort of performance that one of the Ngarrindjeri men had carried out earlier. Later on Kartinyeri repeated the process before Cheryl Saunders, who was told by one of the women, "Well, you know, work it out for yourself".[31]

Doreen Kartinyeri's references to similarities between the Murray Mouth and sexual organs became fewer and fewer after 1996, as did her references to Hindmarsh Island as a birthing or abortion site. This may have been because she and those close to her decided that such references were too secret to be made again. On the other hand, it may be because they realised that those claims, whether true or false, were deeply damaging to the reputation of the Ngarrindjeri.

In 1860 a Dr Wyatt testified to a Select Committee of the South Australian Legislative Council that infanticide, particularly female infanticide, sometimes took place among the Ngarrindjeri, most often if the mother was still suckling another child. The missionary George Taplin told the Select Committee that, although the men "do not like the idea of allowing their wives to prostitute themselves to white men", many of the men and women "like to have white children…because they excite more compassion among white women and can obtain larger gifts of food and clothes". To lessen family discord, the fiction was developed of claiming that the women with pale-faced babies had eaten too much white flour. There was no indication that Ngarrindjeri babies of mixed descent were more likely to be killed than were other babies, but if anything the reverse. By 1913, the next time a Royal Commission was appointed in South Australia to investigate Aboriginal issues, the decisive majority of the Ngarrindjeri people was of mixed descent. No evidence before 1994 links Ngarrindjeri infanticide or abortion with Hindmarsh Island.

The dissident Ngarrindjeri women indignantly rejected Doreen Kartinyeri's claim that there was such a link. When told by Doreen Kartinyeri that white men took the Aboriginal women to Hindmarsh Island to destroy their half-caste babies, one Ngarrindjeri woman replied, "If that's the case, why are we the colour we are today?".[32] Pinkie Mack, whom Doreen Kartinyeri claimed as the ultimate authentic source of the "women's business" at Hindmarsh Island, was the daughter of a white Australian, the Sub-Protector George Mason, and received her nickname from her colouring.

The sexual organs business did not disappear completely, and with the passing of time, Doreen Kartinyeri's recall became ever more powerful. By 1996 she had remembered that in 1954, when her first child was born, she looked at a map on the back of a door. She realised in 1996, "I was looking at Mundoo and between Hindmarsh Island, and I could see the inside of a woman, like it represented the shape of the womb and the ovaries".[33] Her insight was remarkable, since it was apparently a small-scale map "from Port Augusta down".

By the time Margaret Simons interviewed her a few years later still, Doreen Kartinyeri had remembered even more detail. She was then able to recall that, after seeing the map, "I couldn't wait to talk to Aunty Rosie about it. I delivered the milk to Aunty Rosie the next Saturday and I said, 'How did you fellows know?' "[34] Apparently Doreen Kartinyeri, at least by the time Margaret Simons was writing her 2003 book, "had not read the Royal Commission transcript, nor the report. Sandra Saunders had kept it away from her. 'It will make you too angry' ", she had said.[35] Perhaps Sandra Saunders has become her keeper. If Doreen Kartinyeri ever decides to read the Royal Commission report and transcripts, it may jog her memory into renewed activity.

In her evidence to Judge Matthews, Doreen Kartinyeri concentrated on the relationship between

the sky and the waters of the Goolwa channel. Here, she claimed, "is the starting of life. It begins here, of the Ngarrindjeri nation". She explained that the old people believed that if they were a boat on the Goolwa channel, they could not stay motionless, because:

> "You've got to let the waters look up to the sky, and the sky look down to the waters, and on nice evenings when we were sitting out they'd talk about the Seven Sisters in the sky and our Ngarrindjeri up there, the bright stars in the Milky Way".

Kartinyeri does not seem to have told Matthews that this was secret knowledge, so it is difficult to understand why she did not use it earlier, if known to her then.

**Creative mythology**

In 1996 Maggie Jacobs told Diane Bell that the Ngarrindjeri had suffered because "the rising water" had covered the fish traps. In contrast, Eileen McHughes was concerned that the water level has fallen, which indeed it has since white settlement began, and is now too low.[36] Diane Bell did not seem to notice that Maggie Jacobs and Eileen McHughes had opposite complaints about the water level, or that no Aborigines had been on Hindmarsh Island to set fish traps for many years.[37]

Although both bridges and barrages are now deemed bad for Aboriginal health, literature can effect wondrous cures. Or at least books by Diane Bell can. According to Margaret Simons, Ellen Trevorrow had been trying to become pregnant for years, but without success, until she read Bell's book and was pregnant soon afterwards. Evidently, "the Ngarrindjeri community was full of such stories", and Simons "heard of post-menopausal women who had read the book and had their first pregnancy for years". Simons "heard of other surprise pregnancies and gynaecological problems resolved".[38] Ellen Trevorrow told Margaret Simons that she "didn't know of secret women's business when the fight against the bridge began, but she believed in it when her Elders told her" and when her *miwi* told her. Simons explains that "*miwi* is a Ngarrindjeri word that translates as something between soul and instinct", and "is located in the stomach, has to do with the umbilical cord, and is passed from parent to child, but training can develop it".[39]

There are no grounds for any fears that mythic inspiration is fading in Australia. How much ought to be termed fabrication is hard to determine, but one can only wonder at the extent of memory recovery of which many people seem capable. Before the emergence of Doreen Kartinyeri in April, 1994, Sarah Milera had been regarded as the leading Ngarrindjeri woman opponent of the Hindmarsh Island bridge. Sarah knew little about Hindmarsh Island in 1993, but began to remedy that deficiency by reading the Berndts' *The World That Was*. On 15 April, 1994 Sarah told a group that included the new South Australian Liberal Minister for Aboriginal Affairs, Dr Michael Armitage, "I have found where I come from", but she gave no indication then of any specifically "women's business" there, which it seems likely she would have done, had there been anything to relate.

Now Margaret Simons, attributing this information partly to Sarah Milera and partly to Rose Draper, then the wife of Neale Draper, has related that Sarah and Rose were once walking in Hindmarsh Island, where both were then employed in the archaeological survey organised by Neale Draper. Sarah had been in communication with her magpies, when suddenly "the hair stood up on the back of our necks", and Rose realised that something was "grinding away inside" Sarah. Sarah told Rose that she could tell her husband that the Murray Mouth was a "women's fertility site". According to Margaret Simons, Sarah had given this information to Rose before Christmas, 1993, so that "women's business" was not simply concocted in April, 1994.

When Margaret Simons contacted her, "at first Rose had no idea" when this highly significant exchange had taken place, but within a few days Rose conceded that it might have been in 1993. Margaret Simons asks her readers: "Why was Rose Draper not called to give evidence, and cross examined on the crucial question of dates?". However, even Homer nods, and the handwritten letter

from Rose Draper that Margaret Simons found in the Royal Commission archive began: "During 1994 I had been employed as a crew member…". In addition, Rose Draper is an Aborigine, from New South Wales, and almost every Aboriginal woman who had been urged to appear before the Royal Commission had refused, and by then Rose Draper, separated from her husband, was living far away. In fact the secretariat of the Royal Commission did contact her, and Margaret Simons concedes, "Perhaps when Rose was contacted she was, as she admits she might have been, less than coherent…".[40] Simons did not tackle the problem of Sarah Milera's failure in April, 1994 to divulge these revelations.

Sarah Milera told Diane Bell about the effect of contractors on Hindmarsh Island:

> "It's not just a feeling. The injury can put you in hospital. When they drove the pegs into the ground I felt a spiritual wounding….they rushed me to the hospital. They didn't know what to do with me, because I was wounded with pegs going into the ground where children were born. I was really hurt".[41]

Sarah also told Bell, "I was directed to Goolwa through my dreams", not by militant Davey Thomason to the house of Ann Lucas, as was thought earlier.[42]

In like vein Eileen McHughes revealed to Diane Bell that when in 1994 at Hindmarsh Island a toilet was taken from a truck, "it sort of moved, made a dent in the earth…it was just like we'd been stabbed in the heart". Sarah Milera's cousin, Rocky Koolmatrie, told the Royal Commission in 1996, "I just cannot understand how she knows or have anything to do with Hindmarsh Island. She comes from Meningie, the same as the rest of our family, and I know I was not told one thing about Hindmarsh Island until I seen it on TV".[43]

Veronica Brodie has also enjoyed renewed powers of recall. In her evidence to the Royal Commission, where she was the only proponent of "women's business" to appear, Veronica Brodie claimed that she told the other women she knew about "women's business". This claim conflicts with the accounts of not only Dorothy Wilson, but also Deane Fergie and Cheryl Saunders, who, if Veronica had spoken, would surely have named Veronica Brodie in their reports among the "custodians" and informants about "women's business". Veronica Brodie told the Commission she had not received her knowledge of women's business from her mother, Rebecca Wilson, also known as Kumi, as Betty Fisher had stated earlier, and denied that her mother ever had "secret" knowledge of that type.[44] Veronica Brodie named her deceased sister Leila as her informant.

