Upholding the Australian Constitution Volume Nineteen

Proceedings of the Nineteenth Conference of The Samuel Griffith Society

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Foreword

John Stone

As this Foreword is being written, Australian voters have just decisively dismissed the Howard Government and brought Mr Howard's own political career to an ignominious end with his personal defeat in the seat of Bennelong.

The incoming Labor government, under the "new leadership" of Mr Kevin Rudd, is promising all manner of rapid-fire action under the characteristically unoriginal slogan of "the first 100 days". Meanwhile the Liberal Party, bereft not merely of one leader but also of his long-self-designated successor, Mr Peter Costello, is contemplating both its past and its future. On recent evidence, the latter seems likely to be as error-ridden as, recently, the former has been; but we shall see.

All that may seem to have little to do with the 19th Conference of The Samuel Griffith Society, held in Melbourne on 17-19 August, 2007. The papers delivered there make up this volume of the Society's Proceedings, *Upholding the Australian Constitution*.

Consider, however, the themes running through the recent election campaign. I personally place much less weight on the Work Choices issue, among the reasons for the Coalition's defeat, than do Labor spokesmen and women and their ever-compliant associates in the Canberra Press Gallery. It is none the less ironic that that misguided venture by the Howard Government is perceived to have figured so prominently in its defeat. Two years ago, in the Foreword to Volume 17 of these Proceedings, I said:

> "… the government's proposed industrial relations legislation … touches, in one major respect, upon the interests of this Society. I refer, of course, to the government's proclaimed intention to rest its new legislation upon the corporations power of the Constitution".
>
> "It is not clear to me", I said, "(nor, I suggest, to any plain man's reading of them)", how the words of that power (s. 51 (xx) of the Constitution) would authorise the federal Parliament to "take over" the industrial relations functions of the States. "Nor, as it happens, do I believe it is necessary for the government, in seeking to reform our industrial relations system"—a reform objective wholly desirable in itself—"to do so".

It is now a matter of record that, so far as the law of the Constitution is concerned, five Justices of the High Court of Australia said (implicitly) that I was thoroughly wrong. In its November, 2006 judgment the Court upheld the government's *Workplace Relations Amendment (Work Choices) Act* 2005 in its entirety.

Nobody should be under any doubt as to the grave significance of this decision in furthering future expansion of centralist power in Australia. In my judgment it will come to rank with the *Engineer's Case* of 1920 and the *Tasmanian Dams Case* of 1983 in the process of destroying the federal nature of our Constitution and handing ever more power to Canberra.

Two High Court Justices, to their undying credit, discerned these dangers. Mr Justice Callinan (as he then was), in a powerful dissenting judgment whose words will ring down the years, deployed argument after argument as to why what his majority colleagues were doing was in error. In doing so, he addressed squarely a central issue in the process of constitutional interpretation, namely the extent to which precedent must continue to prevail, even when to follow precedent is to produce a constitutional monstrosity.

In a nice touch, at paragraph 748 of his judgment, His Honour quoted in his support none other than Mr Justice Isaacs. Writing in 1913 in support of what became his own subsequent judgment in the *Engineers' Case*, which involved the overturning of a multitude of precedents, Isaacs said :

> "Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all.
>
> "If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation.
>
> "It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right".

Such arguments notwithstanding, the *Work Choices Case* majority Justices, once again, prefered to be "persistently wrong"—although, in their defence, see below.

Mr Justice Callinan, of course, has been long marked out in the judiciary as a steadfast federalist. The same cannot be said of his fellow dissenter, Mr Justice Michael Kirby. It is all the more to His Honour's credit, therefore, that he should have judged that the Howard Government's Work Choices folly was a constitutional bridge too far.

In a different capacity, it is true, Mr Justice Kirby has been a life-long upholder of the Australian industrial relations system. It is perhaps therefore not surprising that he should come down against an enactment that sought to overturn, or at least considerably weaken, that system. Nevertheless, it would in my view be too cynical to read His Honour's judgment with only that consideration in mind. Consider, for example, paragraph 558 of his judgment, namely:

> "This court needs to give respect to the federal character of the Constitution, for it is a liberty-enhancing feature. Federalism is a system of government of special value and relevance in contemporary circumstances. It is protective of the freedom of individuals in an age when the pressures of law, economics and technology tend to pull in the opposite direction".

In noting earlier the blind adherence to the precedents set by earlier bad decisions of their predecessors, I acknowledged the possibility that the majority Justices could defend themselves—namely, by pointing to the way in which the plaintiffs ran their case. Clearly, if the States and Territories (as well as the plaintiff trade unions) were to have any hope of succeeding, they would need to address the principal roadblocks in their path. These were, in particular, the *Engineers' Case* itself, and the *Rocla Concrete Pipes Case* (1971), both of which had established precedents that needed to be confronted and, as necessary, either got around or overturned. Yet, as the majority Justices were quick to note in their joint judgment, at no point in their arguments to the Court did any of the plaintiffs seek to do that.

That brings me back to the Society's 19th Conference, which included four papers under the general rubric, Work Choices and the Federation. In the first of these papers, Mr Julian Leeser addressed this very issue of how the plaintiffs ran their case. His paper, *Work Choices: Did the States run dead?*, notes that, ever since Federation, Labor governments have sought to move industrial relations matters more and more to Canberra.

Why then, he asks, would the State and Territory plaintiffs—all of them Labor governments—want to resist, other than purely as a matter of form, the measure which was doing that for them? And why, he might have asked, would the Howard Government have set out to do for its opponents what they had tried to do themselves on so many past occasions?

That last is a topic for a different forum. Meanwhile, however, we should reflect upon the ominous words of Mr Greg Combet, formerly Secretary of the ACTU and now, as the member for Charlton in the new federal Parliament, already appointed a Parliamentary Secretary. In October, 2006, after the *Work Choices Case* had been heard but prior to the Court's decision, Mr Combet said: "If the corporations power is available, I want people to be under no misapprehension at all, we are going to support a future Labor government to use it". Read in conjunction with Mr Combet's earlier remark that the trade unions "used to run this country, and it wouldn't be a bad idea if we did again", it may not be difficult to forecast the shape of things to come.

Be that as it may, the three other papers in this area also addressed the outcome of the *Work Choices Case*. Mr John Gava gave what can be seen as the conventional lawyer's assessment—namely, that all precedents suggested that the government's legislation would be upheld, and that the dissenting judgments of Justices Kirby and Callinan were, for that reason, seriously in error. (I am inclined to think that, in doing so, Mr Gava, even on his own terms, was somewhat less than fair to Mr Callinan's arguments; but then, I would say that, wouldn't I?).

Professor James Allan and Mr Eddy Gisonda, each in his own way, addressed the central issue. *When does Precedent become a Nonsense?*, Professor Allan asked—a question which, on my reading of Mr Justice Kirby's judgment, lies at the heart of its own admirable apostasy (if I may be forgiven for so describing his view that, in effect, the long down-hill road from *Engineers'* has led us to a constitutional precipice from which it is time to turn back—or at least, aside).

Drawing on the delightful examples of A P Herbert's hilarious book, *Uncommon Law*, Professor Allan has pointed out—without ever quite saying so in such intemperate words—that the law, as interpreted by High Court Justices in this case, has plainly become an ass.

Ass or not, the animal needs to be confronted, and it is to the task of doing so that Mr Gisonda's paper, *Work Choices: A Betrayal of Original Meaning?*, is addressed. His widely ranging discussion of the importance of "originalism" (the term that lawyers have coined to describe what you or I would simply see as adherence to

the text of the federal contract as originally drawn up), will give readers of this volume much to think about.

As usual, our 19th Conference was not confined to the single issue of Work Choices, important though that is. Two papers addressed the issue of Federalism in a Centralist Environment. The first, by Dr David Hamill, *W(h)ither Federalism?*, has provided a most valuable account of the nature of the dealings between an increasingly powerful, and increasingly arrogant, federal government—represented in this case by the then Treasurer, Mr Peter Costello—and more and more enfeebled State governments. As Treasurer of Queensland during 1998-2001, Dr Hamill knows a thing or two about the processes of negotiation—make that *diktat*—of the Goods and Services Tax arrangements. Anyone who still labours under the delusion that the GST is a State tax collected by the Commonwealth acting as their agent, will be left in no doubt by Dr Hamill as to the untruth of that "transparent little lie" (as, many years ago, I publicly termed it).

The accompanying paper by Mr Ben Davies (a member of the Board of Management of this Society), *The Politics of Federalism*, approaches these issues from a rather different perspective. Is the strongly flowing tide of Canberra-centred decision-making, he asks, due to the centralist bent of federal governments? Or is it, particularly in recent years, due to the poor, and in only too many cases wretched, performance of State governments (all of them, today, Labor ones)? Is the vacuum created by poor, even wretched, performance at the periphery not merely inviting federal intervention in area after area, but positively demanding it?

To some extent, as I am sure Mr Davies would be the first to acknowledge, there is in this an element of the chicken and the egg debate. Has the poor quality of State governments led to public demands for federal intervention? Yes, undoubtedly. Has the increasing level of federal intervention led to State governments (and hence, those who make them up) being progressively downgraded? Yes, undoubtedly. Moreover, anyone deploring the quality of current Labor administrations in the States and Territories needs also to ask why the Liberal (and in some States, also National) parties at the State level have proved serially incapable of wresting office from the hands of such administrations.

It would be otiose to continue to canvass, one by one, the contents of this volume. Among all the other high quality contributions, however, I cannot fail to single out three for particular mention.

Those attending the conference opening Dinner on Friday evening were treated to a splendid address by Professor Geoffrey Blainey, *What should we say about our Federation?* In his inimitable style, Professor Blainey threw the light of history upon the development both of our Constitution and of our country. Musing on the manner in which, almost entirely via the agency of High Court interpretation, the focus of our Constitution has shifted more and more towards Canberra, he noted that "to present ambiguity [of constitutional wording] to the Justices of the High Court is, at times, like presenting them not only with their legitimate serve of bread and butter but also with a welcome crate of Scotch. They get merry on it". Just so.

Dr Anne Twomey's paper, *The Queen of Australia*, draws upon her outstanding book, published a year or so ago, *The Chameleon Crown: The Queen and her Australian Governors*. Her paper provides an enthralling account of the development of the relationship(s) in Australia between the Crown (originally the British Crown, now the Australian one), British governments, governments of the Commonwealth of Australia, Australian State governments and, not least, the person(s) of the Monarch. Anyone who believes that the Royal prerogative is dead will find Dr Twomey's paper as revealing as it is fascinating.

It is not only for that reason, however, that I describe Dr Twomey's book as "outstanding". It is because that book represents genuine scholarship, of a kind so rarely seen these days in the humanities areas of our universities. The access given her to British Cabinet papers, and to the Palace records, speaks volumes of the esteem in which, researching her book, she must have been held in those quarters. The same was not true of her (non)access to the corresponding Commonwealth government documents—a fact that may not be unrelated to the clearly duplicitous behaviour of that government at the time, both in its dealings with the British and its dealings with our own State governments. In that sorry tale, Mr Hawke, and then Senator Gareth Evans, have much to be secretive about.

My final encomiums must be reserved for Mr Paul Houlihan's address to the Saturday evening conference dinner. *A Constitutional Fairy Tale* is unlikely, I suspect, to be equaled in the annals of our Society for its mixture of wit, whimsey and the brutal reality which so marks, and so mars, the world of industrial relations in this country—a world with whose entrails Paul Houlihan, over a long life, has become so exuberantly familiar. It is, in my respectful opinion, a rare gem—one to be taken out from time to time, turned over and re-examined for what may well prove to be its lessons over the years ahead. But then, as Mr Houlihan has assured us, it is merely a fairy tale. Isn't it?

The Samuel Griffith Society was founded to promote debate about the Australian Constitution from a federalist (i.e., anti-centralist) viewpoint. Our 19th Conference, like all its predecessors, was directed to furthering that objective, and it is in that spirit that this volume of its Proceedings is now offered.

Dinner Address

What should we say about our Federation?

Professor Geoffrey Blainey, AC

The coming together of the six Australian colonies in 1901 had a touch of the miraculous. Alfred Deakin, who was to be three times Prime Minister, was convinced that the new Commonwealth had only been achieved by a miracle. Most people probably rejoiced in that miracle. Curiously, at this time there was little sign of what would later be seen, in many quarters, as a breakdown in the spirit and the functions of the federal system. The breakdown came from the dominance of the Commonwealth over the States.

Eventually, Australia, in financial terms, became the most centralised federation in the world. In fact, half of the States' revenue in 2001 came from the Commonwealth.[1] Such dominance was not predicted. The States and their financial powers had seemed to be adequately protected by the Constitution that came into effect in 1901. What, then, were the forces and influences that weakened the power of the States?

It is commonly argued, especially by scholars possessing a deep knowledge of legal history, that the politicians who framed the Constitution were not careful enough, not far-seeing enough. As a result, several sections of the Constitution proved to be vulnerable to capture or overthrow. They included the specific financial provisions originally called the Braddon initiative, and the absence of any provision giving the States a voice in the appointing of High Court judges—the very people who would sometimes have a crucial say in determining the relative power of State and Commonwealth governments. After the *Engineers' Case* of 1920 the tendency was for the High Court, when called upon, to sympathise with the Commonwealth and to augment its powers at the expense of the States.

In the end, the financial arrangements in the Constitution probably favoured the Commonwealth more than was envisaged. The financial key was s. 87, the Braddon initiative. It stipulated that three-quarters of the vital customs revenues collected by the Commonwealth should, until 1911, be handed over to the States. This would give to the States a ten-year financial reprieve. But Tasmanians particularly feared that, after 1911, the lesser States might, in a financial emergency, need federal grants. As a result, the making of conditional grants to the States was incorporated in the federal Constitution as s. 96.[2] This section was shaped with little debate and ended with slightly ambiguous wording—if the Constitution is to be viewed as a whole. To present ambiguity to the Justices of the High Court is, at times, like presenting them not only with their legitimate serve of bread and butter but also with a welcome crate of Scotch. They get merry on it.

Various sections of the Constitution were clarified or reinterpreted, as the decades passed by, and as the world became more complex. Thus the conditional or special-purpose grant, originally designed to give a walking stick to limping States, eventually gave the Commonwealth a legitimate way of tapping the States on the head and telling them to stand aside in what they always assumed was their own domain.[3]

The strenuous promoter of s. 96 had been John Henry, a Scot who became a grocer on the Victorian gold diggings around Castlemaine, and then crossed the strait to north-west Tasmania, where he set up a little chain of general stores, over which hung the sign, Universal Provider. The slogan could well have become the slogan of the expanding Commonwealth.

John Henry died in 1912, and was buried in the Devonport cemetery. If he had chanced to belong to a later generation and to have fallen ill in Devonport this year, he himself might have been a beneficiary, in the Mersey hospital, of the latest Commonwealth intervention into State affairs.

I should just add a thought about the High Court. So vital to the new Commonwealth and its relations with the six States, its creation was deferred. When at last the attempt was made by the Barton Government to create the High Court, a loud shout of opposition arose. After it was explained that the High Court would be the keystone of the federal arch, many politicians said they did not want a keystone. Alfred Deakin almost had to threaten to resign until finally some of his Victorian colleagues came into line. So the Bill butted its difficult way through both Houses, and the High Court was finally established.

For its opening years the High Court was largely in the hands of foundation federalists, men of the mainstream such as Sir Edmund Barton and Sir Samuel Griffith. Before long the federalists from the anabranches, those founding fathers who paddled their own canoes, became more influential on the High Court. One was Sir Isaac Isaacs, who was prominent in the *Engineers' Case*. And then came a generation of lawyers who had had no part in creating the original Constitution. Sometimes they found it easier, by their interpretation, to alter the meaning of the Constitution while sitting in the High Court, than had the individual federal fathers when they stood and debated one another, week after week, in the federal conventions that actually drafted and revised the Constitution in the 1890s.

Another reason is widely put forward to help explain the unexpected dominance of the federal government. This is the failure of the Senate in practice to act primarily as a States' House. There is a good deal of validity in such an explanation, but maybe not a great deal. I doubt whether the Senate was widely expected by experienced politicians to play primarily this role. No doubt this role was widely emphasised in the pre-1901 rhetoric. It was an aspirin offered to the less populous States, which felt reassured that they would each elect as many Senators as would the big pair of New South Wales and Victoria.

Even in 1901, however, it was probably clear to experienced politicians that few issues in the new Parliament would be debated largely along State lines. To the best of my knowledge, it was never widely expected that the Senate would vote almost unanimously on some topics, and stand united against the demands of an ambitious federal government. The Colonies or States in their interests were already divided, with one cleavage dividing the populous from the less populous. One sign of the cleavage had been the last-minute and successful demand of New South Wales, as a populous State, that the Braddon section, which was the citadel of the small States, become inoperative after ten years.

In the new federal Parliament the party system was soon in force: loyalty to the party usually came before loyalty to one's home State. Above all, the big unifying national topics such as defence and immigration were moving to the centre of the stage. Even the potentially divisive topic of protection versus free trade was eased, because the argument for tariff protection and self sufficiency, and the emergence of heavily-protected industries such as iron and steel, was subtly linked to the need for national security.

My own view, and I offer it tentatively rather than emphatically, is that the increasing role and power of the Commonwealth government was not primarily the fault of the founding fathers. Even if they had tightened up the Constitution in the interests of the States, the trend of power would have run the other way. Of the four similar federal systems that were functioning by 1914—namely the United States, Switzerland, Canada and Australia—ours was, to an unusual degree, shaped by powerful forces that strengthened soon after the Constitution was accepted and the federation was created.

One influence was the tense international situation: the military victory of Japan over Russia in 1905, the intermittent European crises, and then the outbreak of the First World War. Even before the war the new Commonwealth government was spending massively on defence. Thus in 1913, Australia's defence expenditure *per capita* was far higher, for example, than that of Italy, the United States, Russia and Japan. Indeed Australia was spending, on defence, three times as much *per capita* as Austria-Hungary with its huge army and small Adriatic navy.[4] High spending before, and especially during, the war of 1914-18 increased the role of the Commonwealth. The Second World War accentuated the pattern: it was in 1942 that the Commonwealth became the sole tax collector, and even took over the taxation offices and staff of State governments. Incidentally, the defence power was also used in 1949, four years after the war, to justify the Commonwealth in setting up the Snowy hydro-electric and irrigation scheme.

Another factor that increased the Commonwealth's role was the rapid rise of the Australian Labor Party. Labor had exercised little influence in the shaping of the Constitution in the 1890s. By 1904, however, it was strong enough to take office, federally, for the first time. In the first 16 years of the new Commonwealth it was probably the most successful party. It operated through a caucus, and exercised discipline on its parliamentary members, and those practices possibly tended to have the indirect effect of diminishing the role of the Senate as the States' House. Labor was, as we shall see, not so sympathetic to federalism as were the other major political parties. It also believed deeply in using the Commonwealth to expand and widen social security. That activity , like the demands of war, called for more money, and so the financial demands of the Commonwealth were multiplied. To these two factors we should add the growing nationalism, which initially gave an ideological boost to the national rather than the separate State governments.

So, through these powerful influences, the Commonwealth government slowly gained a dominance which almost no federal founder had envisaged in 1901. This dominance, however, could not have taken place

if it had been opposed by the main political parties.

The Labor Party even began to lose faith in federalism. Its long-term dream was unification, though the desire for unification was stronger in the Labor branches in the south-east corner than in Western Australia and Tasmania. Labor believed it could promote unification by skipping past one of the glories of the Constitution, the section stipulating that the people voting in a referendum must approve of any change to the Constitution. The Scullin Government (1929-32) passed in the House of Representatives a Bill—now largely forgotten—to allow the High Court, rather than a referendum of the people, to make changes to the Constitution. This was accompanied by the decision—made while Scullin was overseas, and made against his will—to add the Labor politicians, Dr Evatt and Mr E A McTiernan, to the small bench of the High Court. The scheme did not succeed. In the Senate in May, 1931 the controversial plan of eliminating or by-passing a referendum of the people was defeated.[5]

Support for unification rather than federalism rose and fell. John Curtin, who became leader of the Labor Party in 1935 and Prime Minister from 1941 to 1945, did not support unification. Coming from Western Australia, he believed in the States: he had to. He certainly did not support secession. For him the States were an essential inconvenience. But it was Curtin who in wartime helped to manufacture those manacles for the States: the policy of a uniform income tax, and thereby the abolition of the States' main prospective source of revenue.

Whitlam was the last of the important Labor leaders who wanted to get rid of the States or to squeeze them into jelly. That was one of the reasons why he supported local government: he really wanted two spheres or tiers of government, not three. His favourite phrase was "the Australian government", not the Commonwealth or federal government.

At present there is some surprise amongst Liberals that Mr Howard at times has intervened in the States' domain, or what were traditionally their domains. But across the decades, the Liberals or their Coalition partner have been at times the promoter of Commonwealth power in various fields. I offer three instances—there are more.

The Bruce-Page Government, a Coalition ruling from 1923 to 1929, initially seemed willing to return the control of the income tax to the States: it was all a matter of how it was to be done. The opposite happened. In the longer term Earle Page, the federal Treasurer and leader of the Country Party, did much to strengthen the Commonwealth's control of finances. He cut out the general grants to the States and initiated the special purpose grants, especially for roads. Likewise it was S M Bruce who, as Prime Minister, tried to give the Commonwealth more control over industrial relations, especially over disruptive strikes. He tried—and failed—to secure such control at a referendum.[6]

In 1946 the Chifley Labor government sought, by referendum, a vital change to the Constitution, giving the Commonwealth government an undisputed right to dispense all kinds of social services. R G Menzies and all but three of the parliamentary members of his new Liberal Party endorsed the proposal. The referendum won a majority of votes in all six States. Menzies, however, did not support the unsuccessful referendum to transfer industrial powers to the Commonwealth. On the other hand, the Country Party supported the unsuccessful referendum to enable the Commonwealth government to set up marketing schemes.[7]

A decade later, the Liberals under Menzies extended the Commonwealth government's intervention in education. Universities had been entirely the realm of the States until 1943, when the Curtin Labor government set up the Commonwealth Reconstruction Training Scheme, called CRTS, to offer a tertiary education and living allowances to ex-service people and to provide grants for certain university buildings. Two years later the Commonwealth Office of Education was set up with the distinguished economist, Professor R C Mills, in charge. This smallish Commonwealth role in tertiary education was formalised at the start of a ten-year period in which university enrolments were to be doubled. Then in 1956 the Menzies Government, worried by the plight of universities, commissioned the Murray Report, which recommended a massive increase in the Commonwealth's role. Mr Menzies promptly accepted, to Murray's astonishment, all the main recommendations. Fadden, the federal Treasurer and leader of the Country Party, was not too happy. Interestingly, Menzies sought no Commonwealth representation on State-supervised university councils, though they were increasingly to spend Commonwealth funds.

On the eve of the 1963 federal election, Menzies promised that the Commonwealth would lend a hand in secondary education. His first step was to award 10,000 scholarships in secondary schools, both public and private. The Catholic Church was delighted. In the federal election, the preferences of the Democratic Labor Party continued to flow strongly to the Coalition parties, and Menzies won easily an election which, in the

view of some commentators, he was in danger of losing.

It was a Liberal government which made a bold attempt to return some way towards the old federalism in which the States accepted more financial responsibility. Mr Malcolm Fraser made the attempt. Perhaps he was especially sympathetic to the States because they had several strong Premiers who, in the tense days of 1975, had given him vital support in fortifying the Opposition numbers in the Senate and so challenging the Whitlam Government. Fraser made effective moves, in the late 1970s, to give more financial backbone to the States. He even made his bold offer, inviting them to set up their own system of income tax. On hearing of the offer, several Premiers closed their ears, or were ashen-faced. They had no wish to endanger their own terms of office by fixing their own tax rates. Only Sir Charles Court of Western Australia expressed keen interest.[8]

The episode was a mirror of how the States, mentally, were contributing to their own financial demise. So the Canberra steamroller rumbled on its way, after most of the Premiers had nervously skipped to the side of the road.

Six States—no more and no less

For my part I regret the astonishing rigidity in the number of States. There were six States in 1901: there are still six. No new colony or State has been created since the birth of Queensland in 1859. I concede that two Territories—the Northern Territory and the Australian Capital Territory—have been created since 1901, but they were carved from existing States. In contrast, in the United States since 1859 about a score of new States has been created, and in Canada since 1867 various new Provinces have come to life.

The essence of the federal system is that, in a big country with wide variations in climate and natural resources, a State government should preside over the special interests of each major region, and that a central government should preside over defence and other matters of common concern. The case for a new State in North Queensland, with its large population, is overwhelming: there the case is far stronger than for the Northern Territory. Critics will argue, of course, that Australia already has too many Parliaments and too many politicians. This appears to be a persuasive argument to the average Australian, at a time when the popularity of politicians as a species is not as high as it could be.

In my view the large number of politicians, and the three spheres of government, are a trifling price to pay for a system of government where the electors have far more say in national affairs than is available to them in nearly all other democracies. The big cost in Australia is not parliamentary salaries: it is the costly overlap whereby particular activities are supervised by three separate spheres of government.

It is possible that during the next century, New Zealand will join the Australian federation. It refused to join in the 1890s: it was then more prosperous than Australia and so could see no pronounced advantage in joining a common market. While, today, the typical New Zealanders would not dream of formally voting away their national independence, they are quietly losing it, to some degree. New Zealand, by virtue of what is called the Closer Economic Relationship or CER, virtually belongs to the Australian common market, the very market which originally it had refused to join. There is virtually a free flow of goods and people across the Tasman. Nothing in the last quarter century has done so much as this free flow to keep buoyant the sometimes-struggling New Zealand economy. Most Australian voters are content with this arrangement, largely because they don't know about it. It is beyond doubt that New Zealand has one foot inside our back door.

The federation has remained surprisingly stable. Only one attempt—by Western Australia—has been made to secede from the Commonwealth. It should be emphasised that secession is the treason of the federal system of government. The US civil war (1861-65) was a war about secession, about the right to secede, as much as a war about the abolition of slavery. Abraham Lincoln was not an abolitionist until the war was far advanced.

Western Australia had a valid case for secession. It had been pushed into the federation at the last moment largely by the votes and agitations of the Victorians who dominated its goldfields. It had entered the federation, however, without adequately negotiating to protect its special interests. Admittedly, it was promised a transcontinental railway, but the first train did not arrive until 1917. The gain from the railway was far less than the loss suffered from the soaring shipping rates and the dear manufactured goods, both of which were the results of the early protectionist policies of the Commonwealth government. The grievances festered. In April, 1933, near the trough of the world depression, Western Australians at a State-wide referendum voted to secede by a massive majority. Of the 50 electorates, only six voted against secession. They were six electorates on the goldfields.[9]

The secession movement, opposed firmly in Canberra, ran out of steam as the nation's economy recovered during the mid-1930s. Moreover, some of Western Australia's grievances were eased by the new Commonwealth Grants Commission, which was really a stepchild of John Henry of Devonport. If Western Australia had been allowed to secede, it surely would have quickly applied to rejoin the Commonwealth early in 1942, soon after the Japanese bombed Darwin, Broome and other tropical ports.

Will a secession movement arise again in WA? Someday it possibly will. Meanwhile, Western Australia is no longer a reluctant recruit but one of the federal stars.

The muddying effect

A federal system is the best for Australia, in my view. It is highly democratic. It is a guardian of civil liberties, because it offers a balance of powers rather than one supreme power. It is close to the people but also Olympian at times. It enables specialisation, and it respects the regional differences in a big continent. But it is not a neat package of powers. Tidiness is not amongst the visible strengths of a federal system. There will always be ragged edges and compromises, there will always be tensions in a federal system. There will periodically be formal or guerrilla raids across the federal-State boundaries, usually led by national leaders. The raids now and then are led by Justices of the High Court.

It is fair to suggest that it is not an easy system for politicians to operate in. Their standing in Australia would, probably, be higher if we had a unitary system. Therefore, some aspects of the present criticism of Australian politicians seems unfair: it is more a criticism of the untidiness of a vigorous federal system. And yet the untidiness, compared to the rigid neatness of (say) a dictatorship, is in the long term a decided virtue.

Federalism, as practised here, is highly democratic. In a ten year period we can each vote on more issues than if we lived in a unitary system. But if a federal system is too unsystematic, too difficult for the half-curious citizen to understand, it can weaken a belief in democracy, especially amongst newcomers to a democratic country.

If three spheres or levels of government carry out the same activity, say in health or social services or education, then the bureaucratic and administrative expenses may well be too high. And if things go wrong, whom do we blame? Praise and blame form the gearbox of democracy. It is vital that a government responsible for creating chaos, or letting chaos reign, should be pinned down. The leaders should be identifiable, should be answerable. But it is not easy to pin down the ministerial culprit, in (say) health or education, when the State or federal governments both shape the policy and provide the funds.

I am reasonably well informed, but I do not even know what proportion of the funds for health come from the Commonwealth government, and how much from my own State government. Without that knowledge, it is hard even to make the first step towards allocating blame and praise, and thereby deciding how to vote, if health is a crucial topic in a State or federal election.

I have another concern about overlapping governments. Our system of taxation is not widely understood, at the grand level or even at the personal level. Most of us can no longer do our own tax returns. The GST quarterly return had me puzzled for months, partly because of the nouns it employs. Most of us do not fully understand the overall taxation system, of which we are the crucial part. And yet taxation is at the core of the political process, and especially of a federal system.

Many of the momentous events in democratic history have hinged on taxation, and the justice and injustice perceived to be embedded in certain taxes. George Washington and King George III knew that. So did Peter Lalor , the leader at Eureka. And yet it is hard to reshape a nation's taxation system. John Hewson lost the 1993 election, partly because he tried to improve the tax system. Many voters were perturbed or even bamboozled: they did not understand the system he was trying to reform.

Will the federal system survive?

The States, still important, are under pressure. The original fortresses intended to protect them have partly been pulled down or infiltrated. The proportion of the Australian voters who instinctively are centralists rather than federalists is probably high, maybe running at 50 per cent. Many well-informed people do not appreciate the strengths of a federal system. The strengths have never been explained to them.

Western Australia and Queensland, and probably Tasmania, retain a deeper belief in the rights of States and in the value of federalism. To me the biggest single guarantee of federalism, as we know it, is the fact that WA and Queensland have been growing for the last third of a century at a faster pace than those States huddled in the south-east corner. These two huge outer States seem likely to exert an increasing influence in national politics.

There is an important rough-and-ready rule in the geography of Australian politics. There are marked exceptions to the rule, but the rule makes sense. The further away you are from the Hume Highway and from Canberra, the less likely you are to worship there regularly.

Endnotes:

l. Brian Galligan, *Commonwealth-State relations*, in Graeme Davison *et al.*, ed., *The Oxford Companion to Australian History*, Melbourne, 1998, p. 141.

2. J A La Nauze, *The Making of the Australian Constitution*, Melbourne, 1972, esp. pp. 213-215, 246.

3. Section 96 was first turned into a stick rather than a walking stick by the High Court in 1926. See David Chessell, *Financial Centralisation*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 1 (1992), p. 96.

4. G Blainey, *The Tyranny of Distance*, Melbourne, 1966, p. 322.

5. Gavin Souter, *Acts of Parliament*, Melbourne, 1988, pp. 272-4.

6. *Bruce-Page and federalism*: J R Nethercote, in Nethercote (ed.), *Liberalism and the Australian Federation*, Sydney, 2001, pp. 130-1.

7. *The 1946 referenda*, Geoffrey Sawer, *Australian Federal Politics and Law 1929-1949*, Melbourne, 1963, p. 173.

8. Philip Ayres, *Malcolm Fraser: A Biography*, Richmond, 1987, pp. 323-5.

9. G Blainey, *A Shorter History of Australia*, Melbourne, 1994, p. 175.

Introductory Remarks

John Stone

Ladies and gentlemen, welcome to this, the nineteenth Conference of The Samuel Griffith Society.

The Society, as most of you know, began in Melbourne, where Nancy and I were living at the time, and it is a pleasure to return to a city of which we have the most pleasant memories. To this day, Victorians constitute more of our members than those from any other State. Perhaps that may partly explain the fact that our numbers for this Conference are, I believe, a record.

Certainly, our numbers at dinner last night were indeed a record—a fact which, however, must be attributed not only to the quality of our speaker, Professor Geoffrey Blainey, but also to the high personal regard and affection in which he is held by Australians generally.

Needless to say, those who came last night to hear Professor Blainey were not disappointed. In his thoughtful and, as always, understated address, *What should we say about our Federation?,* he told us so much about the story of our nation—weaving, as he did so, strands of individuals' histories into his broad tapestry of our country's progress. When, towards the end of his remarks, he said that finally, if we would forgive him, he would "conclude by actually reading from some text", the gasp from the audience was audible. It was a fine address from a fine man. We were fortunate to hear it, and the readers of Volume 19 of our Proceedings will be (almost) equally fortunate.

In the course of preparing these introductory remarks, I looked back at those I made at our Canberra conference in May last year. At that time, you will recall, the *Work Choices Case* before the High Court had only recently concluded, and the Court had reserved its judgment. Referring to that, I said:

"I am confidently informed on all sides, by persons much more learned in the law than I, that the plaintiffs will lose their case and that the Commonwealth will prevail".

To this, I said:

"I can only reply … that I have too high an opinion of most of the Justices to believe that they would actually commit such a monstrosity as that would entail".

As you all know, I was wrong. In all but two cases, the Justices *did* commit that monstrosity, thereby creating for themselves a place in our constitutional interpretative history no less important, because no less debased, than the Isaacs Court in its infamous 1920 judgment in the *Engineers' Case*.

The two valiant dissenters were, as you know, Mr Justice Ian Callinan and Mr Justice Kirby. Mr Justice Callinan (together with Mrs Callinan) have honoured us by their presence this weekend, and I take this opportunity of reiterating the appreciation that I expressed to them last night for doing so. With less than a fortnight before he retires from the High Court bench, Mr Justice Callinan's attendance here today is all the more remarkable.

I could say much more about the *Work Choices Case* and its outcome. Since, however, we are to have four papers on the topic this morning, I shall refrain.

For the rest, our program this week is characteristically eclectic. At a time when the federal government seems bent upon invading one area after another of State responsibilities (note that I say "responsibilities", not "rights"), two papers after luncheon will canvass respectively the financial, and the political, aspects of a Federation that is clearly operating today within a centralist environment. After that we shall return to a topic, Bills of Rights, that was so well canvassed last year, and which was, incidentally, close to the heart of our former President, the late Sir Harry Gibbs. Then, at dinner tonight, we shall have a *jeu d'esprit* from Paul Houlihan. An allegorical fable about the current outlook for workplace relations and the trade union movement, it will bring the day to a pleasurable close.

In the last two years two important books have been published bearing upon the role of the Crown in Australia's constitutional arrangements. Each, in its own way, has put to shame Australia's academic constitutional lawyers. The first of them, *Head of State*, was written by our President, Sir David Smith. The second, published last year by Dr Anne Twomey (now an Associate Professor at Sydney University), is entitled *The Chameleon Crown: The Queen and her Australian Governors*. It is a fascinating book, the product of

meticulous research and genuine scholarship. So tomorrow morning we shall have two papers on the Crown in Australia, one by Dr Twomey herself and another by one of our younger members, Michael Manetta, which both promise to be thoroughly enlightening.

When I was framing this Conference program earlier this year, the state of affairs among Australians of Aboriginal descent continued to give rise to something approaching despair. Since then, we have seen the genuinely hopeful development of the major initiative now being undertaken in the Northern Territory at the instigation of Mr Mal Brough. Dr Geoffrey Partington, who is to close our Conference tomorrow with his paper *Thoughts on Terra Nullius*, may in these circumstances be sorely tempted to stray into those more topical aspects of what we have always described as *The Aboriginal Question*. We must wait and see.

Now it is time to get the Conference proper under way. Julian Leeser will do so with the first of four papers in our session on *Work Choices and the Federation*. His paper is entitled *Work Choices: Did the States run dead?,* and since I am chairing this morning's session, let me now introduce him.

Chapter One

Work Choices: Did the States run dead?

Julian Leeser

In *New South Wales v. The Commonwealth* (*The Work Choices Case*)[1] Justice Callinan cited with approval the statement of Sir Robert Menzies that "constitutional law in a federal system is 'a unique mixture of history, statutory interpretation, and some political philosophy' ".[2] This paper covers similar territory.

My purpose is to examine the arguments of constitutional history and statutory interpretation the States put, or rather failed to put, to the High Court, and to what extent the political philosophy of the State governments influenced the outcome of the case. In short, I will argue that the case mounted by State Labor governments and trade unions was not the full-throated challenge that one would expect given the rhetoric of the State governments. In making these observations I am not being critical of those lawyers advising the States or the unions. Rather, it is my view that the State Labor governments, who were always content for the Commonwealth to have power over industrial relations, pulled their punches in a case that, in a constitutional sense, required a full-frontal attack. State taxpayers and our federal system of government deserved better.

What the Court found

On 14 November, 2006 the High Court delivered judgment in the *Work Choices Case.* The litigation arose from a challenge by six States, two Territories and two unions—some of whom appeared as interveners—to laws enacted by the Commonwealth Parliament.

In a joint judgment, Chief Justice Gleeson and Justices Gummow, Hayne, Heydon and Crennan held that under s.51(xx) of the Constitution the Commonwealth Parliament has power to make laws regulating the employment relations of what are known as constitutional corporations, that is, "Foreign, trading and financial corporations formed within the limits of the Commonwealth". Justices Kirby and Callinan delivered separate dissenting judgments.

In Justice Kirby's view, the effect of the majority's decision was "radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the States' principal governmental activities".[3] He said that:

> "… the unnuanced interpretation of the corporations power now embraced by a majority of this Court … has the potential greatly to alter the nation's federal balance … By this decision, the majority deals another serious blow to the federal character of the Australian Constitution".[4]

Professor Leslie Zines described the dissenting judgment of Justice Callinan as a full-blooded attack on the development of constitutional interpretation over the past 86 years:

> "He [Callinan J] expressed his disapproval of almost all the principles of interpretation expounded since 1920. The one exception is the principle in *Melbourne Corporation v. Commonwealth*, which, however, he interpreted more widely than anyone has yet done".[5]

Justice Callinan found that:

> "The reach of the corporations power, as validated by the majority, has the capacity to obliterate powers of the State hitherto unquestioned. This Act is an Act of unconstitutional spoliation".[6]

He observed:

> "The validation of the legislation would constitute an unacceptable distortion of the federal balance intended by the founders, accepted on many occasions as a relevant and vital reality by Justices of this Court".[7]

Justice Callinan concluded that:

> "There is nothing in the text or the structure of the Constitution to suggest that the Commonwealth's powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society…. The Court goes

beyond power if it reshapes the federation. By doing that it also subverts the sacred and exclusive role of the people to do so under s.128".[8]

Despite the views expressed in the dissenting judgments, it is fair to say that the result of this case was not unexpected in legal circles. At last year's Samuel Griffith Society Conference Stuart Wood delivered a paper[9] which set out what I might call the orthodox view among a substantial majority of legal practitioners who cared to comment about these matters in academic, legal and media fora. Stuart Wood said that in his view the constitutional challenge would fail, and cited 22 papers by 16 different authors to support his proposition.[10] Even George Williams, Labor's constitutional *consigliere*, observed in March, 2005:

"While the High Court has not finally settled upon the scope of this power, it appears wide enough to allow the federal Parliament to regulate the rights and entitlements of employees of corporations".[11]

And Stephen Smith, federal Labor's Workplace Relations spokesman, noted "the bulk of legal opinion seems to be that the Commonwealth does have a range of powers in this area".[12]

On the other hand, the High Court had never considered the specific question of whether the corporations power supports laws regulating the employment relations of corporations. Many of the Justices had not sat on cases dealing with any aspect of the corporations power.