White radical activist Betty Fisher, who is also an astrologist of the school of Hypatia of Alexandria, is a major figure in Margaret Simons' efforts to rehabilitate "women's business" at Hindmarsh Island. Fisher claimed to have a typewritten transcript of a conversation in the late 1960s with Rebecca Wilson. On 26 April, 1994 Betty Fisher met Shirley Peisley at the International Women's Day Committee and arranged to be put in touch with Doreen Kartinyeri.

When they met, Betty Fisher for some strange reason denied that she had any information about Ngarrindjeri "women's business", but Doreen Kartinyeri told her, "Betty, I know all the stories, but these whities have to have written proof". Fisher produced for the Royal Commission a partial transcript of two tapes that she said included conversations with Kumi. The transcript included:

> "…our women went over to the island – that's Hindmarsh Island – to undertake all our women's things there…they went to acknowledge all those places over there…things we still regard as sacred…All around the Murray Mouth, all the waters, so important. Our people knew about those places, the tides, the Coorong secrets, the Islands, so special, sacred to us. We don't talk about those things – too secret, too old, all part of the old times, what you call the dreamtime…"

Kumi covered the barrages as well: "I learnt when I was very young, when those old people cried over the barrages…"

Clearly, if authentic, this tape would prove that there was significant Hindmarsh Island "women's business" well before 1994. However, Betty Fisher refused to provide it for the Royal Commission,

partly because "the information now belonged to Veronica Brodie", her mother having died. Fisher overcame her scruples and on 23 June, 1995 a press conference was called by the ALRM to hear her revelations. The conference was called off at the last minute, but Fisher made arrangements instead to reveal her secrets through Alison Caldwell of the ABC *7.30 Report* and the program was broadcast on 7 August, 1995.

> Extracts from Fisher's old notebook that Veronica Brodie shared with the ABC viewers included: "Down there at Hindmarsh Island, that place, our sacred place. We go there, fires there, very important to men, too. Women's stories in that place all secret…Nothing must lie between the waters and sky".

At this time Veronica Brodie identified herself as a Ngarrindjeri woman, but a few months later she claimed that "her tribe" is the Kaurna.[45] This arose during a "sacred-site" case concerning the former CSR factory in Glanville, which became a key part of a projected major development of Port Adelaide.

Two or three years later Veronica Brodie told Diane Bell that, as a result of women's traditional ceremonies coming to an end, the whales had left the Ngarrindjeri shores, but would return if and when those ceremonies resumed.[46] Veronica Brodie's grandfather, Dan "Killer" Wilson had, she said, many magical powers, so it is not surprising that Veronica has much of interest to reveal. Old Dan could sing people to death, or just whack them down with his waddy.

Culturally sensitive Alison Caldwell did not ask Betty Fisher why, if the information was so secret, Rebecca Wilson had decided to reveal it to her. At the Royal Commission, which rightly recognised the potential importance of Fisher's claims, and changed its timetable to accommodate her the very next day, culturally insensitive Michael Abbott, QC was not so considerate. As Margaret Simons acknowledges, Fisher "made an appalling witness". The most important parts of her supposed transcript, the passages I have quoted, were not on the tape, because, absolutely rotten luck, the tape she had been using had run out. Although the information was so vital, she had not thought it worthwhile to return with a fresh tape.

Fisher stated that she had promised Rebecca Wilson never to reveal what she had told her. This made it even odder that Fisher herself should have been informed in the first place, or that she should then have released the information over the ABC. Later in her evidence, Fisher claimed she had typed the most secret information on a separate piece of paper that was lodged in a bank security box. Then, surprise, surprise, Fisher stated she was not prepared to make this piece of paper available. Michael Abbott recommended that Fisher be charged with perjury, but her son died and she was excused any further appearance before the Commission.

Although she had made poor use of her day in court, Betty Fisher battled on. She posted the precious scrap of paper, folded in a cardboard cover, to Veronica Brodie. According to Simons, the story inside concerned "seven sisters who were very beautiful", and variations of Seven Sisters myths from around the world. However, Simons does not include any references to Hindmarsh Island or the Murray Mouth in her rendering of this scrap of paper.

Fresh recollections of traditional beliefs flourish among the affirmative Ngarrindjeri. Eileen McHughes remembers learning from her grandfather, Michael Gollan, that dead bodies were "smoked" on Mundoo Island. When his family were going home from Raukkan, they would hear a baby crying, until one day they found the baby on the ground and put it up in a tree. They never heard those sounds again.[47] Maggie Jacobs related that in 1967, when David Unaipon died in hospital, the bird he used to talk with began to sing and flap his wings to tell his niece, some miles away, that he had died and in Tailem Bend, because the bird looked straight in that direction.[48] Sheila Goldsmith had a bird that told her when a letter was coming from her fiancé.

**The anthropologists fight back**

The Royal Commission was a significant setback for radical anthropology in Australia, but its leading

practitioners were as determined as Doreen Kartinyeri to fight back. This required an assault on the Berndts and others early regarded as authoritative. Dr Rod Lucas led the attack on delinquent women anthropologists. He asserted that Alison Brookman, an anthropologist who testified before the Royal Commission, was only "young and inexperienced" when she spent time with the renowned song-woman, midwife and Berndt informant, Margaret 'Pinkie' Mack, and "had not established a relationship of trust with Pinkie Mack". Dr Lucas "would not be surprised if culturally sensitive information had not been imparted to her".[49] He doubted whether Dorothy Tindale "was in a position of trust to have had restricted or esoteric knowledge revealed to her". He claimed that "at the time of her fieldwork amongst the Ngarrindjeri, Catherine Berndt was young, childless and inexperienced". Dr Lucas doubted, too, "that Fay Gale knew as much as she thought she did", precisely because she had not "mingled or lived amongst" Aboriginal people.[50]

Dr Lucas was appalled that the Royal Commission used "various empirical 'facts' " in order "to discredit Ngarrindjeri belief". These empirical "facts" included changes in the sea level and the course of the Murray, which among other things ensured that there was for a very long time no Hindmarsh Island at all, of any shape. Dr Lucas noted correctly that "the use of an obscure and remote geological history to refute Aboriginal heritage claims is not new".[51] And many other heritage claims as well. Indeed, the intellectual climate of the 19th Century was transformed by empirical "facts" that made it very unlikely that the world had been created in 4004 BC, or that the whole world had been inundated by Noah's flood.

Dr Lucas is a typical cultural relativist. He believes that "the assertion of a documentary reality is itself an ideological and rhetorical act" that requires entry into "a relationship of knowing in which it does not matter who we are, where we stand…".[52] Given his contempt for the concept of documentary reality, it seems strange that Dr Lucas was so anxious to discredit anthropologists who "stand" differently from him and his wife, Dr Deane Fergie.

Dr Fergie launched vituperative attacks on the Royal Commission. She agreed that there had been "a fabricated account of the 'women's business' ", but alleged that the fabrication had been "*in and by the commission itself*" (emphasis as in original).[53] She was very angry about the use in the Royal Commission report of the phrase "secret sacred women's business", whereas, she claimed, the phrases she used were "women's secret knowledge" and "oral tradition". Her implication seems to have been that Doreen Kartinyeri never thought that anything sacred was involved in her claims.[54]

By 1996, Dr Fergie argued that earlier she had only suggested that the "restricted knowledge related to a specialist domain in Ngarrindjeri culture – the domain of the female *putari* or midwife". This move partly solved one problem for Deane Fergie and Doreen Kartinyeri: why was it that so few Ngarrindjeri women knew anything about "women's business", knowledge or oral tradition, secret or open, sacred or profane, relating to Hindmarsh Island, especially if, as Doreen Kartinyeri claimed at first, this information had been routinely passed on from mother to daughter? A problem with the new account was that Doreen Kartinyeri and Deane Fergie were not midwives. Deane Fergie might have been wiser had she placed all her writings into sealed envelopes.

Neale Draper and Peter Sutton rallied to the cause. Dr Draper found in the diary of early 20th Century white Goolwa resident Charles Harding that a "native" had told him that the name "Goolwa" might not mean "elbow", as generally held to be the case, but referred instead to fresh water or waters meeting. The idea was taken up by another male anthropologist, Peter Sutton, despite his fear that it was "just speculation" that Goolwa might have this alternative meaning.[55]

Peter Sutton also found that in 1969 Annie Rankine had recorded a Seven Sisters story: her father had told her not to swim when the Seven Sisters were moving and the dandelions were in bloom. When the flowers died and the constellation moved further, they were allowed in to the water.[56] Dandelions are, of course, an introduced species, but that only shows the vigour and adaptability of Ngarrindjeri myth.

The same could be said of the 19th Century version in which the Seven Sisters change sex and also enjoy a good smoke. Sutton elaborated his Seven Sisters ideas, and seems to have become a true believer himself:

> "…the building of a bridge would undoubtedly constitute desecration. The injury caused by a bridge would be, in part at least, that the dead and the unborn, who move up and down respectively between the same two places, would no longer have free passage to their destination, as that specific point in the landscape, and thus in Ngarrindjeri belief conception would be hindered".

Informed amateurs can also help. When the Mileras were brought up from Murray Bridge to provide the first Aboriginal input into the anti-bridge campaign, it was Ann Lucas who arranged their accommodation. A few years later Ann Lucas told Margaret Simons that she had discovered about the Goolwa channel, at "exactly where the bridge was to be built", that "the sun shone on the equinox, and perhaps here too the waters used to meet at equinox". Indeed, the "mouth of the longest river in the most ancient land" might be a giant astrological clock.[57]

**Conclusion**

"Aboriginal Studies" in our universities are controlled by a peculiar ideology that combines postmodernism and primitive superstition. In a special 1996 number of the *Journal of Australian Studies*, published by the University of Queensland, on *Secret Women's Business: Hindmarsh Island Affair*, the seven contributors were Deane Fergie, Rod Lucas, Steve Hemming, Betty Fisher, Lyndall Ryan, whose work on Tasmanian history Keith Windschuttle has recently demolished, Christine Nicholls and Kathie Muir. Although they are great advocates of "Aboriginal autonomy", the editors of the *Journal of Australian Studies* evidently could not produce a single Aboriginal contributor. Dulcie Wilson or Dorothy Wilson would have obliged if asked, but such politically incorrect Aboriginal women are beyond the pale of our current university establishments.

Australia is likely to witness many more follies similar to that of the "women's business" at Hindmarsh Island. In the end, however, the spirit of the dissident women of the Ngarrindjeri will triumph. *Magna veritas et praevalebit.*[58]

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12. *Ibid.,* p.24.

13. Royal Commission, *op. cit.*, p. 296.

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22. *Ibid.*, p. 142.

23. *Ibid.*, pp. 445-6.

24. Royal Commission, *op. cit.*, pp. 134-6, 295.

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26. *Ibid.*, p. 42.

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28. Bell, *op. cit.*, p. 259.

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30. *Ibid.*, pp. 325-9.

31. *Ibid.*, p. 213.

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34. Simons, *op. cit.*, p. 140.

35. *Ibid.*, p. 132.

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37. *Ibid.*, p. 256.

38. Simons, *op. cit.*, p. 423.

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41. Bell, *op. cit.*, p. 267.

42. *Ibid.*, pp. 57-8.

43. Simons, *op. cit.*, p. 346.

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58. For those less well educated than Geoffrey Partington, "Great is the truth, and it will prevail". [Editor's note].

# Chapter Eleven
# *Mabo* and the Fabrication of Aboriginal History

Keith Windschuttle

Let me start by putting a case which, to The Samuel Griffith Society, might smack of heresy. There are two good arguments in favour of preserving the rights of the indigenous peoples who became subjects of the British Empire in the colonial era. The first is that, since 1066, British political culture has been committed to the "continuity theory" of constitutional law, in which the legal and political institutions of peoples who were vanquished, rendered vassals or subsumed by colonization were deemed to survive the process. Not even their conquest, John Locke wrote in his *Second Treatise of Government*, would have deprived them of their legal and political inheritance.[1] So, after colonisation, indigenous peoples would have retained their laws and customs until they voluntarily surrendered them.

The second argument is that the previous major decision in this field, by the Privy Council in 1889, was based on the assumption that, when New South Wales became a British colony in 1788, it was "a tract of territory practically unoccupied". This is empirically untrue. At the time, there were probably about 300,000 people living on and subsisting off the Australian continent. Under any principle of natural justice, the Privy Council should have started by recognizing this.

According to a forthcoming book on the history of Australian philosophy by James Franklin, provocatively entitled *Corrupting the Youth*, the *Mabo* decision derived primarily from the Catholic doctrine of natural law, which goes back as far as Thomas Aquinas. The majority of those who supported *Mabo* were Catholics, and three of them had been students of jurisprudence at the University of Sydney under Julius Stone, who, while not a Catholic or supporter of Catholic doctrine himself, taught that judges should look not only to the law itself, but also to the underlying principles derived from moral reasoning that informed the law.[2]

So, because indigenous people lived here in substantial numbers before colonization and retained their own laws and customs, then, irrespective of the specific contents of British common law or the provisions of the Australian Constitution, they had rights deriving from those facts. So, from both the British constitutional tradition, on the one hand, and the principles of justice or natural law, on the other, the Australian Aborigines certainly retained their existing rights beyond 1788.

To say this, however, is not to support the kind of judicial adventurism for which the High Court became notorious in the 1990s. It is simply to argue that there are some cases where one needs to go beyond the Constitution and black letter law, back to first principles. The rights of the original inhabitants are one of those cases – perhaps the only one.

There was, however, far more to the *Mabo* decision than Catholic moral reasoning. The judgment was conceived within the political atmosphere that had prevailed since the 1960s, and it relied upon a significant number of assumptions drawn from contemporary anthropology and the history written in that period.

What I want to suggest is that any reconsideration of the *Mabo* judgment needs to examine its extra-legal dimensions, that is, its political, anthropological and historical assumptions.

While I'm not yet sure of the precise origins of the demand for land rights for Aborigines, the phrase was certainly in common use on the political Left in the late 1960s. The Whitlam Labor Party campaigned for land rights in its successful bid for government in 1972. In office, Whitlam gave Mr Justice Woodward a brief to institute a land rights regime in the Northern Territory, which he did with

the *Northern Territory Land Rights Act* of 1976. Whitlam had a great deal of support for this action from within Australia's political, legal, academic, media and arts communities. He had very little credible opposition.[3]

Indeed, Australia's intellectual classes took up the issue with more fervour than Aboriginal people themselves. In a paper to this society two years ago,[4] I noted that in the *Gove Case* as early as 1971, the anthropologists Ronald Berndt and Bill Stanner assured Justice Blackburn that the local Aborigines had long traditions of ownership of the land in question. However, when ten Aboriginal witnesses from eight different Northern Territory clans appeared in the case, they all denied this, especially the notion of their exclusive identification with this particular territory. Justice Blackburn subsequently decided that the Aborigines did not have a proprietary interest in these tracts of land, that is, they did not have a concept of ownership over them.[5]

In reaching this decision, Justice Blackburn discussed at some length the differences between the colonization of Australia and New Zealand. He said:

> "One of the reasons for the fact that a system of land law exists in New Zealand and does not exist in Australia is that in New Zealand the government had several times to wage armed conflict with organized bands of natives, which never occurred in Australia".[6]

Since that statement was made, a major industry has emerged to prove it wrong. The first and still most influential text of this movement was *The Other Side of the Frontier* by Henry Reynolds, which argued that, faced with white invasion of their land, the Aborigines mounted a century-long campaign of frontier hostilities, with guerilla warfare as their principal tactic.[7] Since its publication in 1981, this work has spawned a host of imitators from other authors, as well as another twelve books and an ABC television documentary series by Reynolds himself. Some of his colleagues, with more than a little envy at his popular success, have unkindly suggested that Reynolds has written the same book, twelve times.