The Labor States would have been aware of all of this. Precedent and the broad trend of constitutional interpretation favoured the Commonwealth. From the perspective of the States, the case would be important and the argument they would make would have to be creative and original.

What did the States say about the case when bringing it?

Rhetorically at least, the States seemed to suggest that the case was important if not fundamental to their existence.

Many of the State leaders spoke passionately of the challenge. NSW Premier Morris Iemma said, "We owe it to workers and their families to prosecute the case".[13] His Industrial Relations Minister John Della Bosca was more strident, and described it as "the most important High Court case since the Second World War … obviously the people of New South Wales will be expecting us to run this case … it's a very important case, and the cost is a very small cost given the significance of this".[14]

Victorian Premier Steve Bracks said:

"I think there is quite a deal at stake and that is sovereignty … This is a takeover by one level of government to [sic] another".[15]

He argued:

"We are obliged to test the legal underpinnings of the Howard Government's new laws, which rely on a new interpretation of our Federation…. [This is] also about whether Canberra should be allowed to unilaterally end the way our Federation works. This High Court challenge is a principled stand".[16]

His Attorney-General and Industrial Relations Minister, Rob Hulls, a man unencumbered by the usual protocols surrounding Attorneys-General, thundered:

"We've made it quite clear to the other States that we'll be part of the action…. It is important that we prepare our case thoroughly and appropriately…. We want to win this case".[17]

South Australian Premier Mike Rann said, "This is very serious for South Australia".[18] His Minister John Hill said that the cost was a "fairly modest amount when you consider what we are trying to protect…. We are doing it because we believe we have a chance of winning, not just making a political point".[19]

Peter Beattie was characteristically understated:

"The corporations power in the Constitution was never intended to be a Trojan horse to take over the States".[20]

"We'll challenge them in the High Court, and know we've got a fight on our hands".[21]

He indicated that:

"If the States lose, it will be the beginning of the end of States with their current powers, because I think it is a threat to Federation in its current form".[22]

Beattie's Industrial Relations Minister, Tom Barton said that his advice indicated that "to put the most forcible argument it is important that Queensland does mount its own case".[23]

The so-called Employment Protection Minister of Western Australia (an ironically named portfolio given that there have been three Ministers since the *Work Choices* challenge was launched less than two years ago), John Kobelke opined that Western Australians would "not have Canberra rule from the East…. What this is all about is trampling the States".[24] His Premier Alan Carpenter said:

> "The Commonwealth can't just come in and take away the responsibilities of State governments. Otherwise, we're going to end up just being an outpost of Canberra, and people have to think about that".[25]

He asked:

> "Should State governments have their constitutional … rights and responsibilities kicked aside by the Commonwealth at the whim of the Commonwealth? No".[26]

Even the Tasmanian Premier told the public that he had "a strong case".[27] And the unions' John Cahill declared: "This is one of the most important cases this Court will ever hear".[28]

Did the States' rhetoric match their arguments?

The rhetoric suggested the States would mount a bold and audacious attack on the use of the corporations power. The States had nothing to lose. On a political level, given Labor's distaste for the content of the laws, a victory for the States in the High Court would have been highly significant.

Constitutional litigation operates best when both parties act in their own institutional interest—when the Commonwealth seeks to pursue maximum power and when the States seek to confine Commonwealth power to the maximum extent possible. When States make concessions, these concessions not only increase the ability of the Commonwealth to encroach easily on the States' residual areas of power, but they also make the High Court's task harder as the Court may not hear, and may be therefore less able to test, the strongest argument against the proposition put by one party.

Furthermore, concessions in one case often come back to haunt the party who has made them. In the *Industrial Relations Act Case*[29] in 1996 Victoria, Western Australia and South Australia "conceded that s. 51(xx) empowered the Parliament to make laws governing the industrial rights and obligations of constitutional corporations".[30] In the same case New South Wales adopted the Commonwealth's submissions. Much was made of this by the Commonwealth in its submissions in *Work Choices.* As the majority held:

> "These concessions do not preclude the States from advancing the arguments made in the present case, but they draw attention to the fact that reliance on the corporations power to sustain parts of the new Act is not unprecedented".[31]

Given this history, one would have expected the States to avoid any semblance of concession.

There were two major precedents that presented obstacles to the States succeeding in the *Work Choices Case*: the *Engineers' Case*[32] and the *Concrete Pipes Case*.[33] The precedents set by these cases underpinned the Commonwealth's use of the corporations power. The former case stands for the proposition that s. 51 should not be interpreted "by reference to a presumption that certain subjects are reserved for the States".[34] In the latter case the High Court took a broader view of the corporations power, finding that the Commonwealth could regulate the trading activities of constitutional corporations even if their trading activities took place within the confines of one State's borders.

George Williams recognized this was the major issue. After judgment was delivered in the *Work Choices Case* he said:

> "For the States, the *Work Choices Case* was lost as far back as 1920. In that year the High Court in the *Engineers' Case* swept aside the earlier decisions and discarded any idea of a balance between federal and State power. This idea of federal balance, like States' rights, became a constitutional heresy. Today, they are nothing more than political slogans. Applied over decades, the *Engineers' Case* has led to a steady increase in Commonwealth power".[35]

In order to ventilate the range of possible arguments completely, and to avoid any unintended concessions, the States needed to challenge these decisions. But they did not, as the majority observed:

> "No party to these proceedings questioned the authority of the *Engineers' Case*, or the *Concrete Pipes Case*, or the validity of the *Trade Practices Act* in its application to the domestic (intra-State) trade of constitutional corporations. Necessarily, however, the plaintiffs experienced difficulty in accommodating their submissions to those developments".[36]

The Justices of the High Court might have made these observations for three reasons. The first is that they were merely reciting these points as a matter of record to state a factual position that these decisions were not challenged. Secondly, their Honours may have been indicating that their reasoning proceeds on the basis that these cases were not challenged. Finally, there may be some members of the majority who are flagging that these cases were not challenged because they may have been interested in entertaining arguments about their continuing authority. For each of the eight governments to have failed to provide the Court with an

opportunity to revisit these cases was a dereliction of duty on the part of the States and Territories.

Although the authority of the cases was not questioned, the majority made some observations about the *Engineers' Case*. They said:

> "It is important not to overstate either the propositions about constitutional construction applied in and after the *Engineers' Case* or the consequences of their adoption".[37]

Their Honours suggested that:

> "As Windeyer J rightly pointed out in the *Payroll Tax Case*, the *Engineers' Case* is not to be seen 'as the correction of antecedent errors or as the uprooting of heresy'. There is no doubt that, as he continued, '[t]o return today to the discarded theories would indeed be an error and the adoption of a heresy' ".[38]

The dissenting Justices' view of the construction of the Constitution led them to find that a challenge to the validity of the *Engineers' Case* was unnecessary. Justice Kirby found that the States' "argument can be upheld without doubting the validity of the general approach to the interpretation of the Constitution adopted by this Court in the *Engineers' Case*".[39]

Justice Callinan held that:

> "None of the plaintiffs here have contended, or need to contend for their argument to succeed, that the *Engineers' Case* should be overturned. That somewhat unsatisfactory case, an early instance of judicial activism, was concerned with, and rejected the doctrine of reserved powers".[40]

However, Justice Callinan thought that the *Engineers Case* was still binding:

> "No one in this case suggests that the *Engineers' Case* should be overruled, and indeed it must be accepted that the principles which it states, subject to some qualifications … are still binding".[41]

What makes Justice Callinan's decision particularly interesting is that he notes the persistent criticism of *Engineers'*. He argued that the *Engineers' Case* fails to take into account the policy of the Constitution, is at odds with modern purposive approaches to interpretation, misrepresented previous decisions, and has been subject to academic criticism. His Honour also cited, with approval, the dissent of Gavan Duffy J.[42]

His Honour has, in effect, outlined some of the criticisms of *Engineers'* that could and should have been vented by the States.

Before proceeding further let me concede that attempting to get the High Court to reconsider these long standing precedents would be neither easy nor necessarily successful. *Concrete Pipes* is a precedent of nearly 40 years standing, and the *Engineers' Case* has set the method of constitutional interpretation for almost 90 years.

Of course the High Court is not bound by its own precedents. However, in order to get the Court to reconsider these previous authorities the States would need to undertake the difficult task of applying the test set out in *John v. FCT*.[43]

The practical effect of reverting to pre-*Engineers' Case* jurisprudence would be revolutionary. It may cause something of a crisis for the Commonwealth. But this does not mean that the States—or at least one of the States—should not mount the argument. As the majority suggested, some of the arguments run by the States went close to conjuring up pre-*Engineers' Case* jurisprudence, especially argument that the corporations power was limited by the conciliation and arbitration power.

Why didn't the States run these arguments?

Modern approaches to litigation suggest that parties should only put their strongest arguments in submissions to the Court. It could be argued, however, that in constitutional litigation the position is a little different, especially where the stakes are as high as the States' rhetoric would suggest. This point is only magnified when so little was known about the individual views of most members of the Court to the interpretation of the corporations power. While I have conceded that to argue successfully against the validity of *Engineers'* or *Concrete Pipes* would be difficult, just because an argument is difficult does not mean that it is not worth making. It may have been less inexcusable not to have made these arguments where there was only one plaintiff appearing. But when ten entities—six of whom had very similar interests—appeared, not making the argument is more difficult to justify.

However, perhaps the main reason for the States' reluctance to run these arguments lies in the fact that they did not believe in their case. The challenge was more about politics than about constitutional law. In fact, the Labor States and the trade unions were always happy to cede the Commonwealth power over industrial relations.

In the week of the October, 2006 ACTU Congress, after the *Work Choices Case* was heard but still a few weeks before the judgment was delivered, ACTU Secretary, now ALP candidate, Greg Combet made a speech to the ACTU Congress and gave a series of media interviews. Combet said that, with relation to the *Work Choices Case*:

> "If the corporations power is available I want people to be under no misapprehension at all, we are going to support a future Labor government to use it".[44]

Similarly, in his speech to the ACTU Congress, having outlined a series of principles he wanted to see in legislation, Combet said:

> "To implement these principles in national industrial relations laws the policy supports the use of all of the constitutional powers that may be available to a Labor government, while recognising a continuing role for State systems. We are of course awaiting the High Court judgment, which we expect to identify the extent to which the corporations power of the Constitution can be relied upon to legislate industrial relations".[45]

Combet's statements confirm that the unions always wanted to see the corporations power used for industrial relations purposes. But that does not entirely explain the position of the States. Their position is better explained by a speech Kevin Rudd gave in April, 2007. Rudd, who had supported the States' challenge to *Work Choices*, now said:

> "We must recognise that business large and small is increasingly operating across State borders. Federal Labor's objective therefore is to create a uniform national industrial relations system for the private sector….".[46]

How do you think the State Premiers acted? Did they say, "this is Canberra ruling from the East"? Did they accuse Mr Rudd of taking the responsibility of the States? Did they protest that this was about whether Canberra should be allowed to unilaterally end the way our Federation works? Of course not. Showing "remarkable" intellectual consistency, Alan Carpenter, one of the greatest critics of John Howard's use of the Constitution to create a national industrial relations scheme, said:

> "Kevin Rudd is looking for a consistent system across the nation … and I'd be supportive of that balance".[47]

His new Employment Protection Minister, Michelle Roberts fell into line:

> "WA is but one State as part of this country … More and more, we are working towards a global economy, certainly it's part of a national economy. There are many national employers and we do need consistency from State to State. It seems to me to be nonsense to have widely varying workplace laws in each of the States and territories in Australia".[48]

The previously strident NSW Industrial Relations Minister, John Della Bosca became sanguine:

> "No one in any of the States, no one in the union movement and I don't think any employers want to go back to the old system … We want to go forward and support Kevin Rudd's view".[49]

These statements of cooperation, collaboration and capitulation essentially underscore the fact that the Labor States were never really serious about confining the Commonwealth's power. It is clear that Labor's High Court challenge was intellectually dishonest.

Further evidence of Labor's philosophical position is to be found in history. One of its great icons, and a key proponent of a Labor constitutional policy, E G Whitlam, as long ago as 1972, advocated the use of the corporations power for industrial relations purposes. He said:

> " … the applicability of this corporations power in the industrial sphere has, of course, yet to be tested. Nevertheless, it would appear probable that the Commonwealth could establish a system of registration of voluntary industrial agreements not simply on the basis of the conciliation and arbitration provision in the Constitution, but on the basis of the corporations power. In this historic High Court decision [i.e., the *Concrete Pipes Case*] could lie the seeds of a new dominance in our industrial affairs of a co-operative rather than an adversarial spirit …".[50]

Therefore it is in Labor's past, and in its future, that the real reason for its less than robust constitutional attack on *Work Choices* lies. Labor always wanted the Commonwealth to have the power over industrial relations.

What conclusions can be drawn about the States and the *Work Choices Case*?

After the High Court handed down its decision, Queensland Deputy Premier Anna Bligh was asked by ABC journalist Eleanor Hall, "Was it a mistake by the States to actually take this to the High Court?". Bligh replied:

"I don't believe so. We, as a State government, and I know this view was shared by others, took the view that we had to do everything in our power … I don't believe it was wrong for Queensland or for any of the other States to actively pursue every avenue to ensure the rights and protections of our citizens".[51]

But this is a mischaracterization of what the States did. They did not do "everything in their power". By failing to actively pursue the *Engineers'* and *Concrete Pipes* cases they effectively ran dead.

The effect of Labor's capitulation is not merely to expand Commonwealth power with relation to the regulation of corporations but, through the methodology endorsed by the majority and insufficiently challenged by the States, a further broad reading of Commonwealth powers may occur in other areas as well. Kevin Rudd and Steve Bracks may talk about reshaping the federation or making it work better, but when Labor had the chance to do so in the High Court it failed to take the opportunity. So when Mike Rann says, "[the] High Court decision fundamentally twists the Constitution and further undermines the role and powers of the States even though Australians weren't given a vote through a referendum",[52] he and the other State Premiers have only themselves to blame.

Clemenceau famously said: "War is too serious a matter to be left to the Generals". Experience shows that Federalism is too serious a matter to be left to the State Premiers.

Endnotes:

1. (2006) 81 ALJR 34.
2. *Ibid.*, 187 [689].
3. *Ibid.*, 154 [539].
4. *Ibid.*, 167-68 [611-612].
5. Leslie Zines, *The High Court and the Constitution in 2006* (Paper presented at the Gilbert +Tobin Centre for Public Law Constitutional Law Conference, Sydney, 16 February, 2007) (footnote omitted).
6. (2006) 81 ALJR 34, 221 [794].
7. *Ibid.*, 253 [913].
8. *Ibid.*, 214-215 [779] (footnote omitted).
9. Stuart Wood, *The High Court Chooses: Will* Work Choices *Work?* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 18 (2006), pp. 303-334.
10. *Ibid.*, pp. 327-330.
11. George Williams, *One-stop Industrial Relations: Coming soon to a workplace near you?* (2 March, 2005), Online Opinion <http://www.onlineopinion.com.au/view.asp?article=3084> at 16 August, 2007.
12. Stephen Smith, *Doorstop Interview* (7 February, 2006) <http://www.alp.org.au/media/0206/dsiirii080.php> at 16 August, 2007.
13. ABC Television, *High Court challenge against new IR laws begins*, *7.30 report,* 3 May, 2006, <http://www.abc. net.au/7.30/content/2006/s1630136.htm> at 16 August, 2007.
14. ABC Radio, *States vow to follow NSW IR challenge*, *PM,* 21 December, 2005, <http://www.abc.net.au/pm/content/ 2005/s1536035.htm> at 16 August, 2007.
15. AAP, *States, federal Govt gear up for High Court IR battle*, 4 May, 2006.

16. Steve Bracks, *Why we've gone to Court*, *The Age*, 9 May, 2006.

17. AAP, *Victoria promises to join IR challenge*, 8 February, 2006.

18. ABC Television, *High Court challenge against new IR Laws begins*, *loc. cit.*.

19. *State Politics—Estimates $50,000 bill for IR fight*, *The Advertiser*, 26 October, 2006.

20. Rosemary Odgers, *Beattie takes on IR laws*, *The Courier Mail*, 31 January, 2006.

21. ABC Television, *High Court challenge against new IR laws begins*, *loc. cit.*.

22. ABC Television, *High Court challenge begins against Govt's new IR laws*, *Lateline,* 4 May, 2006, <http://www.abc. net.au/lateline/content/2006/s1631132.htm> at 16 August, 2007.

23. ABC Radio, *States vow to follow NSW IR challenge*, *loc. cit.*.

24. John Kobelke, *WA to fight federal Government's extreme IR laws* (Press Release, 22 December, 2005).

25. ABC Television, *High Court challenge against new IR laws begins*, *loc. cit.*.

26. ABC Television, *High Court challenge begins against Govt's new IR laws*, *loc. cit.*.

27. ABC Television, *High Court challenge against new IR laws begins*, *loc. cit.*.

28. ABC Television, *High Court challenge begins against Govt's new IR laws*, *loc. cit.*.

29. *Victoria v. The Commonwealth* (1996) 187 CLR 416.

30. (2006) 81 ALJR 34, 59 [46].

31. *Ibid.*.

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

33. *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

34. Andrew Stewart and George Williams, *Work Choices: What the High Court Said*, Federation Press, Sydney (2006) 43.

35. George Williams, *States on back foot over federal powers*, *The Courier Mail*, 16 November, 2006.

36. (2006) 81 ALJR 34, 60 [50].

37. *Ibid.*, 89 [190].

38. *Ibid.*, 90 [193].

39. *Ibid.*, 158 [557] per Kirby J.

40. *Ibid.*, 243-244 [885] per Callinan J.

41. *Ibid.*, 185 [682].

42. *Ibid.*, 203-206 [738-747] per Callinan J.

43. (1989) 166 CLR 417. *John* sets out four rules for overturning previous decisions of the High Court: "(i) do the earlier decisions rest upon a principle that is worked out in successive cases?; (ii) is there a difference in reasoning between the majority Justices in one of the earlier decisions?; (iii) has the earlier decision not achieved a useful result, but rather caused considerable inconvenience?; and (iv) have the earlier decisions been acted upon in such a manner as to militate against reconsidering?". See Gian Boeddu and Richard Haigh, *Terms of Convenience: Examining Constitutional Overrulings by The High Court*, [2003] Fed Law Rev 5, <http://www.austlii.org/au/ journals/FedLRev/2003/5.html> at 16 August, 2007.

44. Megan Shaw, *Unions back federal system*, *The Age*, 26 October, 2006.

45. Greg Combet, Speech delivered at the ACTU Congress, 24 October, 2006.

46. Kevin Rudd, *Facing the Future*, Speech delivered to the National Press Club, Parliament House, Canberra, 17 April, 2007.

47. Kim McDonald and Amanda Banks, *Premier agrees to Rudd's IR takeover*, *The West Australian*, 19 April, 2007.

48. *Ibid*..

49. AAP, *States and Commonwealth can work together on IR: Della Bosca*, 20 April, 2007.

50. E G Whitlam, *Address to the Metal Trades Industry Association*, 5 October, 1972, quoted by J L Webb, *Industrial Relations and the Contract of Employment* (1974) 97.

51. ABC Radio, *IR laws may be constitutional but still not fair*, Anna Bligh, *The World Today,* 14 November, 2006 <http://www.abc.net.au/worldtoday/content/2006/s1788191.htm> at 16 August, 2007.

52. *Stop the power grab says Rann*, *The Advertiser*, 16 November, 2006.

Chapter Two

Can Judges resuscitate Federalism?

John Gava*

In a recent article Greg Craven has argued that we are in the "midst of an ideological struggle for the Constitution's soul",[1] and that it would be appropriate to appoint an "Australian Scalia"[2] to the High Court. Indeed, Craven argues that a conservative government would be "downright derelict in its duty"[3] if it failed to make such an appointment. For Craven, the High Court has consistently, at least from 1920, interpreted the Australian Constitution with such a centralist bias that the original conception of a federation has been distorted.[4] Craven has argued that by going down this centralist path the High Court has departed from the expectations of the founders of the Constitution, and that the role of putative Australian Justice Scalias would be to interpret our Constitution in light of the intentions of those founders.

In this paper I carry out the equivalent of a thought experiment and consider what would happen if Craven were to get his wish of a High Court composed of judges willing to interpret the Constitution in the way in which he advocates—i.e., by giving effect to the original intentions of the founders, who conceived of a robust federation rather than the unbalanced, centrally dominated one that we have today. I will do this by analysing the dissenting judgments of Justices Kirby and Callinan in the *Work Choices Case*[5] to show that both judges decide the constitutional issue before them, the validity of the Commonwealth's Work Choices legislation, with an eye to reviving federalism as a substantive feature of the Constitution. If their judgments are understood in this fashion, we are then able to consider the question raised by my title—can judges resuscitate federalism? Of course, in a conference paper I will not be able to give a comprehensive answer to this question, but an examination of the implications of the federalist position adopted by Justices Kirby and Callinan will suggest that the hope that Australia's federal structure can be resuscitated by judges is misplaced. My argument will be made as follows.

First, I will argue that such a move would run counter to the principled judging that lies at the heart of the common law tradition (and which has been strongly supported by The Samuel Griffith Society). Second, I will show that the High Court is poorly equipped as an institution to reform the federal structure. Third, I will suggest that doing so would politicize the High Court with disastrous effects on its legitimacy.

In this paper I will not make a defence of federalism. I support federalism unreservedly as one of the best ways of preserving liberty. Rather, when discussing the state of federalism in Australia today one needs to ask, with apologies to Lenin—What is to be done?[6] If that is the right question, the wrong answer would be that judges can resuscitate federalism.

The *Work Choices Case*

In *New South Wales v. The Commonwealth*[7] (the *Work Choices Case*) the States and Territories challenged the validity of the *Workplace Relations Amendment (Work Choices) Act* 2005. As is well known, the amended Act broadened the reach of the Commonwealth's control of industrial relations by relying on the Commonwealth's power under s. 51(xx) of the Constitution, which allows it to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". In doing so, the constitutional basis for the Commonwealth's legislation was shifted from its former reliance on s. 51(xxxv), which gave the Commonwealth the power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

By a majority of 5-2 (Chief Justice Gleeson and Justices Gummow, Hayne, Heydon and Crennan), the High Court held that the legislation was valid. Justices Kirby and Callinan, in dissent, found that the amending Act was invalid.

Justice Kirby as an activist federalist judge

Justice Kirby adopted a succinct and straightforward strategy in answering the constitutional question before him: whether the amendments to the *Workplace Relations Act* 1996 effected by the *Workplace Relations Amendment (Work Choices) Act* 2005 were supported by s. 51(xx) of the Constitution.

> "[T]he central issue for consideration in these proceedings is not whether, in the course of its elaboration, especially in the 35 years since the decision in *Strickland v. Rocla Concrete Pipes Ltd*. . . understandings of the ambit of s. 51(xx) of the Constitution have expanded so as to enhance the federal legislative power in that respect. Of course they have. I have myself acknowledged such expansion and called attention to it. The real question now directly presented is whether this expansion of the ambit of para (xx), however large it might otherwise grow, is subject to restrictions or reservations, including those expressed or implied in para (xxxv)".[8]

In other words, Justice Kirby is not blind to the course of authority after the High Court examined its pre-*Engineers*'[9] decisions on s. 51 (xx) in light of the *Engineers' Case* in the pivotal *Concrete Pipes Case*.[10] As will be remembered, in the *Concrete Pipes Case* the High Court overruled and re-interpreted earlier decisions which had limited the scope of Commonwealth legislative power under s. 51(xx).[11] These pre-*Engineers'* decisions had held that particular legislative powers were reserved to the States, with the consequence that s. 51 grants of power to the Commonwealth were correspondingly restricted. Justice Kirby does not question the line of authority that followed the *Concrete Pipes Case.*[12] Instead, he engages in a fundamental reassessment of the High Court's analysis of the powers granted to the Commonwealth, and the interpretative method that has been adopted by the High Court since the *Engineers' Case* in 1920.

While Justice Kirby acknowledges that none of the plaintiffs challenged the approach stated in the *Engineers' Case,* he is careful to note that if the Work Choices amendments were held to be validly enacted by recourse to s. 51(xx), this would amount to a "potentially radical shift of governmental responsibilities from the States to the Commonwealth".[13] He adds that:

> "States, correctly in my view, pointed to the potential of the Commonwealth's argument, if upheld, radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the States' principal governmental activities".[14]

So, despite not expressly indicating a wish to overrule the *Engineers' Case*, Justice Kirby is willing to interpret the Constitution in a way that sidesteps the effect of that decision by, in effect, reserving to the States particular areas of legislative power.

Justice Kirby claims that all that he is doing is interpreting the *Engineers' Case* in line with other decisions, notably *Melbourne Corporation v. The Commonwealth*,[15] *Victoria v. The Commonwealth* (the *Payroll Tax Case*)[16] and *Austin v. The Commonwealth*,[17] but it is difficult to accept that he genuinely believes that these cases stand for the proposition that the *Engineers' Case* is to be read in the following way:

> "In applying the doctrine in the *Engineers' Case* this Court has repeatedly given effect to reasoning that has confined the ambit of express grants of federal legislative power so that they could not be used to control or hinder the States in the execution of their central governmental functions. Once such an inhibition on the scope of federal legislative powers is acknowledged, derived from nothing more than the implied purpose of the Constitution that the States should continue to operate as effective governmental entities, *similar reasoning sustains the inference that repels the expansion of a particular head of power (here, s. 51(xx)) so that it would swamp a huge and undifferentiated field of State lawmaking*, the continued existence of which is postulated by the constitutional language and structure".[18]

The problem with such reasoning is that those cases do not support the proposition that the exception to the *Engineers' Case* described in *Melbourne Corporation*,[19] and the cases that have applied it, extend to protecting *the range of legislative powers* extending to the States at any particular time. They certainly do protect the existence of the States and their governmental structures, but it is a generous reading of these decisions that suggests that they protect an undefined (by Justice Kirby) range of legislative powers.

Justice Kirby's reasoning so far can be summed up as follows. First, the line of authority emanating from the *Concrete Pipes Case*,[20] if considered in isolation, would support the Commonwealth's Work Choices legislation. Second, while not expressing a wish to overrule the *Engineers' Case*, he reads it and subsequent cases as subject to a proviso that the federal structure of the Constitution requires that the grants of legislative powers under s. 51 of the Constitution are to be read as harmonious with each other and subject to an underlying protection of significant State legislative power. Third, this means that Commonwealth laws dealing with industrial relations, which traditionally have been based on s. 51(xxxv) and which have thus retained for the

States significant legislative power over industrial relations, are not to be expanded in scope by the use of the Commonwealth's legislative power under s. 51(xx).

Why does Justice Kirby do this? Why is he willing to overturn the *Engineers' Case* in substance, if not in form? He is quite explicit in arguing that not to do so would gravely weaken the federal nature of the Australian Constitution:

> "No doubt viewed strictly from an economic perspective. . . [the federal] features of the Australian constitutional design may sometimes result in inefficiencies. Doubtless they import certain costs, delays and occasional frustrations. Yet such divisions and limitations upon governmental powers have been deliberately chosen in the Commonwealth of Australia because of the common experience of humanity that the concentration of governmental (and other) power is often inimical to the attainment of human freedom and happiness.
>
> "Defending the checks and balances of governmental powers in the Constitution is thus a central duty of this Court. . . Just as the needs of earlier times in the history of the Commonwealth produced the *Engineers' Case*, so the present age suggests a need to *rediscover the essential federal character of the Australian Commonwealth*".[21]

This is why Justice Kirby can be described as an *activist federalist* judge.

Justice Kirby all but admits that, if one looked at the authorities dispassionately, the decision was clear—the High Court's previous decisions were consistent with a view that the Commonwealth does indeed have the power to legislate for the industrial conditions of the employees of corporations that come within s. 51(xx). But, rather than applying the case law to the question before him, Justice Kirby applies his pre-existing federalist belief that, in this case, the legislative power of the States in industrial relations should be preserved for the greater goal of maintaining some form of substantial federal balance of legislative power between the States and the Commonwealth. This explains why he can be described as a *federalist* judge.

Justice Kirby is an *activist federalist* judge because he is willing to *change* the existing understanding of the Constitution, and the existing approach of the High Court to interpreting the Constitution, in line with his federalist inclinations. As noted above, Justice Kirby is quite frank in advocating a judicial role that will "rediscover the essential federal character of the Australian Commonwealth".[22] While he is less frank in his attitude to the *Engineers' Case*, the effect of his analysis is that that case would be read down considerably in line with his federalist views. This would amount to a dramatic change to the prevailing judicial interpretation of the Constitution since 1920 when the *Engineers' Case* was decided.[23] He is *activist* because he admits that he would be prepared to change the law, and the way in which the Constitution is interpreted, to give effect to his views about the Constitution.

Justice Callinan as an activist federalist and originalist judge

Justice Callinan devotes a lengthy part of his judgment in the *Work Choices Case* to an analysis of the *Engineers' Case* and the restrictions imposed on it that are derived from *Melbourne Corporation*[24] and subsequent cases that applied it,[25] to support his general contention that previous case law does support a federal balance of legislative powers between the States and the Commonwealth. But he is happy to admit that if his analysis were shown to be wrong he would be prepared to overturn the *Engineers' Case.* He explains first his attitude to precedent in the High Court:

> "No doubt careful deference should be paid to the doctrines of the Court as and when they can be identified and can be seen to be consistent, but it is not right for a judge to seek refuge in those doctrines to avoid the undertaking of an independent analysis, informed by the past, of the Constitution".[26]

Would this independent analysis extend to a reconsideration of the *Engineers' Case*? Justice Callinan is quite clear that it would:

> "The Commonwealth has conceded that no other case governs this one. That must mean that not even that monument to the demolition of State power, the *Engineers' Case*, does so. If, however, I am wrong about that, the cases to which I have referred in this section of my reasons would provide precedents entitling me to depart from it".[27]

What is driving Justice Callinan's attitude to the *Engineers' Case*, and to constitutional interpretation more generally? In his words, it appears to be a mixture of two "basal considerations", the "ascertainment of founders' intent" and "maintenance of the federation established by the Constitution".[28]

In other words, for Justice Callinan, originalism—the discovery and application of the founders' intent—and federalism—the maintenance of a proper balance between the States and the Commonwealth—

justify overturning "venerable"[29] decisions, even cases as important and influential as the *Engineers' Case*. In these circumstances it is appropriate to describe Callinan J as both an *activist originalist* and as an *activist federalist* judge. He openly advocates a role for a High Court Justice that arrogates to such a judge the role of determining and applying what *each particular judge* thinks is the appropriate meaning of the Constitution, *irrespective* of the 103 years of decisions made by his predecessors.

The High Court: born in a vacuum or a common law Court?

How does activism of the federalist or originalist type fit into the role of the High Court? If we remember that the High Court was not created in a vacuum the answer is clear. In the words of Chief Justice Latham:

> "The Commonwealth of Australia was not born into a vacuum. It came into existence within a system of law already established".[30]

While debate can be had about the extent to which the common law controls or affects the Australian Constitution, there can be no doubt that in 1901 the new Commonwealth of Australia was created within the British constitutional tradition. In other words, it was a common law country with common law courts. The federal courts that were to be created in accordance with the Constitution would be common law courts, staffed by common law judges deciding cases according to the common law method. It went without saying that the High Court was not to be, for example, a Koranic or Rabbinical or Civil Law Court. The High Court was to be the final court of appeal (in Australia) for common law matters from the States. Could anyone doubt that in deciding such cases the High Court would act as anything other than a court in the common law tradition?

Of course, the High Court was also to be, in effect, the ultimate arbiter of disputes arising under the Constitution, and such disputes were not, directly, common law matters in the way that contract or tort cases would be. But, while the content was clearly new, the method of deciding cases was to be familiar—indeed, given the Privy Council's interpretation of the *British North America Act* (the Canadian Constitution for all practical purposes), and the US Supreme Court's century of interpreting the US Constitution from which the Australian Constitution drew so many of its features, there was also much actual constitutional case law for the High Court to draw upon. Novel issues raised by the Constitution were going to be resolved by a High Court made up of common law judges, the matters were to be argued by common law barristers, and the judgments handed down would be common law judgments, displaying the reasoning of the common law based on authority, legal principles and the accepted methods of statutory interpretation.

It is not surprising that Justice Callinan acknowledges all of this, and he cites with approval Justice Mason's celebrated espousal of the common law method in *Trigwell*,[31] with the comment that what was said there was "of relevance to constitutional law also".[32] His quotation of Cardozo on judging is to the same effect:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'. Wide enough in all conscience is the field of discretion that remains".[33]

The problem with activism sourced in either fidelity to federalism or originalism (or anything else for that matter) is that it is the negation of the common law method. The *Engineers' Case*, however badly reasoned it was and however badly it distorted the original conception of the Australian Constitution, is so embedded in the case law surrounding the interpretation of the Constitution that it now forms part of it in ways that are similar to the fundamental role that *Marbury v. Madison*[34] plays in United States constitutional interpretation. Whilst *in theory* it must be possible for the US Supreme Court, for example, to revoke the power of judicial review that was recognised (or, for its opponents, created) in *Marbury v. Madison*, could this really happen? Could a court realistically even conceive of overturning a decision that underpins almost the whole of the judicial, indeed, political, understanding of the US Constitution? The centrality of the *Engineers' Case* to Australian constitutional law raises similar issues here, and one wonders whether any High Court would deliberately give effect to the revolutionary change that such a departure would import.

Like it or not, the Constitution is an instrument of governance which has been changed and developed by over a century of judicial interpretation. It was inevitable and expected that the bare text of the Constitution would be engrafted with meanings from the cases that would be decided in interpreting it, even if the result of these cases would transform the Constitution in ways that likely would have been surprising (and unpalatable)

to its founders. After all, much the same happens to ordinary legislation which, with the passage of time and the hearing of cases, has a meaning that is to be found as much in the words of the cases applying and interpreting it as in the words of the legislation itself.[35]

The result of a century of interpretation by the High Court might not be to the taste of all—it certainly is not to mine. But, the approach taken by Justices Kirby and Callinan amounts to saying that the constitutional tradition in which the Constitution was created, and the judicial method which formed part of that tradition, have produced results that they do not like, and that they are thus willing to ditch that judicial method and tradition to achieve their own goals.

I have read many papers emanating from The Samuel Griffith Society that strongly, and justly in my view, criticise the judicial activism of the Mason court.[36] Is the approach of Justices Kirby and Callinan in the *Work Choices Case* different from the activism that has been criticised? It is not, of course, and deserves exactly the same criticism. Indeed, as Justice Callinan noted before his elevation to the High Court:

> "A Court that reserves the right to pick and choose upon wholly unpredictable bases those settled arrangements which it would, and others that it would not disturb. . . is, on any view, a body of enormous, indeed unparalleled power in society".[37]

Perhaps the last word on this matter should be left to two celebrated supporters of the common law method.[38] In 2006 Justice Heydon cited part of the judgment of Justice Gibbs in the *Second Territorial Senators Case*[39] as follows:

> "No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of the decision did not survive beyond the rising of the Court. . . . It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court".[40]

The gradual but inexorable dilution of the federal character of our Constitution is one of the most important political issues of our time. Something needs to be done about this. But assuming a judicially activist role to overcome this problem would be an unprincipled decision which would, even if it could work, merely replace one problem with another.

The worst possible body to resuscitate Federalism?

What are "all the circumstances" that need to be considered before judges can overrule decisions in order to achieve the goals sought by activist federalist and activist originalist judges?

As indicated in my introduction, I am considering the hypothetical situation of a High Court composed of activist federalist/originalist judges. Thus, we would need to be clear about the implications that flow from the judgments of Justices Kirby and Callinan, since I have argued that their judgments fit the mould of my hypothetical High Court. If their positions became the majority view on the High Court, they could not expect their arguments to be limited to the *Work Choices Case*. The first obvious implication of their positions is that the *Engineers' Case* would be overruled. This, in turn, would mean reconsidering the High Court's treatment of every grant of power given to the Commonwealth by s. 51 of the Constitution.

But, of course, activist federalism and originalism demand more than this. Activist federalists and originalists would look to overrule *all* the decisions which they see as having distorted the fundamental federal character of the Constitution that they discern from its very structure and from the intention of its founders. This would mean overturning decisions that affect the representation of the States in the Parliament, decisions which have had a deleterious impact on the financial and economic independence of the States (ss 90, 92 and 96), and even such provisions as s. 117.

Is this claim taking the views of Justices Kirby and Callinan too far? I do not think so. First, the logical implication of suggesting that the High Court needs to take into account the fundamentally *federal* nature of the Constitution, and of the centrality of the founders' original intent when deciding constitutional questions before the Court, leads inevitably to a root and branch overhaul of the Constitution.

Justices Kirby and Callinan are quite clear that they are not *passive* federalists or originalists. They are *not* arguing that we should accept the presently existing centralist interpretation of the Constitution, but that the centralizing tendency in Australian constitutional decision-making should stop. Justice Kirby expressly indicates that *absent* his belief that the federalist nature of the Constitution determines its meaning, he would accept that the trend of decisions following the *Concrete Pipes Case* would have led him to find that the Work Choices legislation was valid.[41] In other words, he wants to unwind the effect of previous decisions. Justice

Callinan expressly indicates that he would overrule the *Engineers' Case*. This is not a passive acceptance of what has gone before with a determination to say "no further". It is a *rejection* of the past.

A rejection of the High Court's century of constitutional interpretation in favour of the federal and originalist imperatives discerned by Justices Kirby and Callinan would, necessarily, invite litigation to overturn High Court decisions which have established the demarcation lines between the Commonwealth and State legislative powers. For example, if the High Court followed Justice Callinan's lead and overruled the *Engineers' Case*, the stage would be set for litigation involving virtually every placitum in s. 51. That would, in turn, involve the High Court in setting new, federally "appropriate" boundaries between Commonwealth and State legislative powers. When the new, federally appropriate understandings of ss 90, 92 and 96 were added to the mix, it would become obvious that the High Court would be reformulating the Australian federation in the most fundamental ways.

Is the High Court the appropriate body to carry out such a task? I think that the answer is "No", for two reasons.

First, even if all present and future High Court Justices adopted an activist federalist attitude to the Constitution, the constraints operating on the Court would make the recasting of the Australian Constitution a lengthy process. Constitutional cases don't happen overnight. And the large number of cases needed to reconsider the interpretation of virtually the entire Constitution would ensure that the process would take many years, perhaps decades, to complete. In the meantime, of course, both Commonwealth and State governments would be trying to govern while not knowing which powers would next be litigated, and what the final legislative framework would look like. I cannot imagine a less attractive proposition.

But, of course, unanimity amongst the judges is extremely unlikely. What is more likely is that some judges will be activist federalists, that some won't be, and that even those that are will have different notions of what that would mean. So the process of recasting the Constitution would be messy and unpredictable, with oscillations between more and less federalist decisions adding to the uncertainty. Again, one would have to ask whether this would aid the cause of good governance in Australia.