The notions of Aboriginal resistance, frontier warfare and patriotic defence have been accepted throughout the historical profession itself. Only a handful of skeptics have dared suggest that Reynolds has overdone the violence.[8] The few complaints have been confined to the specialist academic literature, and have done virtually nothing to influence wider intellectual circles. The judges in the *Mabo Case* had no doubt that Reynolds's story was true. Indeed, the Deane and Gaudron judgment discusses hostilities between British colonists and Aborigines as early as the 1790s, and goes on to describe:

> "….. a conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame".[9]

Three years ago I began a project to examine the evidence that the historians had used to construct this case. I started with Reynolds's claim in *The Other Side of the Frontier* that 10,000 Aborigines had been killed in Queensland before federation.[10] The reference Reynolds provided for this was an article of his own in an anthology called *Race Relations in North Queensland.* This was a typescript publication held by only a few libraries, but I found a copy and read it. To my surprise, it was not about Aboriginal deaths at all. It was a tally of the number of *whites* killed by Aborigines. Nowhere did it mention an Aboriginal death toll of 10,000. Reynolds had provided a false citation of his evidence.[11]

Since then I have been checking the footnotes of the other historians in this field, and have found a similar degree of misrepresentation, deceit and outright fabrication. The project began in Tasmania, or Van Diemen's Land as it was known until 1855, about which I originally expected to write a single chapter. However, in going back to the archives to check what happened there, I found such a wealth of material, including some of the most hair-raising breaches of historical practice imaginable, that Van Diemen's Land has become the subject of the first of what will eventually be a three-volume series entitled *The Fabrication of Aboriginal History.*[12]

Volume One (*Van Diemen's Land, 1803-1847*) has two major arguments: first, that there was no

genocide in Van Diemen's Land; second, that there was nothing that deserved the name of frontier warfare either. In any discussion of *Mabo* and land rights, the question of frontier warfare is the key. If the Aborigines acted as Reynolds says they did, then not only was Justice Blackburn wrong in 1971, but the case for land rights would also be substantially strengthened.

In the debate over genocide, I can report that my opponents among the historians of Tasmania have largely conceded. Frontier warfare, however, is a different matter, and there is no sign of any of them giving way. So let me give some examples of the case against them.

Lyndall Ryan says the so-called "Black War" of Tasmania began in the winter of 1824 with the Big River tribe launching patriotic attacks on the invaders. However, the assaults on whites that winter were made by a small gang of detribalized blacks led by a man named Musquito, who was not defending his tribal lands. He was an Aborigine, originally from Sydney, who had worked in Hobart for ten years before becoming a bushranger. He had no Tasmanian tribal lands to defend. Musquito was captured and executed in 1825.

His successor as leader of the gang was Black Tom, a young man who, again, was not a tribal Aborigine. He had Tasmanian native parents, but had been reared since infancy in the white middle class household of Thomas Birch, a Hobart merchant. He apparently joined Musquito's gang because it offered him the prospect of a female companionship, which he could not find in white society. Until his capture in 1827, he was Tasmania's leading bushranger but, as with Musquito, his actions cannot be interpreted as any kind of patriotic defence of tribal Aboriginal territory.[13]

From 1828 to 1830, tribal Aborigines emulated these predecessors by raiding white households, assaulting and killing their occupants, and stealing their contents. Henry Reynolds claims Lieutenant-Governor Arthur recognized, from his experience in the Peninsular War against Napoleon, that the hostilities emulated the Spanish tactic of guerilla warfare, in which small bands attacked the troops of their enemy. However, during his military career Arthur never served in Spain. If you read the full text of the statement Reynolds cites, you find Arthur was talking not about troops coming under attack by guerrillas, but of Aborigines robbing and assaulting unarmed shepherds on remote outstations.[14]

In 1841, after they accompanied George Augustus Robinson to Victoria, five Tasmanian Aborigines attacked several shepherds and looted their huts in the Westernport-Dandenong districts. Ryan claims: "Their tactics had all the marks of sustained guerilla resistance to white settlement".[15] However, these so-called "guerillas" were in what was to them a foreign country, where they were intruders just as much as anyone from England. The notion that they were offering "resistance" to white incursions of the tribal lands of Victorian Aborigines, with whom they had no cultural, linguistic, tribal or kin connections of any kind, is absurd. Yet this is what passes for historical analysis in the book described by Henry Reynolds as "by far the best and most scholarly work on the Tasmanian Aborigines in the 20th Century".[16]

Arthur inaugurated the "Black Line" in 1830, Reynolds claims, because "he feared 'a general decline in the prosperity' and the 'eventual extirpation of the colony' ".[17] Reynolds presents that last phrase as a verbatim quotation from Arthur. However, Arthur never said this. Reynolds altered his words. When confronted by journalists of *The Sydney Morning Herald* with this charge from my book, Reynolds replied: "I've never said that. That's quite, quite misleading. How could the Aborigines destroy the colony? … Nowhere did I suggest that Arthur thought they could wipe out the colony. That would be a silly thing to say".[18] However, six days later, after journalists sent Reynolds the page in his book *Frontier* where he did quote Arthur saying exactly that, he finally agreed what he had done. He said: "It's a bad mistake. I obviously didn't know it existed, far from it that I had done it deliberately to distort the story … All historians are fallible and make mistakes".[19]

However, anyone who reads the offending page in Reynolds's book *Frontier* will struggle to understand how it could be merely a mistake. In the same paragraph there are five other truncated

quotations that appear to support the same false claim, that the colonial authorities thought the Aborigines threatened the very survival of the colony. One of them was made by the editor of the *Hobart Town Courier*, James Ross, who said at a public meeting in 1830 that if Aboriginal violence was not stopped they would "come and drive us from this very Court room and compel us to take refuge in the ships".

Reynolds presents this statement as if it were a common fear at the time. But he neglects to say that as soon as Ross said this, Robert Lathrop Murray, the editor of the rival newspaper, *The Tasmanian*, got to his feet and said:

> "No doubt that they are enabled to commit many atrocities, most frequently by the exercise of that cunning by which all savages are distinguished, but to talk of six dozen miserable creatures, and never was a larger body seen assembled than 72, driving us from this room, is of course a joke".[20]

Reynolds knew full well that Murray had made this statement, but he deliberately kept it from his readers in order to falsely portray all the settlers quaking with fear. This omission is just as much a distortion of the truth as Reynolds's original alteration of Lieutenant-Governor Arthur's words. None of this is an accident or a mistake. Indeed, Reynolds claims such fears were common throughout Australia. He writes:

> "Many pioneer towns – including Perth and Brisbane – were to experience moments of equal anxiety during the half century after 1830". [21]

Lyndall Ryan claims that in 1826, police killed fourteen Aborigines at Pitt Water. However, none of the three references she provides mention any Aborigines being killed there in 1826 or any other time.[22]

Ryan claims that hostilities in the northern districts of Tasmania in 1827 included: a massacre of Port Dalrymple Aborigines by a vigilante group of stockmen at Norfolk Plains; the killing of a kangaroo hunter in reprisal for him shooting Aboriginal men; the burning of a settler's house because his stockmen had seized Aboriginal women; and the spearing of three other stockmen, and clubbing of one to death, at Western Lagoon. But not one of the five sources she cites mentions any of these events.[23]

Between 1828 and 1830, according to Ryan, "roving parties" of police constables and convicts killed 60 Aborigines. Not one of the three references she cites mentions any Aborigines being killed, let alone 60. The Governor at the time, and most subsequent authors, regarded the roving parties as completely ineffectual.[24]

Lloyd Robson, author of the two-volume *History of Tasmania*, claims the settler James Hobbs in 1815 witnessed Aborigines killing 300 sheep at Oyster Bay, and the next day the 48th Regiment killed 22 Aborigines in retribution. However, it would have been difficult for Hobbs to have witnessed this in 1815 because at the time he was living in India. Moreover, the first sheep did not arrive at Oyster Bay until 1821, and in 1815 there is no evidence the 48th Regiment ever went anywhere near Oyster Bay.[25]

Robson, and four other authors, repeat a story that 70 Aborigines were killed in a battle with the 40th Regiment near Campbell Town in 1828. However, all neglect to say that a local merchant told a government inquiry that he went to the alleged site with a corporal on the following day but could find no bodies or blood, only three dead dogs. "To tell you the truth," the corporal then confessed, "we did not kill any of them".[26]

Both Robson and Ryan also repeat the story of the heroic Aboriginal resistance fighter, Quamby, after whom the peak known as Quamby Bluff is supposedly named. They claim Quamby disputed the land occupied by the colonists near Westbury and repelled them, although he was later shot dead. However, Quamby Bluff was not named after an Aboriginal person at all. The first account of how it got its name appeared in the *Hobart Town Courier* in March, 1829. A party of white kangaroo hunters came across a lone Aborigine, who fell to his knees crying "quamby, quamby" meaning "mercy, mercy". In other words, "quamby" was not the name of a man but an expression of the language. More than a year later George Augustus Robinson invented the story about the Aboriginal resistance leader, which

academic historians now repeat as if it were true. They repeat this story because it supports their thesis about frontier warfare, their assumption being that, because it fits the thesis, it therefore must be true.[27]

This whole case is not just a fabrication, it is a romantic fantasy derived from academic admiration of the anti-colonial struggles in South-East Asia in the 1950s and '60s. The truth is that in Tasmania more than a century before, there was nothing on the Aborigines' side that resembled frontier warfare, patriotic struggle or systematic resistance of any kind.

It is a similar story on the white side of the frontier. The infamous Tasmanian "Black Line" of 1830 is described by Reynolds as an act of "ethnic cleansing", and it is commonly regarded as an attempt to capture or exterminate all the Aborigines.[28] However, its true purpose was to remove from the settled districts only two of the nine tribes on the island to uninhabited country, from where they could no longer assault white households. The Lieutenant-Governor specifically ordered that five of the other seven tribes be left alone.[29]

The so-called "Black War" turns out to have been a minor crime wave by two Europeanised black bushrangers, followed by an outbreak of robbery, assault and murder by tribal Aborigines. All the evidence at the time, on both the white and black sides of the frontier, was that their principal objective was to acquire flour, tea, sugar and bedding, objects that to them were European luxury goods.[30]

In the entire period from 1803, when the colonists first arrived, to 1834, when all but one family of Aborigines had been removed to Flinders Island, my calculation is that the British were responsible for killing only 120 of the original inhabitants, mostly in self defence, or in hot pursuit of Aborigines who had just assaulted white households. In these incidents, the Aborigines killed 187 colonists.[31] In all of Europe's colonial encounters with the New Worlds of the Americas and the Pacific, the Colony of Van Diemen's Land was probably the site where the least indigenous blood of all was deliberately shed.

One of the critical issues in the debate over native title is the attitude the pre-contact Aborigines had to the land. Most discussion assumes they had clearly defined territories, which were exclusively theirs. This concept was one of the principal assumptions on which the *Mabo* decision was made. Justice Sir Gerard Brennan has made clear that his own judgment had been informed by his son, Father Frank Brennan, the Jesuit barrister and advisor to the Catholic bishops on Aboriginal affairs. In an article in 1988, Frank Brennan wrote:

> "When a traditional tribal community has continued to reside on its traditional land, discharging its spiritual obligations with regard to that land, and that land has never been occupied by any other persons, that community is entitled to a legal title to that land in legal recognition of the fact that they have always lived on that land, land to which no other persons have any moral claim".[32]

The anthropology of Van Diemen's Land has long been based upon assumptions of this kind. The archaeologist and anthropologist Rhys Jones says that the Tasmanian Aborigines had clearly defined territories and were prepared to defend them against interlopers. Jones writes:

> "Movements outside this territory, and of alien bands into it, were carefully sanctioned and had reciprocal economic advantages to the bands concerned. Trespass was usually a challenge to or punished by war".[33]

However, in my investigation of the sources from which Jones derived this information, I was surprised to find that his own evidence does not support it. Jones based his conclusion on the ethnographic information about Tasmanian bands contained in the diaries of George Augustus Robinson, who traversed Van Diemen's Land between 1829 and 1834 rounding up tribal Aborigines. But nowhere in the diary entries that Jones cites, nor anywhere else in the diaries for that matter, is there any mention of tribal conflict over trespass. There is a good deal of information about conflict between Aboriginal bands over women (the main cause), over long-standing vendettas, and over tribal honour, but no statement anywhere of the kind: "we fought them because they came onto our territory". Nor has any other author ever recorded one statement by the Tasmanian Aborigines that would confirm that they had

sanctions against trespass, or any concept of the exclusive use of the land.[34]

The strongest evidence for this thesis is actually the history of white colonization and the timing of the conflict that did occur between blacks and whites. Most observers at the time agreed there was very little violence in Tasmania for the first twenty years after the British arrived. And the historians, except Lyndall Ryan, agree there were minimal hostilities before 1824.[35] If the Aborigines had really felt the land was exclusively theirs, they would not have waited more than twenty years after the colonists arrived to do something about it.

Moreover, none of the Tasmanian languages had a word for land. There were twelve separate vocabularies compiled in the 19th Century. Some contained words for "ground", but this was a synonym for "earth". Others contained a word for "country", as in "her country", but this meant the country where she was born, or the country with which she identified herself. The vocabularies recorded that this meant no more than the English phrase "my country". When I say Australia is my country, or Sydney is my city, I do not imply ownership, exclusive possession or sanctions against trespass. The word "land" does appear in the index entry to Brian Plomley's compilation of the vocabularies, but when you look up the text you find the actual entry is "grassland", which Plomley himself distinguishes from "forest" and "heath"; that is, it refers to a form of vegetation or landscape.[36]

Individual Aboriginal bands were certainly identified with particular territories, which they regularly visited. But they by no means confined themselves to these territories. Members of the Big River tribe, for instance, annually visited Cape Grim in the north-west, Port Sorell on the north coast, Oyster Bay on the east coast, and Pittwater and Storm Bay in the south-east; that is, they regularly traversed most of the island.

Nowhere in the Tasmanian language, or indeed mindset, was there "land" in the sense that we use it, that is, as a two-dimensional space marked out with definite boundaries, which can be owned by individuals or groups, which can be inherited, which is preserved for the exclusive use of its owner, and which carries sanctions against trespassers. In other words, in Tasmania there was nothing that corresponded to Frank Brennan's notion of "land to which no other persons have any moral claim".

Indeed, in Tasmania there is a further point to be made. Brennan's case is based on the assumption that Aborigines "have always lived on that land", and that "that land has never been occupied by any other persons". The timescales he imagines, however, do not fit the evidence we have about the lifespan of Aboriginal bands.

Robinson's diaries indicate that within Tasmanian tribal society, the formation, extinction and re-formation of hunter-gatherer bands was a very fluid process. Bands could merge with one another or be destroyed by internecine warfare, all within the span of one generation. Robinson recorded one incident where natives from Bruny Island mounted an expedition to the Tasman Peninsula, where they killed several of the men of the local tribe and took away their women. Obviously, without women, this band would not survive beyond the remnants of the current generation. Robinson records at least ten other incidents of inter-tribal fighting to capture women, some of which must also have led to the complete inability of the losing band to reproduce itself.[37] There is not enough data to record the rate of band extinction in Tasmania, but anthropological evidence from tribal societies in New Guinea and the Amazon basin indicates that, within a tribe, that is, a population sharing language and inter-marriage, the rate of extinction of particular territorial bands can range from ten to thirty per cent every twenty five years.[38]

In other words, Frank Brennan's assumption that there are territories which an identifiable group of indigenous people have always lived on, cannot be automatically made without good evidence. And it certainly should not be made for Tasmania, given all the evidence we have to the contrary.

Any analysis of land rights in Tasmania is bound to remain an academic exercise. While there are people today who certainly have genetic links with the Tasmanian Aborigines, there was no cultural

continuity between the original inhabitants and their modern descendants. Under existing Commonwealth legislation, no land claim from Tasmania would be successful, which is why politicians from that State who have given land to the modern descendants have done so simply by making grants or purchases through the Indigenous Land Fund.

On mainland Australia, however, the situation is obviously very different. There are some indigenous communities with long-standing connections to particular territories. If you read the work of the most reliable anthropologists on the subject, that is, the anthropologists who have been least infected by the modern politicization of the topic, such as Ken Maddock and Les Hiatt,[39] you find the situation is mixed. There are some mainland Aborigines who do have notions of exclusive ownership and responsibilities to particular territories. From both their own oral evidence and British colonial records, they can demonstrate very long ties to these lands. In what is now Victoria, some built stone huts and engaged in semi-permanent activities such as fish and eel farming. Others, however, appear to have had no closer a relationship to the land than that prevailing in Tasmania.

The problem with the *Mabo* judgment was its sweeping assumptions about all of this. As is well known, its decision was made about land on the island of Mer, where the indigenous people cultivated gardens. The judges simply said that the same title was also applicable to land on the mainland, where the overwhelming pattern of land use was nomadic hunting and gathering.