If, however, we ignore this concern, we are still left with the issue of whether the High Court has the institutional capacity to redesign the Australian Constitution. In his pre-activist days Sir Anthony Mason had some wise words to say about the capacity of judges to act as law reformers and *de facto* legislators:

> "The Court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts found. The Court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The Court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the Court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the Court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature".[42]

Exactly the same constraints would apply to the High Court if it were to embark on the long road of litigation designed to reform our existing constitutional arrangements to give effect to federalist or originalist imperatives. Could anyone really believe that the High Court would be an appropriate, let alone desirable, institution for the reshaping of Commonwealth and State legislative powers? Would it be the body that one would choose to redesign the financial relationships and responsibilities of the Commonwealth and the States? For all the very good reasons that Sir Anthony gave for not wanting to see the High Court as a roving law reform commission, one would not want to see the High Court as a long term constitutional convention armed with the power to implement its decisions.

Despite his occasional call for activist originalists to be appointed to the High Court, even Greg Craven notes the incongruity of the High Court being involved in such decision-making:

> "Even if one accepts that there is no democratic impropriety in judges assuming a political and legislative function, why would we believe that relatively elderly and cloistered male barristers, sequestered all their lives from the making of any policy decision larger than that concerning the purchase of office stationery, should upon elevation to the High Court bench become qualified for the taking of the most fundamental political decisions in our society".[43]

The end of the High Court?

If the High Court were to go down the path of recasting the Constitution to reflect federalist imperatives via the mechanism of essentially endless litigation, it would be unlikely to emerge unscathed. In fact, such a development would be catastrophic for the Court and for the country.

Can it really be expected that the Commonwealth and State governments would patiently and stoically sit aside and govern while the High Court entered upon a lengthy process of refashioning the Constitution in ways that would impact upon the powers of each tier of government? Would the Australian people, for that matter, rest quietly while immensely controversial political questions about which tier of government should be responsible for passing laws, and raising and spending tax money, were litigated and decided by unelected barristers and judges?

Would the Commonwealth government especially—given that it is most likely to lose most out of such a process—see this as a political challenge and respond in kind? Can anyone imagine a Prime Minister such as John Howard, for example, peacefully accepting successive High Court decisions which continually reduced his power to legislate for Australia? Of course not. If the High Court were to go down this path, the Commonwealth would respond by appointing politician lawyers to the Court in order to defend its interests. As Greg Craven notes:

> "Finally, there is the obvious point that if judges are to behave as politicians, then politicians will be appointed as judges. Once the executive is convinced that the occupants of the bench intend to behave as political rather than legal creatures, it is a short step to ensuring that only those persons thoroughly amenable to the programme of the governing party will be appointed to the judiciary. Consequently, the politicisation of the judiciary through judicial activism may be expected to be a self-perpetuating process. . . This culminating disaster will set the seal on the loss of independence and prestige inherent in the pursuit of the course of judicial activism".[44]

This, of course, would totally destroy any popular belief about the independence of the judiciary and its importance in our mixed and balanced Constitution.

Conclusion

In the *Work Choices Case* Justice Kirby adopts a position to the precedents contained in High Court decisions over one hundred years that amounts to what I have described as an activist federalist position. Justice Callinan, in the same case, adopts a similar method but adds to it an activist originalist program. What are the implications of these positions if they were to become the ruling orthodoxy on the High Court?

The application of an activist federalist/originalist judicial method would see the High Court adopt the role of immediately entering into a protracted storm of litigation with the ultimate aim of recasting the Australian Constitution in light of federalist and originalist views. This would be achieved by setting aside the traditional methods of the common law judge, and the deference to authority and disinclination to enter into political questions commonly associated with such judges, in favour of an openly aggressive program of reforming the legislative, taxing and spending powers of the Commonwealth and the States.

This would amount to the greatest attack on common law judging and its place in our constitutional framework that Australia has ever seen. If, however, one ignores the matter of principle, one can ask whether anyone really believes that the High Court is anything other than the least appropriate public body to undertake a dedicated program aimed at fundamentally recasting our constitutional and political structure. For good reasons it does not have the political legitimacy to undertake such a role. On a more practical level, the resources and skills of High Court judges are patently unsuitable for such a role. Finally, if the High Court did embark on this path it would amount to a one way ticket to self-destruction. An openly activist federalist and/or originalist High Court would quickly become immersed in political battles with both Commonwealth and State governments (which it would lose), as well as losing all respect from the Australian people. That is a catastrophe that we do not need.

Given the parlous state of federalism in Australia it is not surprising that some might look to the High Court for a remedy. But such a course would be as wrong in principle as it would be unwise in practice. Federalism can only be rescued if the Australian people can be convinced that it is worth reviving, and it can only be resuscitated through political action.

Endnotes:

* I would like to thank members of the Law School Brown Bag Discussion Group at the University of Adelaide for their many helpful comments on an earlier version of this paper.

1. Greg Craven, *Judicial Activism: The Beginning of the End of the Beginning*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 16 (2004), pp. 153-172, at 162. The reference here is to Justice Antonin Scalia, a noted and controversial Justice of the United States Supreme Court who has argued trenchantly for an "originalist" interpretation of the United States Constitution in the cases brought before that Court.

2. *Ibid*., at 163.

3. *Ibid.*.

4. See, for example, Greg Craven, *Reforming the High Court*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 7 (1996), pp. 21-65; Greg Craven, *The High Court and the States*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 6 (1995), pp. 65-104; Greg Craven, *The Engineers' Case: Time for a Change?,* in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 8 (1997), pp. 73-124. Geoffrey Walker has given a detailed description of the way in which the High Court has systematically, although not uniformly, increased the powers of the Commonwealth at the expense of the States. See Geoffrey Walker, *The Seven Pillars of Centralism: Federation and the Engineers' Case*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 14 (2002), pp. 1-102.

5. *New South Wales v. The Commonwealth* (2006) 231 ALR 1 (*Work Choices Case*).

6. V Lenin, *What is to be Done?*, in *Lenin, Collected Works* (Foreign Languages Publishing House, 1961, Moscow), Volume 5, pp. 347-530. (Originally published 1902). Accessed at http://marxists.org/archive/lenin/works/ 1901/witbd/index.htm

7. *Loc. cit.*.

8. *Ibid.,* at 118 per Kirby J (internal footnote omitted).

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

10. *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 (*Concrete Pipes Case*).

11. *Ibid.*.

12. *Ibid.*.

13. *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 147 per Kirby J.

14. *Ibid.*, at 146 per Kirby J.

15. (1947) 74 CLR 31.

16. (1971) 122 CLR 353.

17. (2003) 215 CLR 185.

18. *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 149 per Kirby J (internal footnotes omitted, emphasis added).

19. (1947) 74 CLR 31.

20. (1971) 124 CLR 468.

21. *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 150-51 per Kirby J (internal footnotes omitted, emphasis added).

22. *Ibid.*.

23. In technical terms it can be argued that certain aspects of the *Engineers' Case* have already been discarded by the High Court. The rhetorical device of claiming that literalism is the correct approach to interpreting the Constitution is an example of a "doctrine" from that case that has been displaced. One can agree with Nicholas Aroney that the "resilient core" of the *Engineers' Case* "is the proposition that primary and virtually exclusive attention is to be given to the interpretation of federal legislative power, without regard to the impact on State legislative capacity", and yet note that the *Engineers' Case* is also symbolic of a systematic and comprehensive centralist attitude towards interpreting the Constitution by the High Court. Overturning the *Engineers' Case* involves more, I would argue, than simply overturning particular technical doctrines associated with that case. The quotation is from Nicholas Aroney, *The Ghost in the Machine: Exorcising* Engineers, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 14 (2002), pp. 103-140 at 122.

24. (1947) 74 CLR 31.

25. *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 226-34 per Callinan J.

26. *Ibid.*, at 219 per Callinan J.

27. *Ibid.*, at 220 per Callinan J.

28. *Ibid.*, at 218 per Callinan J. See also pp. 186-7 and 225-6 for further discussions by Callinan J of the importance of originalism and federalism as basal considerations in the interpretation of the Australian Constitution.

29. *Ibid.*, at 219 per Callinan J.

30. *Re Foreman & Sons Pty Ltd; Uther v. FCT* (1947) 74 CLR 508 at 521 per Latham CJ, noted by Callinan J in *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 167, footnote 698.

31. *State Government Insurance Commission v. Trigwell* (1979) 142 CLR 617 at 633 per Mason J.

32. *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 211 per Callinan J.

33. B Cardozo, *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921), p. 141, cited in *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 215 per Callinan J.

34. (1803) 5 US 137.

35. Greg Craven, a proponent of what I have called activist originalism, nevertheless notes that "there is nothing to suggest that the Founders intended that the High Court should operate outside the construct of the traditional mode of proceeding by a British Court". See Greg Craven, *Reforming the High Court*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 7 (1996), pp. 21-65 at 25.

36. Greg Craven is both succinct and blunt about this. "In relation to statutory and constitutional interpretation, judicial activism is entirely illicit and must be stigmatised as such". Greg Craven,

Reflections on Judicial Activism: More in Sorrow than in Anger, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 9 (1997), pp. 187-208 at 208.

37. Ian Callinan, QC, *An Over-Mighty Court?*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 4 (1994), pp. 81-118 at 113.

38. I have written at length elsewhere about the nature of common law judging in response to claims that it amounts to a form of mechanical jurisprudence or, even worse, a myth perpetuated by cynical judges who really knew better. For the sake of brevity of argument, I will refrain from repeating myself on why Dixon's notion of strict legalism, for example, encapsulated a sophisticated analysis of common law judging, one that recognised the creative role of judges within a bounded form of reasoning which aimed to give effect to a judge's genuine attempt to apply the law as he or she understood it. See, for example, *Another Blast from the Past or why the Left should embrace Strict Legalism: A Reply to Frank Carrigan* (2003) 27 *Melbourne University Law Review* 186-98; *Law Reviews: Good for Judges, Bad for Law Schools?* (2002) 26 *Melbourne University Law Review* 560-76; *The Rise of the Hero Judge* (2001) 24 *University of New South Wales Law Journal* 747-759 and *Unconvincing and Perplexing: Hutchinson and Stapleton on Judging*, forthcoming, *University of Queensland Law Journal*.

39. *Queensland v. The Commonwealth* (1977) 139 CLR 585.

40. *Ibid.*, at 599 per Gibbs J, cited by Justice Dyson Heydon, *Chief Justice Gibbs: Defending the Rule of Law in a Federal System*, *The Inaugural Sir Harry Gibbs Memorial Oration*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 18 (2006), xv-lvii at xxx-xxxi.

41. Apart from the majority in the *Work Choices Case* which explained why this was the case, even Greg Craven seems to accept that on the present law the Work Choices legislation is within the Commonwealth's legislative capacity. Greg Craven, *Industrial Relations, the Constitution and Federalism: Facing the Avalanche* (2006) 29 *University of New South Wales Law Journal* 203 at 208-11.

42. *State Government Insurance Commission v. Trigwell* (1979) 142 CLR 617 at 633 per Mason J.

43. Greg Craven, *The Engineers' Case: Time for a Change?*, *loc. cit.*, at 111.

44. Greg Craven, *Reflections on Judicial Activism: More in Sorrow than in Anger*, *loc cit.*, at 207.

Chapter Three

When does Precedent become a Nonsense?

Professor James Allan

I begin by thanking the Society for having invited me here to speak today. It is a great pleasure to be here, and to speak to such a distinguished group.

Let me proceed by turning away from specifics to have you consider a quite abstract, theoretical issue. Assume for the moment that you were designing a legal system from scratch. All sorts of issues would arise. Do you want an adversarial court system (where each side presents its own case and the judge is merely a referee or umpire), or an inquisitorial one (where the judge actively attempts to pursue the truth and has the greater powers fitting for this expanded role)? Do you want to give a comparatively big role or a comparatively smaller (even non-existent) role to juries? Do you think it best to gear your procedures—all the many rules that set out how lawsuits are to be initiated, how relevant information is to be "discovered" from the opposing side, how disputes about these information-gathering and issue-refining interlocutory steps are to be handled, and more—towards a system that will eventually (2, 3 or even 5 years down the track) allow all the disputed issues to be tested at once so as to give both sides their single day in court as it were, or instead towards a system that settles issues piecemeal and one-by-one over time? And what about the judges? Do you want them chosen from the general ranks of lawyers, or do you want to establish a separate training and career stream for them right from university onwards?

If you opted for the former alternative in each instance then you should be glad to be living in a common law legal system rather than in one of the civil law systems as found in France or Germany, say.

Here's another difference between the common law world (one that includes not just Australia, but the UK, the US, Canada, New Zealand, India, Ireland, Malaysia, chunks of Africa, and most of the formerly pink bits on the map of the world) and the civil law world. It has to do with what might be thought of as the gravitational force or weight of previously decided cases. Or put in terms of those people who apply and interpret the legal rules, namely the judges, it has to do with their freedom of action. Do you want past cases—precedents—to constrain our judges always, sometimes or never? The common law world, as a generalization, opts to make past decisions—precedents—more influential, more constraining, and of greater gravitational force (arguably much, much more so) than does the civil law world.

Of course there are also rules related to court hierarchy, to lower courts being compelled to follow the reasoning and decisions of higher courts. But for the rest of this paper, let us put aside any difficulties related to upholding that sort of hierarchy by assuming that we are always talking about a jurisdiction's highest court. So any constraints or gravitational force (for the simplifying purposes of this paper) will be those that operate at the same level—the highest level—of the court structure.

With that caveat out of the way, the question becomes this: do you want your highest court's top judges, when deciding difficult cases today, to be constrained by (or to feel the gravitational force of, or the influence of) past decisions of that same highest court always, sometimes or never?

Those inclined to opt for the "always" answer are explicitly or implicitly putting much stock in the importance of certainty. Where judges are compelled to follow the reasoning used in a five-year-old or twenty-year-old or even eighty-year-old case—or series of such cases—then outcomes will generally be more predictable than when such precedents are not regarded as constraining.

Of course, no one thinks of certainty of outcome as a good-in-itself. Its value is tied to the satisfaction of people's expectations, and the concomitant Benthamite importance placed on facilitating their fulfilment.[1] On this way of thinking, greater certainty of outcome leads to more satisfied expectations, and so to greater ease in planning and shaping one's life, and so on.

Those who would have answered "never", by contrast, are making flexibility (at the point of application of the rules) the more important value or virtue. On this view, the emphasis is put on changing social

circumstances and technology, and the need for a responsive, flexible approach at the point of application of the rules.

In highly simplified terms, then, there is a spectrum ranging from total certainty at one end to total flexibility at the other, with various shades of grey in between. In practice, of course, all real life legal systems will strike a compromise somewhere between the two poles of "total certainty" and "total flexibility".[2] They will answer "sometimes" to the question of whether the top court's judges ought to be constrained by that court's past decisions—though common law systems lean this way, comparatively speaking, more than others.[3]

That sketches out the basic framework in which we can consider the question posed in the title to this paper. Or rather, it almost does. Two further matters are worth mentioning. Both relate to rules and the nature of rules, because it will be rules that the point-of-application judges will be interpreting. Now in today's legal world the vast preponderance of the relevant rules that affect us come from statutes. They are rules that have been laid down by the elected Parliament after three readings and the Royal Assent. Statutory rules intrude into almost all areas of life. But even so, there are also rules that come from past cases, that have evolved (case by case) over time from the sequential decisions of unelected judges. We can see these latter sort of rules most obviously in tort law, and in the glosses put by judges on all those statutes.

So one further matter worth mentioning is the issue of the relative clarity and certainty of statutory rules versus judge-made or common law rules. Some writers have been tempted to think that the judge-made variety will always be inherently amorphous, fuzzy and lacking in determinacy. I think that sort of line is over-stated. The best legal philosopher of last century, the Oxford don H L A Hart, responded to that sort of nihilistic claim by noting that there is no doubt that the common law can produce "a body of rules … as determinate as any statutory rule".[4]

Of course, one must recognize that the indeterminacies involved when rules are inferred from precedents will be more complex, and the uncertainties more often encountered than with statutes, as a generalisation. But that is just to say that when rules have to be inferred from the ratio of past decisions, it will generally (though not always) be the case that such rules have less specificity, and less constraining effect over future circumstances, than do rules laid down in statute form by a legislature—*not* that such judge-made rules can never really amount to rules, or never provide determinacy (which is the sort of nihilistic line that tempts some writers).

The second further matter that needs stating is that *all rules*—be they statutory or judge-made or constitutional in origin—will have an "open texture"[5] or "penumbra of uncertainty".[6] No rule, however fanatically detailed (and one might think here of a tax code), can unambiguously and uncontentiously apply to every single future set of circumstances. All rules will have a "core of settled meaning"[7]—where the answer dictated by the application of the rules to the facts is clear to most people, such as when I drive into the back of your car while it is stopped at a red light—and an attendant penumbra of doubt. It is just that some rules have a very large core of settled meaning and a very small amount of doubt (again, think of tax codes, or laws related to corporate securities), while a few others have a tiny core of settled meaning and great amounts of uncertainty as to the outcomes they command (think of the "award custody based on the best interests of the child" rule in family law, or any enumerated rights in a Bill of Rights).[8] Indeed, on rare occasions it is the case that legislatures will intentionally pass rules with next to no constraining content—no core of settled meaning—as a means of abdicating decision-making powers and handing them off to the unelected judges.

For our purposes in this paper, though, this second matter worth mentioning boils down to this. Despite the claims made by some writers, rules are *not* empty, wholly amorphous things that leave the point-of-application judges always free to do as they please or think best. "[T]he life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules [whatever their source] which … do *not* require from them a fresh judgment from case to case".[9]

On the other hand, no rule (whatever its source, and no matter how fanatically detailed) will always be constraining, always point to only one reasonable choice, always eradicate reasonable disagreement. That is simply the nature of language, and the fact that humans bring to the table differing moral sentiments. Sometimes, though by no means always or even often, judges simply will have discretion, whether it be in interpreting a statutory or constitutional provision, or in determining the applicability of a case law rule.

As that same legal philosopher H L A Hart put it:

> "The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental [for example] constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success".[10]

I think now, with that framework and those two supplementary refinements in place, we can turn to the issue of when precedent becomes a nonsense.

Stare decisis ("to adhere to decided cases") is the policy or doctrine of standing by precedent and not disturbing settled points of law. This respect for precedent, as noted above, is stronger in common law systems, though in no system today does it amount to total inflexibility, with no scope at all or ever for judges in the present to second guess what they decided in the past.

And notice this. The whole point of such a doctrine or policy is to constrain judges *when they would otherwise decide a case differently*. A doctrine or rule that said, "Follow past cases only when you think they have been rightly decided (given the other sources of law in play)", is empty.[11] It amounts to nothing more than saying, "Decide this case on grounds *other than* how similar cases have been decided in the past, though if your conclusion and the conclusion from past cases happen to align or agree, then feel free to mention those past cases (for window dressing purposes)".

More bluntly put, *stare decisis* is about imposing a constraint, the substance or outcome of which today's decision-maker thinks is wrong. (Again, it would be no constraint if past cases pointed to an outcome believed right or correct on independent grounds, or on first principles, or in the absence of any concern for precedent).

As I tried to make clear at the start, therefore, *stare decisis* emphasises certainty over flexibility and even over perceived right outcomes (in the absence of those precedents). It is grounded on the view or theory that securing expectations and certainty of outcome should trump (at least sometimes) other legal principles pointing to a different outcome.

And surely it will be uncontentious for me to say that following such a doctrine is at least sometimes a good thing. Indeed, I am one who places more emphasis on upholding certainty than most—or at least than most legal academics—and so would depart from the doctrine's strictures more grudgingly than most.

But therein lies the rub. Therein lies a main gravamen or grievance at the heart of the High Court's s. 51 (xx) corporations power jurisprudence. The fact is that different judges take different views of how much respect to pay past precedents. As far as the High Court's corporations power jurisprudence is concerned, not all these views have been equally well placed. There has been an asymmetry at work. When precedent-respecting judges (who also happened to be inclined to adopt relatively narrower interpretations or Commonwealth-unfriendly interpretations) found themselves outvoted in subsequent cases, and outvoted fairly consistently as it turned out, they regarded themselves as bound by those previous decisions. Their self-disciplined adherence to *stare decisis* contributed to a kind of ratchet-up effect. A Gibbs and a Wilson, and maybe too a Dawson[12] and to a lesser extent a Stephen, or possibly even a Brennan, felt locked into what had gone before—namely, a creepingly expansionist development of s. 51 doctrine.[13]

On the other hand, a number of judges—a Murphy, a Mason, a Deane and a Gaudron, say—those inclined to adopt relatively liberal or Commonwealth-friendly interpretations of the Commonwealth's s. 51 (xx) powers, were not as attached to *stare decisis*. They felt freer to ignore its constraints. So although these judges were occasionally outvoted, they usually adhered to their minority views in subsequent cases, holding out in some instances until they could form part of a newly-constituted and more expansionist majority. This ratchet-up effect began with Isaacs J in the 1920 *Engineers Case*[14] and has more or less characterized the High Court ever since.

So let me call this Nonsense Number One. It is the asymmetry problem. Where some judges are more precedent-respecting than others, there comes a point at which those who feel themselves to be more constrained by past decisions than their judicial colleagues start to look like chumps (to the outside observer). Movement is all one way. The interpretively-conservative, precedent-respecting judge can only ever hold the existing line. His or her judicial philosophy does not allow for the recapturing of lost territory. Once lost, it is lost forever. The upholding of past decisions, even of what are seen to be wrongly decided precedents, counts for too much for these judges.

Now of course an asymmetry problem only arises here or anywhere if the judges who more greatly defer to precedent happen also to share some substantive position—one in favour of a federalist, pro-States interpretation of the Australian Constitution, say, or one that sees no right to an abortion lurking in the penumbras and emanations of the US Constitution, perhaps. If the various substantive judicial views were independent of, or randomly distributed amongst, the approach-to-precedent judicial views, all this might well balance out or come out in the wash or amount to nothing.

The problem arises—the nonsense shows itself—when the distribution of the two sorts of views is not random, not mutually independent. And that, unfortunately, can plausibly be claimed to be what has happened with division of powers federalism cases in Australia. As a generalisation, the precedent-respecting judges have tended also to be the States-rights or pro-federalism judges. When that happens, such judges find themselves on the losing end of a ratchet-up effect. And at that point, one might well say that the normal respect shown by these judges for precedent has become a nonsense.

Staying with Australian High Court federalism or division of powers jurisprudence, I think one might lay claim to a second sort of nonsense as regards precedent. I call this the *Uncommon Law* effect. I call it that because the best way to illustrate this second nonsensical aspect of a strict respect for precedent is by turning to a work of fiction.

A P Herbert's *Uncommon Law*[15] is a brilliantly sustained parody of the common law. Its 66 so-called "misleading cases", which over time first appeared in *Punch*, appear technically correct in both the language and reasoning typically used in common law judgments. Each step in the fictional judge's train of thought follows plausibly from what went before. Some steps are wholly uncontentious and mirror orthodoxy, some choose between alternatives that are all within the realm of reasonable possibilities, none is obviously identifiable as beyond the Pale. And yet from sound, unexceptional starting points the conclusions reached are ridiculous; they are laughable—which is, of course, Herbert's intention. He is trying to make the reader laugh by shepherding him along a path that ends in absurdity, but whose twists and turns all appear well-chosen, or at least not strikingly wayward.

Each time the conclusion reached looks laughably far-fetched, or at minimum implausible, when viewed from the initial vantage of the rules (statutory or case law ones) used to determine the outcome. The self-evident problem with each case—the point which enables Herbert to demonstrate the absurdity of the result—is that the enactors of those rules (or the earlier judges creating them in a previous case) would never have envisaged that they would be used or interpreted in this way.

It is precisely that sort of claim—one that makes following precedent today take on a nonsensical aspect—that I think can be made in relation to the Australian Constitution and how it has been interpreted by the High Court in federalism cases since at least 1920. None of the Constitution's framers would ever have imagined, back in the 1890s or in 1901, that a century or so later the Australian States would be as emasculated as they are today: that they would be so dependent upon the Commonwealth for their governmental finances; and that their policy-making capacities would be so contingent upon political decisions taken by the federal government.

More specifically, none of the framers would have anticipated that the "corporations" power (s. 51 (xx)) would be held to allow the Commonwealth to take over the field of industrial relations; that the "external affairs" power (s. 51 (xxix)) would be deemed to enable the Commonwealth to enact far-reaching environmental, human rights and industrial relations laws; or that the States could be cajoled into abjuring income tax powers, not least because four federal statutes—passed at the same time (during the Second World War) and consecutively numbered—were assessed or judged individually (and, of course, held to be valid) and not as part of a package. And this is merely to highlight some of the better known ways in which the competencies of the Commonwealth have waxed, while those of the States have waned.

Nothing in the language of the Australian Constitution, or its structure, or the process that was used to adopt it, or the basis upon which its approval by the voters was promoted, or the likely original understandings of most of those voters, or anything else at the time would have suggested that the States would become the enfeebled, emasculated creatures they have become. Put slightly differently, no one, or almost no one,[16] would have guessed or predicted that virtually all of the *important* division of powers cases would go the Commonwealth's way.[17] Or at least, there would have been no grounds at the time for thinking that Australia's political centre would do so much better at the hands of the judiciary than would be the case in Canada, Germany or even the United States.

So my second nonsense claim amounts to this. Australia's High Court, in deciding distribution of powers federalism cases over the last century, culminating in the recent *Work Choices Case*,[18] has created an end product that looks not unlike one of Herbert's misleading cases, although of course the High Court's intentions have been something other than simply the reader's amusement.[19]

Like the mock hypotheticals of A P Herbert's *Uncommon Law*, a number of discrete steps have been taken in interpreting s. 51, each of which seemed at the time to be itself certainly plausible, usually reasonable, sometimes perhaps inevitable, and never beyond the Pale, yet which cumulatively created an effect that today

is at least remarkable, if not troubling or even possibly absurd (according to taste). And that cumulative effect has left us today in the position where following these division of powers precedents can seem to be a nonsense, our Nonsense Number Two.

That makes two sorts of nonsense claims I am linking to our High Court's federalism jurisprudence—one I have called the asymmetry problem and one the *Uncommon Law* problem, reminiscent of A P Herbert's mock hypotheticals.

All that space and time allow me now[20] are two final indulgences. Firstly, I will give a quick recap of the outcome in the *Work Choices Case*, to show how far down Herbert's path we have come. Then, secondly, I will leave the realm of diagnosis and speculate on a few potential cures—or paths that at least offer some faint hope of ameliorating matters.

So recall that in the *Work Choices Case* the High Court, by a majority of five to two, upheld the entirety of the *Workplace Relations Amendment (Work Choices) Act* 2005,[21] largely on the basis of s. 51 (xx). As importantly, the majority reached this broad understanding of what s. 51 (xx) authorizes by rejecting various arguments that would have restricted its ambit. Hence, the argument that the explicit laying down of a more limited industrial disputes power in s. 51 (xxxv) served to restrict the ambit or reach that could be attributed to s. 51 (xx) was rejected, principally on the basis that this would entail, as it did, a return to the reserved powers doctrine.

Likewise, the proposition that a narrower construction of s. 51 (xx) should be adopted to avoid altering the federal balance was rejected, this time on the basis that arguments from the "federal balance" are contrary to the established principle that federal heads of power are to be interpreted as widely as the language used allows, without any thought being given to the impact of the conclusion on the powers left to the States.

Appeals to the Convention Debates, and the original intentions of the framers, and to s. 51 (xx)'s drafting history, as evidence of a more limited reach for the power, were also rejected. And the fact that three referendum attempts by Commonwealth governments to broaden the scope of the corporations power had been defeated—that the 1910, 1912 and 1926 proposals to amend s. 51 (xx) and s. 51 (xxxv) to confer a general industrial relations power on the Commonwealth were put to referenda but each one failed to pass—was not seen as relevant, but was baldly dismissed on the basis that the "failure of successive referendums to alter s. 51 (xx) and s. 51 (xxxv) provides no assistance in the resolution of the present matters".[22]

Thus, each argument that would have restricted the ambit or scope of s. 51 (xx) was rejected by the majority. Yet nothing in the majority's Commonwealth-friendly interpretation or approach ran obviously contrary to precedent. (Indeed, if anything, the dissenting judgments of Justices Kirby and Callinan are more inconsistent with previous authority.)[23] The outer reaches of s. 51 (xx) having never before been specified, the majority in the *Work Choices Case* could be seen as simply having adopted one of various plausible alternative readings or interpretations open to it.

That is the *Uncommon Law*-like point we have now reached. To me, it is not unfair to characterize where we are now as a nonsense.

Yet that is diagnosis, not cure. True, it raises interesting theoretical issues, such as which of the orthodox views surrounding division of powers questions are today most plausibly rejected—perhaps, say, the orthodox view that no powers are reserved to the States by implication? Yet rather than consider those sorts of issues, I finish this paper by turning to the practical issue of whether anything at all can be done.

A s. 128 referendum is almost certainly out—only the Commonwealth, not the States, can trigger one. This will not happen, whichever party is in government. So that leaves the judges themselves. They are the ones who have interpreted the Australian Constitution heavily in favour of the Commonwealth; they have gotten us to where we are today by means of a step-by-step series of cases. Anyone seriously interested in rebalancing our federalist arrangements is forced into relying on the judges, for want of other alternatives.

Here are three suggestions:

(1) Overrule *Engineers*': The time has come to argue that the reasoning in the *Engineers' Case* was faulty. However nuanced the case itself might or might not have been,[24] it now appears to be a roadblock to rebalancing federalism in Australia. So it is now, I think, time to argue that the *Engineers' Case* went too far in propounding that each federal legislative head of power should be read not only literally, but in isolation from the other heads of power, and without any regard to the history and federal structure underlying the distribution of powers between the Commonwealth and the States. True, counsel have been leery of taking this line of argument—they shied away from it in the *Work Choices Case* and in the equally important, equally Commonwealth-friendly *Tasmanian Dam Case*.[25] But given where we are now, there is no longer any tactical advantage in conceding that *Engineers'* was correctly decided. The States should instruct counsel to argue

explicitly for it to be overruled.

(2) Appoint more High Court Justices from smaller States: In 2005, five of the seven High Court Justices came from the Sydney Bar. One of the other two was from the Melbourne Bar. To Canadian or American eyes this is nothing less than incredible. Nothing remotely similar could happen, or has happened, in either of those federalist jurisdictions. Yet in Australia, the two largest States (and perhaps one in particular) dominate when it comes to the appointment of High Court Justices. In fact, the two smallest of Australia's six States, South Australia and Tasmania, have never—not once in over a century—had a single High Court Justice appointed from their State. More to the point, though, it has often been judges appointed from the other smaller states—Queensland and Western Australia—who have been the more balanced in their judgments and more solicitous of the point of view of the States, although as one might expect, the picture is by no means uniform.

Given where we are today in division of powers federalism jurisprudence, this is a change worth considering. Appoint regularly two or even three of the High Court's Justices from outside New South Wales and Victoria—at this stage there is nothing to lose. And a campaign to have High Court Justices chosen from a broader geographical pool might, on other grounds, attract the support of some non-federalist centralists.

(3) Defend originalism as the best interpretive approach to the Constitution: In my opinion, and despite the disparaging views of some current High Court Justices to the contrary, originalism is the most attractive interpretive framework for interpreting Constitutions, as opposed to statutes.[26] Without entering into the philosophical arguments,[27] I think any other interpretive approach ends up collapsing into a sort of "Constitutions are just about expressing our most important values as a community" outlook: one that has the effect of giving us an unshackled judiciary, uniquely free to amend or alter or change it in ways they—those judges, and no one else—happen to think advances society, or keeps pace with the international community, or whatever be your favourite metaphor (i.e., any metaphor that obscures the fact that people disagree about what advances society, and that a handful of judges do not have a pipeline to God on these matters).

The present emphasis on a sort of literalism in these cases does nothing to prevent this collapse and the end result of a relatively unshackled judiciary—one that clearly favours a very strong, powerful Commonwealth. Stronger advocacy of some sort of originalism as the best interpretive approach to the Constitution, coupled with the explicit aim of appointing High Court Justices who are committed originalists, may help. Certainly this interpretive approach, when sincerely held, appears capable of pushing a judge to uphold federalist outcomes, even when he personally agrees with the thrust and goals of the Commonwealth legislation being challenged (as seems likely in the case of Justice Callinan in the *Work Choices Case*).

That more or less exhausts any positive suggestions I have. Even cumulatively they can seem rather lame, I concede. The fact is, though, that the odds are stacked against our federalist arrangements being rebalanced. And this is no less true, even when the accumulated body of precedents that have interpreted our division of powers federalism arrangements has become a nonsense.

Endnotes:

1. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (eds. Burns and Hart), Athlone Press, 1970 (first published in 1780). Bentham thought that the more people's pre-existing expectations were satisfied, the more likely this was to translate into an increase in overall utility or social welfare.

2. The well-known Oxford legal philosopher H L A Hart put it thus in his masterpiece *The Concept of Law* (Oxford University Press, 1961), p. 127:

   > "In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case".

3. Indeed, up to 1966 in the United Kingdom, the House of Lords' position was that these top judges

would not overrule past decisions, though there was still some wiggle-room via distinguishing past cases on narrow grounds.

4. *The Concept of Law*, *op. cit.*, p. 132.

5. *Ibid*., p. 130.

6. *Ibid*., p. 131.

7. *Ibid*., p. 140.

8. No one goes to court and says, for example, that he is against "the right to free speech". Such Bill of Rights entitlements bear on matters such as where to draw the line when it comes to campaign finance regulations, or hate speech provisions or defamation regimes. The rule, "everyone has the right to free speech", leaves all these areas virtually wide open. Different lines can be drawn in the name of the rule, as is clear from even a cursory glance at the different answers given in the free speech jurisprudence of, say, Canada, the US, New Zealand and the UK.

9. *The Concept of Law*, *op. cit.*, p. 132 (italics in the original).

10. *Ibid*., p. 149 (italics in the original).

11. See Bruce Harris, *Final Appellate Courts Overruling Their Own 'Wrong' Precedents: The Ongoing Search for Principle*, (2002) 118 *Law Quarterly Review* 408, where he seems to miss this point, as made clear by Jack Hodder's blunt response in *Departure from 'Wrong' Precedents by Final Appellate Courts: Disagreeing with Professor Harris*, [2003] *New Zealand Law Review* 161.

12. Though see Dawson J in *Re Dingjan* (1995) 183 CLR 323.

13. This paragraph and a dozen or so others scattered throughout the remainder of this paper are reworked versions of similar comments made in a paper I am writing with a colleague, Nicholas Aroney, entitled *An Uncommon Court: How the High Court of Australia has undermined Australian Federalism*. I thank Dr Aroney for allowing me to incorporate bits of our joint paper into this one.

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

15. First published by Methuen, 1935. This edition 1979.

16. It is quite possible that Isaac Isaacs foresaw the potential for interpreting the Constitution in a pro-federal manner, provided the High Court's interpretive approach could be separated from the framers' original intentions and understandings.

17. This is not to deny that some well-known federalism cases went against the Commonwealth, such as the *Communist Party Case*, the *Bank Nationalisation Case*, the *State Banking Case* and the *Incorporation Case*, nor that s. 51 was in part a ground for these decisions. The point is that the general trend has undeniably been in the Commonwealth's favour.

18. *New South Wales and Ors v. The Commonwealth* (2006) 231 ALR 1 (hereinafter "*Work Choices*").

19. Here is a sampling of Herbert's *Uncommon Law* cases. In *Dahlia Ltd v. Yvonne* (pp. 314-319), a decision of the House of Lords is argued to be in the nature of an Act of God, something no reasonable man could assess or predict in advance. In *Fardell v. Potts* (pp. 1-6), the notion of a reasonable man is held not to encompass or subsume that of a reasonable woman. In *Rex v. Puddle* (pp. 159-163), a Collector of Taxes is held to be a blackmailer. In *H M Customs and Excise v. Bathbourne Literary Society* (pp. 408-413), a lecturer who makes people laugh, and so is entertaining as well as informative, is held (against

expectations) not to be subject to a heavy tax and not to be doing something illegal. In *Haddock v. Mogul Hotels, Ltd* (pp. 269-274), it is held that every waiter must know by heart the whole text of the Licensing Acts before being permitted, lawfully, to remove a patron's alcoholic beverage after closing time. In *Haddock v. Thwale* (pp. 124-129), motor cars are held to be subject to the same treatment, at law, as wild beasts (and in this case ordered to be put down). And so on, and so on.

20. For a much more detailed defence of the claim, with extensive reference to, the cases, see my and Nicholas Aroney's paper cited above, *loc. cit.*.

21. This Act introduced a number of very significant amendments to the earlier 1996 Act. The key goal of the *Work Choices Act* was the replacement of State industrial relations laws (and bits of the old Commonwealth system) with a near-comprehensive national system designed to encourage direct negotiations of workplace agreements, without the intervention of trade unions or other third parties.

22. *Work Choices*, paragraph [135]. See too paragraphs [125]—[134].

23. And Kirby J's attempts to distinguish the external affairs power from the corporations power seem particularly weak.

24. See George Winterton's *The High Court and Federalism: A Centenary Evaluation* (pp. 197-220), in P Cane (ed.), *Centenary Essays for the High Court of Australia* (Lexis Nexis, 2004) for an argument that it was more nuanced.

25. *Commonwealth v. Tasmania* (1983) 158 CLR 1 (*Tasmanian Dam Case*).

26. See my *Constitutional Interpretation v. Statutory Interpretation: Understanding the Attractions of 'Original Intent'*, (2000) 6 *Legal Theory* 109-126, and my *Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century*, (2006) 17 *King's College Law Journal*, 1-26.

27. See *ibid*..

Chapter Four

Work Choices: A Betrayal of Original Meaning?

Eddy Gisonda

Originalism stipulates that a search for the original meaning of constitutional terms upon enactment is the only legitimate interpretive method. By its very nature, this is an historical exercise. In particular, it requires a thorough evaluation of Australia's transition from a collection of independent colonies to a federated Commonwealth. It necessitates taking the temperature as it then was, and giving the attitudes and values of the time a sympathetic ear.

A difficult task, it is none the less an enjoyable one. It involves, for a start, immersing oneself in the former British colonies, a time when border duties were paid, travel occurred on three different types of railway gauge, and men with waistcoats and whiskers were elected to office. These peculiar looking gentlemen, of course, became our nation's founding fathers. Amongst their ranks were such luminaries as Barton, Parkes, Clark and Griffith, all of whom contributed in some way to the Commonwealth Constitution, and whose understanding of that document remains especially crucial.