I would argue that we have to make distinctions among hunter-gatherers themselves. The Aborigines were not one people, and they did not inhabit one culture. When the British arrived in 1788, the Aboriginal population had been formed by successive waves of hunter-gathers who had made the crossing from Asia since the Pleistocene era. Some came here as much as forty thousand years ago; others, especially those who brought the dingo, did not arrive until about five thousand years ago. The evidence of both stone tool cultures and mitochondrial DNA analysis indicates the Australian continent actually contained a greater diversity of indigenous peoples than Europe.[40]

The *Mabo* judgment lumped them all together. As the evidence from Tasmania demonstrates, however, some pre-contact indigenous cultures did not exercise any land rights. This is not an argument that they had no rights of any kind. The rights that would have persisted beyond colonization in 1788 would have been those they exercised and enjoyed before the British ever arrived on the scene. Whether we take Thomas Aquinas or John Locke as our guide, these would have been hunting rights, fishing rights, foraging rights, traveling rights and perhaps some others that the evidence would support. The Tasmanians certainly thought the game belonged to them, since the very little conflict that did occur in the first twenty years of settlement was over whites taking kangaroos, which the Tasmanians plainly regarded as their sole prerogative. But native title, in terms of a two-dimensional space conferring exclusive rights of occupation, was not part of their conceptual universe.

None the less, as I said before, I do not know at this stage to what extent that mentality was replicated on the mainland. Nor am I certain at what point in colonial history the Aborigines would have voluntarily surrendered their original laws and customs, and thus lost those rights that Locke assures us they did retain. Some of them "came in" to white society and became dependent upon it soon after the initial settlement, as early as the 1790s in Sydney, but as late as the 1930s in some parts of northern Australia.

What we can be more certain of, however, even from the sole perspective of the Tasmanian evidence, is that the High Court's *Mabo* judgment was an inadequate response to the complexity of pre-contact Aboriginal culture, and to those genuine rights that Aboriginal people did have by the fact of their earlier occupation of this continent. In making its judgment, the Court was heavily influenced by the politics of the day, by the push for land rights that emerged in the 1960s, and by the highly politicized version of history that was part of the same movement.

The major problem that stems from the judgment is also political. Since the 1970s, land rights have

been seen as the panacea for Aboriginal problems. Land rights were supposed to usher in an era of Aboriginal self-determination.

Today, Aboriginal people have now been subject to almost thirty years of an extensive and expensive social experiment. Native title has not been the only variable in this experiment and so cannot be allocated all the blame. Other variables have been the decisions of industrial relations tribunals, the policies of the welfare state, the curriculum of the education system, and the activities of the legal fraternity. On any reasonable assessment of the outcomes, the experiment has been a failure.

There are now prominent Aborigines who are prepared to tell it like it is. John Ah Kitt, an Aboriginal Minister in the government of the Northern Territory, where nearly all Aborigines have had land rights for decades, says it is now almost impossible to find an Aboriginal community that is not dysfunctional:

> "I don't mean the 10 to 15 communities that my department tells me at any one stage are managerial or financial basket cases … I am talking of dysfunction that is endemic through virtually all of our communities, both in towns and the bush".[41]

Others, like Noel Pearson, speak of the despair and violence produced by the regime of passive welfare. Recently, Richard Ahmat from Cape York wrote: "Our people are mired in social dysfunction and economically we are neck-deep in dependency".[42]

Land rights may not have originated as a white man's idea, but it has certainly been a white man's solution. It has provided the means for white society to congratulate itself on its munificence, but at the same time to avoid the problem of integrating Aborigines into mainstream society. The policy of land rights has focused on the Aboriginal past rather than the Aboriginal future.

If you look at the broad demographics of Aboriginal society it is not hard to see where the future lies. Today more than 70 per cent of Aboriginal people live in what the Census describes as major urban and other urban centres, that is, the cities and large country towns.[43] There are more Aborigines now living in Sydney alone than in the entire western third of the continent, outside Perth. The news media, of course, prefer the bad news out of inner urban ghettos like Redfern, and miss the main story of measurable progress in the outer suburbs. The Australian Bureau of Statistics shows clearly that, in suburban Australia, there is now an Aboriginal middle class. Even at the lower socio-economic levels, in urban regions the majority of Aboriginal adult males are employed, and the majority of Aboriginal children leave school literate and numerate. In the remote communities, where they have long enjoyed land rights, these statistics are completely reversed.

In other words, most Aboriginal people have voted with their feet in favour of integration with white Australia. They are now the long-term beneficiaries of the modernization and civilization that Britain first brought to these shores in 1788. You would never know this, however, if you only listen to Australia's intellectual classes. They still advocate the politics of segregation, of which native title is but the latest manifestation. By giving its imprimatur to this same old, persistently failed approach to Aboriginal affairs, the High Court's *Mabo* judgment deserves to be recognised as part of the problem, not part of the solution.

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11. Henry Reynolds (ed.), *Race Relations in North Queensland*, History Department, James Cook University of North Queensland, 1978. See Reynolds's own contribution, *The Unrecorded Battlefields of Queensland*, pp. 23-52, especially footnote 128, which is the only comment in the article on the Aboriginal death toll:

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24. *Ibid.*, pp. 149-58.

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41. *Black communities in a mess, warns Aboriginal minister*, in *The Sydney Morning Herald*, 8 March, 2002; Northern Territory government Hansard, 8 March, 2002.

42. *Market forces hit the Cape*, in *The Australian*, 23 May, 2003.

43. Australian Bureau of Statistics, Census of Population and Housing, Selected Social and Housing Characteristics, Australia, 2001, Cat. no. 2015.0.

# Concluding Remarks

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

I hope that you will agree that we have had a stimulating conference. We have discussed a number of important issues that relate to the possible improvement of the working of our constitutional system. All of these issues warrant close and continuing consideration.

The questions raised by Mr Justice Callinan are perhaps more appropriate to be considered by judges than by the general community. He discussed some problems created by the law of precedent, and in particular the paradox that the conservative view that precedent should be followed entrenches the activist decisions of those judges who, sometimes by a majority, have already disregarded existing precedent. That is a serious matter for judicial consideration.

Three constitutional reforms were, in particular, suggested. Professor Walker and Mr Peter Reith advanced a strong and persuasive case for the introduction of citizen initiated referenda. The Honourable Len King put forward arguments to the contrary, some of which were demolished by Professor Walker as élitist and undemocratic. The nagging fear of the opponents of CIR is that vested interests may throw their weight and their money behind proposals which are superficially attractive, but which would infringe the legitimate interests of a section of the public or would be deleterious to the public interest. These fears may be groundless. It is hard to oppose a CIR limited to the repeal of existing legislation, and it is attractive to think that CIR would provide a useful balance to the power of the Executive in any State which had a unicameral legislature. The debate on this subject generally could usefully be pursued.

Professor Walker, however, went a bridge too far when he acceded to the suggestion that High Court Justices could be subject to recall. Nothing would be more destructive of judicial independence than the possibility that a judge might be hounded out of office by a media campaign based, for example, on the judge's alleged leniency in dealing with criminal appeals.

The question whether it would be desirable to retain an upper House was examined in relation to South Australia, but it is a general issue. The Honourable Len King favoured a unicameral legislature, but the Honourable Trevor Griffin saw no reason to make a change of that kind. Mr King suggested that Queensland and New Zealand had not suffered from the abolition of an upper House. I am not sure that I agree. The harmful effects of undesirable constitutional change can be slow and imperceptible. There have been instances in Queensland when a government has rushed legislation through the Legislative Assembly overnight, allowing no opportunity for the public to voice its legitimate objections. In New Zealand, as I understand it, it was a wish to curb the power which the Executive often has to dominate a unicameral Parliament that led to the adoption of an electoral system which makes it virtually impossible for any party to obtain a majority.

I understand the frustration of governments when an upper House fails to pass perfectly sound legislation, and does so purely for political reasons, but an upper House, besides providing an opportunity to revise and amend legislation, usually also operates as a useful check on the growing power of the Executive.

Senator Minchin put forward an unanswerable case in favour of voluntary voting. We are so used to the fact that voting in Australia is compulsory, that we tend to forget that Australia is one of the very few countries whose laws make it obligatory to vote. Unfortunately, Senator Minchin was not optimistic that this unnecessary infringement of our liberties will be removed.

In a lively address, Julian Leeser brought us up to date on the republican debate, showing that the

republicans remain in a state of muddled division. No one has yet devised, nor is anyone likely to devise, a republican Constitution for Australia that would work as well as our present Constitution.

Dr Partington told us the sorry story of the Hindmarsh Island bridge. One can hardly doubt that a blatant and unconvincing fabrication of Aboriginal tradition was accepted as true, or possibly true, by persons whom we would have expected to be more perceptive, or less ideologically committed, than proved to be the case.

Mr Windschuttle, in the course of a thoughtful discussion of indigenous land rights, gave examples of other cases in which authors have, in many instances, fallen into error, or resorted to fabrication, in an attempt to advance the Aboriginal cause – to place the best possible interpretation on the motives of those involved.