Also involved was Sir George Reid, perhaps the most intriguing of them all. One reason is that it remains incredibly difficult to decipher whether Reid was for the federation project or against it. On 28 March, 1898 hundreds of New South Welshmen crammed into the Sydney Town Hall to hear their Premier's views on the federation question. Two hours later, they left none the wiser. The bemused commentariat labeled him "Yes-No Reid", an epithet he carried for the rest of his life.[1]

A second reason was his love-hate relationship with the Australian people. During one address, a female interjector cried out, "If I were your wife, I'd put poison in your coffee". The response, often attributed to Sir Winston Churchill, was in fact Reid's: "If I were your husband, I'd drink it," he quipped.[2]

There was more. Whilst delivering an address from a hotel balcony at Newcastle, a young male in the audience pointed up at Reid's immense and unwieldy jelly-like stomach as it threatened to spill over the balustrade on which it was resting, and asked, "What are you going to call it, George?". There are certainly no attempts to implicate Mr Churchill in the response on this occasion as Reid, adjusting his monocle and loosening his waistband, bellowed at his heckler:

> "Well, if it's a boy, I'll call it after myself. If it's a girl, I'll name it Victoria. But if, as I strongly suspect, it's nothing but piss and wind, I'll name it after you".[3]

The larrikin nature of Australian politics, however, belies the serious message of the federation movement. In 2001, Don Watson, after lamenting the fact that the Commonwealth Constitution was soldered together through a protracted series of lawyers' meetings, concluded that Australia's originating documents were entirely without poetry, inspiration, or even an overriding principle.[4] That view is not only denigratory, it is false. Unfortunately, it is increasingly widespread. Hence, it is important to uphold the originating principles of our nation. This is a task for many, including lawyers charged with constitutional interpretation. The most natural way for them to do so is to respect the original meaning of the Commonwealth Constitution. What follows is an explanation of how that might occur.

The search for original meaning

The originalism I speak of regards the discoverable meaning of a constitution at the time of its initial enactment as authoritative for the purposes of present day constitutional interpretation.[5] The focus is not on the subjective intention of the drafters or ratifiers of a constitution, but rather the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.[6] This prohibits us from relying on esoteric information such as private correspondence and the like.[7] It does allow us, however, to rely on certain secondary materials, such as the debates at constitutional conventions, to the extent that they assist us in ascertaining how intelligent and informed people of the time

originally understood the constitution.[8]

In operation, originalism is textualist. A fundamental characteristic of a constitution is that it is a written document, and like all written legal documents, we must respect that text for evidentiary, cautionary and clarificatory reasons.[9] Yet this is not an invitation to embark upon extreme literalism. Rather than construing legal text strictly, or leniently for that matter, we ought to give the text the meaning it most reasonably bears. As Justice Felix Frankfurter observed, legislative ideas are both explicit and immanent, rendering the problem thus: "What is below the surface of the words and yet fairly a part of them?".[10]

In order to answer that puzzle, one cannot approach the task of constitutional interpretation with some kind of "astral intelligence, unprejudiced by any historical knowledge".[11] Instead, the answer requires an appreciation of the context, purpose, circumstances and historical facts surrounding the formation of each constitutional term, not to mention grander considerations such as the object and design of the constitution as a whole. Because constitutions are necessarily broad and general in terms, in many circumstances a strict or literal reading of the language will offend the principle that it is not permissible to adopt a construction which is demonstrably one not intended by those who drafted a constitution.[12] That is why it is acceptable, as with all legal instruments, to utilise extrinsic material which helps supplement, but does not contradict, the relevant language at hand by gleaning the manifestations of the drafters' intent at the time of enactment.[13]

Yet whilst the literal meaning of constitutional words may need to give way to values, intentions or purposes not expressly stipulated in the text, at all times the focus remains the original meaning of the constitution. Any values, intentions or purposes relied upon must belong to those responsible for the words at the time they expressed or ratified them, and must fairly be open given the confines of the express stipulations that the drafters ultimately chose to reduce to writing. It is not legitimate to have recourse to some other set of values, intentions or purposes,[14] whether such recourse is dressed up as "the needs and goals of our present day society",[15] the need for consistency with "universal and fundamental rights",[16] or a determination of what is the "right thing to do".[17]

Before proceeding, a word of caution is worth mentioning. As it is conducive to the scholarly analysis of judicial method to employ terminology such as "originalism", it is important to refrain from appropriating such terms for polemical or rhetorical purposes, particularly given the baggage hitherto carried over from the United States in this field of discourse.[18] Moreover, opinions about whether a particular method is more conducive to "conservative" or "progressive" political agendas should not affect the evaluation and assessment of interpretative technique.[19] We must also be ever vigilant to resist the temptation, within the sphere of originalism, to make dogmatic assertions about what was, or was not, originally intended by our constitutional framers.[20] In all legal controversies, constitutional or otherwise, decisions must ultimately rest on reasoning and analysis that transcend any immediate result at hand.[21]

Original meaning and the rule of law

It is not the purpose of this paper to extol the virtues of originalism. In any event, there is very little one can add to what is perhaps the finest intellectual presentation of these issues by Professor Jeffrey Goldsworthy.[22] That said, a brief point is worth mentioning.

One of the primary arguments supporting originalism is that it is the approach most respectful of the democratic process.[23] Yet the nature of democracy is indeterminate, meaning that proponents of non-originalism can just as easily invoke democracy-based arguments.[24] If anything, the major thrust of justifications for originalism resides not at the more abstract level of democracy *per se*, but at the more material level of asserting the desirability of majoritarianism.[25] Either way, there remains the outstanding jurisprudential issue of how the drafters and ratifiers of a constitution may legitimately bind those who took no part in the democratic polity which initially established the document.[26]

Instead, a more persuasive argument justifying originalism is its consistency with notions of the rule of law,[27] in particular the virtues of constitutional stability, predictability, equality of treatment and neutrality in application.[28] The moment one departs from the text and history of a provision, and the fair implications derived therefrom, it becomes extraordinarily difficult not only to construct a principled way of determining an approach to constitutional interpretation, but to construct an approach that can attract sufficient consensus.[29] Invariably there will be differences as to how a court should approach a matter and what criterion they may invoke, as the judicial task descends into substantial indeterminacy and complexity. The result is judicial decisions that conflict with prior precedent, and the reaching of results that were once unthinkable.

This is not to say that originalism solves all potential conflict. Reasonable minds committed to originalism may well reach divergent opinions from time to time, disagreeing on the original meaning of a provision, or the application of the original meaning to the situation before a court; but at least the originalist always knows what he or she is looking for, namely the original meaning of the text.[30]

For an illuminating example of just how originalists claim that their method promotes the rule of law in constitutional adjudication, and how originalism operates in context more generally, one may look to the experience in the United States, one of the countries to which our founding fathers looked for inspiration when constructing our federation.

Original meaning in context: an American example

Allegations of illegitimate judicial activism, past and present, plague the United States' judiciary in its constitutional jurisprudence. The result has been a hardening of originalist thought. The *United States Constitution*—particularly the *Bill of Rights*—lies replete with instances where originalists argue that the current approach by the judiciary contradicts, or in no way reflects, the original meaning of key constitutional terms. According to originalists, this has led to an unwarranted politicisation of the judiciary and the Constitution itself.

To take just one example, there is no need to look further than the very first sentence of the *Bill of Rights*:

"Congress shall make no law respecting an establishment of religion".[31]

This is not to suggest that the Establishment Clause has generated decisions any more erratic than other constitutional clauses. It is, however, one of the few clauses explicitly replicated in the *Commonwealth Constitution*.[32]

Leave aside the issue of whether the Establishment Clause applies to give rights to individual citizens as against the legislatures of the States.[33] The crucial point for originalism is to ascertain what the prohibition against the *establishment* of religion originally meant. According to originalists, this task remains relatively free from difficulty. At the time of enactment, there were still a number of established religions throughout the States. The hallmark of these establishments was the coercion of religious orthodoxy and of financial support by force of law and threat of penalty.[34] Examples would include the mandatory payment of taxes to support ministers, religious qualifications for office, laws prohibiting the breaking of the Sabbath, and so forth.[35]

Lurking in the background also was the grandest established religion of them all, and the impetus of both the American and Australian establishment clauses: the Church of England. With that in mind, it is clear that the real object of the amendment was to prevent an establishment that vested in an ecclesiastical hierarchy the exclusive patronage of the national government.[36] The original meaning was not to rid the nation of religion, or even to ensure the separation of religion and government more generally, but to prevent perpetual strife and jealousy on the subject of ecclesiastical ascendancy.

For a considerable time, the Establishment Clause served its intended purpose, attracting little controversy. Like so many other clauses, however, its original meaning eventually became lost. The shift commenced in 1947, when the Supreme Court held that the Establishment Clause applied to State as well as federal action, and that it could be construed to prohibit not only the establishment of a religion, but also lesser forms of aid and support, including those directed towards religion more generally (as opposed to a particular denomination).[37] It was the beginning of the Court's injunction that it was necessary to construct a "wall of separation" between church and State.

Despite judicial remonstrations that it was a metaphor "based on bad history" and "useless as a guide to judging",[38] the "wall of separation" continued to underpin Establishment Clause jurisprudence. The result was both inevitable and predictable. It led to a series of tests and counter-tests, qualifications and exceptions, distinctions and contradistinctions, as the Court attempted to grapple with the new direction in which the "living constitution" was taking it. At various points in time, it summoned courts to declare unconstitutional a picture of a crucifix printed on a temporary sign informing the public that a courthouse was closed for Good Friday;[39] the teaching of "creation-science" alongside "evolutionary-science" in Louisiana schools;[40] the delivery of a non-sectarian prayer by a local rabbi at a middle school graduating ceremony;[41] a crèche displayed in a Pittsburgh courthouse during the Christmas season;[42] a minute silence at the start of each school day in Alabama for a moment of "meditation or voluntary prayer";[43] government funding for the teaching of secular subjects in parochial schools;[44] a cross erected in the Mojave Desert Preserve to honour World War I

veterans;[45] and, the decision by a student council to deliver a prayer before their high school football games.[46] It is not yet clear whether the Pledge of Allegiance itself is constitutional.[47]

Hopes for the resolution of this large-scale uncertainty were pinned on the final day of the October, 2004 Term when the Supreme Court handed down its decisions on two cases concerning the display of the Ten Commandments. Unfortunately, these hopes were short lived. In the first case, the display of the Ten Commandments (one of nine framed documents that also included the *Bill of Rights*, the Magna Carta, the Declaration of Independence and the Mayflower Compact, all in a courthouse hallway as part of a "Foundations of American Law and Government" exhibit) was unconstitutional.[48] By contrast, in the second case, the display of the Ten Commandments (one of 17 monuments and 21 other historical markers on the grounds surrounding the Texas State Capitol, commemorating the "people, ideals and events that compose the Texan identity") was constitutional.[49]

In holding both displays to be constitutional, Thomas J explicitly urged a return to the original meaning of the Establishment Clause, noting that such an approach would reflect the intention of the constitutional framers.[50] That intention was to prohibit the legislature from coercing its citizens into supporting an established religion; it was not to prohibit actions as benign as the displaying of text on a wall or stones in the ground.

Thomas J also reflected the views of other originalists on the Supreme Court, that the systematic departure from the original meaning of the Establishment Clause had produced decisions that rested upon the "changeable philosophical predilections" of judges, rather than the "historic practices" of the American people.[51] This departure was also responsible for turning the Court into some form of "theological commission"[52] which "bristles with hostility to all things religious",[53] and invents manipulable tests as the "bulldozer of its social engineering".[54] According to these originalists, a return to the original meaning of the Establishment Clause would therefore bring much needed certainty and simplicity to the jurisprudence in this area.

Whilst the Commonwealth Constitution also contains an establishment clause, it is worth pointing out that the existence of a *Bill of Rights* is a basal difference between the constitutional arrangements of the United States and that of Australia.[55] This may lead some to argue that a debate about originalism as witnessed above has little application to Australian constitutional jurisprudence.[56] To the extent that the Commonwealth Constitution contains purely procedural arrangements, this may be true. Such an observation does not apply, however, to s. 51. Whilst that section does not contain abstract moral principles, and therefore does not invite the imposition by judicial decision of social values, it does confer legislative power upon the federal Parliament in abstract and imprecise terms. The originalism debate has just as much, if not more, relevance in these circumstances than in any other. What follows demonstrates how this is so.

The *Work Choices Case* and originalism

Under the Commonwealth Constitution, the federal Parliament has the power to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" ("the Corporations Power").[57] It also has the power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State" ("the Industrial Relations Power").[58]

It was pursuant to the Corporations Power that the federal Parliament passed the *Workplace Relations Amendment (Work Choices) Act* 2005 ("*Work Choices Act*"). At the risk of simplicity, but most relevantly to this paper, the *Work Choices Act* was aimed at governing completely the employment relationship between corporations and their employees.

Each of the States challenged the constitutional validity of the *Work Choices Act*. In *New South Wales v. Commonwealth*,[59] five members of the High Court joined in dismissing the challenge. The joint reasons held, again at the risk of undue simplicity, that laws prescribing the industrial rights and obligations of corporations and their employees, and the means by which they are to conduct their industrial relations, are laws that fall within the Corporations Power.[60] The joint reasons also held that the Industrial Relations Power did not contain a positive prohibition or restriction upon what would otherwise be the ambit of that power, and therefore the Corporations Powers was not subject to it.[61]

Some initial observations

It is worth noting from the outset that only the dissenting reasons of Callinan J expressly endorse originalism as the most suitable interpretive method in the *Work Choices Case*.[62] This may lead some to the premature

conclusion that an application of originalism would destine one to rule in favour of the States, whilst an application of non-originalism would lead the other way. Yet things are not so simple. Kirby J also upheld the States' challenge, but his Honour's reasons are not necessarily originalist ones.[63] As Ben Jellis has demonstrated, if one travels beyond Kirby J's avowedly anti-originalist rhetoric, one discovers a more nuanced approach that incorporates a somewhat complex attitude towards the concept of original meaning.[64] Kirby J's reasons in the *Work Choices Case* illustrate this thesis, relying just as much upon notions of "industrial fairness" and preserving the "national ethos of the fair go", as considerations of history, purpose and the content of the convention debates.

Conversely, the joint reasons are not completely dismissive of the search for original meaning, supporting the earlier observation that reasonable minds may well differ from time to time in their assessments of original meaning. One of the principal submissions of the States centred on the claim that the Corporations Power would only support a law with respect to the relationships between a corporation and members of the general public (therefore excluding employees). The joint reasons rejected such a distinction, arguing it attracted no support in the convention debates, the drafting history, learned texts written at the turn of the century, or early judicial decisions.[65] Similarly, the joint reasons also rejected the various submissions of the States pertaining to the Industrial Relations Power because "the contemporary meaning in 1900 of the language used" did not support the submissions.[66]

Whilst the joint reasons, at least in some part, rely upon notions of original meaning in rejecting certain submissions, there are other passages where the search for original meaning is seemingly abandoned. A perception that the search for original meaning can be both impossible and futile appears to lie at the heart of this approach:

> "[T]he absence of any extended debate about this power does no more than show that, like so many of the legislative powers ultimately granted to the federal Parliament in s. 51, the power with respect to corporations was not politically controversial at the time the Constitution was framed. But it also follows that it is impossible to distil any conclusion about what the framers intended should be the meaning or the ambit of operation of s. 51(xx) from what was said in debate about the power, or from the drafting history of the provision.
>
> "To pursue the identification of what is said to be the framers' intention, much more often than not, is to pursue a mirage. It is a mirage because the inquiry assumes that it is both possible and useful to attempt to work out a single collective view about what now is a disputed question of power, but then was not present to the minds of those who contributed to the debates".[67]

This passage reflects the extra curial comments of Chief Justice Murray Gleeson that the subjective beliefs of our constitutional founding fathers are irrelevant, largely because these beliefs were far from unanimous.[68]

To the extent that these observations focus on the subjective thoughts, intentions and beliefs of each constitutional framer, they are irrefutably correct. Such a concession, however, does not present an insurmountable obstacle to originalism, which is a search for objectivity, not subjectivity, in original meaning. As recently alluded to by Heydon J, when we speak of the intentions of the framers of the Constitution, what we should really be referring to is what the language drafted by the framers meant.[69]

Bearing in mind the nature of an objective inquiry, we should acknowledge that the search for original meaning might be difficult at times, but also put in perspective the kind of problems that may arise. This is not, after all, an inquiry into the machinations of lawmakers in some ancient Babylonian empire. The framers of the constitution lived on the same land, spoke the same language, worked within the same basic legal and governmental structure, and shared many of the same values and aspirations that we do today.

There is also a great deal of reliable written information left behind from the period of constitutional formation, information which goes to the problems with which the constitutional framers were concerned and how they proposed to address them.[70] From that information, we may also draw inferences. That there was scant debate on the Corporations Power could be just as telling as if there was debate, particularly when assessing the claim that the power incorporates a further power that was very controversial at the time and would have attracted much debate. Ultimately, the task of ascertaining original meaning can be difficult, but no more so than the myriad of other difficult tasks that often confronts a court, including ascertaining the meaning of contemporary legislation upon which there is often scant information.

The historic practices of the Australian people

The requirement of objectivity also leads to the aphorism that "a page of history is worth a volume of logic".[71] Again, the originalist critique of Establishment Clause jurisprudence in the United States proffers an illuminating example. In 1970, Brennan J held that the existence of a practice since the beginning of the United States, whilst not conclusive of its constitutionality, was a "fact of considerable import" when it came to the issue of constitutional interpretation.[72] This explains why Scalia J, when upholding the constitutional validity of a rabbi delivering an invocation at a middle school graduation ceremony, catalogued an extensive list of examples to prove a long-established American practice of prayer at public events. These included the inaugural addresses of Presidents from George Washington onwards, the establishment of a national day of thanksgiving and prayer the day after proposal of the Establishment Clause, not to mention the presence of prayers at public high school graduation ceremonies from at least 1868.[73]

The dissenting reasons in the *Work Choices Case* reveal a similar approach at play. Both Callinan and Kirby JJ refer to the fact that from 1901 onwards the courts, industrial tribunals, members of the legal profession, academics, the business community, politicians and legislators alike, all commonly accepted that the federal Parliament did not have the power to legislate with respect to industrial relations beyond the limits of the Industrial Relations Power. This was true even of those who wished that the federal Parliament did have such power.[74]

Callinan J, in particular, also referred to the fact that the Commonwealth tried, on four separate occasions, to give the federal Parliament a broad industrial relations power by way of referenda:

> "Part of the history … of s. 51 that the Commonwealth has had to accept, and had generally accepted until 1993, is that it has no general industrial power, other than the power found in s. 51(xxxv). It has long, from 1910 at least, been understood by the Parliament that it could only exercise general, almost exclusive, legislative powers, and with respect to corporations as well, for industrial affairs, if the Constitution were amended. To effect these amendments the Parliament sought changes on four occasions by referenda, in, respectively, 1911, 1913, 1926 and 1946. The speeches in Parliament regarding the Bills for these are more even than the polemics of referenda … having regard particularly to the experience, eminence, legal qualifications and knowledge of the speakers, [these speeches] throw much light on the founders' intentions and the understanding of the meaning of the Constitution of informed, legally qualified, politically astute, responsible people. The meaning of the words of the Constitution may not change following, and as a result of the failure of a referendum, but it is a distortion of reality to treat the failure as other than reinforcing the received meaning of the words which prompted the attempt to change or enlarge them".[75]

Returning to the extra curial reflections of Chief Justice Murray Gleeson, his Honour there urged resistance against the temptation to "test a proposition of constitutional interpretation by asking whether it would come as a surprise to the Founding Fathers".[76] There can be no doubt that a general test incorporating "surprise" as the yardstick of constitutional validity would divert attention away from the central interpretive task, which is to discover the meaning of the enacted text. Nothing in those remarks, however, signifies permission to pursue constitutional interpretation completely oblivious to history.

The method of originalism places much store on history. To that end, it would receive the views of learned persons at the time of enactment or shortly thereafter, and would greatly respect any judicial decisions handed down in temporal proximity to the time of enactment that bear on the issue at hand: *contemporanea expositio est optima et fortissima in lege*.[77] It would also examine the surrounding circumstances of referenda, successful or not, throughout our constitutional history. In essence, originalism would see all information that goes to the historic practices of the Australian people as relevant to the issue of constitutional interpretation.

The following example is apt. Assume the presentation of the same case, involving the same legislative question and cast at the same level of abstraction, to the High Court at intermittent intervals across time. If the ruling is not consistent, if the States continue to win this hypothetical appeal, only to then lose unexpectedly, it is demonstrative of the kind of illegitimate constitutional change that the search for original meaning aims to prevent. Thus, if history demonstrates that the *Work Choices Act* would not have been constitutionally valid had its passage been secured much earlier in time, then this is demonstrative of the fact that a subsequent meaning has replaced the original meaning.

The relationship between original meaning and precedent

The joint reasons regard the repeated attempts at constitutional amendment by way of referenda as providing

no interpretive assistance. In the context of this case, such dismissal is not consistent with the search for original meaning. By contrast, the joint reasons rely upon the accumulation of High Court precedent, consistent with the command that "close and detailed attention must be given to the previous decisions of the Court in which s. 51(xx) has been considered".[78] This included relying upon previous concessions and absences of critique, as well as any prior overruling, any authorities that had expanded the Corporations Power over time (and the failure of the States to question them), and case law pertaining to the Industrial Relations Power and the construction of the powers in s. 51 more generally.[79] The joint reasons culminated in the approval of a statement by Gaudron J in *Re Pacific Coal Pty Ltd; Ex Parte Construction, Forestry, Mining and Energy Union*,[80] that the Corporations Power:

> "… extends to law prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations".

This is despite her Honour's remarks coming in *obiter*, in dissent, on a point not argued, and subject to significant qualification.[81]

Just like the search for original meaning, reasonable minds differ from time to time on the principle to be distilled from precedent. Callinan J reached the conclusion that there was neither firm authority, nor compelling *dicta*, that required his Honour to hold for the Commonwealth.[82] Kirby J noted two distinct strands of authority that tore in different directions.[83]

That issue aside, the interrelationship between originalism and the doctrine of *stare decisis* is a vexed one, and it is beyond the scope of this paper to explore all the antecedent complexities. There is clearly the potential, however, for discontinuity between original meaning and developed constitutional jurisprudence. As Justice Antonin Scalia has observed of the American experience:

> "If you go into a constitutional law class, or study a constitutional law casebook, or read a brief filed in a constitutional law case, you will rarely find discussion addressed to the text of the constitutional provision that is at issue, or to the question of what was the originally understood or even the originally intended meaning of that text. The starting point of the analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding".[84]

Consequently, some may suggest irreconcilability between the doctrine of *stare decisis* and a commitment to originalism.[85] Others may suggest a compromise path, one that is only prepared to discard precedents of recent vintage or precedents that buck core constitutional values.[86] Either way, a commitment to originalism will countenance the possibility of overruling precedents, and will command such an outcome if a previous decision is inconsistent with the original meaning of the text. Such an approach is consistent with the thinking behind the following statement by Callinan J in the *Work Choices Case*:

> "[E]ven if those of a different mind could, or do, point to past decisions or *dicta* of this Court which in their opinion might appear to compel a different conclusion from mine, there is a clear line of thinking of members of the Court that departures may legitimately and conscientiously be made. In my view they are not merely permissible, but obligatory when the issue is, as here, as significant as the continuing role and integrity of the States. The Commonwealth has conceded that no other case governs this one. That must mean that not even that monument to the demolition of State power, the *Engineers' Case*, does so. If, however, I am wrong about that, the cases to which I have referred in this section of my reasons would provide precedents entitling me to depart from it".[87]

The "federal balance"

Another point of difference between the joint reasons and those of the dissentients inheres in notions of the "federal balance". Understanding the relevance of this balance, if any, to our constitutional arrangements is crucial to any attempts to ascertain original meaning. If one recalls Justice Felix Frankfurter's question set out above, the federal balance is precisely the kind of context, purpose, circumstance and historical fact that aids in the answering of that inquiry.

The Commonwealth Constitution is not a contract.[88] Neither the States nor the Commonwealth existed prior to its enactment, making it factually impossible for those entities to have been privy to such an arrangement. The colonies, however, did exist; a significant fact, at least to the extent that each of them was a geographical polity that bargained for its own interests,[89] and within which existed popularly elected governments and courts of law with the same powers as the ancient royal courts at Westminster.

As Sir Samuel Griffith was explaining in 1890, the colonies were *practically* sovereign states, and perhaps a great

deal more sovereign than the separate States of the United States.[90] This represented a key factual and institutional underpinning of federation as a concept. It meant each colony would seek to preserve the standing to which it had become accustomed, and would only surrender so much of its powers as was "necessary to the establishment of general government to do for them collectively what they cannot do individually for themselves".[91]

Such characterisation of the colonies informed the majority view of constitutional drafters, producing two main consequences. On the one hand, the constitutional arrangements of the federation would incorporate the normative presupposition that each colony was self-governing, separate, and supreme, if not sovereign. Each State (as the successor entities of each colony) would retain these core attributes, subject to the new federal Constitution, under which they would *surrender* particular and discrete legislative power to the federal legislature. By contrast, the minority view would have seen the creation of two new levels of government, State and federal, with legislative power *divided* between the two.[92]

On the other hand, drafting of the constitutional arrangements would occur with a particular conceptual vision of federation in mind. According to that vision, a defining characteristic of a federation was that the executive government of the federation had a direct relationship with each individual citizen, in contradistinction to the key characteristic of a confederation, whereby the federal executive's relationship rested primarily with each member state. Again, there was a minority view, which this time saw the issue of where sovereignty lay as the distinguishing feature between a confederation and a federation. Under the former, sovereignty inhered in the constituent states; under the latter, it lay in the federation as a whole and the people therein.[93]

The joint reasons play down the significance of these factors, referring to Windeyer J's statement in *Victoria v. Commonwealth* that the colonies were not sovereign bodies in any strict legal sense.[94] Upon federation, the colonies became mere components of a nation where the Commonwealth assumed legal supremacy. Consequently, the joint reasons opined that references to a "federal balance" not only carried a misleading implication of static equilibrium, but also introduced a concept ultimately devoid of meaning or utility. Such a concept also failed to take account of changes in constitutional doctrine primarily instigated by developments outside of the law courts, most particularly the experience of the First World War, which consolidated Australian nationhood. Finally, the joint reasons noted that the starting point of constitutional interpretation was the text, and not a particular characterisation of the States formed independently of the text.[95]

To the extent that this represents a view of the original meaning of the Commonwealth Constitution, it is a minority view, in the sense that it is better associated with the preferences of those whom John Stone once referred to as the "centralist quarter … defeated in the debates of the 1890s".[96] As noted above, it was the majority view that prevailed, and with it, certain consequences. These consequences, one might add, were far from theoretical. Without them, it is hard to imagine the current composition of the Senate, the express saving of State Constitutions,[97] and a referendum process requiring majority State approval.

On this last point, it is worth considering the final attempt in 1946 to give the federal Parliament power to legislate over industrial affairs by way of referendum. More Australians were in favour of the proposal than against it, but the referendum failed because a majority of Queenslanders, South Australians and Tasmanians rejected the move. There is no other way to describe this outcome than the constitutional enshrinement of a form of "static equilibrium" that not even the Second World War, let alone the First, could overcome. It is no coincidence then that Callinan J placed much store in the idea of a "federal balance",[98] arguing that to disregard the idea would be tantamount to disregarding the "object which, beyond all doubt, the framers intended, the people who voted in favour of federation adopted, and the Imperial Parliament implemented".[99]

It is also necessary to say something, from the perspective of originalism, about the suggestion in the joint reasons that the rightful "starting point" of constitutional interpretation is the text. Originalism is a textualist doctrine; it demands the interpreter rely primarily on the text. At the same time, the originalist understands that one cannot ascertain the meaning of a constitutional text with a dictionary in one hand and the constitution in the other.[100]

The legislative power of the Commonwealth is restricted to those powers enumerated in the Commonwealth Constitution, the majority of which are set out using general language in s. 51. In fact, so general is the language that a quick glance at s. 51 demonstrates that what we have before us is indeed "an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application".[101]

Of course, on the one hand these general propositions are necessary. Their generality ensures the legislature can, in its own wisdom, adopt its own means to effectuate legitimate objects, and to mould and

model the exercise of its powers, as required by the public interest from time to time.[102] Yet on the other hand, their generality also creates a danger, namely the potential for extraordinarily wide interpretations.

It is essentially left to the judiciary (assuming the futility of relying on central governments) to ensure that such liberty is not taken with any of the general propositions that will offend the central design and operation of the federation. This is where, from the perspective of originalism, notions of the "federal balance" are relevant, not as a starting point of interpretation, but as a relevant factor that helps supplement the otherwise perfunctory language of the federal Parliament's enumerated powers.

If the federal balance is relevant as an interpretive aid in the ascertainment of original meaning, then what precisely, to paraphrase the joint reasons, does it mean? Callinan J answers this query by defining it as the protection of the essential functions and institutions of the States (for example, internal law and order, their judiciaries, and their executives) from obstruction, impediment, diminishment, or curtailment.[103] Within an originalist framework, however, the definition of the federal balance can go further still, namely the denial of any legislative power to the Commonwealth that was within contemplation at the time of enactment but which the Commonwealth did not originally possess.

In a general sense, the application of originalism leads us to a simple and relatively uncontroversial point: the original meaning of the Commonwealth Constitution tilted the balance of power in the Australian federation much further towards the States than has come to be the case.[104] More specifically, pitched at that level of abstraction which says, either the federal Parliament's power to legislate with respect to corporations did, or it did not, extend to industrial affairs at the time of constitutional enactment, we can use that answer to articulate with greater precision the location of the "federal balance".

The idea of a stagnant federal balance may ring alarm bells for those familiar with orthodox principles of constitutional interpretation. That is why it is important to bear in mind that such stagnation does not operate across the board. We are not here dealing with technological developments (such as aeroplanes and television), or the advent of new phenomena (such as the metamorphosis of the United Kingdom into a "foreign power",[105] or the need to defend Australia against Islamic terrorism).[106] Nor are we dealing with fluid moral principles, such as the right to free speech or the prohibition against cruel punishment, which remain largely absent from our constitutional arrangements in any event. In those matters, the debate between "moderate" and "extreme" originalism,[107] not to mention the distinctions between concepts and conceptions, connotations and denotations, application intention and enactment intention, may all come into play. In those matters, it may be perfectly consistent with originalism to regard a particular expression as subject to "dynamism",[108] just as it may be perfectly consistent to agree with the following statement by Lord Wright about the Commonwealth Constitution:

> "The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of their meaning".[109]

The issue of industrial affairs is different. It was just as much an issue in 1900 as it is now. It went to the very heart of the fault lines between those who stood for free trade and those who stood for protection. Nothing has changed. Over the past century, as the nation's two mainstream political forces have come closer and closer together, the issue of industrial relations remains the one issue that consistently defines the political divide. If the founding fathers could see us now, they would be astonished at so much before them: internet commerce, the multicultural nature of our society, native title. They would not be at all surprised, however, at the way we continue to argue about the employment relationship. They would stare in wonder at the plasma televisions within our homes, but nod with recognition at the current union and business group advertisements appearing on them.

The question then is a simple one: who had legislative competence in this area? Was this severe difference in opinion accommodated as much as possible, with the people of each State left to decide their own arrangements? Alternatively, was it better to contain this difference of opinion as much as possible, with over-arching standards imposed upon the diversity of autonomous views that would otherwise arise immanently out of the heterogeneity of political groupings and alliances extant in society?[110] Given the history and circumstances of the federation movement, not to mention the nature of industrial relations, it seems most likely that the colonies, when faced with a choice of keeping such power to themselves or surrendering them away, chose the former.

Subsequent developments

Given the foregoing, it is illegitimate, from the perspective of originalism, to allow subsequent developments to shape the judicial interpretation of certain constitutional puzzles, particularly those at the centre of the *Work Choices Case*. That Australia is now a more united nation than it once was, whether that be due to the waging of military campaigns or otherwise, has no impact on a constitutional situation, which should remain unchanged from 1900 until a majority of Australians and a majority of States determine otherwise.

Also irrelevant, from the perspective of originalism, are considerations about the changing nature of corporations in Australian society. It is true, as the joint reasons point out,[111] that there are now more corporations than there once were, and that they occupy many more industries and achieve many more things than they used to. Those factors may be relevant to determining the meaning of a "trading corporation". That may be an example of how the Commonwealth Constitution is not entirely static, and how the legislative power of the federal Parliament is not limited to the corporations, or the type of corporations, that existed in 1900.

The abstract issue, however, of whether the Constitution gives legislative power to the federal Parliament over industrial relations that occur within a corporation, is one that never grows without the say-so of the people. Even if the enormity of the place now occupied by corporations in today's society were relevant, it is not clear why it justifies the handing of power to the Commonwealth, instead of the other way around. The ruling in the *Work Choices Case* will probably demonstrate a direct correlation between the size of corporate activity and the potency of State legislative irrelevancy. Given the underlying federalist framework of the Commonwealth Constitution, one would have thought such economic developments, if at all relevant, assisted the States in their respective submissions.

Conclusion

Many potential approaches to constitutional interpretation exist.[112] The search for original meaning is just one of them. Whilst there is some High Court authority in support of originalism,[113] there currently exists no universally accepted method.[114] Indeed, some even question the appropriateness of having a universal interpretative method at all.[115] That hurdle aside, originalism is not everyone's preferred choice. To the contrary, vehement attacks on originalism are frequent.[116] Such attacks are sometimes legal or philosophical, but they are more often than not political, reflecting the perception that originalism is responsible for decisions sometimes at odds with popular norms of justice.[117] Moreover, there is no limit to the alternatives to originalism. There are probably even some who would praise Greaney J's 2003 decision in the Supreme Judicial Court of Massachusetts, that a particular result was mandated because it was "the right thing to do".[118]

This paper does not suggest the *Work Choices Case* was wrongly decided. As the saying goes, the joint reasons are final and therefore infallible. However, if one took the view that original meaning should govern constitutional interpretation generally, or at least should have governed the *Work Choices Case* more specifically, the observations raised in this paper become relevant. Indeed, they are relevant anyway. Originalism is an interpretive method supported by numerous normative grounds, including respect for particular notions of democracy and the rule of law. In Australia, notions of federalism also act as a principal motivator of originalism.[119] To that end, it is important that members of this Society are familiar with it.

Endnotes:

1. See Norman Abjorensen, *Reid and the Yes-No Speech*, (1999) 3 *The New Federalist: The Journal of Australian Federation History* 88.

2. Mungo MacCallum, *Australian Political Anecdotes*, (1994) xi.

3. Helen Irving, *Sir George Reid*, in Michelle Grattan (ed), *Australian Prime Ministers*, (2000) 66, 67.

4. Don Watson, *Rabbit Syndrome: Australia and America*, (2001) 4 *Quarterly Essay* 1, 33.

5. Keith Whittington, *The New Originalism*, (2004) 2 *Georgetown Journal of Law and Public Policy*, 599.

6. Randy Barnett, *An Originalism for Nonoriginalists*, (1999) 45 *Loyola Law Review*, 611, 620-621; cf, Whittington, *supra*, 603.

7. Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, (1997) 25 *Federal Law Review*, 1, 10.

8. Justice Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, (1997) 38; Robert Bork, *The Tempting of America*, (1990) 144.

9. Randy Barnett, *supra* 630-631. As Barnett points out, there is also a fourth reason for respecting constitutional text, namely that it performs an earmarking or channeling function whereby the populace are made aware of the formal requirements needed to amend the text legitimately.

10. Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes* (Benjamin Cardozo Lecture delivered to the Bar Association of New York, New York, 18 March, 1947).

11. *Baxter v. Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1106 (Griffith CJ, Barton and O'Connor JJ).

12. Sir Daryl Dawson, *Intention and the Constitution—Whose Intent?*, (1990) 6 *Australian Bar Review*, 93, 100.

13. Randy Barnett, *supra*, 631-634.

14. Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, (2005) 42 *San Diego Law Review*, 493, 518.

15. William Eskridge, Jnr, *Dynamic Statutory Interpretation*, (1994) 50.

16. *Kartinyeri v. Commonwealth*, (1997) 152 ALR 540, 598 (Kirby J).

17. *Goodridge v. Department of Public Health*, 798 NE2d 941 (Mass, 2003).

18. Justice Kenneth Hayne, *Concerning Judicial Method—Fifty Years On* (Fourteenth Lucinda Lecture delivered to the Monash University Law School, Melbourne, 17 October, 2006), publication forthcoming in (2006) 32 *Monash University Law Review*; see also Greg Craven, *After Literalism, What?*, (1992) 18 *Melbourne University Law Review*, 874, 884.

19. Ben Jellis, *Justice McHugh, Justice Kirby, and the 'Loose Leaf' Theory of Constitutional Interpretation* (LLB Honours Thesis, Monash University, 2005) 6.

20. Leslie Zines, *The High Court and the Constitution*, (1997) 19.

21. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, (1959) 73 *Harvard Law Review*, 1; Sir Owen Dixon, *Concerning Judicial Method*, in Judge Severin Woinarski (ed), *Jesting Pilate and Other Papers and Addresses by the Right Honourable Sir Owen Dixon*, (1965) 152.

22. Jeffrey Goldsworthy, *Interpreting the Constitution in its Second Century*, (2000) 24 *Melbourne University Law Review*, 677.

23. Justice William Rehnquist, *The Notion of a Living Constitution*, (1976) 54 *Texas Law Review*, 693, 705-706; Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, (1986) 27 *South Texas Law Review*, 226, 465.

24. Mirko Bagaric, *Originalism: Why Some Things Should Never Change—Or at Least Not Too Quickly*, (2000) 19 *University of Tasmania Law Review*, 173, 186.

25. Earl Maltz, *The Failure of Attacks on Constitutional Originalism*, (1987) 4 *Constitutional Commentary*, 43, 45; Daniel Farber, *The Originalism Debate: A Guide for the Perplexed*, (1988) 49 *Ohio State Law Journal*, 1085, 1097-1099.

26. Randy Barnett, *supra*, 637; see also Jeremy Kirk, *Constitutional Interpretation and a Theory of Evolutionary Originalism*, (1999) 27 *Federal Law Review*, 323, 346-347.

27. Cf Larry Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified*, (1985) 73 *California Law Review*, 1482, 1519, ff.

28. On this last point, see Robert Bork, *supra*, 146-153.

29. Robert Bork, *Neutral Principles and Some First Amendment Problems*, (1971) 47 *Indiana Law Journal*, 1, 8; Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, (1988) 82 *Northwestern University Law Review*, 226, 287-288.

30. Justice Antonin Scalia, *supra*, 45.

31. *United States Constitution*, amend I.

32. *Commonwealth Constitution* s. 116 states, *inter alia*, that:
> "The Commonwealth shall not make any law for establishing any religion".

33. The US Supreme Court has held that the Establishment Clause protects State citizens as against their respective State legislature by virtue of the *United States Constitution*, amend XIV, § 1 which states, *inter alia*:
> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

There are suggestions, however, that the original meaning of the *United States Constitution*, amend I, and amend XIV, § 1 resist such incorporation: see *Elk Grove Unified School District v. Newdow*, 542 US 1, 46 (2004) (Thomas J, concurring); see also Daniel Conkle, *Toward a General Theory of the Establishment Clause*, (1988) 82 *Northwestern University Law Review*, 1113, 1136-1142.

34. *Lee v. Weisman*, 505 US 577, 640 (1992) (Scalia J, dissenting).

35. Leonard Levy, *The Establishment Clause: Religion and the First Amendment*, (1986), 3-4; Daniel Dreisbach, *Thomas Jefferson and the Wall of Separation between Church and State*, (2002) 32-33.

36. Adam Callinger, *Original Intent and the Ten Commandments: Giving Coherency to Ten Commandments Jurisprudence*, (2005) 3 *Georgetown Journal of Law and Public Policy*, 257, 269-270.

37. *Everson v. Board of Education of Ewing Township*, 330 US 1 (1947).

38. *Wallace v. Jaffree*, 472 US 38, 108 (1985) (Renhquist CJ, dissenting).

39. *Granzeier v. Middleton*, 955 F Supp 741 (ED Ky, 1997).

40. *Edwards v. Aguillard*, 482 US 578 (1987).

41. *Lee v. Weisman*, *loc. cit.*.

42. *County of Allegheny v. ACLU (Pittsburgh Chapter)*, 492 US 573 (1989). In the same case, however, the Court held that a Chanukkah menorah placed just outside the City-County building next to a Christmas tree and a sign saluting liberty was constitutional.

43. *Wallace v. Jaffree*, *loc. cit.*.

44. *Grand Rapids School District v. Ball*, 473 US 373 (1985).

45. *Buono v. Norton*, 371 F 3d 543 (9th Cir, 2004).

46. *Santa Fe Independent School District v. Doe*, 530 US 290 (2000).

47. *Newdow v. United States Congress, Elk Grove Unified School District, et al.*, 542 US 1 (2004).

48. *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005).

49. *Van Orden v. Perry*, 545 US 677 (2005).

50. *Ibid*., (Thomas J, concurring).

51. *Lee v. Weisman*, *loc. cit.*, (Scalia J, dissenting).

52. *Van Orden v. Perry*, *loc. cit.*, (Thomas J, concurring).

53. *Santa Fe Independent School District v. Doe*, *loc. cit.*, (Renhquist CJ, dissenting).

54. *Lee v. Weisman*, *loc. cit.*, (Scalia J, dissenting).

55. Sir Owen Dixon, *supra*, 156.

56. Sir Daryl Dawson, *supra*, 95-96; Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, *op. cit.*, 22.

57. S. 51(xx).

58. S. 51(xxxv).

59. (2006) 231 ALR 1 ("*Work Choices Case*"). Note that at the time of presentation of this paper, the official reporting of this case in the Commonwealth Law Reports was not available.

60. *Ibid.*, 60.

61. *Ibid*., 65.

62. *Ibid*., 223-224.

63. *Ibid*., 117, 118, 127, 130, 139, 147-148 (Kirby J).

64. See Ben Jellis, *supra*.

65. *Work Choices Case*, *loc. cit.*, 24, 41.

66. *Ibid*., 62, 65, 68-71.

67. *Ibid*., 40; see also at 29.

68. Chief Justice Murray Gleeson, *The Constitutional Decisions of the Founding Fathers* (Inaugural Annual Lecture delivered to the University of Notre Dame School of Law, Sydney, 27 March, 2007).

69. *White v. Director of Military Prosecutions* (2007) 235 ALR 455, 516 (Heydon J).

70. See generally Richard Kay, *loc. cit.*, 253.

71. *New York Trust Co. v. Eisner*, 256 US 345, 249 (1921) (Holmes J).

72. *Walz v. Tax Commission of New York City*, 397 US 664, 681 (1970) (Brennan J, concurring).

73. *Lee v. Weisman*, *loc. cit.*, (Scalia J, dissenting).

74. For example, in 1903, Henry Higgins said:

> "Throughout the whole of the Convention debates, I felt that labour legislation should be exclusively vested in the Commonwealth Parliament…. There was a general belief in the Convention that factory legislation should be left to the States' Parliaments. It was utterly impossible to overcome that feeling".

75. *Work Choices Case*, *loc. cit.*, 196, 208.

76. Chief Justice Murray Gleeson, *supra*.

77. [Editor's Note] Which, as we all know, may be translated, "A contemporaneous exposition is the best and most powerful in the law".

78. *Work Choices Case*, *loc. cit.*, 19.

79. *Ibid*., 17-18, 21-23, 46-55, 64-68.

80. (2000) 203 CLR 346.

81. *Work Choices Case*, *loc. cit.*, 132 (Kirby J).

82. *Ibid*., 220 (Callinan J).

83. *Ibid*., 162-163 (Kirby J).

84. Justice Antonin Scalia, *supra*, 39.

85. See Richard Fallon, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, (2001) 76 *New York University Law Review*, 570; Steven Calabresi, *The Tradition of the Written Constitution: Text, Precedent and Burke*, (2006) 57 *Alabama Law Review*, 635.

86. See generally Richard Brisbin, Jr, *Justice Antonin Scalia and the Conservative Revival* (1998) 89-92; see also *Work Choices Case*, *loc. cit.*, 151 (Kirby J):

> "This court needs to give respect to the federal character of the Constitution, for it is a liberty-enhancing feature. Federalism … is protective of the freedom of individuals in an age when the pressures of law, economics and technology tend to pull in the opposite direction".

87. *Work Choices Case*, *loc. cit.*, 220 (Callinan J) (footnotes omitted).

88. Sir John Latham, *Interpretation of the Constitution*, in Justice Rae Else-Mitchell (ed), *Essays on the Australian Constitution* (1961), 1, 4-5.

89. Sir George Reid, *My Reminiscences* (1917), 181.

90. Nicholas Aroney, *The Griffith Doctrine: Reservation and Immunity*, in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court*, (2003) 219, 228; Nicholas Aroney, *Griffith's Vision of Australian Federalism*, in Michael White and Aladin Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution*, (2002) 179, 180-181.

91. *Official Report of the National Australasian Convention Debates*, Sydney, 4 March, 1891, 31 (Sir Samuel Griffith).

92. Nicholas Aroney, *Griffith's Vision of Australian Federalism*, *supra*, 180-181, 186.

93. *Ibid*., 199-201.

94. (1971) 122 CLR 353, 395-396.

95. *Work Choices Case*, *loc. cit.*, 20, 57-60 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

96. John Stone, *Foreword*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 1 (1992), vii, vii.

97. S. 106.

98. *Work Choices Case*, *loc. cit.*, 224-234 (Callinan J); see also 44-151 (Kirby J).

99. *Ibid*., 212 (Callinan J).

100. Justice Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, (2000) 24 *Melbourne University Law Review*, 1, 8.

101. *Australian National Airways v. Commonwealth* (1945) 71 CLR 29, 81 (Dixon J).

102. Sir John Latham, *supra*, 9.

103. *Work Choices Case*, *loc. cit.*, 225 (Callinan J).

104. Greg Craven, *supra*, 891.

105. See, e.g., *Sue v. Hill* (1999) 199 CLR 463.

106. See, e.g., *Thomas v. Mowbray* [2007] HCA 33 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 2 August, 2007).

107. Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, *op. cit.*, 20, ff.

108. *XYZ v. Commonwealth* (2006) 227 ALR 495, 536-537 (Callinan and Heydon JJ), quoting *Grain Pool of Western Australia v. Commonwealth* (2000) 202 CLR 479, 496 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

109. *James v. Commonwealth* (1936) AC 578, 614 (Lord Wright).

110. See David Meale, *The History of the Federal Idea in Australian Constitutional Jurisprudence: A Reappraisal*, (1992) 8 *Australian Journal of Law and Society*, 25, 54.

111. *Work Choices Case*, *loc. cit.*, 25, 40.

112. Paul Michell, *Just Do It! Eskridge's Critical Pragmatic Theory of Statutory Interpretation*, (1994) 41 *McGill Law Journal*, 713, 718-737; Sir Anthony Mason, *The Interpretation of a Constitution in a Modern Liberal Democracy*, in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions*, (1996) 13, 13-30; Justice Susan Kenny, *The High Court on Constitutional Law: The 2002 Term*, (2003) 26 *University of New South Wales Law Journal*, 210.

113. *Australian Steamships v. Malcolm* (1914) 19 CLR 298, 328 (Isaacs J); *Ex parte Professional Engineers' Association* (1959) 107 CLR 208, 267 (Windeyer J); *King v. Jones* (1972) 128 CLR 221, 229 (Barwick CJ); *Attorney-General (Vic); Ex rel Black v. The Commonwealth* (1981) 146 CLR 559, 614-15 (Mason J); *XYZ v. Commonwealth* (2006) 227 ALR 495, 536-537 (Callinan and Heydon JJ).

114. *Work Choices Case*, *loc. cit.*, 208 (Callinan J):
> "I search for consistency of interpretation of the Constitution by the Justices of this Court but cannot find it because it does not exist".

115. *SGH Limited v. Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J).

116. Earl Maltz, *supra*, 43-44.

117. Ken Foskett, *Judging Thomas: The Life and Times of Clarence Thomas*, (2004) 264.

118. *Goodridge v. Department of Public Health*, 798 NE2d 941 (Mass, 2003).

119. Jeffrey Goldsworthy, *Interpreting the Constitution in its Second Century*, *op. cit.*, 683-684.

Chapter Five

W(h)ither Federalism?[1]

Hon Dr David Hamill

When the Howard Government promoted A New Tax System (ANTS), it claimed the reforms would address Australia's over-reliance on direct taxation, particularly income taxes, by introducing a broad based consumption tax. It also claimed the reforms, with the Goods and Services Tax (GST) as their core, would enhance the financial capacity of Australia's States and Territories by arresting the century-long erosion of their fiscal capacity by a central government that had expanded its role in the social and economic affairs of the nation.

The reality has been very different. The implementation of ANTS and the complex set of financial relations at the heart of Australian federalism has diminished the fiscal autonomy of the States and Territories whilst simultaneously delivering substantially enhanced revenue streams to their Treasuries. To explain this paradox, and to ascertain the health of the Australian federation, it is necessary to understand the context in which the federation has evolved—an analysis that will also provide insight into the issues and challenges which lie ahead.

The federal state and state capacity

Whilst conventional definitions of the state generally identify it with the central or national governmental authority, these do not adequately describe the state as it pertains to a federation. With the central and sub-national governments sharing the range of legislative, executive and judicial powers and functions constitutionally available to government, the concept of the state in federations should not be limited to that part of the state which is the central authority but, rather, it must also embrace the constitutional authority residing with the sub-national governments.

Each of the national and sub-national governments in a federation will enjoy a measure of state authority and state autonomy, and each will have its own political, legislative, administrative, judicial, coercive and fiscal capabilities. A state's capacity waxes and wanes; and the political and institutional reality of federation means that the state capacity of each of the governmental entities within the federation is constantly being shaped by its interaction with the other entities, as well as with the various political, judicial and bureaucratic actors and institutions from both within the federation and external to it.

This interaction amongst different tiers of government and their various institutions, ensures that federal political systems are dynamic. However, they are neither inherently centralising nor decentralising. Whereas some federations have demonstrated a trend towards greater centralisation, others have disintegrated. Some erstwhile unitary states have become federations and have continued to decentralise, some federations have evolved into unitary states. It is important to note that the dynamic will not only vary with the circumstances of the particular federation but also across time, with the prevailing dynamic being centralising, decentralising or neither.

The Australian experience

Structural factors, such as the geographical isolation of the European settlements in early 19th Century Australia, shaped the governance choices of the political leaders of the day. Initially, this produced a decentralising dynamic that found its expression in the separation of new colonies from New South Wales. However, economic and technological changes in the late 19th Century led to new governance choices, with federation advanced as a policy response to a shared concern for security and the growing economic intercourse amongst the colonies. Thus the earlier decentralising dynamic yielded to the new centralising dynamic, that saw its expression in a federation with a new central government to which the six Australian colonies would cede part of their capacity as states.

Notwithstanding the desire to centralise the exercise of certain powers in the new central government, Australia's constitutional draftsmen sought to devise a framework for the new federation in which its centrepiece, the Constitution, contained various formal institutional constraints on its state capacity. However, over the course of the ensuing century, with the impact of two World Wars and other factors, including changing international and domestic economic conditions, there was an expansion in the role of government in general, and of central governments in particular.

The result of these influences has been the circumvention of many of those constitutional constraints on central government agreed by the delegates to the Constitutional Conventions of the 1890s.[2] Nowhere has this been more evident than in respect of the expansion of the central government's fiscal capability. Those who framed the Constitution did not foresee the Commonwealth circumventing the distribution of its surplus revenue amongst the States by using trust accounts; nor the action of the Commonwealth in excluding the States from their income tax revenue base; nor the High Court's actions that denied the States access to sales taxes, on the grounds that these were "duties of excise" and therefore exclusive to the Commonwealth.[3]

Ha, ANTS and fiscal federalism

When the High Court handed down its decision in *Ha's Case*, it reaffirmed earlier decisions that defined the Commonwealth's exclusive power to levy "a duty of excise" in such a way that States were precluded from taxing the manufacture, production and distribution of goods.[4] It concluded that State-imposed business licensing fees on tobacco products were excise duties and, therefore, invalid. Although the decision was specific to the New South Wales legislation, the High Court effectively invalidated similar legislation in all the Australian States and Territories and, by inference, questioned the validity of their fuel and liquor taxes. The decision, whilst not unexpected, sent shock waves through State and Territory governments, as $4.9 billion or 16 per cent of the total State and Territory own-source revenue base was immediately placed in jeopardy.[5]

In the wake of *Ha*, the States and Territories were anxious to restore their fiscal capability to at least that which they enjoyed before the High Court struck down their business licensing fees. However, they agreed to an arrangement that would restore their budgetary capability, rather than the autonomy that is fundamental to fiscal capacity. In what was acknowledged by the Commonwealth and the States as a temporary measure pending the implementation of wider tax reform, the States and Territories agreed to the Commonwealth imposing additional excise duty, the proceeds of which would be distributed amongst the States and Territories in the form of conditional grants known as Revenue Replacement Payments (RRPs).

When the Commonwealth announced its proposals for tax reform, it maintained that significant benefits would accrue to the States and Territories, as they would access all of the revenue generated by a GST. However, at the November, 1998 and April, 1999 Special Premiers' Conferences (SPCs), the Commonwealth made it clear, through the terms of its proposed Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations (IGA), that State and Territory access to GST revenue would be conditional upon their agreement to a timetable for the abolition of various State taxes and the implementation of other measures, including a First Home Owner Subsidy Scheme.

It was also clear from the IGA that it was not the Commonwealth's intention for GST to replace all of its payments to the States and Territories; tied grants or Specific Purpose Payments (SPPs) would be maintained. Whilst the GST revenue would replace the RRPs, the major significance of the new financial arrangement was that the GST revenue would replace the States' and Territories' general revenue assistance (Financial Assistance Grants or FAGs), and like FAGs, the share of the GST pool received by each State and Territory would be determined by the Commonwealth Grants Commission (CGC). However, unlike the FAGs pool, the size of which was determined unilaterally by the Commonwealth, the GST pool would simply be the quantum of revenue generated by the tax, less the cost of collection and administration by the Australian Tax Office (ATO).

This was familiar territory for the State Premiers, Chief Ministers, their Treasurers and their bureaucrats. Since the Curtin government introduced uniform income taxation during the Second World War, successive Commonwealth Governments had maintained their monopoly of this important revenue source, and compensated the States for their loss of revenue by way of general revenue assistance in the form of untied grants. Would the rules governing the distribution of GST be any different?

The Premiers, their Treasurers and senior bureaucrats did not think so. Apart from the requirements of the IGA, they believed that the manner in which distributions would be made from the GST pool would mirror the arrangements that had applied to the distribution of general revenue assistance in the past. This

view was borne out in comments from the Queensland Premier, Peter Beattie, who recalled his participation in the SPC negotiations on the IGA in the following terms:

> "When I sat down and signed the GST deal with the Prime Minister and Peter Costello, the deal said—and the wording of it's very clear—that the States can use this for any purpose. We gave up untied grants, and they've been around since the States gave up their taxing power after World War II. We've given up a whole lot of taxes. This money is Queensland money, and we're gonna [sic] spend it in the areas where necessary".[6]

Furthermore, at neither SPC was there was any suggestion from either the Prime Minister or his Treasurer that the Commonwealth intended to depart from its long-established practices with respect to the provision of general revenue assistance to the States. However, by placing conditions on how States and Territories *spend* GST revenue, the Commonwealth would simultaneously enhance its capacity to control State and Territory budgetary policy, whilst further diminishing the state capacity of the States and Territories as they become increasingly reliant on GST as a source of State revenue.[7] That the Commonwealth could unilaterally redefine the institutional framework for Australian fiscal federalism demonstrates the level of its ascendancy over the States and Territories. It also provides a useful insight into the conduct of federalism in Australia's second century as a federation.

Coercive federalism

Australia's Constitution provides for the Commonwealth and the States to exercise their legislative authority concurrently across a wide range of heads of power. However, a centralising dynamic has been at work within the federation, such that the conduct of federal-State relations has witnessed many examples of politicians, bureaucrats and the judiciary enhancing the power and influence of the central government at the expense of the States. Furthermore, it has occurred in the conduct of federal-State relations and, in particular, federal-State financial relations, under both Labor and non-Labor governments.

In the period since the Second World War, successive Commonwealth governments have assumed greater fiscal influence within the federation by pursuing policy objectives in areas traditionally within the policy preserve of the States. Under Chifley, the fiscal dominance of the Commonwealth achieved through the wartime uniform tax legislation was used to expand its activities in social welfare provision. Despite professing their support for federalism, Liberal-dominated governments under Menzies, Holt, Gorton and McMahon also strengthened the Commonwealth's fiscal domination of the States, and presided over an expansion of Commonwealth activity in areas such as education, health and transport through the increased use of SPPs.[8] This means of extending the Commonwealth's policy influence over the States intensified during the Whitlam years, and again under Hawke and Keating, and the Commonwealth's use of SPPs for this purpose has remained a canker within federal-State relations to the present day.[9]

Partisan debate in Australia over federalism is by no means polarised between Labor centralists and conservative federalists. Conservative central governments in Australia have contributed to the cause of centralism within the Australian federation just as surely as their Labor counterparts. Similarly, Labor administrations at a State level have been no less enthusiastic than their conservative counterparts in defending their State capacity and autonomy in the face of expansionist central governments of whatever political complexion.[10]

During its first two terms of office, the Howard Government's approach to federalism was broadly consistent with that of its post-War conservative predecessors. However, there were events from its early period in office, such as the Prime Minister's push for a national approach to firearms control, that suggest a preparedness on behalf of the Prime Minister and his government to identify national priorities and require the participation of the States and Territories in the policy directions it prescribes.

Furthermore, in what has become the great tradition of Australian federal-State financial relations, the Prime Minister has often used financial inducements to stiffen the resolve of the States to act in concert and embrace Commonwealth initiatives. Although this strategy was adopted in respect of the national gun buy-back scheme,[11] and more recently with respect to the proposal for the States to hand over their powers with respect to water in the Murray River catchment, the development and implementation of ANTS provides a clear demonstration of the Howard Government's coercive approach to federal-State relations in action.

The Commonwealth presented the final form of the IGA to the States and Territories as a *fait accompli*.[12] Despite claiming the new arrangements as a significant reform of federal-State financial relations, the IGA's terms were steeped in the way Australian fiscal federalism had been conducted since the passage of the uniform

tax legislation in 1942. Indeed, the Commonwealth's plan was virtually identical to that of 1942. That is, in return for their relinquishing the ability to raise certain of their own-source taxes, compliant States would be rewarded through their participation in the pool of revenue generated by uniform Commonwealth taxation. With the States again ceding a measure of their fiscal autonomy, and hence their fiscal capability, in return for a share of a growing revenue stream, albeit liable to conditions imposed by the Commonwealth, the ANTS package and its implementation should be seen as the Australian federation taking yet another step along the path of centralism.

Under ANTS, the distribution of GST revenue would replace the Commonwealth's FAGs and RRPs to the States and Territories. Whereas RRPs had been provided to the States on condition that any revenue they received in excess of that generated by the business licensing fees they replaced would be returned to taxpayers, FAGs were untied grants, and the direct successors to the untied compensation payments made to the States in return for their withdrawal from imposing income taxes in 1942. Regardless of whether there were conditions imposed on the use of a grant or not, it is important to note that the provision of both of these types of payments is authorised by s. 96 of the Constitution and, as such, can be made subject to whatever conditions the Commonwealth deems suitable or appropriate. This constitutional point would assume particular significance in June, 2000 on the eve of the introduction of the GST, and provide further evidence of the creeping centralisation within the Australian federation and Australian fiscal federalism in particular.

Regardless of their political allegiances, the States and Territories saw the introduction of GST and the abolition of RRPs as offering them an opportunity to abandon the subsidies they had been forced to introduce on liquor and fuel products in return for RRPs in 1997. There were clear financial incentives for the States to act, both in terms of enhancing their revenue and reducing their outlays by saving the costs of administering the various subsidy schemes. It was in this context that Tasmania, Victoria, South Australia, Western Australia and New South Wales resolved to withdraw their subsidies on low alcohol beer, whilst the Northern Territory, Western Australia, Victoria and Queensland prepared to withdraw their fuel subsidies.[13]

Although it was in the interests of the States and Territories to remove the subsidies and reallocate the funds to other, higher priorities, the Commonwealth viewed the prospect of the removal of these subsidies with alarm. Recognising that there would be an inflationary "spike" in prices as a consequence of the introduction of the GST, and conscious of public sensitivity to rising fuel prices, the Howard Government was fearful that it would be blamed for any price rises by voters who could not distinguish the price impact of GST from that caused by State and Territory governments removing their fuel and liquor subsidies.

The actions of the Commonwealth in response to the States' and Territories' threat to remove liquor and fuel subsidies remove any doubt that the Commonwealth considers the distribution of GST to be a s. 96 grant, and hence subject to conditions which it may unilaterally impose. In a series of media releases and letters to the State and Territory governments, Treasurer Costello and the then Finance and Administration Minister Fahey announced that, as any government threatening to remove fuel and liquor subsidies would be seeking an "unjustified financial windfall", it would face financial penalties in the form of deductions from its share of GST revenue.[14] At this time, the Queensland Treasurer also received correspondence from his federal counterpart demanding Queensland provide subsidies for low alcohol beer in line with those provided by other States. This intervention by the Commonwealth into the jurisdiction of the Queensland Government was made more extraordinary by the fact that no similar subsidy had previously been provided for such purposes in Queensland!

If there had been any doubt that the Commonwealth had the constitutional teeth to put these threats into effect, one had only to read the judgements in the *Uniform Tax* cases to learn how s. 96 of the Constitution was available for this purpose.[15] Furthermore, with the introduction of GST, and the States and Territories having become more reliant than ever on the munificence of the Commonwealth, it should come as no surprise to learn that, in the face of a threat to such a large portion of their revenue, the States and Territories relented. By this action, the States and Territories clearly demonstrated they lacked the political and fiscal capability to resist a central government with the fiscal clout to support its demands.

The Commonwealth's use of its fiscal dominance to achieve its policy objectives, regardless of whether it has the constitutional authority to legislate in that area, is well documented. As the Constitution provides a wide area of shared legislative competence for the Commonwealth and the States, and the Commonwealth has extensive powers to appropriate funds and provide grants as it thinks fit, there is ample opportunity for the Commonwealth to shape policy and budgetary outcomes at both the State and local government level.

Under the Howard Government, the Commonwealth has continued to expand its influence in the States' key service delivery areas such as education and health. Whilst the use of SPPs in these areas by successive Commonwealth governments has been a feature of Australian fiscal federalism since the Menzies years, Commonwealth policy and administrative interventionism has intensified under Prime Minister Howard.

There have been various ways in which the Commonwealth has used SPPs to shape the policy and spending outcomes of other tiers of government. In some cases the funds have been allocated to a specific project, in other cases they are allocated subject to matching funds being provided from the recipient. Some SPPs are passed through the States for distribution to third parties including community groups, as occurs with Commonwealth funding for non-government schools and local government. However, in all these cases, the conditions under which funds are being made available are becoming more prescriptive.

In the area of schools funding, the Commonwealth had concentrated its resources on the non-government sector and a range of specific programs for general application across the education system. Under these arrangements, the States dedicate the bulk of their education budgets to the State-run government sector. In March, 2004 the Prime Minister and his Education Minister announced a four-year funding program that included, *inter alia*, specific allocations for capital works, literacy and numeracy programs and remote area education. In what would otherwise have been a relatively unremarkable announcement in the tradition of earlier federal government education policy pronouncements, the 11th March statement foreshadowed an unprecedented degree of Commonwealth involvement in the *minutiae* of schools administration. The *Courier Mail* reported the Prime Minister as claiming that "the funding was, for the first time, conditional on agreement to a series of benchmarks for educational basics and guarantees to report in plain English to parents", adding that amongst these benchmarks would be the requirement that "schools will have to spell out to parents such things as absentee rates, where students go upon leaving and what professional qualifications are held by teachers".[16]

Three months later, the Prime Minister and the Education Minister amplified their March announcement, stating that schools funding was conditional on school authorities embracing "values-based" conditions, which would include the States implementing a uniform starting age by 2010, and developing common teaching and testing methods for English, maths, science and civics. In addition, schools would be required to supply information on their educational outcomes, including academic results, university entry rates along with student and teacher attendance records and teachers' formal qualifications.

In a further significant challenge to the institutional arrangements within the school systems, the Commonwealth stated that it would give principals greater autonomy to make decisions about staff recruitment and dismissal.[17] In what one newspaper editorial described as "an over-the-top threat" and "an unfortunate precedent that subsequent governments should avoid following", the Prime Minister and his Education Minister added that no school would be able to share in the government's four-year funding package unless it had a "working flagpole" and flew the Australian flag.[18]

Over the last three years, the Howard Government's focus on education, and in particular schools, has intensified as the number of public servants within the federal education bureaucracy has grown rapidly.[19] In a more recent series of announcements in relation to the next four-year schools funding agreement, the Howard Government agenda for school education has widened to embrace discipline and bullying, the introduction of a core national curriculum, as well as the previously canvassed intention to devolve greater managerial discretion and decision-making responsibilities to school principals.[20]

Universities also received attention from the Howard Government, with funding for new higher education places made conditional upon the reform of industrial relations practices and governance structures.[21] The Commonwealth's actions in linking funding levels to changes in university governance structures provide another example of the central government flexing its fiscal capacity in an area generally within State jurisdiction. Although the Commonwealth has borne the primary funding responsibility for the university sector since the 1970s, most Australian universities and their governance structures remain subject to legislation enacted by State Parliaments. In order to access the enhanced level of funding pledged by the Howard Government, universities have been obliged to convince State and Territory legislators to amend their governing legislation to comply with Commonwealth demands.

Although the Commonwealth's use of SPPs to achieve its policy ends has long been a source of aggravation in Australian federal-State relations, the Howard Government's use of tied grants to obtain policy leverage on issues outside of its legislative competence has only served to heighten tensions between the Commonwealth

and the States. However, for all of their complaints about the Commonwealth's use of SPPs to establish policy and fiscal hegemony within the federation, the States' fiscal dependence upon the Commonwealth is such that their budgets have little tolerance for any reduction in the level of their SPP funding.

Commonwealth SPPs have often been made conditional upon States providing matching funding. However, in agreements covering the provision of services in the health and disability sectors, Commonwealth funding has been made conditional on States agreeing to both a range of new performance measures as well as substantial real increases in their contributions to public hospitals over the life of the agreement.[22] Spending on health and education comprise about half of the States' budget outlays. As these service delivery areas are highly labour intensive and, in the case of health services, already facing increasing demands from an ageing population, this combination of structural and institutional factors places the States in the dilemma of having to meet the rapidly escalating cost of providing services, whilst at the same time operating within a tightly constrained fiscal environment.

With such heavy reliance on Commonwealth funding to support their activities in major service delivery areas such as health, education and disability services, the States are not only vitally concerned with the changes in the aggregate level of SPP funding, but also with changes in the ratio of SPP funds that pass "through" them to local governments and entities such as non-government schools, as opposed to grants "to" the States for their use. These concerns are summarised in the following extract from the Queensland State Budget 2004-05:

> "In the IGA, the Australian Government undertook to not reduce aggregate SPPs as a result of national tax reform. The Australian Government has met this undertaking in real per capita terms when current payments are compared with the level of SPPs in 1999-2000. However, SPPs 'through' States have increased more than SPPs 'to' States over this time.
>
> "The position taken by the Australian Government in negotiating SPPs with the States represents a significant risk to the provision of essential services, particularly health and disability services in Queensland".[23]

The risks to service delivery to which this passage refers are indeed palpable. It has always been easier for governments to introduce new programs or expand existing services than withdraw from a program and manage the public and institutional fall-out from such decisions. Consequently, there have been numerous examples of States accepting SPPs to fund new programs, only to find themselves left with an on-going commitment long after the Commonwealth's priorities had moved to another area and the SPP had been discontinued.

Furthermore, the Commonwealth mantra that under ANTS, the States' existing and emergent fiscal requirements should be satisfied from the "free cash" generated by a rapidly expanding GST pool rings hollow, when much of that future revenue stream is either being locked up in long-term Commonwealth-State funding agreements, or identified by the Commonwealth as offsetting revenue that will be forgone by the States from the abolition of other taxes. In this vein, the comments of Treasurer Costello have been particularly interesting, as he has criticised States and Territories for spending too much of their GST revenue on improving services rather than reducing the tax burden. Apparently, Treasurer Costello considers it inappropriate for States to use their share of GST revenue to pursue a State policy agenda of service delivery in preference to the Commonwealth's policy agenda for the States, *i.e.*, the abolition of State taxes.[24]

It has been stated that, contrary to the portrayal of the GST as a tax in lieu of States' taxes, the introduction of the GST had a greater impact on the composition of Australian taxation at the national level.[25] Whilst this may be so in a strictly mathematical sense, the fact that an increasing proportion of State and Territory revenues is being derived from GST means that ANTS has enhanced the influence of a central government agency, the CGC, over State and Territory finances, with implications for the fiscal capabilities of States and Territories relative to each other.[26] Under these circumstances, the various attempts of the donor States to seek changes to the horizontal fiscal equalisation (HFE) formula applied by the CGC to the distribution of GST should be seen not simply as an attempt to limit the extent of fiscal equalisation within the federation, but also as a bid to arrest the growing institutional constraint of the CGC on their future fiscal capability.

Whilst there are those who would argue that the mere existence of intergovernmental transfers demonstrates the existence of fiscal imbalance, others point to fiscal imbalance being the result of a structural imbalance between the revenue raising and the spending needs of different tiers of government.[27] However, the fact that there are intergovernmental transfers, or that a level of government raises more revenue than it

needs, tells us very little about the relative fiscal capabilities of States within a federation. It is therefore more important to know whether, and to what extent, the respective levels of government have the ability to control both the source and the quantity of funds they require to meet *their* spending priorities, and to what extent one level of government can exercise control over the source of revenue and the spending priorities of other levels of government within a federation. On this test, whilst ANTS has enhanced the flow of revenue to the States and Territories, it has simultaneously exacerbated vertical fiscal imbalance (VFI)[28] within the federation and diminished the fiscal, as opposed to the budgetary, capacity of Australia's States and Territories.

Whereas the implementation of ANTS has only enhanced the budgetary capacity of the States and Territories, it has enhanced both the budgetary and fiscal capacity of the Commonwealth. As GST revenue has grown more rapidly than the Commonwealth had forecast at the 1999 SPC, it has delivered a budgetary windfall to the States and Territories, and an indirect windfall to the Commonwealth. As the enhanced cash flow to the States alleviated the Commonwealth's budgetary obligation to fund budget balancing assistance for States like New South Wales, which would have otherwise required such transitional financial support from the Commonwealth until 2007, the Commonwealth has enjoyed the budgetary freedom to reallocate this funding to other purposes.[29] Furthermore, as the funds that the Commonwealth would have otherwise had to allocate to the States are obtained from other sources under the Commonwealth's control, the burgeoning of GST revenue has enhanced both the budgetary and fiscal capacity of the Commonwealth.

A changing political paradigm

In February, 2002 South Australian voters elected a Labor government. This event ushered in a unique situation in the history of Australian federalism, with the same political party controlling all eight State and Territory governments, whilst its political opponents held office at the national level. Moreover, this one party monopoly on State and Territory government has persisted for an unprecedented period. Whilst there had been a short period in 1969-1970 when the Liberal and Country Parties dominated all six States and the federal government, there were differences from State to State in the composition of the governments.[30] Some were coalitions, some were not, and in the case of Queensland, it was the Country Party that dominated the coalition. Furthermore, the political capacity of the federal government of 1969-1970 was tempered by the fact that it did not command a Senate majority, whereas since 2005, its political successor has not been similarly constrained.

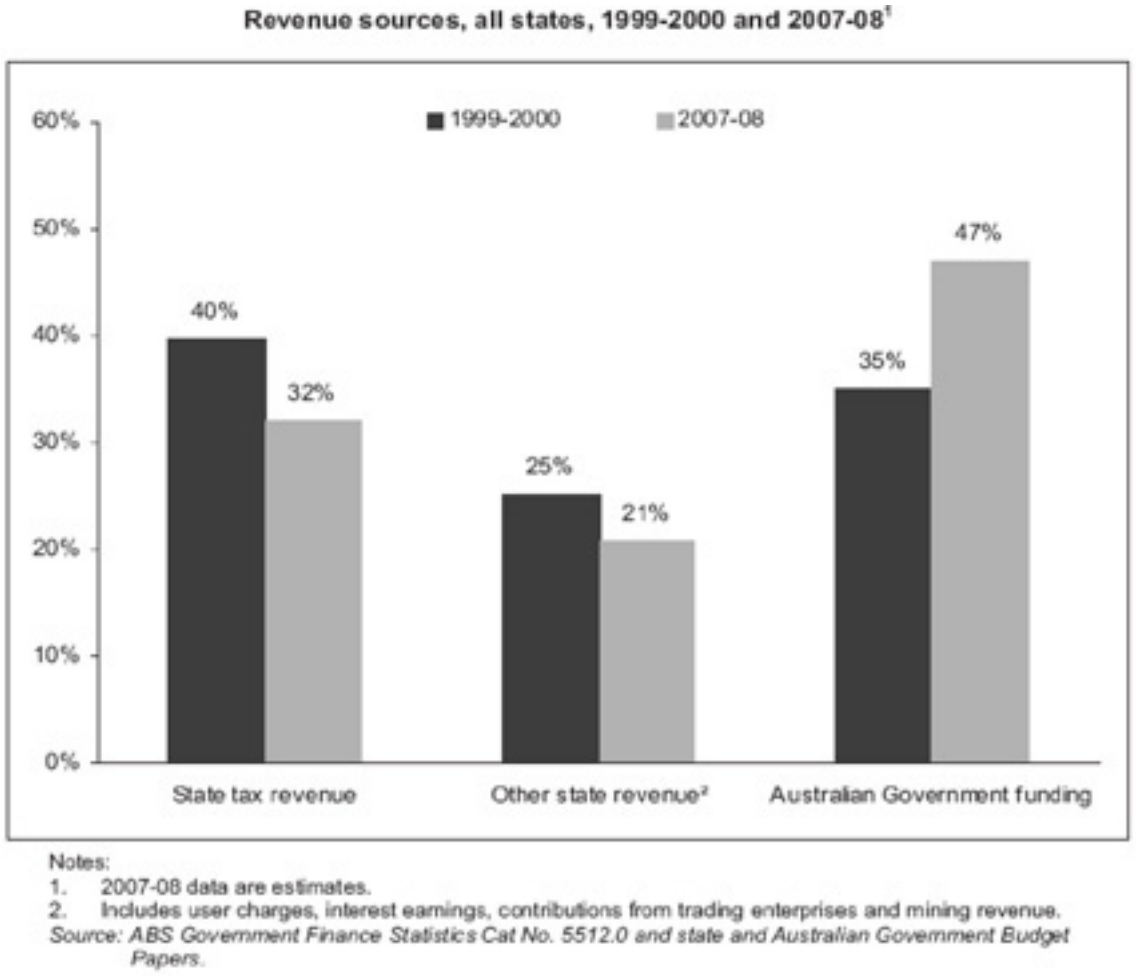
There is a double irony in the Labor monopoly of State and Territory government at a time when the Liberal-National Party coalition dominates both houses of the Federal Parliament. Whereas the ALP had traditionally opposed Australia's federal structure and, until the 1970s, was formally pledged to the abolition of the States, the Liberals had traditionally represented themselves as staunch advocates of federalism.[31] However, as Galligan has observed, the institutional environment in which the ALP has operated, contesting elections and holding government at both the State and federal level, has shaped its policy and the structure, enmeshing it in Australia's federal system of government.[32]

Whereas federal Labor governments have been compelled to engage with one or more Labor-controlled States or Territories as well as governments controlled by its political opponents, this institutional environment has not been the third and fourth term experience of the Liberal-National Party government of Prime Minister Howard. Indeed, the increasingly strident centralism of the Howard Government is probably as much a product of its strategic policy agenda, and the fact that it contains few influential members who have had first-hand experience and empathy with State politics, as it is the product of political partisanship in an environment untempered by the presence of political allies on the Treasury benches in State and Territory assemblies.

It is certainly an interesting twist in the history of Australian federal politics that it is a once avowedly federalist Liberal Party at the national level that is seeking to diminish the legislative and fiscal capability of the States, and that the once avowedly centralist Labor Party, at least at a State level, has fought to maintain the jurisdiction of the States in industrial relations, education and health systems. Furthermore, the absence of conservative State or Territory governments arguing the case for the States within Coalition party circles has meant that a political constraint on the Commonwealth, which may have sustained the States against the Commonwealth's centralism, is now effectively absent.

The creeping centralism of the 1970s, 1980s and 1990s witnessed the Commonwealth's use of s. 96 to shape States' spending priorities and make the States' delivery of Commonwealth funded programs subject to the administrative oversight of the relevant Commonwealth departments and agencies. Under ANTS, all

Commonwealth transfers to the States and Territories, explicit SPPs and GST revenue alike, have become conditional grants under s. 96, with the Commonwealth now threatening to make the States and Territories accountable for their spending decisions in respect of both tranches of funds.[33]



Source: Queensland Government, *Budget Strategy and Outlook*, *Budget Paper No2,* 2007 p. 145.

Prior to the election of the Howard Government, the Commonwealth's use of SPPs had reached its zenith in 1993-1994, when SPPs comprised 53 per cent of total Commonwealth transfers to the States and Territories.[34] With Commonwealth payments now comprising almost one-half of all State and Territory revenue, and with the prospect of that proportion increasing through the combination of the abolition of other State taxes and growth in the GST pool (see above), the prospect of the Commonwealth determining the appropriateness of State government spending priorities represents a serious challenge to State capacity at a sub-national level.

The increasing interventionism of the Howard Government in the activities of the States and Territories has accompanied a sea change in the way the Commonwealth views the role of the States in service delivery. Rather than treating the States as partners in the delivery of public goods and services, the Howard Government has increasingly characterised them as simply another category of service provider that must be made accountable to the Commonwealth in return for the Commonwealth funds they administer. Not only does this foreshadow a level of Commonwealth intervention in the activities of State governments and their administrative arrangements that is unprecedented in the history of peace-time Australian federal-State relations, it may also presage a greater preparedness on the part of the Commonwealth to allocate funds straight to private service providers in direct competition with State agencies.[35]

Federalism not only requires the States and the Commonwealth to have the capacity to fulfil their responsibilities, but it also requires them to have actual responsibilities to fulfil. It also requires the States and the Commonwealth to enjoy and exercise a degree of autonomy when determining their respective policy

objectives and program priorities. The danger for Australian federalism lies in the fact that, as the access of States and Territories to own-source revenue diminishes, their budgets become increasingly dependent upon Commonwealth munificence. Moreover, the Commonwealth will similarly diminish the capacity of States and Territories when it allocates funds to them subject to the condition that they comply with increasingly prescriptive policy and administrative requirements.

In a scenario in which they are effectively deprived of any real fiscal, administrative or legislative capability in areas of major public spending, and with ever-diminishing autonomy with respect to their revenue raising, the States face the prospect of being reduced to mere agents of the Commonwealth with little state capacity of their own. Clearly, this is not co-operative federalism or partnership between the Commonwealth and the States but, rather, a highly coercive form of federalism in which the Commonwealth uses whatever means it has at its disposal to impose its will on the States. Such a scenario raises a fundamental question about the future of Australia as a federation. That is, in circumstances where the capacity of the States is progressively denied, at what point does Australia cease to be a federation?