One serious problem that I see with the *Mabo* judgment is that it should never have dealt with the question of Aboriginal lands, since the land in question in that case was on the Island of Mer, whose inhabitants have a culture quite different from that of the Aboriginal peoples of mainland Australia. Further, the Court brushed aside, as discriminatory, the principle that some indigenous notions of land rights are too unlike those recognised by the common law to be able to be given effect by the common law. That of course does not mean that indigenous land rights cannot be recognised by statute, but the existing native lands legislation can hardly be regarded as desirable or appropriate.

The nation has wasted a great deal of money, and unnecessary social division has been caused, by mistaken policies which governments have been led to adopt by erroneous theories and misleading propaganda. Some Aborigines are in great need of help, and the Government has the difficult task of meeting their needs more rationally, less wastefully and with less rancour than has so far been the case.

Finally, we had an interesting historical retrospect. Professor Howell and Professor Ayres gave us accounts, in the one case, of South Australia's early unhappy experience of Federation – an unhappiness that perhaps persists – and in the other case of a time when the High Court was unfortunately divided by the mutual antipathies of some of the judges.

I am very grateful to the Board of the Society for the gifts which they gave me, and which I value greatly. I have enjoyed my association with the Society and its members, and hope that we have done something of value. I am, however, unworthy of the gifts, when the credit should go to John and Nancy Stone, without whose efforts the Society could not have continued to function successfully for over a decade. I thank them for their efforts, and the members of the Board for their cooperation, and you all for your support of the Society.

# Appendix I
# Presentation to Sir Harry Gibbs

## Professor David Flint, AM

Sir Harry, Lady Gibbs, Your Honours, Ladies and Gentlemen.

It is an honour to be invited to speak on behalf of the Board on this particular occasion, to make a presentation to our President in recognition of his considerable contribution to the achievements of The Samuel Griffith Society. I refer of course to the Right Honourable Sir Harry Gibbs, GCMG, AC, KBE.

Most of us are of course well acquainted with Sir Harry's career. It will be sufficient to recall that after service as Major Gibbs in the Australian Imperial Force in the Second World War, he was called to the Queensland Bar, and found time to lecture at the TC Beirne Law School in the University of Queensland.

Then followed a series of judicial appointments culminating in his elevation to the very pinnacle of the Australian judicial system. He served as Chief Justice of Australia from 1981 to 1987.

When John Stone and Ray Evans founded the Society in 1992, Sir Harry agreed to accept the role of President. At the launch of the Society in 1992, he set the tone of his presidency when he presented a most substantial paper entitled *Re-Writing the Constitution.*

*Upholding the Australian Constitution*, the record of the Proceedings of the Society, is replete with further contributions from Sir Harry – and not only in his succinct reports at the end of each conference. Most importantly, we find there a collection of papers, each examining a particular constitutional issue. These begin with his address in launching Volume 1 of the series, in which he spoke on the proposed review of the Constitution. (This address may be found in an Appendix to Volume 3, which itself contains the Proceedings of the third conference, in Fremantle in 1993). Then over the years, we find the following, the titles of which demonstrate the breadth of interest Sir Harry has in constitutional issues:

- In Sydney in 1995, *"A Hateful Tax"? Section 90 of the Constitution*, Volume 5;
- In Canberra in 1997, *A Republic: The Issues*, Volume 8;
- In Perth in 1997, *Two Rules of Law?,* Volume 9;
- In Melbourne in 1999, *A Preamble: The Issues*, Volume 11;
- In Sydney in 2000, *The Erosion of National Sovereignty*, Volume 12; and
- In Melbourne in 2001, *The Constitution: 100 Years On*, Volume 13.

In addition, Sir Harry has issued a series of messages to our members on Australia Day each year, always on some subject of relevance to the time. This program of publication – and it does not include papers given elsewhere – would put many academicians to shame. And speaking as one of them, I have to say that there is more sense in all of these than that which flows from the pens of those who argue that we have a "horse and buggy" Constitution in need of reform.

To mark this occasion, the Board thought it appropriate to make a presentation to Sir Harry as a testament to the respect and affection in which he and Lady Gibbs are held, not only by the Board but by our membership in general. The presentation consists of a selection of antiquarian books, a choice made particularly appropriate by the learning which Sir Harry has so long demonstrated.

The actual task was – as is so often the case – delegated to John and Nancy Stone, who were more than willing volunteers. Each volume has been inscribed to record this occasion.

The first four books came from the Antiquarian Bookshop, Crows Nest, NSW. The first three of these are part of a special group of notable legal works, privately printed by The Legal Classics Library, a

division of Gryphon Editions, New York, between 1985 and 1992. They are facsimiles of early editions (as listed below), all in perfect condition, leather bound, with gilt-edged pages and gold stamped designs and print on the spines and covers. Each contains a booklet of notes from the editor, Thomas G Barnes, Chairman of the Legal Classics Library and Professor of History and Law at the University of California at Berkeley. These are:

- *Areopagitica*, by John Milton, with an introduction (1890) by James Russel Lowell.
- *The Nature and Sources of the Law*, by John Chipman Gray, Professor of Law at Harvard, a member of the Boston Bar, and a friend of Oliver Wendell Holmes, Jr. This is a facsimile of the second edition, 1927, the work having been first published in 1909. It is based on a course of lectures in Comparative Jurisprudence given at Harvard Law School between 1896 and 1902. The central theme of these lectures is that "…the law is what the judges declare…".
- *Law in the Making,* by Carleton Kemp Allen, first published in 1927. CK (later Sir Carleton) Allen, an Australian, was Professor of Jurisprudence at Oxford and subsequently Warden of Rhodes House. In this classic he appears to take issue in important respects with JC Gray's *The Nature and Sources of the Law.* The seventh edition was published in 1964, shortly before Sir Carleton's death.

On a lighter note, and because of Sir Harry's Queensland connections, John and Nancy found a fine illustrated copy of *The Letters of Rachael Henning,* edited by David Adams (1986). These letters, first published in 1951, were written by Rachael Henning between 1853 and 1882, and describe for her relatives "back home" the life of an English gentlewoman who, at a second try, took with enthusiasm to life on a north Queensland sheep property.

To complete the gift, John and Nancy went out to Berkelouw's great book barn at Berrima, NSW where they found a copy of *The Commonwealth of Australia Constitution Act together with the Debates and Speeches on the same in the Imperial Parliament,* published of course in 1900. This is a rare offering, and because it is in a somewhat fragile condition, it was decided to have a bookbinder (Sabine Pierard) make a buckram "chemise", which will preserve and protect the Act when it is not in use.

Before I make the presentation, I should record the Board's appreciation – as well as, I am sure, that of all our members – to both John and Nancy Stone for the time and care they spent in putting together this elegant and attractive collection.

And now, on behalf of the Board and the members, it is with great pleasure that I now make this presentation to you, Sir Harry, as a small token of the esteem in which we hold you, and for the active leadership you have given to The Samuel Griffith Society, and we thus convey our very best wishes to you and to Lady Gibbs.

# Appendix II
# Contributors

## 1. Addresses

The Hon Ian CALLINAN, AC, was educated at Brisbane Grammar School and the University of Queensland (LLB, 1960). He was admitted to the Queensland Bar in 1965 and practised as a barrister-at-law, becoming Queen's Counsel in 1978, and serving as President of the Queensland Bar Association (1984-87) and of the Australian Bar Association (1984-85), before being appointed to the High Court bench in 1998. Prior to that time he held several company directorships (QCT Resources Ltd, Santos Ltd, Queensland Coal Resources Ltd), while also acting as Trustee of the Queensland Art Gallery (Chairman, 1997-98), the Brisbane Community Arts Centre and the Brisbane Civic Art Gallery Trust. Since 2000 he has been Chairman of the Australian Defence Force Academy. He is also the author of a number of plays, novels and short stories.

The Hon Senator Nick MINCHIN was educated at Knox Grammar School, Sydney and the Australian National University (B Ec, 1974; LLB, 1976) before embarking on a career in the Liberal Party organization, initially in Canberra (1977-83) and then in South Australia (State Director, 1985-93). Elected as a Senator for South Australia in 1993, he became, in turn, Parliamentary Secretary to the Prime Minister (1996-97), Special Minister of State and Minister Assisting the Prime Minister (1997-98), Minister for Industry, Science and Resources (1998-2001), and, since the 2001 election, Minister for Finance and Administration.