Australia's State and local governments were collectively responsible for 46 per cent of the nation's total taxation effort in 1938-39, but for only 12 per cent in 1948-49.[36] Over the following half century, the proportion of total taxation collected by Australia's States, Territories and local governments gradually rose, such that by the late 1960s and through the 1970s, the figure had reached 18 per cent, increasing to 21 per cent by the early 1990s.[37] Whilst State and Territory governments were responsible for 19 per cent of total taxation in 1999-2000, falling to 15 per cent following the introduction of the GST, local governments have maintained their three per cent share of total taxation revenue.

Notwithstanding the impact of ANTS, the States and Territories, through their own-source revenue, are still contributing a significantly greater share of the national taxation collection than they did in the years immediately following the introduction of uniform income taxes. However, this situation may change significantly if the Commonwealth makes the receipt of GST revenue conditional upon the States' abolition of certain stamp duties and other State taxes imposed upon business, such as land tax and payroll taxes, in addition to those taxes identified for abolition under the IGA.

Although the *Uniform Tax Cases* upheld the Commonwealth's power to make conditional grants, even in circumstances where the States' compliance with the condition precluded them from exercising their constitutional powers, there is a body of High Court jurisprudence that suggests that it would be unconstitutional for the Commonwealth to totally remove the fiscal capability of the States and Territories. Citing Dixon CJ in the *State Banking Case*[38] and Menzies J in the *Payroll Tax Case*,[39] Zines concluded:

> "The present position seems to be that the Commonwealth may not make a law discriminating against a State unless the nature of the power indicates otherwise. The Commonwealth may not even under a general law threaten the existence of the State or its capacity to function. This, however, would seem to be a somewhat narrow restriction, which does not in itself prevent a Commonwealth law from taxing a State, or from controlling the prerogatives of the Crown in the right of a State. Section 106 may provide a restriction on Commonwealth power to affect a State Constitution, but the only restrictions that have been suggested so far have been that the Commonwealth cannot impose a liability on a State to pay money which has not been appropriated by the State Parliament (except where the liability is under the Financial Agreement *Garnishee (No 1) Case* (1932) 46 CLR 155) or deprive State courts of State jurisdiction: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; 84 ALR 1".[40]

More recent support for the proposition that the Constitution, by its federal nature, would prevent the Commonwealth from acting in such a way as would strip the States of their capacity as states can be found in the *Australian Education Union Case*.[41] In this case, a majority of the High Court found that any attempt to bring a State's higher level employees, such as Ministers and their advisers, heads of departments, high level statutory office holders, judges and officers of the Parliament, under a Commonwealth industrial award would be unconstitutional as it would violate the States' constitutional integrity. Whilst the High Court majority stated that the Constitution contained an implied limitation that safeguarded the States' autonomy and constitutional integrity against encroachment by the Commonwealth, the decision in the *Australian Education Union Case* indicates that this exclusive State jurisdiction is preserved only in relation to a very small group of the States' employees, comprising only the most senior State political, bureaucratic and judicial figures.[42]

It would appear that whilst the High Court would move to preserve a modicum of a State or Territory's state capacity in the face of an attempt by the Commonwealth to totally remove such capacity, the Court could

only be relied upon to act in the most extreme circumstances, *i.e.*, where the Commonwealth reduced a State to total fiscal dependence upon sources of funding over which it had no control, or where the Commonwealth sought to assume control of the State's core constitutional, political, bureaucratic and judicial functions. Whilst the institutional and structural factors shaping the revenue base of each State and Territory vary considerably from State to State, as does their level of financial dependence upon Commonwealth largesse, even those States and Territories with the highest levels of fiscal dependence upon the Commonwealth have some way to go before they could be described as wholly dependent. Under these circumstances, it is highly unlikely that a State could successfully mount a High Court challenge to a Commonwealth strategy that linked the abolition of State taxes to a share of GST unless virtually all of the State's own-source revenue was at risk.

Conclusion

Whilst centralisation has occurred under both Labor and non-Labor governments, the Howard Government has become increasingly interventionist, and has used its fiscal dominance and s. 96 to aggressively pursue its policy priorities in areas such as water, health, education and industrial relations. The Howard Government's embrace of this "coercive federalism" is also reflected in its increasing tendency to view the States and Territories as agencies for the delivery of services, and in competition with private service providers.

Whilst there are numerous examples of the Howard Government using the carrot and stick approach in its dealings with the States and Territories, the Labor monopoly of State and Territory government since 2002 may be one of several factors contributing to the increasingly interventionist approach taken by the Howard Government in federal-State relations during its third and fourth terms in office. In addition to a decline in empathy among federal parliamentarians for the role of State government,[43] and the traditional rivalry existing between the two tiers of government, the State and Territory Labor monopoly has left federal Liberals and Nationals unconstrained by State-based colleagues and party structures seeking to maintain the capacity and their control of State or Territory governments.

Whereas it was claimed that ANTS would reform federal-State financial relations by enhancing the capacity of State and Territory governments, the implementation of ANTS and the GST has actually exacerbated VFI. It has also eroded the fiscal capacity of the States and Territories, whilst enhancing their budgetary capacity. Furthermore, through the application of HFE, it has enhanced the budgetary capacity of some States and Territories at the expense of others. With a greater proportion of State and Territory revenue being derived from GST and therefore being subject to HFE, the implementation of ANTS is also enhancing the ability of a central government agency, the CGC, to shape the budgetary capacity of the States and Territories.

As the Commonwealth's fiscal, legislative and administrative capabilities, have been enhanced over the course of the last century, it has often been at the expense of the States' capabilities, with the result that they have limited access to own-source revenue and a diminishing scope for autonomous action or the independent exercise of their authority.[44] Although the High Court has recognised that Australia's federal Constitution contains an implied protection of the States' constitutional capacity, the scope of this protection is extremely limited. Furthermore, the fact that the States and Territories do not have exclusive access to substantial own-source revenue underscores the vulnerability of their fiscal capacity from a Commonwealth willing and capable of dictating the scope and source of State government finance.

In the institutional environment of coercive federalism, the Commonwealth is striking at one of the fundamental features of a federation, *i.e.*, that the central and sub-national tiers of government are neither superior nor subordinate to each other.[45] In such circumstances, the fiscal capability of the respective tiers of government can only be maintained where each tier of government has both exclusive access to specific revenue sources and can exercise control over those sources of revenue. It is immaterial that the diminution of fiscal capacity occurs over a short or extended period, for the outcome will be similar. The erosion of the state capacity of the States and Territories will reduce them to little more than agents or service providers engaged by the Commonwealth. Under these circumstances, States and Territories would have little scope for policy or administrative autonomy, and meagre fiscal capability to support it.

Whilst this is a likely scenario, it is not inevitable. If the Commonwealth were to eschew coercion and embrace a more co-operative federalism in its dealings with the States and Territories, there is a chance that the degeneration of the States and Territories may be halted. If this sea change extended to the way in which the High Court views the role of the States within the federation, and interpreted the Constitution as

preserving, by implication, a substantially broader range of powers and responsibilities for the States, again the centralising dynamic which has eroded the capacity of the States might abate. However, a failure to address the area where the creeping centralism has been most evident, *i.e.*, in Australian fiscal federalism, would almost certainly mean that any reprieve for the States would at best be temporary.

Although the High Court could revisit its interpretation of "a duty of excise", and empower the States and Territories to legislate with respect to taxes on the distribution and sale of goods and services, this alone would not constitute a solution to what is potentially a fatal flaw in the institutional design of the Australian federation. As this enhancement of the States' legislative capability would occur in respect of a concurrent power under the Constitution, the Commonwealth could still exclude the States from exercising their powers in the same way that it has excluded them from the collection of income tax, Financial Institutions Duty and certain stamp duties. Unless the High Court resolves to preserve a discrete revenue source for the States in order that they can discharge the core responsibilities implied by Australia's federal Constitution, or unless there is a constitutional amendment to provide the States and Territories with exclusive access to an own-source revenue stream, the centralising dynamic that has been dominant within the Australian federation will undermine the characteristics that define Australia's system of government as a federation.

In the absence of such fundamental change in the institutional framework of Australian fiscal federalism, future studies of state capacity in the Australian federation will find the States reduced to little more than agents or service providers for the Commonwealth, and reliant on whatever residual political capability they possess to represent their interests.[46] Under these circumstances, enquiries into the state of the Australian federation will be more fruitfully focused upon the implications for state capacity in Australia's interaction with the institutions of the international community, rather than with domestic federal-State relations, where States and Territories will have been subordinated to the central government and stripped of the capacity essential to the essence of federation.

Endnotes:

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2. Warden, J, *Federalism and the Design of the Australian Constitution*, *Australian Journal of Political Science*, vol. 27, 1992, p. 157.

3. Mason, Hon Sir A, *The Australian Constitution in Retrospect and Prospect*, French, R, G Lindell, C Saunders (eds), *Reflections on the Australian Constitution*, Federation Press, Sydney, 2003, p. 14.

4. *Ha and anor v. State of New South Wales & ors; Walter Hammond & Associates v. State of New South Wales & ors* (1997) 189 CLR 465.

5. Mathews, R and B Grewal, *The Public Sector in Jeopardy: Australian Fiscal Federalism from Whitlam to Keating*, Centre for Strategic Economic Studies, Victoria University, Melbourne, 1997, p. 49; French, Lindell and Saunders, *op. cit.*, p. 103.

6. Australian Broadcasting Corporation, *Beattie warns Costello against GST spending controls*, *AM*, 1 March, 2005.

7. Wardill, S, *Canberra won't keep GST without a fight, pledges Mackenroth*, in *The Courier Mail,* 28 February, 2005.

8. Haward, M and G Smith, *What's New About the "New Federalism"?*, *Australian Journal of Political Science*, vol. 27, 1992, p. 41.

9. James, D, *Federal-State Financial Relations: The Deakin Prophecy*, Research Paper No. 17 1999-2001, Department of the Parliamentary Library, 2001, p. 24. Accessed 13 July, 2004. Available at http://www.aph.gov.au/library/pubs /rp/1999-2000/2000rp17.htm.

10. Parkin, A and J Summers, *The States, South Australia and the Australian Federal System*, in Parkin, A, (ed.) *South Australia, Federalism and Public Policy*, Federalism Research Centre, Australian National University, Canberra, 1996, p. 66; Parkin, A, *The States, Federalism and Political Science: A Fifty-Year Appraisal*, *Australian Journal of Public Administration*, vol. 62, no.2, 2003, p. 104.

11. Department of the Parliamentary Library.1996. *Bills Digest 104 1995-96: Medicare Levy Amendment Bill 1996,* accessed 15 February 2005. Available at http://www.aph. gov.au/library/pubs/bd/1995-96/96bd104.htm. The Bill increased the Medicare Levy in order to raise the funds necessary to finance the Howard Government's national gun buy-back scheme—that is, provide the fiscal incentive for the States and Territories to administer the scheme.

12. Although the Premiers and Chief Ministers had signed an earlier version of the IGA at the April, 1999 SPC, the terms of that agreement were unilaterally amended by the Commonwealth following concessions it made in negotiations with Australian Democrat Senators in order to secure their support for the GST legislation.

13. Fahey, J, *Removal of State and Territory Fuel Subsidies*, Press Release, 26 June, 2000; Costello, P, *Low Alcohol Beer Subsidies—NSW Isolated*, Press Release, 8 June, 2000.

14. Fahey, *ibid.*.

15. *South Australia v. Commonwealth* (1942) 65 CLR 373; *Victoria and New South Wales v. Commonwealth* (1957) 99 CLR 575.

16. Atkins, D, *PM sets school standards: Record spending tied to performance*, *The Courier Mail,* 12 March, 2004.

17. Cole, M, *Schools to teach values for money*, *The Courier Mail*, 23 June, 2004; Howard, J, *Australian Schools Agenda*, Media Release, 22 June, 2004.

18. Cole, *ibid.*; Editorial, *Hoisting politics up the flagpole*, *The Courier Mail*, 24 June, 2004.

19. The number of bureaucrats in the Commonwealth Government's Department of Education, Science and Training was reported as having risen from 1,469 in June, 2001 to 2,379 in June, 2006. Morris, S, *Howard widens bid for control of schools*, *The Australian Financial Review,* 15 May, 2007.

20. *Ibid.*.

21. Dullroy, J and T Livingstone, *Academics warn reform benefits still years away*, *The Courier Mail,* 14 May, 2003.

22. Howard, J, *Australian Health Care Agreements 2003-2008*, Media Release, 23 April, 2003.

23. Queensland Government, *State Budget 2004-05: Budget Paper No.2,* Government Printer, Brisbane, 2004, p. 122.

24. Jones, C, *Costello in tax attack*, *The Courier Mail,* 8 July, 2004.

25. Sixty per cent of the revenue generated by the new tax equated to Commonwealth revenue forgone from abolishing WST, whilst the remaining forty per cent related to other revenue forgone by the States. This includes the additional excise collected by the Commonwealth and transferred to the

States and Territories as RRPs. As these replaced State business licensing fees, this revenue was officially recorded as State and Territory revenue despite being collected on their behalf by the Commonwealth. See also Collins, D J, *The 2000 Reform of Intergovernmental Fiscal Arrangements in Australia*, in *Texts submitted for the International Symposium on Fiscal Imbalance,* Report—Supporting document 3, Quebec Commission on Fiscal Imbalance, 2002, p. 124.

26. *Ibid.*, pp. 134, 137.

27. Quebec Commission on Fiscal Imbalance, *A new division of Canada's Financial Resources*, *Report*, 2002, p. 17.

28. Vertical Fiscal Imbalance refers to the extent to which the various tiers of government do not have access to sufficient revenue to enable them to deliver the goods and services for which they are responsible. As the achievement of vertical fiscal balance is generally considered fundamental to the achievement of governmental accountability, governments making decisions about their spending priorities should not only be responsible for raising the funds they require to support those expenditures, but also have control over the source of those funds. (See also Walsh, C, *Federal Reform and the Politics of Vertical Fiscal Imbalance*, *Australian Journal of Political Science,* vol. 27, p. 31).

29. Parliament of New South Wales, *Debates (Legislative Council),* vol. 287, 2001, p. 17244; Queensland Parliament, *Parliamentary Debates*, vol. 370, 2003, p. 3139.

30. Since the emergence of the modern system of party politics in Australia, this was the only time that the same parties have simultaneously controlled government in all States and the Commonwealth.

31. Galligan, B and C Walsh, *Australian Federalism Yes or No,* Federalism Research Centre, Research School of Social Sciences, Australian National University, Canberra, 1991, p. 3.

32. Galligan, B, *A Federal Republic: Australia's Constitutional System of Government,* Cambridge University Press, Melbourne, 1995, p. 97.

33. *The Courier Mail, Costello steps up GST attack on States*, 2 March, 2005; Wardill, *op cit*..

34. Mathews and Grewal, *op cit.*, p. 549.

35. Howard, J, *Australian Schools Agenda*, *op cit.*; Wilkins, R B, *Federalism: Distance and Devolution*, *Australian Journal of Politics and History,* vol. 50, no.1, 2004, p. 100.

36. Smith, J, *Fiscal Federalism in Australia: A Twentieth Century Chronology,* Federalism Research Centre, Research School of Social Sciences, Australian National University, Canberra, 1992, pp. 18, 24.

37. *Ibid.*, pp. 30, 34, 38, 40.

38. *Melbourne Corporation v. Commonwealth* (*State Banking Case*) (1947) 74 CLR 31.

39. *Victoria v. Commonwealth* (*Payroll Tax Case*) (1971) 122 CLR 353.

40. Zines, L, *The High Court and the Constitution*, Butterworths Australia, 1992, pp. 277-282.

41. *Re Australian Education Union: Ex parte Victoria* (*Australian Education Union Case*) (1995) 184 CLR 188.

42. This is further confirmed by the implications for State industrial jurisdiction in the wake of the recent High Court decision in *New South Wales v. Commonwealth (Work Choices Case)* (2006) 231 ALR 1, which upheld legislation enacted under the Commonwealth's corporations power that extended

Commonwealth jurisdiction over a large section of the workforce who were previously subject to State-based industrial laws.

43. Whereas three-quarters of those who took their seats in the first federal Parliament had prior State parliamentary service, one hundred years later less than nine per cent of federal parliamentarians had similar State or Territory parliamentary experience. There were no former State or Territory Ministers amongst the membership of the 2004—2007 Howard Ministries. In this context it is worth noting that Ministries in the 1990s generally included one or two former State Ministers, e.g., former Western Australian Premier Carmen Lawrence and former New South Wales Minister Laurie Brereton served as Ministers in the Keating Government, and former New South Wales Premier John Fahey served as a Minister in the Howard Government.

44. Galligan, B, *Parliament's Development of Federalism*, Research Paper 26 2000-2001, Parliamentary Library. Accessed 17 February, 2005. Available at http://www.aph .gov.au/library/pubs/rp/2000-01/01rp26.htm.

45. Parkin, A (ed), *South Australia, Federalism and Public Policy*, *op. cit.*, p. 1.

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Chapter Six

The Politics of Federalism

Ben Davies

In 1967 Sir Robert Menzies published *Central Power in the Australian Commonwealth*. In this book he adopted the labels coined by Lord Bryce to describe the two forces which operate in a federation—the *centripetal* and the *centrifugal*. For those uneducated in physics, such as myself, centripetal means those forces which draw power towards the centre, or the Commonwealth, whilst centrifugal forces are those which draw power outwards towards the States.

Menzies remarked that these forces are constantly competing against each other, and that the balance between them is never static.[1] Not surprisingly, his view in 1967 was that the centripetal forces had well and truly predominated during the previous 66 years of Federation. Of course, he would not need long to reach the same conclusion were he to consider the same question now, 40 years later.

Essentially there are three levels on which these two forces exert themselves. The first and most fundamental is the legal level, which describes the constitutional structures which determine the federal balance. On questions of federalism this Society has since its inception quite rightly concentrated most on this level of federalism, as it is at this level that the most profound changes have occurred. It is also the most influential level, as it sets the boundaries within which the other two levels can operate.

The second level is what I would call the financial level, and this level concerns itself with the question of the relative financial powers of the States and Commonwealth. In particular, this level is characterised by the ever-increasing financial dominance of the Commonwealth relative to the States, and the "vertical fiscal imbalance" with which the States have had to contend for most of their existence since Federation. It goes without saying that, as more financial power has passed to the Commonwealth, more political power has generally followed, though this has not always been, and need not always be, the case.

The third level of federalism, the level on which this paper is concerned, is what I describe as political federalism. This is the level that manifests itself in the political contest between States and Commonwealth as to who should do what. Whilst the boundaries within which the political contest takes place on this level are determined by constitutional and financial constraints, this political contest can, on its own, significantly alter the federal balance in practice. Menzies acknowledged this concept in his book when he said that:

> "The relations between the Central Government and the States are inevitably, in a federation, most complex. Developments occur every year, some of them almost invisible to the purely legal onlooker".[2]

Though they may be invisible to a purely legal onlooker, in the sense that no change to any legal structures or financial agreements has taken place, they are very much obvious to the political onlooker. In 2007, arguments over political federalism have reached a level of prominence not seen for decades, despite the legal and financial levels remaining static.

The premise of this paper is that, in recent years, some of the most notable shifts of power towards the Commonwealth have not been due to changes on the first two levels of federalism, but changes on the political level. Furthermore, this is a trend which has become stronger and stronger under the current federal government and the current crop of State governments. Political federalism has become increasingly topical in this election year as the Commonwealth, much like the Starship *Enterprise*, continues to boldly go where no Commonwealth government has gone before in its encroachment on State powers.

My contention is that the Commonwealth has felt so emboldened to exert its power at the expense of the States because now, more than ever before, it feels it can win the political argument. In addition, there is now an increasing public acceptance of such intervention and, in many cases, a public demand for it.

The corollary of this argument is that the Commonwealth has felt increasingly able to broaden its own powers because the States have made a mess of issues in the first place and, increasingly, look to the

Commonwealth themselves to either solve their problems for them, or bear the cost of their own policy ideas. In so doing they are ceding their political authority to the Commonwealth and, as a result, further reducing their ability to resist the Commonwealth's encroachment.

By the phrase "political authority" I mean two things—first, the level of faith that voters have that their State government is best positioned to manage certain issues, and secondly, the ability of State governments to win the political argument when they come up against the Commonwealth. In all of the examples I cite below, the States have either lost the argument, or contributed to bringing Commonwealth intervention on themselves by failing to manage adequately on their own. In all these examples, where the States have ceded their political authority it has been a result of political controversies—questions of changing legal or financial balance hardly played any role at all.

The financial environment

Before commenting on the political environment it is worth making some brief remarks on the financial environment.

The Commonwealth's disproportionate financial power since the 1940s has clearly created an environment of State subservience and reduced the States' ability to resist Commonwealth encroachment. Victoria's greatest Premier, Sir Henry Bolte summed up the dilemma facing State governments in 1972 when he remarked:

> "As a State Premier I want the cash on the most favourable terms; but if the terms are not all that favourable, I still want the money".[3]

States have always been in a weaker bargaining position, and in many cases have had little choice but to ultimately accept the Commonwealth's terms. Whilst this may explain some of their loss of political authority, it does not excuse it.

The issues of Commonwealth financial control which faced Henry Bolte four and five decades ago have also faced all subsequent State governments. There has been a great deal of continuity in the ways in which the States have attempted to address such issues. For example, in 1970 the States proposed to the Gorton Government that they receive a fixed share of income tax (30 per cent) and access to growth in Commonwealth grants that would match the increase in the rate of Commonwealth tax receipts.[4] They complained that growth in their revenue responsibilities had exceeded growth in their receipts from the Commonwealth. This was to be a recurring complaint.

The States finally achieved their goal of guaranteed revenue from a Commonwealth "growth tax" 30 years later when the Goods and Services Tax (GST) was introduced. In theory, this should have had the effect of re-empowering the States financially and restoring some of their political sovereignty.

The GST in many respects overcomes the previous problems of fiscal imbalance by giving the States a growing source of untied grants. Not everyone agrees with the Commonwealth's characterisation of the GST as a State tax collected by the Commonwealth, but when one considers the figures for State budget enrichment as a result of the GST, they are truly startling.

In 2000, prior to the GST commencing, it was estimated that States and Territories would benefit in the first eight years by $3.7 billion over and above the previous arrangements. Within only five years that figure had grown to almost $10 billion. Between 2005-10, States and Territories are predicted to be $16 billion better off than they would have been under the pre-GST arrangements.[5] In Victoria, for example, in 2004-05, Commonwealth grants (including GST) constituted 45.5 per cent of total State revenue, with the GST having grown to 25 per cent of State revenue.[6]

It is worth bearing these figures in mind when we consider some of the State requests for *further* Commonwealth funding that I refer to later on.

John Howard described the GST as "the most important federalist breakthrough since the Commonwealth took over income tax powers through the exercise of the defence power during World War II",[7] and in the abstract it arguably is. But in terms of its practical effect of changing the political dynamic of federalism it has singularly failed. Its initial goal of empowering the States by increasing their financial independence has not been realised. In fact the opposite has occurred, as States have instead become increasingly reluctant to accept greater political responsibility for their affairs.

It is not unreasonable to argue that the constantly growing stream of no-strings attached money that the States are now receiving has effectively become the political equivalent of "Sit Down Money". As the money has kept pouring in from a tax that the States themselves do not levy, they have become fiscally lazy,

and have lost the willingness to exercise the kind of fiscal responsibility that they once would have been forced to exercise in less lucrative times.

Recent examples of Commonwealth political authority

There have been numerous examples of the politics of federalism in the past twelve months which have each seen the States lose more of their political authority. What is most notable is that, in almost all of these examples, the Commonwealth was not proposing any substantive change to the legal or financial structure, but relying on the oldest and most common means for expanding its powers—s. 96 tied grants.

Although numerous examples exist, it is worth concentrating in closer detail on those which occured in the States' two most significant fields of responsibility—schools and hospitals. We hear so many references by State politicians to "schools'n'ospitals" that it has almost become a new five syllable word in the vernacular, but in the case of both education and health policy, it is clear that the States have been letting their side down. The Commonwealth is now more dominant in both these fields than it has ever been.

Education

In the last three years education has been the theatre for a political conflict that was as much cultural as financial, as the Commonwealth sought to influence political debate about its own preferences for school curriculum, school governance and school "values". This was a philosophical argument the Commonwealth thought it could win, sensing State government weakness and public disaffection at the state of State schools.

In 2004 the Commonwealth began its new program of assertiveness by first tying school funding to "plain English" school reports.[8]

It then launched a campaign against school curricula of dubious quality, such as the unfortunately named (and even more unfortunately implemented) "Outcomes-Based Education" (OBE) and "Studies of Society and the Environment" (SOSE), and raised the prospect of imposing new funding conditions if States did not re-introduce more rigorous curricula.[9]

It then insisted on greater accountability and autonomy in the way individual schools were managed, including the power to "hire and fire" teachers.[10]

It's not hard to see why the Commonwealth thought it was on a winner in this area. The existence of "outcomes-based" school curricula, and school reports written in mumbo jumbo, is reminiscent of the joke in *Yes Minister* about the adoption of "comprehensive" education in the UK. Bernard Woolley explained to the Minister who actually wanted it—not the students, not the parents, only the teachers' unions. The same is probably true of the origins of similar curricula in Australia, but none the less every State had, to some degree, adopted such measures. Even NSW Premier Morris Iemma was driven to public despair at the unintelligible nature of his children's school reports,[11] which probably prompted even greater despair amongst other State school parents that it took him ten years in government to notice. In terms of the political contest with the Commonwealth, this was effectively a pre-emptive surrender by NSW.

Such an encroachment by the Commonwealth into a clear area of State jurisdiction may once have seemed politically novel. But it seemed to work. Following Morris Iemma's sudden seeing of the light, in July, 2006 Western Australia abandoned a planned roll-out of OBE in senior high school levels, whilst still maintaining that it disapproved of the Commonwealth's intervention.[12] A brief campaign to defend its OBE policies then followed, with the highlight undoubtedly being the comment by its then Education Minister, Ljiljanna Ravlich, who suggested that students did not need to be taught key historical events or dates, as they could use Google to find out what they were.[13] Thankfully, she is no longer Education Minister. But it was not long before WA followed the other States in raising the white flag.

Perhaps realising that the *status quo* could not credibly be defended, by April, 2007 all States had agreed to get rid of Outcomes-Based Education, as well as abolish "Studies of Society and the Environment" and replace it with separate history, geography and economics subjects.[14] They did not try to mount a defence of their existing arrangements—they effectively conceded the argument and the political victory to the Commonwealth.

It is worth considering just how realistic the Commonwealth's threats to withhold billions of dollars in schools funding would have been had the States tried to resist and called its bluff. If they really had believed in Outcomes-Based Education and Studies of Society and the Environment then perhaps they would have mounted a political argument, if they had been confident of public support. But even recipients of Outcomes-

Based Education would have been able to see that popular sentiment favoured the Commonwealth, and the States would have clearly been defending a highly unpopular position. It reflects very poorly on the States that they either failed to respond to years of public sentiment in favour of common sense education, or they were too captured by vested interests of teacher's unions and the education bureaucracy to bother doing anything about it themselves.

It would be interesting to consider how a plan for such a significant intervention by the Commonwealth would have played itself out politically in times past. If John Gorton had proposed a similarly interventionist plan to dictate school curricula in 1970, it seems fairly likely that the likes of Henry Bolte, Joh Bjelke-Petersen and David Brand would have fought it very strongly, and won the political battle. In fact, they probably would have eaten Gorton alive. As recently as 1993 Paul Keating was "rolled" by the States when he attempted to introduce a form of national school curriculum. It is certainly hard to imagine the likes of the Kennett and Court governments responding as meekly as the current State governments did.

Health

Menzies was indeed prescient when he commented in 1967 that:

> "It is so easily said about any local problem, 'Well, why don't you take this to Canberra? Why don't you get the Commonwealth to do something about it?' ".[15]

Never was this more true than in the area of responsibility for public health services, where hand-balling problems to the Commonwealth seems to be part of the standard operating procedure for State governments.

The States provided clear evidence of this approach in June this year, when the eight State and Territory Health Ministers published a report entitled *Caring for our Health*, which was ostensibly a report into the state of the Australian health system designed to encourage "transparency and accountability about our own performance, and to working with the Australian Government to improve the system as a whole".[16]

The report claimed to be intended to highlight where the States thought the Commonwealth was under-performing, but its highlights leave the reader in no doubt as to how the States perceived their own responsibilities, or lack thereof:

> "Health care is becoming more expensive, and more of it will be needed as the population ages. … **Is the Australian Government doing enough to care for our health, both now and in the future?".**[17]
>
> "Free access to public hospitals is … **a continuing responsibility of the Australian Government".**[18]
>
> **"The Australian Government is responsible for educating the majority of this health workforce.** Unless **it** increases student numbers dramatically across all health professions … there will continue to be significant staff shortages in the future".[19]
>
> "If you were starting from scratch and designing a way to look after a person with diabetes, or heart failure, or recurrent anaemia, or even someone who was dying with dignity, you would not start with a hospital. You would start with providing health care in the community. **Will the Australian Government work with States and Territories to build up community services to deal with the change in disease patterns?".**[20]

The most remarkable thing about this report is that it contains not a single detail of what the States are doing to address these issues. Whilst it disingenuously calls on the Commonwealth to "work with" States and Territories, it does not show what, if any, initiative they are taking themselves. In every instance where there is a problem with health provision, the sole purpose of the report and, it would appear, the sole policy of the States, is to set up the Commonwealth to take the blame.

I have previously argued that the States are losing their political credibility. But this is not simply because of Commonwealth expansionism. Their approach to health management resembles the famous tactics of Ron Barassi in the 1970 VFL Grand Final, which has been described as, "Handball, Handball, Handball!". When they cede their responsibilities in this way they are willing participants in their own political decline.

In such an environment it is not surprising that the Commonwealth now feels emboldened enough to by-pass the States and directly fund and administer State public hospitals. It did not have to be this way. As recently as February, 1994 a State Premier (Richard Court) unambiguously stated that:

> "Health and Education are just two key areas of Australian life in which both the formulation and delivery of services should be done at a local level so that these services are both appropriate and accountable".[21]

This was a clear statement of a State government willing to accept primary responsibility for service provision. In 2007, as *Caring for our Health* makes clear, it is no longer possible to find a State government willing to accept policy and service delivery responsibilities for its hospitals.

This co-ordinated policy of squibbing by the States gives all the indication of a deliberate and ongoing political strategy on their part to seek to put responsibility at the feet of the Commonwealth. It seems part of their day-to-day political management of issues in the health portfolio. The consequences of such an approach are now coming home to roost.

Only two years ago, in April, 2005 the Commonwealth Health Minister floated the idea of completely by-passing the States and allocating health funds directly to "regional bodies",[22] only for the Prime Minister to reply that:

> "I am not persuaded that the effectiveness or efficiency of healthcare in Australia would be improved by the Commonwealth assuming responsibility for public hospitals".[23]

Clearly something has changed since then. The Commonwealth has recently announced a policy of "inviting" public hospitals to volunteer themselves for take-overs.[24] It's still too early to tell how this policy will work out, but the initial indications surrounding the Mersey Hospital in Tasmania are that this could be a popular policy and more takeovers could result.

The intervention in the Mersey Hospital in Tasmania is likely to be viewed by many through the prism of Commonwealth political expediency in an election year, but this does not tell the full story. When asking, "How has it come to this?", State governments might well look in the mirror and consider their own role in how their handballing strategy has created the environment in which the public has lost faith in their ability to do their job properly, and led to a situation where such a Commonwealth take-over is likely to be a vote winner.

Yet the State handballing strategy shows no signs of changing. In June this year the New South Wales government announced a new policy for public dental health services—only to cry for the Commonwealth to fund it as soon as it was announced.[25] This led to the predictable retort from the Commonwealth that States had become "glorified beggars", rather than sovereign states willing to take responsibility for their own programs.[26]

Perhaps some form of "mutual obligation" is required when States receive Commonwealth money. The slightest sniff of Commonwealth money seems to render States politically lazy. In the same way that Sit Down Money has created a cycle of poverty in remote indigenous communities, State government Sit Down Money creates a cycle of political poverty for the States. The more they handball the issues to the Commonwealth, the more public opinion starts looking to the Commonwealth to solve the problem, and the more emboldened the Commonwealth becomes to interfere even further.

Other examples

Health and education are not the only examples of States failing in their duties. As an editorial in *The Australian* recently put it:

> "Everywhere voters look, they see examples of State government incompetence: teachers who refuse to write plain-English report cards; queues of ships waiting to load coal at ports with insufficient capacities; trains that are late; hospital queues to get operations performed and medical staff who have not been properly vetted".[27]

Further examples of State incompetence this year are not hard to find:

- Victoria's transport minister saying she didn't really want to run a train system;[28]
- Victorian Premier Steve Bracks upon his retirement, saying that one of his proudest achievements was the so-called "Regional Fast Rail" project[29] that was over two years late, 10 times its original budget and had average time savings of barely a few minutes on most lines. If that is a successful State project I'd hate to see a bungled one;
- The Commonwealth's unprecedented intervention in the Northern Territory to ensure that remote indigenous communities receive even the most basic modicum of services in relation to education, health, and law and order—all fundamentally the responsibility of the Territory government. Once again, the Territory could not credibly argue that it was better able to meet this challenge: it was another meek political surrender; and
- The latest proposal, announced on the day of this conference, for the Commonwealth to manage the nation's ports under a new Commonwealth-controlled body.[30]

The political environment is clearly changing in ways which are highly unfavourable to the States. Last year John Howard justified his increasing centralism in the following way:

> "This Government's approach to our Federation is quite simple. Our ideal position is that the States should meet their responsibilities and we will meet ours. And our first impulse is to seek state cooperation with States and Territories on national challenges where there is overlapping responsibility. But I have never been one to genuflect uncritically at the altar of States' rights… while ever the States fail to meet their core responsibilities there will be inevitable tensions in our federal system".[31]

This is certainly not a comment that Menzies would have made. But then again, Menzies had State leaders of the calibre of Henry Bolte. It's not surprising that John Howard has adopted such a position when confronted with some of the laziest, most inept State governments we have ever seen.

In response to the increasing Commonwealth assertiveness, the States have made some attempts to regain some political initiative. On the eve of this year's Council of Australian Governments (COAG) meeting in April, the States released a report detailing a grandly-named "10-year Plan to Lift Productivity".[32] Once again, this big idea of the States immediately called for Commonwealth funding of things such as:

- Expansion of early learning for four-year-olds and providing greater access to childcare;
- Improved literacy and numeracy standards;
- Programs to improve exercise and diet; and
- A plan to boost energy efficiency and a rollout of "smart meters" to help households reduce energy bills.

With the arguable exception of child care, these are all clear areas of State responsibility. Most of these proposals, although clearly in the realm of the States, called for Commonwealth funding of at least 60 per cent of the cost. If such contributions are not forthcoming, then presumably we can expect to see the States handball the blame to the Commonwealth for such programs not coming to fruition.

Once upon a time the issue of Vertical Fiscal Imbalance caused great concern for federalists. Perhaps now it is time to coin a new phrase—Vertical Accountability Imbalance, which can be defined as the imbalance which arises when one level of government wishes to accept a lesser level of responsibility than the level required for the services it provides.

The Second XI?

At this stage it is perhaps worth commenting on how State governments came to be in such a position. Perhaps there are underlying issues with both the political strategies they choose to adopt and the people in them which lead to poor performance. One Commonwealth Minister this year said people don't want important issues left to the "Second XI" of State governments.[33] Perhaps there is some substance to this argument.

The revelations earlier this year of the astounding influence that former Premier Brian Burke holds over most of the WA government did not exactly fill anyone with faith that this particular State government is full of particularly intelligent or ethical types. When similar allegations were made about the influence wielded by former Labor Minister David White in Victoria this year, Victorians would have had equal reason to be concerned. Those concerns were certainly not assuaged when Premier Steve Bracks re-assured us that:

> "David White was a respected Minister who now has a business operation and he is undertaking his business activities … there is no comparison at all with the former Premier of New South Wales Brian Burke".[34]

One particular pessimistic commentator in *The Age* earlier this year was certainly in no doubt that our current State governments are not exactly drawn from the deep end of the talent pool:

> "By any reckoning, one State government (WA) is irredeemably corrupt, two (Queensland and Tasmania) have major problems in that regard, and Victoria's 'secret' police union agreement suggests Steve Bracks is no Mr Clean. NSW, at the very least, seems to attract some extraordinarily low life to its parliamentary ranks. This leaves only South Australia as passably respectable…".[35]

To paraphrase Lady Bracknell, one corrupt or inept State government may be regarded as a misfortune. Five certainly looks like carelessness, and raises serious questions about the people who comprise them and the way they operate.

Almost invariably State Labor governments are these days dominated by people with pre-parliamentary careers as either union officials, political staff for Labor MPs or Labor head office employees—in other words, those who are insiders of the Labor Machine.

The Hawke-Wran review of the Labor Party in 2002 identified this issue as a significant problem for the party's future and criticised:

> "… the growing malaise in Australian politics that arises from this fast-tracking of people, the research officer of the trade union or the politician largely associated with the major factions, so we are not getting the diversity of candidates and the diversity of experience".[36]

Hawke and Wran were right to be concerned. For example, almost 90 per cent of the ministry in the Victorian government is comprised of people with a Labor Machine career. Their whole life is spent in the Machine, so they tend to see State government—and its trappings—as merely an extension of the Machine. They see their role as political operatives and fixers, and primarily servants of the Machine, rather than bold leaders with vision who are actually representative of their communities.

Of the eight Labor State and Territory Premiers and Chief Ministers, six of them came through the Labor Machine. The other two were ABC journalists, so arguably they fall into the same category anyway.

No less a State political figure than Neville Wran has said that he would struggle to even gain preselection in the modern ALP because he had a career outside politics and was not a Machine insider.[37] This is a staggering comment about the narrow, insular political class that now runs all our States.

Unless the Labor Machine has some magical quality about it that produces a master race of philosopher kings who are more suited than anyone else to public office, then it does seem rather anomalous that people drawn from this narrow spectrum of life experience should have a near-monopoly on all senior positions in our State governments.

The perverse results of having State governments full of uncreative machinists probably reached its nadir with the election slogan of the NSW Labor Party in this year's State election: "More to be done but we're heading in the right direction". Based on such a slogan, we can only conclude that the NSW government does not know what it's going to do, what even needs to be done, nor after 12 years, what it actually has done. Paul Keating recently said that successful politicians needed two qualities—imagination and courage.[38] This slogan clearly shows that the NSW machine concedes it has neither. It is not an encouraging sign.

Future alternatives?

The problems of State government squibbing and Vertical Accountability Imbalance now seem to be acknowledged by both sides of federal politics. The federal Labor Party's most recent attempt to address the issue was recently announced. Its policy is to get rid of Specific Purpose Payments and instead make almost all Commonwealth grants to the states "untied", with only "bare bones" minimum standards to be attached to them. Its proposal is as follows:

> "For those areas where it is agreed that shared responsibility between the Commonwealth and the States should continue, the aim should be to identify and agree on the respective roles of each level of government. Collaborative federalism should then be founded on a partnership between the Commonwealth and the States, where there is proper consultation on program objectives and information demands. The States would then have considerable discretion and more flexibility as to how they achieve those objectives, having regard to their particular local circumstances".

In theory this seems like a sensible solution to encourage the States to accept greater responsibility. But recent experience suggests that in practice this is unlikely to be the case. This proposal runs the real risk of simply exposing the States to the same trap as the GST—more no-strings attached money will mean more Sit Down Money.

If anyone needed evidence of the likely pitfalls of such a policy it was provided on the very day that the policy was announced by Kevin Rudd as the lead story in *The Australian*.[39] What was interesting was that the second story on the front page featured another Rudd policy, this time to spend $500 million of Commonwealth money supposedly to make home ownership more affordable.[40]

What is interesting about this policy is that this $500 million is to be almost entirely allocated to overcoming the red tape imposed by State and local governments, and paying for infrastructure that these two levels of government should be supplying themselves. If State governments (and the local governments for which they are responsible) were doing their job properly, there would have been no need for such a policy in the first place. They would have spent their ever-increasing amounts of GST money cutting their own red tape, and reducing their own taxes which inhibit new home development.

Perhaps this inadvertent policy juxtaposition is an indication of what to expect under Labor's policy. First the Commonwealth will reduce the level of accountability that applies to the States, thus giving them

greater freedom to stuff up. Then, once they have stuffed up, the Commonwealth will come to the rescue with buckets of its money to fix the mess the States created.

Future solutions?

So how do we solve the problem of Vertical Accountability Imbalance?

The first and most desirable solution would be to see a new breed of State government which had the political courage and the ability to unequivocally accept responsibility for its own affairs, and then act accordingly. Given the record of existing incumbents and, it must be said, the inability of State Oppositions to capitalise on these flaws, this seems unlikely in the short-term. It seems hard to imagine where the next Henry Bolte is going to come from.

Secondly, perhaps greater accountability measures could be introduced when States receive Commonwealth funding. Perhaps a new Grants Commission could be established, to be chaired by Noel Pearson, who can educate the States on the dangers of Sit Down Money, and then whip them into shape to take responsibility for their own affairs. If it can work in dysfunctional Cape York communities then surely it can work in State Cabinet rooms.

Finally, perhaps the least likely but the most desirable course is to give the States their own independent taxing powers commensurate with their spending responsibilities. For supporters of true federalism there is something tragic about an ostensibly sovereign level of government seeking to handball responsibility for its own core business. It is even more tragic now to see both sides of politics at the Commonwealth level going to an election promising to administer services that could and should be provided by the States, if they were up to the task. A balanced tax arrangement would end the problem of Sit Down Money, and finally introduce what is for the current crop of State governments the explosive element of accountability. Let's hope they would be able to handle it.

Conclusion

This paper began by referring to the three levels of federalism. The balance in the political level is currently tilting so far towards the Commonwealth that serious questions need to be asked about how to redress it or, as some are now arguing, whether it even needs to be redressed. The political level is the most open to fluctuation, and in the event of a weak federal government and even one assertive and competent State government, it would be eminently possible to reverse this imbalance within the current legal and financial framework. But a more fundamental re-alignment of the financial and legal levels is probably the only hope of seriously reversing what has been a continuing shift in political authority to the Commonwealth.

It does not have to be that way. Even in their current subordinate state, there is nothing to prevent a State government from demonstrating that it is better at solving problems than "the feds".

Sovereignty entails both sovereign rights as well as sovereign responsibilities. For so long as the States feel they need to look to Canberra to solve their problems, their sovereignty and their political authority is diminished. The more these things become diminished, the harder they are to rebuild. But unfortunately, we are unlikely to see any such rebuilding until we can see a demonstration that somewhere within the States there is the political will, and the political competence, to actually attempt such a task.

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Chapter Seven

Bills of Rights: Some Reflections on Commonwealth Experience

Dr Charles Parkinson

During the constitutional conventions leading up to the federation of the Australian colonies in 1901 Andrew Inglis Clark proposed an Australian bill of rights.[1] In the 1940s HV Evatt attempted to insert into the Constitution recognition for basic rights derived from international legal norms. And in 1988 the Hawke Government proposed constitutional guarantees for rights and freedoms as well as fair elections.[2] A groundswell for an Australian bill of rights is again rising.

A notable feature of the current debate over a bill of rights in Australia is that it is so sharply polarised. It is the nature of this public debate, and the assumptions underpinning the competing arguments, that will be the focus of this paper.

It is rightly said that a question well framed can provide, at least inferentially, the answer to that question and the reasons for that answer. This proposition is frequently demonstrated in the public debate in Australia about the adoption of a bill of rights. The debate is commonly framed both by proponents and opponents in a manner designed to deliver a preferred answer. Those in favour of a bill of rights might, and do, ask: "Do you think it wrong for a government to infringe the human rights of its citizens?". Of course. "Do you think a government should be prohibited by law from infringing the human rights of its citizens?". Naturally! "Do you support the adoption of a bill of rights?". Which leads to the answer, "Yes".

Alternatively, those opposed to a bill of rights might, and do, ask: "Do you think the people through the democratic process should determine the laws under which they live?". Of course. "Do you think it wrong for unelected judges to determine what democratically enacted laws should or should not be followed?". Yes. "Do you oppose the adoption of a bill of rights?". Which leads to the answer, "Yes".

Both sets of questions are framed to produce only one logical response, and to provide the reasons for that response. But whether or not Australia should adopt a bill of rights is not capable of resolution by rhetorical assertions alone. Whether or not Australia should adopt a bill of rights requires competing public policy considerations to be weighed. The form in which the current debate is frequently framed is not conducive to weighing those public policy considerations.

My intention for this paper is not to persuade this audience about the desirability or the undesirability of a bill of rights for Australia. My intention is far more modest: to clarify the key public policy considerations that should be weighed to determine what value, if any, a bill of rights may have for Australia.

This paper is divided into three parts. Parts 1 and 2 respectively will address the pro- and anti- bill of rights propositions set out in the questions above. Part 3 is directed more specifically to the British Commonwealth experience with bills of rights, although that theme runs throughout this paper. Part 3 will address one particular aspect of the current debate: what conclusions for Australia may legitimately be drawn, first from the fact that most common law nations today have a bill of rights, and second, from the experiences of those nations in operating their bills of rights.

Part 1: The case for a bill of rights in Australia

The first set of questions, which is designed to elicit support for a bill of rights, is underpinned by three assumptions. Firstly, that human rights are at present not protected in Australia. Secondly, that a bill of rights will protect human rights in Australia. And thirdly, that parliament should never infringe human rights, and that the government should be restricted by law from infringing human rights. It is convenient to consider each assumption in turn.

It is an obvious oversimplification to state that human rights are not protected in Australia. The method of protecting rights in Australia follows the Westminster system. The mechanism for the protection of rights under that model may best be explained by reference to the writings of the two most influential English

constitutional lawyers, Sir William Blackstone[3] and Prof AV Dicey.[4] Simply put, a person may do anything not expressly prohibited either by the common law or by statute. Parliament is sovereign and thus can enact any law, but Parliament is elected by the people and answerable to the people through regular elections. Thus in theory Parliament can only limit the rights of the people with the people's approval. Further, the independent judiciary ensures that the executive adheres to the laws as enacted by Parliament.

The basic flaw in the Westminster model of protecting rights is most simply revealed in cases where a majority of the population wishes to discriminate against a minority of the population. Examples occur throughout the world on such bases as ethnicity or religious belief. Some familiar historical examples have included discrimination of Catholics in England following the Reformation, and of Africans in South Africa under apartheid.

But even in societies where the majority of the population does not want to discriminate against a minority, the Westminster system does not always protect against the general restriction of individual liberty. Such restrictions are commonplace during times of national emergency, whether real or perceived. England between 1914 and 1945 is a notable and, to many, a somewhat surprising example.[5] Some commentators point to anti-terrorism legislation as evidence that it may be occurring in Australia today.[6]

The second assumption is that bills of rights do protect human rights, or at the very least bills of rights are better at protecting human rights than the Westminster system.

It is useful to begin with a general statement about the utility of bills of rights before focusing upon the class of liberal democracies into which Australia falls. Three basic conditions must exist for human rights to be protected. Firstly, a majority of the population must want the human rights of all members of that society to be protected. Secondly, the views of that majority must be capable through democratic means of influencing government action. Thirdly, the rule of law must be respected. The importance of these pre-conditions cannot be stressed too highly.

In countries where these pre-conditions are not met, the presence or absence of a bill of rights will have little impact upon the protection of human rights. Where a majority of the people want to discriminate against a minority group, restrictive laws will almost inevitably follow. The discrimination against white farmers in Zimbabwe may fall into this category. Where the government cannot be swayed by the will of the people, restrictive laws will also almost inevitably follow. The discrimination against Africans by the government of Southern Rhodesia, as Zimbabwe was called under white rule, may fall into this category. Equally, if a government that does not respect the rule of law intends to violate the rights of its people, it will do so regardless of any legal impediment. Recent history in Africa provides countless examples: Ghana, Nigeria, Uganda—to name only a few.

Turning specifically to liberal democracies such as Australia, rights will usually be protected regardless of the presence or absence of a bill of rights because the above pre-conditions are met. That is, the people want to protect rights, the democratic process works, and the rule of law prevails.

The real question then becomes what constitutes an impermissible infringement of a right. The answer is rarely absolute, because notions of justice are not uniform. For example, where one person may see justice in a tobacco company's advertisements being protected by the right to free speech, another may see injustice in advertisements for a product that causes smoking-related illness being protected.[7] For this reason it cannot always be said that a bill of rights is better at protecting rights in a liberal democracy. A bill of rights merely uses a constitutionally fixed legal method to provide an answer to the question. The alternative, discussed below, is to permit Parliament to provide an answer using the democratic process.

The third assumption is that Parliament should never infringe human rights, and that Parliament should be restricted by law from infringing human rights.

The starting point is to recognise that most laws infringe the rights of some individuals in society.[8] Laws, according to Blackstone,[9] were the embodiment of a social contract. Persons living outside a community had absolute freedom to do as they pleased. The cost to such persons of becoming a member of a community, and gaining the concomitant benefits, was that the community could exercise a right to limit that person's absolute freedoms, but only as far as was necessary for the smooth operation of that community. Thus every law represents Parliament choosing to elevate the subject of that law ahead of the liberty that that law restricts. By way of illustration, by making the wearing of seatbelts in motor vehicles compulsory, Parliament has decided to elevate safety above the absolute rights of the individual to travel by vehicle in his or her preferred mode.

Parliament's traditional role was to restrict liberties to protect or to advance what it deemed more compelling public interests. Parliament's function remains to balance competing interests, with the inevitable

result that some rights will to some extent be abrogated. But to assert that Parliament should not and must not infringe rights is to misunderstand the parliamentary law-making process. The real question remains why that function should be limited.

Part 2: The case against a bill of rights in Australia

The second set of questions, which is designed to elicit opposition to a bill of rights, reasons from the premise that a bill of rights transfers power from the democratically elected Parliament to unelected and unaccountable judges.

The starting point is to address how a bill of rights works in practice. A bill of rights removes Parliament's legislative power to enact laws that infringe the rights enumerated in that bill of rights. In doing so a bill of rights limits both Parliament's power and the democratic process. This is the stark reality that must be the focus of any consideration about adopting a bill of rights.

The concept of removing certain matters from the power of Parliament is contrary to the Westminster tradition, whereby Parliament is sovereign and may legislate on any matter. But it is not contrary to the system of government in Australia.[10] The Constitution contains implied limitations on legislative power to ensure the integrity of the system of representative government[11] and the doctrine of the separation of powers.[12] However, these legislative prohibitions infrequently deal with issues normally the subject of a bill of rights, and it is the very nature of the issues normally the subject of a bill of rights that sets apart the judicial task of interpreting a bill of rights.

The role of the judiciary in dealing with a bill of rights is to determine the scope of the legislative power removed from the legislature by the enumerated rights. It is essentially the task of drawing a line in the sand to determine whether a statute is invalid because it infringes the protected rights. There is no transfer of power to the judiciary of a law-making function to create either rights or obligations.

At its simplest, the task of interpreting a bill of rights will involve determining whether a law infringes an enumerated right, such as whether a law banning public gatherings infringes the right to freedom of assembly. But in liberal democracies legislatures rarely enact laws which have as their *purpose* the infringement of rights. More common are laws that infringe one or more enumerated rights to pursue another legitimate public policy goal. For example, whether a law regulating a mother's ability to abort her foetus infringes the unborn child's right to life; or whether a law regulating the publication of photographs infringes either the publisher's right to free press or the subject of that photograph's right to privacy.

The complexity and significance of the judicial task is highlighted by the latter examples of competing public policy goals. This task does involve the exercise of considerable power with respect to shaping public policy. But this task is not an arbitrary exercise, reliant upon the idiosyncrasies of the judicial officer or officers before whom the matter is heard. The power given to the judges is a judicial function to be exercised according to judicial method. Judicial method ensures guiding principles emerge and are then followed as precedent.[13] The scope of the judiciary to determine those guiding principles is largely dependent upon the terms of the rights set down in that bill of rights. But the task of determining that content does fall to the judges. Whether that is a task best undertaken by judges is certainly debatable.

But to focus upon the repository of arbitral power is to lose sight of what is in fact taking place. Power is being taken away from the people, as represented through Parliament, to effect public policies that infringe the enumerated rights. It is a necessary incident of removing that power that determination of the extent of such removal falls to the judiciary. It is also a necessary incident of removing that power that the extent of that removal will not always be clear-cut, and that the method of that determination will be judicial method.

Part 3: The Commonwealth experience

What conclusions for Australia may appropriately be drawn, first from the fact that most common law nations today have a bill of rights, and second from the experiences of those nations in operating their bills of rights?

As to the first proposition, it is commonly stated that Australia should adopt a bill of rights because Australia is one of the few common law countries without one. Implicit in this proposition is the assumption that the reasons other common law countries have adopted a bill of rights are relevant to Australia.

To consider this assumption it is instructive to look to the United Kingdom, and also those Commonwealth countries that were still British territories after 1950. Those Commonwealth countries provide a convenient group because they constitute a large portion of common law countries with bills of rights.

Although the United Kingdom does not have a bill of rights, it is useful to consider the United Kingdom's situation because it adopted two human rights instruments with domestic application and it is the home of the Westminster system. The two human rights instruments are the *European Convention on Human Rights* and the *Human Rights Act* 1998 (UK). The *European Convention on Human Rights* was one of the first manifestations of that grand post-1945 scheme to avoid another European conflict through closer political and economic ties within Europe. Its current manifestation is the European Union.

The British government ratified the *European Convention on Human Rights* in 1950, extended its operation to its overseas territories in 1953, and gave individuals the right directly to petition the European Court of Human Rights in 1966. The reason that the United Kingdom adopted and extended the *European Convention on Human Rights* was to ensure that other countries in Europe did likewise, the rationale being that entrenched rights would halt the spread of Communism throughout Europe.[14] Protecting individual rights played no meaningful role in the British government's decision to ratify the *European Convention on Human Rights*. The *Human Rights Act* 1998 (UK) codified the *European Convention on Human Rights* into domestic law. The catalyst for this Act was the political necessity to achieve ever closer integration within Europe. Protecting individual rights played a more limited role in the British government's decision to enact the Act.

Most Commonwealth countries given independence after 1960 have a bill of rights. In 1951, bills of rights were virtually unknown in Britain's overseas territories. By 1962 bills of rights were being mandated for them. In this process over 30 nations and territories received bills of rights. The reason: fear of what might happen after independence.

These nations and territories may conveniently be categorised into groups: those with a population where voting was based on voter assessment of the competing policies of government and opposition, such as Jamaica; and those where voting was based on religious or ethnic affiliation and not on voter assessment of competing policies, such as British Guiana. In the former territories, the bill of rights' purpose was to lock in the basic features of the political system, so that subsequent governments could not transform the nation into a one-party state after independence; in the latter territories it was to assuage the fears of minority groups at the prospect of independence and the withdrawal of British protection. Because a bill of rights restricts a government's power, sitting governments were reluctant to adopt a bill of rights without a pressing political imperative. Let me be absolutely clear: bills of rights were *not* being adopted to protect individual human rights.[15]

One further observation warrants mention. In the great majority of British overseas territories, a bill of rights was viewed as a conservative force to lock in the system of government operating at the time of independence, and thus stop post-independence radical (and frequently Communist) legislative reform agendas. In Australia the position is reversed. The Westminster system, with plenary legislative power, is viewed as the conservative system, and a bill of rights which locks in certain rights is viewed as the more radical alternative.

The necessary conclusion is that the reasons that bills of rights were adopted in a large proportion of common law countries are not relevant to Australia. In both the United Kingdom and British Commonwealth, human rights instruments were used as political tools to further political agendas. The primary reason for their adoption was not to protect individual liberties. The primary purpose of an Australian bill of rights is to protect individual liberties. If Australia chooses to adopt a bill of rights to protect individual liberties, it will be one of the few common law nations to have taken such a course without a political imperative.

As to the second proposition: since bills of rights are so prevalent in the common law world, what might happen if Australia adopts a bill of rights?

The British Commonwealth experience with bills of rights indicates that a bill of rights drafted in general terms can have a significant impact both at a practical and institutional level. Lord Phillips, the current Chief Justice of England, described the ratification of the *European Convention on Human Rights* and resulting *Human Rights Act* 1998 (UK) as one of the most significant constitutional developments in England since the enactment of the Bill of Rights of 1689.[16] Certainly bills of rights are apt to have profound consequences. But without knowing the form and terms of a proposed Australian bill of rights, predictions about its impact are impossible to make. Equally, even if the form and terms of the bill of rights were known, predictions about its impact are still highly unreliable.

No two nations have had identical experiences with their bills of rights. Several reasons stand out: every bill of rights is unique; the constitutional system in which each bill of rights operates is unique; and the legal

culture in which each bill of rights is litigated and interpreted operates differently.

An example conveniently demonstrates this point. Some commentators assert that a bill of rights will politicise the judiciary, with particular reference to the experience of the Supreme Court of the United States. The term politicise is used to mean that court appointments will be based on party political affiliation and that judges will vote along political or ideological lines. Turning to the British Commonwealth, the presence of bills of rights has not tended to politicise the judiciary. Institutional considerations in the United States may explain this difference, such as the tradition in some States of the United States to elect judges, and the historically longstanding role of the Supreme Court as a political institution.

The necessary conclusion is that the impact of a bill of rights in Australia cannot be known, and assertions about any predicated legal and social outcomes, whether positive or negative, should be viewed with great caution.

Conclusions

To return to the premise of this paper: the public debate about whether Australia should adopt a bill of rights has been framed by proponents and opponents alike to produce a preferred outcome. What then should be the focus of the inquiry into whether Australia should adopt a bill of rights?

The public debate over a bill of rights for Australia is frequently drawn to what should be regarded as secondary considerations. The influence of the judiciary upon public policy, in its capacity as the repository of arbitral power over a bill of rights, is a necessary but fundamentally incidental feature of having a bill of rights. The prevalence of bills of rights throughout the common law world is a minor consideration for Australia when the circumstances under which most nations adopted their bills of rights are examined. Further, caution should be undertaken when arguing by analogy with reference to the experiences in other common law jurisdictions, unless those experiences are understood within their unique legal and political contexts. Moreover, the impact of a bill of rights upon Australia will largely be dependent upon the form and terms of that document. Without knowing the form and terms of that document, arguments based on the experiences of other nations are likely to be highly misleading.

Rights in Australia are protected according to the Westminster model. In liberal democracies that operate under this model, rights are rarely infringed, because the public will and institutional mechanisms exist to protect human rights. Disagreement usually focuses upon nuanced understandings of what constitutes an impermissible infringement of a right.

Because laws are a balance between competing rights and other policy goals, and the appropriate balance between those rights and policy goals is often ambiguous, neither the absence nor presence of a bill of rights can ensure universal acceptance that all rights are being protected. A bill of rights merely provides one method of determining that balance between competing rights and policy goals.

The real question facing Australia is whether the power of Parliament should be limited with respect to certain rights. A bill of rights would limit Parliament's traditional role in determining public policy on certain subjects that interact with the rights in that bill of rights. This would mean Parliament could not realign those rights against other policy goals. And the balance set down in the bill of rights could not be altered without recourse to a referendum. Thus perceived injustices would not be capable of correction, and laws could not necessarily be amended to reflect changing social conditions. In this way, a bill of rights limits the democratic process by taking power out of the hands of the people.

The decision about a bill of rights must primarily be viewed as a choice between Parliament having the power to balance competing rights and policy goals, and Parliament having that power permanently removed to ensure that some rights are never abrogated. This is the reality that the public must focus upon and grapple with in assessing any proposal for a bill of rights.

Endnotes:

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2. Simon Evans, *Australian Bills of Rights—A Short History* (Liberty Victoria Symposium, 13 August,

2005, www.law. unimelb.edu.au/cccs).

3. *Commentaries on the Laws of England* (1769).

4. *Introduction to the Study of the Law of the Constitution* (1885).

5. C Gearty and K Ewing, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law 1914-1945* (Oxford: Oxford University Press, 2000).

6. Hon Sir Gerard Brennan, *Liberty's threat from executive power*, *The Sydney Morning Herald*, 6 July, 2007.

7. *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199; *Canada (Attorney General) v RJR-MacDonald Inc* [2007] SCC 30.

8. The complexity of modern legislation makes this analysis inappropriate for all legislation, but it provides a useful model for present purposes.

9. *Commentaries on the Laws of England*, BK 1, ch 1, pp. 120-2.

10. Owen Dixon, *The Law and the Constitution* (1935) *Law Quarterly Review* 590 at 597 and 604.

11. *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1.

12. *Attorney-General (Commonwealth) v. R; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529.

13. *Shop Distributive Employees' Case* (1976) 135 CLR 194 at 216 per Mason and Murphy JJ.

14. Brian Simpson, *Human Rights and the End of Empire* (Oxford: Oxford University Press, 2001).

15. Charles Parkinson, *Bills of Rights and Decolonization: the emergence of domestic human rights instruments in Britain's overseas dependencies* (Oxford: Oxford University Press, forthcoming 2007).

16. Lord Phillips, *Foreword*, in Leigh-Ann Mulchany, *Human Rights and Civil Practice* (London: Sweet & Maxwell, 2001), vii.

Chapter Eight

A Constitutional Fairy Tale

Paul Houlihan

In the one year that I spent studying law, I was taught that law is a body of rules, imposed upon, and enforced among, members of a given society. Further I was told, that it is the criminal law that does the enforcing, and constitutional law that does the imposing.

It's nice to be with the imposers rather than the enforcers!

When John Stone asked me to speak to this gathering, I was a little taken aback. I am used to the less elevated areas of the H R Nicholls Society rather than this august body.

The inspiration for my topic tonight actually comes from an address that P P McGuinness gave to the H R Nicholls Society many years ago, where he "took as his text" that marvellous Australian tale, "The Magic Pudding", as a means of explaining the wondrous logic of the then Australian Industrial Relations Commission.

I wish to extend our horizons a bit and delve into that extraordinarily rich literary lode of English fairy tales, particularly by Joseph Jacobs, and especially the story of Henny-penny.

You will all remember Henny-penny. As a well behaved "chook", she was pecking up grain off the ground when she was hit on the head by something, and she concluded that it was the sky that was falling on her. She then decided that she must go and tell the King about this and set off on her journey. She is joined along the way at various points by Cocky-locky, Ducky-daddles, Goosey-poosey, Turkey-lurkey, and last but definitely not least the dreadful Foxy-woxy, who "does them all in".

Of course there is a vast array of issues that can be addressed by allusion to different fairy tales, and at differing times. One of the admirable strengths of this particular art form is its adaptability and overall utility.

From time to time, indeed almost on an annual basis, we will find someone referring to Henny-penny (although frequently mistakenly called Chicken Little), as a means of highlighting a call that is essentially a false alarm, but which is perceived by at least some people to be an urgent and necessary wake-up call.

I want to relate this story of Henny-penny to the response by the ACTU and its affiliates to the introduction by the Howard Government of its then called "Work Choices" legislation, and I want to make the case that, in all of the circumstances, what we have seen from the ACTU *et al* is in fact a moderate, cogently argued, rational and entirely reasonable response. Exactly as was Henny-penny's.

It is all too easy to sneer at the campaign run by the ACTU, to point to the blatant scaremongering. "The sky is falling" is a derisory call that is frequently heard in the circles that I mix in. But is it so?

Let us look beyond the first impressions. Let us look at substance, significant substance; let us look at Ms Sharon Burrows, ACTU President and see if she is just doing her Henny-penny impersonation or whether she has a real story.

Of course her sky is falling. Union influence is down, there are more independent business people in Australia today than there are trade unionists. She must feel that she has been hit on the head by a very heavy object, at least a very leaden sky. What it is of course that fell on her head, is Union membership. And it happened in a field on the edge of a wood.

So, as any good person in her position would do, Shazza-wazza goes off to alert the King. In our case, of course, that means His Majesty Public Opinion (or in this case Ruddy-duddy).

Along the way to see the King, she comes across Billy-willy Shorten, who immediately volunteers to join her in going to see the King, because he too realises that this issue of falling Union membership is so staggeringly important, he may have to stop doing Cocky-locky impersonations outside Tasmanian goldmines. And much and all as he doesn't want to, he feels that it may in fact be necessary for him actually to become King; and as such, at least going and having a look should do that difficult and onerous responsibility no harm.

So Shazza-wazza and Billy-willy go on their way to see the King.

Along the way to see the King who do Shazza-wazza and Billy-willy run into, but the good old ABC.

Shazza and Billy, breathless with the excitement (or possibly just out of breath), tell ABC that falling Union membership has hit Shazza on the head and that ABC should join them in going to see the King, and alerting him to this terrible state of affairs.

ABC immediately sized up the situation, and realized that this was an "issue", nearly absolutely and almost specifically addressed in its charter. Although from an inclusiveness point of view ABC would have been happier if Shazza-wazza and Billy-willy were a same sex couple, ABC saw no reason to discriminate merely on grounds of sexual diversity. And, showing an otherwise surprising sense of worldliness, ABC thought that if Billy-willy did become King (much and all as he didn't want to), then the broad interests that ABC served could be well "looked after" by King Billy.

That humorous name suddenly sounded horribly like a racist slur to ABC, who was very pleased that this thought had been heard by no one but ABC, and immediately resolved never to even think that thought again.

So ABC joined Shazza-wazza and Billy-willy on the way to see the King.

As Shazza-wazza and Billy-willy and ABC made their way to the King's Palace, they came across a well meaning, though slightly shabby person named Fairfax, who was well known to be close to public opinion, certainly in Fairfax's opinion at least. Indeed Fairfax is pretty sure (you don't want to be dogmatic about these things) that he actually leads public opinion. "Where I go opinion follows", is writ large in perfectly conjugated pidgin-Latin, just below his masthead.

ABC and Billy-willy straight away told Fairfax about the falling Union membership that had almost concussed Shazza-wazza, and of course his response was immediate and generous.

"I will direct our superior and utterly fearless reporters to get to the bottom of this 'post haste' ", he said, thus showing the intellectual edge for which Fairfax was so justly famous. He paused a while and struck his best thinking pose, thumb and forefinger to the remnant jaw, then he unburdened himself of the awesome thought that had come to him. "If Union membership continues this way, who will be here to enforce freedom of choice?"; and he immediately instructed Ross Gittins to prepare a six-part series on the need to impress on the King the requirement to stop the decline in Union membership.

Gittins, good man that he is, queried the imperious tone of the direction from Fairfax. "This isn't an example of the proprietor seeking to influence editorial content, is it?", queried Gittins. But the short sharp response from ABC, "Mate, this isn't sectoral, this is us versus them", settled him down.

Then Fairfax joined ABC, Billy-willy and Shazza-wazza on the way to see the King.

As Shazza-wazza, Billy-willy, ABC and Fairfax went on their way to see the King they passed a field where there was a reasonable number of people, standing around, agreeing with each other, and wringing their hands and looking really caring. Among them there was a particularly tall one who was muttering, "Life was meant to be easy".

ABC and Fairfax knew immediately who this was, and took Billy-willy and Shazza-wazza over to meet Community.

Community of course was delighted to see ABC and Fairfax. They all knew each other really well from Friends of ABC and Friends of Fairfax, and ABC and Fairfax were Friends of Community as well.

So when ABC and Fairfax told Community about the terrible falling Union membership that had so shocked Shazza-wazza, everyone wrung their hands just that much harder; and just as Fairfax expected, they all looked to him and ABC to tell them what they should do.

"Well, we are all going to see the King, to have him change the rules to ensure that Union membership stops falling and grows again, that's what we are doing", said ABC and Fairfax. Billy-willy stepped forward and said a few words about "working families", and asked if Community had seen him on *Sunrise*. This comment certainly created a bit of unease about Billy-willy, as everyone there only watched the ABC, and Billy-willy, quick as you like, dropped that subject and was back onto "working families" before you could say "Kochie rules".

Naturally, Community thought going to see the King was a fantastic idea, and as a long term activist, this was precisely the sort of clearly effective action to which Community was really committed. "This decline in Union membership is an intolerable blow to the people's right to choose", Community said, very much in line with Fairfax's thinking. ABC, not to be outdone, then chimed in with this contribution:

"Union membership is a lot like climate change. It is such an unarguably good thing, that it is in fact

reprehensible to run the contrary argument, and those who say there are two sides to the story ignore the fact that Unionism is an unarguable good".

Seeing the positive response that this bold statement was getting from the whole group, ABC went on:

"We like to pride ourselves that we are a civilised society, a society that values its people and its diversities. We simply must ensure that everyone is a member of their Union, simply to safeguard the pluralism that is such a fundamental right in a multi-cultural society. Unionism, friends, is simply not negotiable".

Community returned to the field for a second go, so strongly were feelings running by now. "You remember there used to be laws against holocaust deniers", Community orated.

"Well, I think it is past time to have anti-Union 'hate speakers', 'anti-Union good deniers' and all of their fellow travellers removed from our civilised society, and have them sent off for re-education to a camp run by the Australian Education Union. Unionism, they have to understand, is not A choice, it is OUR choice!".

As you can imagine, Shazza-wazza was pretty much moved to tears by the profundity of these heartfelt contributions, and she mumbled something about "working families" as well.

This second reference to "working families" was a bit much for ABC and Fairfax, and they took Shazza-wazza and Billy-willy aside to gently remonstrate with them:

"You can't expect Community to put its shoulder to the wheel for Union membership when you keep talking in exclusionary terms like 'working families', which must leave out, and in a very real way denigrate, a significant and active part of the workforce".

Shazza-wazza and Billy-willy were really a bit crushed by this. "Obviously", Shazza said," some of our best friends are gays and lesbians, greens and geeks. The Trade Union Movement is rightfully proud of its generations-long struggle for inclusiveness, aren't we, Billy-willy".

Billy-willy, remembering the AWU's colourful campaigns against Asian and Pacific Islander workers and New Zealand shearers, decided that discretion was the better part of valour in the current circumstances, and just said, "Yeah, bloody oath. Let's get back to Community before their poor old hands get wrung off".

Then a really interesting thing happened!

Shazza-wazza, Billy-willy, ABC, Fairfax and Community were all marching off to see the King, when who do they meet but Greggy-weggy Combet.

Now Greggy-weggy listened very attentively as Shazza-wazza, and everyone else, related the terrible story of falling Union membership—but it wasn't actually a surprise to him at all.

You see, Greggy-weggy was actually in the wood, quite near the field that Shazza-wazza was in when the Union membership fell on her. He had recently taken to spending a fair bit of time "sloping around" in woods, grooming his splendid tail, rehearsing great orations, and such like, and was doing that at the time of Shazza's terrible incident, and had actually seen it happen. But he didn't let on at all.

He immediately declared that, "This must be taken to the King at once".

ABC was the first to speak:

"Thank God we caught up with you, Greggy-weggy. I always knew you were a real man of decisiveness and clear thinking, not just some bastard boy, and this just shows how right I was. I bet you even know the best way to get to the King".

Fairfax then chimed in with, "Yes, I've always thought you '*tres magnifique*' as well". (Fairfax thought it past time to re-establish who was the man-of-the-world here.)

And Community said not a word, but held hands aloft as in adulation.

Shazza-wazza and Billy-willy were a bit miffed about this, as they were already leading everyone to see the King, long before Greggy-weggy came on the scene. They had decided that was what had to be done, and no one had gone on with all this bourgeois blather about them, but they kept their own counsel and just smiled happily. Or at least Billy-willy did.

Then Greggy-weggy spoke:

"It is a very good thing that we met up, because I do know the best way to the King. It is not short, or easy—nothing worthwhile ever is—and it does mean leaving the safety of Victoria to go to New South Wales, but it is definitely the best way. As you know, I came from New South Wales and I can steer us all safely to the King.

"Actually, we have to go through a place called Charlton, and there was a wicked witch there that I had to smite fairly recently, but I will certainly get us to the King".

So our "merry band of brothers" marched off in a new and different order. First was Greggy-weggy, then ABC, then Fairfax, then Community, with Billy-willy and Shazza-wazza at the rear.

As they crossed the Murray a *frisson* of real fear ran through them all, and being the leader that he is, Greggy-weggy immediately cautioned the whole group to be on the look out for "free traders, scab shearers and sundry other undesirables that live in these wild and untamed parts".

"You will need to do exactly what I tell you here. This is such dangerous country that the people hereabouts elect members like Bill Heffernan to represent them".

That caused everyone to bunch up, and to take a quick look over their collective shoulder—and Greggy-weggy adjusted his glasses, and allowed himself a quiet little smile, and a surreptitious flick of his tail!

"It's not far now, friends" he said, "and we will see the King, but first we have to go through this long, dark cave. We will need to go through the very narrow part one at a time, and I will call the next one through as I get each one safely to the other side", Greggy-weggy assured them.

ABC was just about beside itself. "We will have to do an *Australian Story* about Greggy-weggy, there is just nothing else to be said".

Fairfax, while agreeing, thought a spread in the *Good Weekend* might have more "*panache*" (just can't help himself, that bloody Fairfax, thought Billy-willy).

Community cleared its throat and declaimed that what was needed was a "Friends of Greggy-weggy Society", to which there was general agreement.

Shazza-wazza went behind a tree and expectorated quite loudly, and Billy-willy said, in a fairly loud voice, "I'll second that, Comrade".

Then Greggy-weggy, cool as a cucumber, entered the long dark cave, and shortly thereafter got the surprise of his life! A long way back into the cave, near its dankest and darkest but just where a small shaft of light entered, Greggy-weggy saw the unmistakable profile of Princess Julia-rulya, and she was studying him, very profoundly.

Holding a paw to his lips he hurried up to her and said:

"If you know what is good for you, Comrade, you will get out of sight, and say and do absolutely nothing about what is going to happen here in the next little while. We can have our little chat after I do what has to be done".

Julia-rulya had never seen such authority and decisiveness in a man in her entire life, and it quite took her aback, almost brought her undone as it were. "I feel a touch of the Bronte heroines syndrome", she said. "I'll just take my kill out of the way, Greggy-weggy, and let you get on with your job". And then, as a sort of little girl throw-away, she added, "Who said the political and industrial wings can't work together".

Greggy-weggy composed himself, gave his paws a quick lick, and after a decent interval he called out, "Come through, ABC", and ABC came through.

He hadn't gone very far into the dark, narrow part of the cave when, "Hrumph", Greggy-weggy snapped off ABC's head and threw him over his shoulder.

Then he called out, "OK, Fairfax, you come through. Hrumph", and off went Fairfax's head and he was thrown beside ABC.

"Community, can you come through now please", called Greggy-weggy. "Of course, if you say it's safe, Greggy-weggy", answered Community; and then, "Hrumph", and off came that head to join the others.

"Billy-willy, are you ready to come through, Comrade?", asked Greggy-weggy; and Billy-willy, who was not as simple as some would have you believe, asked, "Where are ABC, Fairfax and Community, mate?".

Greggy-weggy answered, "They have made their Work Choices, mate, and are out into the munificent sunshine on the other side".

Thus reassured, Billy-willy lurched into the narrow, dark cave, and "Hrumph", off came his head, and he joined ABC, Fairfax and Community in the "killing fields" of Greggy-weggy.

"Shazza-wazza, old son—sorry", said Greggy-weggy, "Comrade, can you come through now?".

"You listen to me, you bourgeois bull artist, I am the President of the ACTU and you are only the Secretary, and I am a teacher and you are only a mining engineer; can we level with one another?".

"Shazza-wazza, are you suggesting that there is something that we haven't been entirely frank about in our opposition to Howard's emasculation of workers' rights in this country?".

"Stuff Howard, stuff workers and in particular stuff their rights. What I want to know is why there are no sounds from those buggers who have gone into the tunnel in front of me", blurted Shazza-wazza.

"If you weren't just an ignorant teacher you would understand the venturi effect on the distribution

of sound in a confined space", Greggy-weggy answered confidently. "Get yourself into gear and come on through".

Shazza-wazza was not convinced. She had taught naughty little boys and knew that they could be terribly convincing, even without any substance at all. "A lot like Doug Cameron really", she thought.

"Are they really all through, safe and sound? You know I hate these individual arrangements, Greggy-weggy. And another thing, ACTU policy is for a collective approach, we should have stuck together".

"You will stick together when you come through. The others are already sticking together, I can assure you. Blood is stickier than water", he added, in a rather Delphic tone that puzzled Shazza-wazza.

"Come on, Shazza", called Greggy-weggy, "through you come, come to Greggy-weggy"; and just as she entered the tunnel, something started to click in her brain .

But it had been a long time since Shazza-wazza had used her brains, and she wasn't used to trusting them. They weren't really working class brains at all, she suspected, and she kept pushing into the tunnel while her poor old brains were saying, "Shazza, this is not what we recommend at all".

And there, in front of her, licking his paws, and generally preening himself, was Greggy-weggy.

"God, you are a silly old goose, Shazza-wazza", he said, "and probably too tough for the pot as well. What am I to do with you?".

Shazza-wazza suddenly realised the full enormity of what was happening here, and was appalled. Community gone, Fairfax gone, ABC gone, and sweet, modest and unassuming little Billy-willy, all gone; all sacrificed on the altar of Greggy-weggy's ambition.

Summoning her last reserves of ideological strength, she demanded, "What will you do about falling Union membership, Greggy-weggy?", and was surprised to realise that Greggy-weggy was surprised by her question.

"What, nothing", he replied. "You can see all the Unions' supporters over there in that corner—without their heads. What will Unions do without them?. As for me, I'm off to greener pastures". And with that he leapt up and attacked Shazza-wazza.

Poor old Shazza-wazza, the fight had all gone out of her and she just succumbed. "Hrumph", went Greggy-weggy, and off came her head, and she was flung on to the pile of bodies.

Greggy-weggy sat back and looked at his handiwork. It had been a fairly full day, even by his standards. He had forgotten all about Princess Julia-rulya, and he couldn't help it, he just started to hum an old song he knew, and he kept returning to one of the verses. "John, John, the grey goose is gone and the fox is on the towno, towno".

"That's no way for the Member for Charlton to behave", Julia-rulya admonished him. "After all, the sky is falling in".

Her voice snapped Greggy-weggy out of his happy reverie, and made him focus on the issues in hand.

"That kill of yours, who was it?", he demanded.