## 2. Conference Contributors

Professor Philip AYRES was educated at Adelaide Boys High School and the University of Adelaide (BA, 1965; PhD, 1972) and is currently Associate Professor and Head of English Literature at Monash University. In addition to numerous books and scholarly articles on English literary history, he has published first-hand accounts of Khomeini's Iran and of the mujahedeen side of the war in Afghanistan. In 1989 he was elected a Fellow of the Royal Historical Society (London), and in 1993 was Visiting Professor at Vassar College in New York State. He is the author of *Malcolm Fraser: A Biography* (1987), *Mawson: A Life* and *Classic Culture and the Idea of Rome in Eighteenth Century England.* His most recent, much acclaimed biography of Sir Owen Dixon was published earlier this year.

Professor David FLINT, AM was educated at Sydney Boys High School, at the Universities of Sydney (LLB, 1961; LLM, 1975) and London (BScEcon, 1978), and at L'Université de Droit, de l'Économie et des Sciences Sociale, Paris (DSU, 1979). He practised as a solicitor in Sydney (1962-72) before moving into University teaching, holding several academic posts before becoming Professor of Law at Sydney University of Technology in 1989. In 1987 he became Chairman of the Australian Press Council, and in 1992 Chairman of the Executive Council of the World Association of Press Councils. Since October, 1997 he has been Chairman of the Australian Broadcasting Authority. During the 1999 Referendum campaign on the Republic issue, he played a prominent part in the "No" Case Committee; he remains today the National Convenor of the Australians for Constitutional Monarchy.

The Rt Hon Sir Harry GIBBS, GCMG, AC, KBE was educated at Ipswich Grammar School and Emmanuel College at the University of Queensland (BA Hons, 1937; LLB, 1939; LLM, 1946) and was admitted to the Queensland Bar in 1939. After serving in the AMF (1939-42), and the AIF (1942-45), he

became a Queen's Counsel in 1957, and was appointed, successively, a Judge of the Queensland Supreme Court (1962-67), a Judge of the Federal Court of Bankruptcy (1967-70), a Justice of the High Court of Australia (1970-81) and Chief Justice of the High Court (1981-87). In 1987 he became Chairman of the Review into Commonwealth Criminal Law, and since 1990 he has been Chairman of the Australian Tax Research Foundation. In 1992 he became, and remains, the founding President of The Samuel Griffith Society.

The Hon Trevor GRIFFIN was educated at Scotch College, Adelaide and the University of Adelaide (LLB, 1961; LLM, 1970). He practised as a solicitor and at the Adelaide Bar (1963-79) until his election, in 1978, to the South Australian Legislative Council. After having been Attorney-General and Minister for Corporate Affairs in the 1979-82 Liberal government, in 1993 he again became Attorney-General and Minister for Consumer Affairs (1993-2001) and Minister for Justice (1997-2001); throughout this period he was also Deputy Leader of the Government in the Legislative Council. Since retiring from the SA Parliament in 2002, he has most recently been a member of the Panel of Experts of the SA Constitutional Convention.

Associate Professor Peter HOWELL was educated at St Virgil's College, Hobart and the Universities of Tasmania (MA, 1965) and Cambridge (PhD, 1972). After teaching at the University of Tasmania (1962-66), he has been lecturing at the Flinders University of South Australia since 1968, becoming Reader in History in 1982. He has specialised in British and Australian constitutional history, the best-known of his earlier books being *The Judicial Committee of the Privy Council: its Origins, Structure and Development.* He is a Fellow of the Royal Historical Society (London). In 1995 he became Chairman of the South Australian Constitutional Advisory Council, and most recently has been a member of the Panel of Experts of the SA Constitutional Convention. His most recent book, *South Australia and Federation*, was published earlier this year.

The Hon Len KING, AC, was educated at Marist Brothers School, Norwood, SA and the University of Adelaide (LLB, 1950). After practising as a barrister-at-law and solicitor (1950-70) (Queen's Counsel, 1967) he was elected in 1970 as the Labor member for the House of Assembly seat of Coles. He served in several Ministerial portfolios – Attorney-General (1970-75), Social Welfare and Aboriginal Affairs (1970-72), Community Welfare (1972-75) and Prices and Consumer Affairs (1973-75). Appointed a Justice of the Supreme Court in 1975, he became Chief Justice (1978-95). He has recently been a member of the Panel of Experts of the SA Constitutional Convention.

Julian LEESER was educated at Cranbrook School, Sydney and the University of New South Wales (BA Hons, 1999; LLB, 2000). After having been an elected Australians for Constitutional Monarchy delegate to the 1998 Constitutional Convention and, subsequently, a member of the No Case Committee for the Republic referendum, he has since served as Associate to Mr Justice Callinan (2000) and as Adviser to the Minister for Employment and Workplace Relations, the Hon Tony Abbott (2001). A solicitor, he is currently also working on a biography of the late Sir William McMahon.

Dr Geoffrey PARTINGTON was born in Lancashire and was educated at Queen Elizabeth Grammar School, Middleton and the Universities of Bristol (BA, 1951; MEd, 1972), London (BSc, 1971) and, after his emigration to Australia in 1976, Adelaide (Ph D, 1988). He was a teacher, headmaster and Inspector of Schools in England and has since taught in the school of Education of Flinders University, South Australia. During that time nearly 200 of his essays and articles have been published, many in scholarly journals as disparate as anthropology and moral education. His books include *Women Teachers in the*

*Twentieth Century*, *The Idea of an Historical Education*, *What do our Children Know?* and *The Australian Nation: Its British and Irish Roots.*

The Hon Peter REITH was educated at Brighton Grammar School, Victoria and Monash University (BEc; LLB). After some years as a solicitor (1974-82), he became the Liberal Party Member for the seat of Flinders in 1984. During the period 1987-96 he served in numerous Shadow portfolios (Attorney-General, Industrial Relations, Education, Treasurer, Defence, Foreign Affairs) as well as being Deputy Leader of the Opposition (1990-93). On the election of the Howard government in 1996 he became Leader of the House and, in turn, Minister for Industrial Relations (1996-97), Workplace Relations and Small Business (1997-2001) and Employment (1998-2001), before becoming, in 2001, Minister for Defence. Following his retirement from Parliament at the 2001 election, he has become Executive Director for Australia on the Board of the European Bank for Reconstruction and Development in London.

John STONE was educated at Perth Modern School, the University of Western Australia (BSc Hons, 1950) and then, as a Rhodes Scholar, at New College, Oxford (BA Hons, 1954). He joined the Australian Treasury in 1954, and over a Treasury career of 30 years served in a number of posts at home and abroad, including as Australia's Executive Director in both the IMF and the World Bank in Washington, DC (1967−70). In 1979 he became Secretary to the Treasury, resigning from that post – and from the Commonwealth Public Service − in 1984. Since that time he has been, at one time and another, a Professor at Monash University, a newspaper columnist, a company director, a Senator for Queensland and Leader of the National Party in the Senate and Shadow Minister for Finance. In 1996−97 he served as a member of the Defence Efficiency Review, and in 1999 he was a member of the Victorian Committee for the No Republic Campaign. A principal founder of The Samuel Griffith Society, he acts today as its Conference Convenor, and edits and publishes its proceedings, *Upholding the Australian Constitution.*

Professor Geoffrey de Q WALKER was educated at a number of State High Schools and the Universities of Sydney (LLB, 1962) and Pennsylvania (LLM, 1963 and SJD, 1966). He was admitted to the New South Wales Bar in 1965, and practised both there and in industry before becoming an Assistant Commissioner with the Trade Practices Commission (1974-78). He taught law at the University of Pennsylvania (1963-64), the University of Sydney (1965-74) and the Australian National University (1978-85), before becoming, in 1985, Professor of Law (and, in 1988, Dean of the Faculty of Law) at the University of Queensland. In 1996 he retired from that post to resume private practice in Sydney. He is the author of four books and a large number of articles on a variety of legal topics, including in particular citizens-initiated referendum systems and, more recently, federalism.

Keith WINDSCHUTTLE was educated at Canterbury Boys High School, and, after seven years in journalism, Sydney University (BA Hons, 1969) and Macquarie University (MA, 1978), the intervening years having been spent partly in journalism and partly in teaching at the University of NSW (History Department, 1973-75) and the NSW Institute of Technology (now UTS) (History and journalism, 1977-1981). After briefly teaching sociology at the University of Wollongong in 1981, and history and social policy at the University of New South Wales (1983-90), he has since become an author and publisher (Macleay Press), being a frequent contributor to *Quadrant* and to *The New Criterion*, New York. Among his several books are *The Killing of History: How Literary Critics and Social Theorists are Murdering our Past* (2000), and more recently, his *tour de force*, *The Fabrication of Aboriginal History: Volume 1, Van Diemen's Land.*