"Oh, that's just an old Ruddy-duddy", Julia-rulya replied, in a very off-handed way.

"The bloody King, you've killed the bloody King. Hell, there's a word for that. I wish Fairfax was here, he would have known it".

"Kevicide", she cooed, flicking her tail in a most provocative way. "But what about you, it's all right for you to get uptight about me killing the King, but you've wiped out our entire cheer squad. Who is going to explain the regicide of Ruddy-duddy to the masses now?

"Frankly, Greggy-weggy, I think you've stuffed up! I was counting on Community coming out and saying that everyone is sick and tired of Ruddy-duddy's mealy mouthed lectures. It's fine for him to talk about 'working families'; there's his missus a mega-millionaire, and him pretending that he gives a damn about working families. Without ABC and Fairfax, who can we rely on to inform and educate the masses. How will we be able to convince the Country that you and I are the answer to the maiden's prayer?".

"Hang on a minute, Julia-rulya", Greggy-weggy said. "Am I to understand that you are proposing that I should become King, and you my Deputy?".

"Well, not quite, but close", Julia-rulya replied. "You have to understand that your smiting of the witch of Charlton has left a very nasty taste in many mouths. People think your actions look like rank ambition and opportunism; and particularly now that you haven't got ABC and Fairfax shouting what a man of integrity and compassion you are, you really must understand that you have brought yourself back to the field a fair bit".

To say Greggy-weggy was a bit taken aback by this is to understate his reaction very significantly.

"You have just killed the King, and you think I need all the help I can get from a bunch of broken down half-wit has-beens. Just what sort of a megalomaniac are you?", he asked scornfully.

"A female one", she replied, as she dragged her kill back to the pile where Greggy-weggy's kill was, and sort of tucked poor old Ruddy-duddy in among the other carcases.

She then sat down on her haunches and gave her paws and chops a very good licking, adjusted her make up, and calm as you like trotted out of the cave to a waiting press conference.

There, as the picture of stoic grief, she was barely able to conceal her emotions, and gulping back tears she announced, "We won't wait for ABC and Fairfax, they won't be coming". Then with head slightly lowered, voice tremulous with emotion, she said simply, "The King is dead, long live the Queen".

Then, pushing her head up and taking a deep breath, she went on:

"Friends—for I count you all my friends at a time like this—in the cave behind me lie the remains of our Nation's finest people: Ruddy-duddy, but not just him, Shazza-wazza, Billy-willy, Community, and ABC and Fairfax, all gone. And just as we were all outraged at the terrible treatment of the former Member for Charlton, let us be thankful that she didn't receive the treatment that all of these stalwarts have.

"For friends, also in this cave is the Member for Charlton, red in tooth and paw, as it were, steeped in the foulness of his crime and utterly unrepentant, seeking anyone to put the blame upon so that he can fulfil his rampant ambitions!".

Facing the stunned assemblage of the Nation's finest reporters, "*sans* Fairfax and ABC" (as Fairfax might have said), Queen Julia-rulya went on. "This is no time for slow, clumsy judicial processes. I will summons a People's tribunal, and we will do justice, here and now. Some of you big boofy News Corp and Channel 7 blokes go in there and bring out the foul murderer".

Suffice to say, as so often happens in these things, where there is no strong constitutional basis for the action, and no Samuel Griffith Society advocating clear constitutional directions, justice was both done and not done. Greggy-weggy was found guilty and beheaded. Fair enough, I hear you say, but Julia-rulya wasn't.

There are two morals in this tale, as there should be.

Before you cry wolf, beware of the fox.

But while being wary of the fox, be very, very wary of the vixen.

Thank you very much for allowing me to indulge my "penchant" (as Fairfax may have said) for fairy stories. We all of course realise that the foregoing is only a fairy story, don't we, don't we!

And I must give credit to John Stone for coming up with the real villain of this story. (I can hear many, though not here, saying of course he would, wouldn't he). For he gave me Julia-rulya and also Ruddy-duddy.

John's contribution to our public life continues.

Chapter Nine

The Queen of Australia

Dr Anne Twomey*

Sir Samuel Griffith and State Governors

Sir Samuel Griffith was a federalist and a nationalist. In both these guises he played a significant role in the development of the Crown in Australia. In the Canadian federation, provincial Lieutenant-Governors were appointed by, and subordinate to, the Governor-General. Provincial Bills were reserved for the Canadian Governor-General's assent, and laws could be disallowed by the Governor-General on the advice of federal Ministers. Griffith, in drafting the Commonwealth Constitution, took a different approach. He maintained the independent relationship between the States and the Crown. In the Constitutional Convention of 1891, he stated that the term "Governor" was used in the Constitution that he had drafted, rather than "Lieutenant-Governor", to show that the "states are sovereign"[1] and maintained their independent links with the United Kingdom.

The consequence was that the British government, rather than the Commonwealth government, advised upon the appointment of State Governors, assent to reserved Bills and the disallowance of laws. The States preferred this position, because they regarded the British government as less politically interested, and therefore fairer, in its treatment of State matters than a Commonwealth government was ever likely to be.

Sir Samuel, however, was also a nationalist who would have preferred no British involvement in State constitutional affairs after federation. He drafted a clause that would have allowed the States to make such provisions as they thought fit as to the manner of appointment of State Governors, their tenure in office and their removal. This would have empowered the States to select their own Governors by election or by the appointment of local people, rather than the existing system of imported English Governors. Griffith was concerned to make sure that the States obtained full power over their affairs in future. He did not want them to have to seek changes from the Imperial Parliament, or, for that matter, the Commonwealth Parliament.[2] He also argued that having an elected Governor was neither inconsistent with responsible government nor inconsistent with loyalty to the Crown.[3] This clause was later removed from the draft Constitution in 1897 on the ground that it unnecessarily interfered with State matters.

After federation, the British government continued to advise the Sovereign about the appointment of State Governors. State Ministers had no power to advise the Sovereign on such matters, but they were consulted in advance of appointments being made and could express their reservations. Sir Samuel Griffith, however, took matters further when he was acting as Queensland Governor in October, 1901, prior to a new appointment being made. In blunt terms, he advised the British government that its proposed new Governor for Queensland was "unacceptable".[4] This shocked the Colonial Office, as it made the situation "awkward"[5] (which is a very undesirable state of affairs in diplomacy).

The British Secretary of State responded that the candidate in question fully satisfied the downgraded criteria for a State Governor. He sought reasons from the State for its objection. Sir Samuel blithely replied that his responsible advisers were strongly of the opinion that the candidate was not "suitable by temperament for the position of Governor".[6] This made matters even more "awkward". To avoid a diplomatic impasse, the British government offered an alternative candidate who was deemed acceptable. Even though the State government had no power to advise the Sovereign on the appointment of State Governors, Griffith made clear that it could manipulate matters by exercising a political veto over appointments.

Sir Samuel Griffith and the divisible Crown

Once appointed as Chief Justice of the High Court, Sir Samuel Griffith played a further role in shaping the notion of the Crown in Australia. The orthodox view of the Crown was that it was "one and indivisible". While this may have been a correct view of the Imperial Crown, the notion made little sense within a federation,

where the Crown in its capacity as representing bodies politic or executive government was clearly divisible. In 1904 in *Municipal Council of Sydney v. Commonwealth,*[7] Griffith CJ observed:

> "It is manifest from the whole scope of the Constitution that, just as the Commonwealth and State are regarded as distinct and separate sovereign bodies, with sovereign powers limited only by the ambit of their authority under the Constitution, so the Crown, as representing those several bodies, is to be regarded not as one, but as several juristic persons, to use a phrase which well expresses the idea".[8]

Griffith CJ distinguished between the "Crown as representing the community of New South Wales", the "Crown as representing the Commonwealth" and the "Crown as representing the whole Empire".[9] In later cases Griffith CJ drew a distinction between the different manifestations of the Crown according to where executive authority and responsibility lay.[10] If executive authority was exercised upon the advice of State Ministers, who were responsible for that advice to the State Parliament, then it was exercised by the Crown in right of a State. If it was exercised on the advice of Commonwealth responsible Ministers, then it was exercised by the Crown in right of the Commonwealth. If it was exercised on the advice of United Kingdom responsible Ministers, then it was exercised by the Crown in right of the United Kingdom. This might seem obvious, but it was highly contentious in Griffith's time and was a view overturned by the High Court in the infamous *Engineers Case*,[11] which reverted to the notion of an indivisible Crown, with all the ambiguity, qualification and resulting confusion that this notion entailed.

The House of Lords and the divisible Crown

It is now well accepted that the Crown is divisible, but there is little understanding of how this came about and by what criteria a separate Crown is to be recognised. Even the House of Lords has struggled unsuccessfully with the issues involved. In 2005 a majority of the House of Lords in the *Quark Fishing Case*[12] held that an instruction issued by the British Foreign Secretary to the Commissioner of South Georgia and the South Sandwich Islands (hereafter "South Georgia") concerning fishing licences, was actually made by the Queen of South Georgia and therefore did not fall under the *Human Rights Act* 1998 (UK). This was despite the fact that the Queen, to the extent that she was formally involved at all, acted on the advice of her British Foreign Secretary, who was responsible for that advice to the Westminster Parliament. Executive authority and responsibility with respect to this instruction rested in the United Kingdom, not South Georgia.

The House of Lords, however, thought that the mere fact that there was a separate "government" of South Georgia meant that there was a separate Crown, and that the Queen in performing any act in relation to that territory was acting under that Crown.[13] Their Lordships ignored the question of who took responsibility for the Queen's acts. Indeed, they regarded the British Foreign Secretary as merely the "mouthpiece" or "vehicle" of the Queen, implying that she must have exercised her powers upon her own initiative.[14]

This is an extraordinary conclusion, for a number of reasons. First, it is contrary to the cardinal constitutional convention that, except when exercising the reserve powers in exceptional cases, the Queen only acts upon the advice of her responsible Ministers, and those Ministers are responsible for those acts to the legislature to which they are elected.[15]

Secondly, the "government" of South Georgia was comprised of a Commissioner, who was also Governor of the Falkland Islands, and a couple of other officers, all of whom were British career diplomats posted to the Falkland Islands. They were responsible to no one but the British government and did not even live on South Georgia. There is in fact no permanent population on South Georgia—merely some visiting scientists left to maintain Britain's claim over the island to keep the Argentinians at bay. There is no representative government, let alone responsible government. The Commissioner of South Georgia had no right to advise the Queen. Instead, he was subject to instructions from the British Foreign Secretary, who remained responsible to the Westminster Parliament—not to the few people living on South Georgia.

Thirdly, we in Australia are very well aware that the mere existence of a separate government does not necessarily mean that the Queen acts in relation to the territory concerned as Queen of that territory under a separate Crown. If the House of Lords judgment were correct, then the Queen would be Queen of Victoria now, and would have been Queen of Victoria since 1855. It would also have other ramifications for places such as Scotland, which now has its own government, which is both representative and responsible, and therefore has a far greater claim for a separate Crown than South Georgia.

The identification of separate Crowns

Some of the confusion about the status of the Crown arises because the same term is used to describe a

number of different concepts. As the High Court pointed out in *Sue v. Hill,*[16] the different meanings of Crown include:

1. The Sovereign's regalia;
2. The body politic;
3. The international personality of a body politic;
4. The "government" or "executive"; and
5. The Sovereign's powers with respect to a body politic.

The divisible Crown that Griffith CJ was referring to in those early High Court cases was the Crown as a body politic, with the States and the Commonwealth all being sovereign within their spheres, and perhaps also the Crown as the "government" or "executive". At the Imperial level there remained one Crown because the Sovereign, when exercising powers with respect to any of his or her realms, continued to do so on the advice of responsible British Ministers. It was this notion of the Crown that became divisible in 1926-1930, with the recognition in Imperial Conferences of the equality of the Dominions and the United Kingdom, and that the Sovereign, when acting in relation to those Dominions, did so on the advice of the responsible Ministers of those Dominions. Thus in 1930, the King, albeit reluctantly,[17] acted on the advice of the Commonwealth government in agreeing to the appointment of Sir Isaac Isaacs as the first Australian Governor-General.[18]

This change, however, did not occur at the State level.[19] The Australian States remained dependencies of the British Crown, and when the Sovereign acted in relation to them by appointing a State Governor or giving assent to a reserved Bill, it was on the advice of British Ministers. Why? It was a relationship of convenience.

First, the States had faith in the British government to act in their interests without being affected by political self-interest. They had no such faith that the Commonwealth government would be as impartial or disinterested. Secondly, the Sovereign was not prepared to be advised by different sets of Ministers within Australia because of the risk of receiving conflicting advice on Australian matters. Hence, if the role of British Ministers in advising on State affairs were to be terminated, then the only outcome acceptable to Buckingham Palace was that the Sovereign be advised by Commonwealth Ministers with respect to State and Commonwealth matters, or that the Sovereign's powers with respect to the States be delegated to the Governor-General, as in Canada. This was not acceptable to the States. Hence, the *status quo* prevailed, and British Ministers continued to advise the Queen about State matters from 1930 to 1986.

Until the *Australia Acts* came into force on 3 March, 1986, Her Majesty performed her functions with respect to the Australian States in her capacity as the Queen of the United Kingdom, rather than the Queen of Australia. This can be seen by the royal style and title used on the commissions of State Governors and State Letters Patent, and the fact that the counter-signature was that of a British Minister, indicating that this Minister took responsibility for the action involved.[20] When new Letters Patent were issued in 1986 to make them consistent with the *Australia Acts*, the British government still insisted that the counter-signature be that of a British Minister rather than a State Minister, because Her Majesty was still acting as the Queen of the United Kingdom in issuing new Letters Patent for the States, until the *Australia Acts* came into force in a matter of days. State Premiers requested that they also be permitted to counter-sign the Letters Patent, to indicate the change in status of the Queen. British officials replied that they could add their names if they wished, but they would have no more significance than an ink blot, as they were not yet Her Majesty's responsible advisers.[21]

The "Queen of Australia" did not perform any functions with respect to the States. In that capacity, the Queen only dealt with Commonwealth matters on the advice of Commonwealth responsible Ministers. To this extent the term "Australia" was misleading, and deliberately so.

Constitutional conflicts of the 1970s

During the 1970s, the Whitlam Government tried to convince the British government that the Queen should act on the advice of Commonwealth Ministers in all Australian matters, including State matters.[22] One of its weapons was a change in terminology. The Whitlam Government ceased to use the word "Commonwealth" and instead referred to itself as the "Australian Government",[23] thus blurring the distinction between the Commonwealth and the States. It also altered the Queen's royal style and title to make it clear that she was "Queen of Australia".[24] The next step in this argument was that the Queen must then act in relation to "Australian" matters on the advice of "Australian Ministers", meaning that Commonwealth Ministers would advise the Queen about State matters. This argument was neither accepted by the British Government nor the Queen.

The dispute was at its starkest with respect to the seabed petitions.[25] Tasmania and Queensland petitioned the Queen to refer to the Privy Council for an advisory opinion, the question of who owned the seabed adjacent to the States. The Commonwealth government claimed that it owned the seabed and that it had the right to advise the Queen in all Australian matters. It advised her to reject the petition. The States claimed that they were petitioning the Queen of Tasmania and the Queen of Queensland.

The British Cabinet, after seeking legal and scholarly opinions, took the view that the Queen was not separately Queen of each State, even though the States had separate representative and responsible governments. The British Cabinet accepted advice that Her Majesty acted as Queen of the United Kingdom with respect to the States, because she was advised by her responsible Ministers for the United Kingdom, who were in turn responsible to the Westminster Parliament for that advice.[26] The British Cabinet also accepted that while it would advise the Queen with respect to the petitions, because they concerned the States, the Commonwealth government also had the right to advise Her Majesty with respect to the petitions, as it had also claimed an interest in the seabed.[27] In the end, both the United Kingdom and Commonwealth governments advised Her Majesty not to refer the petitions to the Privy Council, and Her Majesty accepted the advice of both Governments.[28] In doing so, she tacitly accepted the view that her United Kingdom Ministers remained responsible for advising her with respect to State matters, and that Commonwealth Ministers did not have exclusive power to deal with such issues.

This did not deter Justice Murphy and other Commonwealth officers from attempting to argue that the Queen had accepted the argument that only Commonwealth Ministers may advise upon Australian (including State) matters.[29] Indeed, the Queen's speech on the opening of the Commonwealth Parliament in 1974, as drafted by Commonwealth officials, referred only to her receiving and accepting advice from Commonwealth Ministers on the seabed petitions. The Queen's Private Secretary, Sir Martin Charteris, had to insist that "for the sake of truth", it be added that she also accepted the advice of her responsible British Ministers.[30] While the Queen might have been obliged to act on the advice of her Commonwealth Ministers with respect to the opening of the Commonwealth Parliament, she still had sufficient moral power to force a change to her speech to ensure that she stated the truth.

Within Australia it had long been assumed that, although British Ministers formally advised the Queen with respect to State matters, they were merely the channels of communication of State advice.[31] This assumption was wrong. The British Cabinet, when deciding on the seabed petitions, took into account British political interests and felt not in the slightest bit obliged to comply with State wishes.[32]

This attitude became even more obvious during the Sir Colin Hannah affair. Sir Colin, who was the Governor of Queensland, caused a controversy in 1975 by making statements critical of the Whitlam Government. The British government seriously considered dismissing him from that office, but the dismissal of the Whitlam Government by Sir John Kerr made that course of action impractical.[33] As a British official noted, few would understand why Sir Colin was dismissed for involving himself in local politics when Sir John Kerr had done so in an even more spectacular fashion.[34]

The Queensland Premier, Joh Bjelke-Petersen, sought to support Sir Colin by asking the Queen to extend his term for another three years. The British government was enraged by this attempt to embroil the Queen in this controversy, and angry at Sir Colin for his acquiescence in it. The British government refused to put this advice to the Queen, and made it clear that Sir Colin's term would not be extended. The Queensland Premier later observed that until that point he had believed that he was advising the Queen through the British government.[35] This experience brought home to him, and to other State Premiers, that the British government was providing independent advice to the Queen on State matters.

The development of the *Australia Acts* 1986

This was a spur to the States to break off constitutional relations with the United Kingdom. The States were willing to continue the role of the British government as long as it was disinterested and supported State wishes. It was now clear to the States that this was not the case. The Wran Government in New South Wales decided to take unilateral action by legislating to terminate appeals from State courts to the Privy Council, and by requiring the Queen to act on the advice of State Ministers when appointing the State Governor.[36] The British Foreign Secretary, at the behest of the Queen, replied that he would advise the Queen to refuse royal assent to such Bills.[37] The only way out was a formal termination of constitutional links between all the States and the United Kingdom.

The dilemma for the States, however, was the same as in 1930. It remained unacceptable to Buckingham Palace that the Queen be advised by different sets of Ministers within Australia. This was regarded both as "unconstitutional" and dangerous, as it had the potential to place the Queen in the invidious position of receiving conflicting advice from State and Commonwealth Ministers.[38]

At one stage in negotiations the "post-box solution" was proposed.[39] It involved the Commonwealth Prime Minister acting as a "post-box" for State advice to the Queen. The States begrudgingly agreed to it, as did the Palace. It was scuttled in the end by the Department of the Prime Minister and Cabinet, after it was made clear by the Palace that the Prime Minister would have to be politically accountable and responsible to the Commonwealth Parliament for his advice to the Queen (even though the advice originated with a State Minister). For example, if Queensland sought the appointment of Sir John Kerr as Governor of Queensland, Bob Hawke would have been responsible for proposing it and would have to take responsibility in the Commonwealth Parliament for the appointment. This prospect was too unpalatable for the Prime Minister to bear, so the "post-box solution" was abandoned. The impression was given to the States, however, that it was Buckingham Palace that had vetoed the proposal.

This sent negotiations back to the table. Prime Minister Hawke said he would not advise the Queen to accept advice directly from State Premiers. This was based in part upon concerns about advancing State claims to sovereignty, but mostly upon the concern that such advice would be unacceptable to the British government and the Queen.

The next proposal was that the Governor-General advise the Queen about State matters. This would have absolved the Prime Minister from responsibility. British officials noted that such a proposal was constitutionally impossible, because only responsible Ministers could advise the Queen—not the Governor-General (unless he was doing so on behalf of his responsible Ministers). This proposal was rejected by the States, largely because of concerns about how it would fit with the Governor-General's existing relationship with responsible Commonwealth Ministers.

The Commonwealth then proposed to leave the question of advice to the Queen on State matters to an inter-governmental agreement to be reached in the future. This worried the British government. It did not want the Commonwealth alone to advise the Queen as to whether to agree to a future proposal. Even though the subject concerned Australian matters, British officials took the view that:

> "We have a constitutional duty towards The Queen as Queen of the United Kingdom in Her present relationship with the Australian States; we have a duty to advise Her whether Her current position should be relinquished and we have a duty to advise Her whether any new arrangements are constitutionally acceptable".[40]

The States wanted to advise the Queen directly. From both ends of the political spectrum, John Cain and Joh Bjelke-Petersen argued that the Queen must accept State advice and that anything less was unacceptable. The States' position was hardened by the outcome in the *Tasmanian Dam Case.*[41] They were not prepared to see more powers going to the Commonwealth.

Queensland commissioned a paper by John Finnis of Oxford University, which argued that if the Queen's functions were narrowed to matters such as the appointment and removal of State Governors, there could be no risk of conflicting advice to the Queen, as it would be clear which jurisdiction had the right to advise her. The British Attorney-General found the paper "interesting and cogent", but Buckingham Palace rejected it as "ill-founded" and continued to assert that the Queen could not be advised by State Premiers.[42]

This impasse was resolved largely by accident. The New South Wales Solicitor-General, Mary Gaudron, who was visiting London for a Privy Council Appeal, met with the Legal Advisers to the Foreign Office on the subject of residual links. Foreign Office officials wrote the following description of the meeting:

> "Ms Gaudron came bristling with prejudice and holding a deep conviction that we were in collusion with the Commonwealth Government at the expense of the States. She also thought it was the British Government which was imposing impossible restrictions on proposals for severing the residual constitutional links.
>
> "It was abundantly clear that the Commonwealth Government, and probably in particular Senator Evans, has to some extent misrepresented our position so as to disguise the fact that the difficulties stem from the position of the Commonwealth Government itself. For example, Ms Gaudron was firmly of the view that the "Post Box" proposal … had been rejected by the British Government. We know of course, that it was Mr Hawke's Department which objected to the proposal".[43]

One of the consequences of this meeting was that the British decided to open up new channels of communication with the States, in the words of one official, "to stop the Commonwealth misleading the States about our views and misleading us about the States' views and to stop the States misleading us about the Commonwealth's views".[44]

More significantly, Mary Gaudron came away from the meeting with the impression that the British government would accept direct access to the Queen as long as the possibility of conflicting advice was eliminated. It appears that this was a misunderstanding. The nuances of British diplomatic-speak were lost upon the more direct and blunt Solicitor-General. British officials were later shocked to learn that the Solicitor-General had convinced her fellow Solicitors-General that the British position had shifted, and that direct access would be acceptable if the powers of the Queen were narrowed to the appointment and removal of State Governors. This stripped away the Commonwealth government's argument that it would not support direct access because it was unacceptable to the United Kingdom. The Commonwealth was therefore persuaded to agree to the proposal. By the time the British were aware of the misunderstanding, it was too late. The States and the Commonwealth had agreed to direct access upon this minimal basis.

British Foreign Office officials, when faced with the agreement of six States and the Commonwealth government, noted that they would need some "fairly persuasive arguments" that it was unconstitutional if they were to object to it, but they were at a loss as to what they might be.[45]

Buckingham Palace continued to object to the proposal for direct access. It had two concerns. First, that the Queen might be put in an invidious position if she received conflicting advice from different sets of Ministers. Second, the Palace was concerned that it would be "unconstitutional" for the Queen to accept advice from the Ministers of a sub-national polity. This issue had arisen once previously with regard to Nigeria. In 1960, the Order in Council that gave Nigeria independence provided for the Premiers of the Regions, having consulted the Prime Minister, to advise the Queen on the appointment of regional Governors. The Palace had objected to this arrangement, but British officials argued that it was not an "unconstitutional" arrangement as it was expressly provided for in the Constitution of Nigeria. The system only lasted from 1960 to 1963, when Nigeria became a republic. However, it was a minor precedent for what the Australians proposed.

The British Foreign Office recognised that the status of the Crown in a true federation is necessarily different from a unitary state. The Permanent Head of the Foreign Office, Sir Antony Acland, noted that Australia is an independent country and that:

> "When the United Kingdom bows out, the Government of that independent country will comprise all Australia's Governments (Commonwealth and State)—in other words 'independence' and 'sovereignty' will not be the prerogative solely of Commonwealth Ministers".[46]

This view of the divided or shared sovereignty with the federation, with which Sir Samuel Griffith would have agreed, was further explained in a brief to the UK Attorney-General for advice on the subject. In that brief, a Foreign Office Legal Adviser observed:

> "The non-independent status of the Australian States does not seem necessarily to rule out the possibility of State Ministers being a constitutionally proper source of advice on certain State matters…
>
> "This is more especially the case in the present context where the non-independent status of the Australian States is by no means clear cut. This may be illustrated by the correspondence with the Law Officers in 1965 in which the then Law Officers agreed that, in the context of [litigation against the State of Victoria]… that State was recognized by the British Government as a sovereign State, the Governments of which were the Commonwealth Government and the State Government".[47]

The British Attorney-General, in his advice, stated that he found the above statement from the brief "wholly convincing".[48] In relation to whether UK Ministers should advise the Queen on the termination of residual links with Australia, he noted that UK Ministers had a formal role to play because of their constitutional relationship with the States, but that they should advise Her Majesty to accept whatever has been decided upon by the Commonwealth and the States. If, however, the proposals had an adverse effect on the Queen of the United Kingdom (apart from the termination of her functions regarding the States) or as Head of the Commonwealth, then he thought it would be appropriate for UK Ministers to advise her on the substance of the proposals. This was because the United Kingdom government was *primus inter pares* in advising the Queen.

British officials decided that the Australian proposal could not be faulted constitutionally and that they had no ground to attack it. Mrs Thatcher stated that it would be "too colonial for words" for the British

government to interfere, and she supported the proposal.[49] The British Foreign Secretary, Sir Geoffrey Howe, agreed that the right of Premiers to advise the Queen directly was a "consequence of Australia having been established as a federation with a fragmentation of sovereign powers".[50]

Even though it was no longer supported by the British government, Buckingham Palace continued to object to the *Australia Acts* proposal. It was concerned that the Queen might be faced with "outlandish advice". The Queen's Private Secretary took on negotiations directly with the Commonwealth government, using his status as the Private Secretary to the Queen of Australia, rather than the Queen of the United Kingdom. This worried the British government, which considered that the "independence negotiations" should be conducted by British Ministers, not the Palace.

In January, 1985 Senator Evans told the British High Commissioner that Australian patience was wearing thin, and suggested for the first time that the Queen might be formally advised to act despite her personal objections. Senator Evans presented to the Queen's Private Secretary a paper that accepted the States' arguments about sovereignty. It said:

> "The States are jealous of their sovereignty, and the Commonwealth has no wish to impinge upon it. The States are not prepared to solve one offence by committing themselves to another—that is, by handing to the Australian Prime Minister the right to recommend or block appointments of State Governors who, in the States, exercise significant constitutional authority. Any such solution would run counter to the nature and history of federation in Australia, as shown by the express provisions of the Commonwealth Constitution continuing the constitutions and residual sovereign powers of each State".[51]

The Palace remained unconvinced. Finally, the formidable Sir Geoffrey Yeend, the Secretary of the Department of the Prime Minister and Cabinet, travelled to London to secure the Queen's agreement. One Foreign Office official hoped that the Palace appreciated the beauty of the situation that the "Secretary of an Australian Prime Minister, associated with the idea of a republic and an enemy of State rights, is obliged, in the face of Palace objections, to argue the case for how The Queen might entrench Her position in the Australian States".[52]

Second hand sources report that Sir Geoffrey explained that the package would fall if direct access to the Queen by State Premiers was removed, and that the Australian Prime Minister therefore had no alternative but to advise that the Queen accept the entire package. This would be the case for both his informal and formal advice to the Queen. The Queen had no choice but to agree or cause a constitutional crisis of enormous proportions. She agreed to the enactment of the *Australia Acts,* but the Palace continued to negotiate a convention to protect the Queen's position.

While s.7 of the *Australia Acts* limited the Queen's powers with respect to the States to those of appointing and removing State Governors, the Queen was still to have the capacity to exercise her other powers while visiting a State. She did not want to be advised, for example, to read a speech upon the opening of a State Parliament that criticised one of her other governments. After much negotiation, it was agreed that the Queen would not have to act upon the advice of State Premiers, when visiting the State, unless she agreed to do so.[53] A convention was agreed that when Her Majesty was present in a State she would "only do what she wants to do". An attempt to write this into the *Australia Acts* was abandoned, as it was too stark a departure from the principle of responsible government. Effectively, it gave the Queen the discretion to reject advice. Instead, the final form of the agreed "convention" is that the Queen will only perform functions or exercise powers within a State if there is prior and mutual agreement on the subject.

The effect of the *Australia Acts*

Apart from this convention, s.7 of the *Australia Acts* 1986 requires the Queen to act upon the advice of State Premiers with respect to the appointment and removal of State Governors. What effect did the *Australia Acts* have upon the status of the Queen of Australia? Clearly, as Sir Samuel Griffith recognised in 1904, there were separate "Crowns" with respect to the States from their creation, to the extent that the term "Crown" refers to separate bodies politic or to separate executive governments. However, to the extent that the "Crown" refers to the role of the Sovereign with respect to a body politic, the position was different. Until the *Australia Acts* came into force, it was the Queen of the United Kingdom who exercised powers with respect to the Australian States. The Queen of Australia was confined to dealing with matters within the executive authority of the Commonwealth level of government.

The *Australia Acts* terminated the responsibility of British Ministers to advise the Queen with respect to State matters,[54] and instead provided for State Premiers to advise the Queen on the exercise of any remaining

powers she holds with respect to the States.[55] Does this make Her Majesty now Queen of Victoria or Queen of New South Wales? According to the orthodox analysis above, it would do so. Indeed, Lord Bingham of Cornhill in the *Quark Fishing Case*, expressly referred to Her Majesty as "Queen of New South Wales",[56] pointing to an authority from 1873,[57] but as discussed above, the reasoning in that case is flawed.

The Australians who negotiated the *Australia Acts* avoided the issue, preferring the safety of ambiguity to the potential conflict that might arise if the matter were dealt with explicitly. British officials however contemplated the issue. They accepted that orthodox reasoning would lead to the view that the Queen would become Queen of Victoria and the other States. However, in their pragmatic style, they also accepted that the role of the Queen of Australia could be expanded so that there is one Crown but with different advisers—a form of federal Queen.[58] They left it to Australians to determine which course they pursued. That is a matter now for us to decide.

Endnotes:

* Much of the material in this paper is derived from A Twomey, *The Chameleon Crown—The Queen and Her Australian Governors* (Federation Press, Sydney, 2006), which in turn is based upon British and State Government records.

1. *Official Record of Debates of the Australasian Federal Convention* (Legal Books, Sydney, 1986 (reprint)), Sydney, 1891, p. 866, per Sir Samuel Griffith.

2. *Ibid.*, p. 874, per Sir Samuel Griffith.

3. *Ibid.*, p. 875, per Sir Samuel Griffith.

4. Telegram by the Queensland Lieutenant-Governor to the Colonial Secretary, 14 October, 1901.

5. Colonial Office, internal memorandum, 14 October, 1901.

6. Telegram by the Queensland Lieutenant-Governor to Colonial Secretary, 17 October, 1901.

7. (1904) 1 CLR 204.

8. *Ibid.*, per Griffith CJ at 231.

9. *Commonwealth v. New South Wales* (1906) 3 CLR 807, per Griffith CJ at 813-4.

10. *R v. Sutton* (1908) 5 CLR 789, per Griffith CJ at 796.

11. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129, per Knox CJ, Isaacs, Rich and Starke JJ at 152.

12. *R (on the application of Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2006] 3 All ER 111.

13. *Ibid.*, per Lord Bingham of Cornhill at [10] and [19]; and per Lord Hope of Craighead at [72] and [76]. See also per Lord Hoffman at [64], on the slightly different (and also dubious) point that the actions were taken under a law of South Georgia, rather than a law of the United Kingdom.

14. *Ibid.*, per Lord Bingham of Cornhill at [10]; and per Lord Hope of Craighead at [76].

15. R Brazier, *Constitutional Reform and the Crown*, in M Sunkin and S Payne, *The Nature of the Crown* (OUP, Oxford, 1999); S de Smith and R Brazier, *Constitutional and Administrative Law* (Penguin

Books, London, 7th ed, 1994) at 124; and R W Blackburn, *The Queen and Ministerial Responsibility* [1985] Public Law 361.

16. *Sue v. Hill* (1999) 199 CLR 462, per Gleeson CJ, Gummow and Hayne JJ at [83]—[88].

17. Letter by Lord Stamfordham, Buckingham Palace, to Mr R Howorth, UK Cabinet Office, 15 July, 1930, noting that the King wanted to appoint as his representatives persons personally known to him.

18. Z Cowen, *Isaac Isaacs* (OUP, Melbourne, 1967), pp. 191-205. Isaacs took up office in 1931.

19. UK, *Parliamentary Debates,* House of Commons, 16 December, 1930, col 1037; and Memorandum by the Dominions Secretary, *The Constitutional Position of New South Wales*, Cabinet Paper, July, 1931, CP 177 (31).

20. See, for example, the appointment of the Victorian Governor: Victoria, *Government Gazette,* 18 February, 1986, p. 392; and the Letters Patent of 14 February, 1986 made with respect to South Australia by the Queen of the United Kingdom, not the Queen of Australia: SA, *Government Gazette,* 6 March, 1986, pp. 518-20.

21. Memorandum by Mr Watts, Deputy Legal Adviser, Foreign and Commonwealth Office (FCO), to Mr Thompson, FCO, 17 February, 1986.

22. Letter from Mr Whitlam to Mr Heath, 18 January, 1974.

23. *The Term "Australian Government"* (1974) 48 ALJ 1.

24. *Royal Style and Titles Act* 1973. See: A Twomey, *The Chameleon Crown—The Queen and Her Australian Governors* (Federation Press, Sydney, 2006), Ch 9.

25. See: Twomey, *op. cit.*, Ch 10.

26. Opinion of Law Officers of the Crown, 12 June, 1973; Opinion of the UK Attorney-General, Sir P Rawlinson, 27 July, 1973; Memorandum by the Lord Chancellor, Lord Hailsham, to the UK Prime Minister, Mr Heath, 25 July, 1973; Memorandum by the Foreign Secretary to the Defence and Overseas Policy Cabinet Committee, July, 1973; and Advice by Professor de Smith to the UK Government, July, 1973.

27. Record of meeting of the UK Defence and Overseas Policy Cabinet Committee, 30 July, 1973.

28. Letter by Sir M Charteris, Buckingham Palace, to Mr Acland, FCO, 22 January, 1974.

29. *Commonwealth v. Queensland* (1975) 134 CLR 298, per Murphy J at 335; and Letter by Sir M Byers, QC, Commonwealth Solicitor-General, (1981) 55 ALJ 360-1.

30. Letter by Sir M Charteris, Buckingham Palace, to Mr Wright, No 10 Downing St, 27 December, 1974.

31. J Fajgenbaum and P Hanks, *Australian Constitutional Law* (Butterworths, Melbourne, 1972), pp. 19-20; R D Lumb, *The Constitutions of the Australian States* (4th ed, UQP, Brisbane, 1977), pp. 70-2; Sir W Campbell, *The Role of a State Governor*, 1988 Endowed Lecture of the Royal Australian Institute of Public Administration (Queensland Division), 22 March, 1988, p. 2; and M Stokes, *Are there separate Crowns?* (1998) 20 *Sydney Law Review* 127, at 133, fn 27.

32. UK Cabinet Minute DOP(73) 77, 17 December, 1973.

33. See: Twomey, *op. cit.*, Chs 5 and 13.

34. Letter by Mr Fergusson, FCO, to Sir M Charteris, Buckingham Palace, 6 January, 1976.

35. Transcript of the Premiers' Conference, 24 June, 1982, p. 44.

36. See Twomey, *op. cit.*, Ch 14.

37. Despatch by Lord Carrington to Sir R Cutler, 19 November, 1979.

38. Letter by Sir P Moore, Buckingham Palace, to Sir A Acland, FCO, 2 March, 1984.

39. See Twomey, *op. cit.*, pp. 230-4.

40. Teleletter by Mr Chick, FCO, to Sir J Mason, UK High Commissioner, Canberra, 7 October, 1983.

41. *Commonwealth v. Tasmania* (1983) 158 CLR 1.

42. Memorandum by Sir P Moore, Buckingham Palace, to Mr Dove, Protocol Department, FCO, 11 November, 1983.

43. Letter by Mr Chick, FCO, to Sir J Mason, UK High Commissioner, Canberra, 1 November, 1983.

44. Memorandum by Mr Watts, Legal Adviser, FCO, to Mr White, FCO, 26 October, 1983.

45. Memorandum by Mr Watts, Legal Adviser, FCO, to Mr Chick, FCO, 22 November, 1983.

46. Letter by Sir A Acland, FCO, to Sir P Moore, Buckingham Palace, 14 February, 1984.

47. Letter by Mr Watts, Deputy Legal Adviser, FCO, to Mr Steel, Law Officers Department, 22 March, 1984.

48. Letter by Mr Saunders, Legal Secretary, UK Attorney-General's Chambers, to Mr Watts, Deputy Legal Adviser, FCO, 19 April, 1984.

49. Letter by Mr Butler, Principal Private Secretary to Mrs Thatcher, to Sir A Acland, FCO, 11 September, 1984.

50. Letter by Mr Appleyard, Private Secretary to the Foreign Secretary, to Mr Butler, Principal Private Secretary to Mrs Thatcher, 8 February, 1985.

51. Commonwealth "Aide-Memoire" provided by Senator Evans to Sir P Moore, February, 1985.

52. Memorandum by Mr Chick, FCO, to Dr Wilson, FCO, 8 May, 1985.

53. Twomey, *op. cit.*, Ch 20.

54. *Australia Acts* 1986, s.10.

55. *Ibid.*, s.7.

56. *R (on the application of Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2006] 3 All ER 111, per Lord Bingham at [9].

57. *Re Bateman's Trust* (1873) LR 15 Eq 355 at 361. The case, however, is not authority for the divisibility of the Crown. Rather, it supports the notion of the indivisibility of the Crown.

58. Letter by Mr Watts, Deputy Legal Adviser, FCO, to Mr Steel, Law Officers Department, 22 March, 1984.

Chapter Ten

Sovereignty in the Australian Federation

Michael Manetta

Delivering its judgment in 1920 in the apparently-notorious *Engineers' Case*, the High Court made the following statement:

> "For the proper construction of the Australian Constitution, it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and … radically distinguish it from the American Constitution…. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government".

Drawing support from the preamble to the *Commonwealth of Australia Constitution Act*, the Court went on to identify the doctrine of the unity and indivisibility of the Crown, in its sovereignty throughout the King's dominions, as a living principle of Australian constitutional law:

> "Though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality. The Act establishing the Federal Constitution of Australia [was] passed by the Imperial Parliament for the express purpose of regulating the royal exercise of legislative, executive and judicial power throughout Australia…",

powers which it went on to characterise as the *sovereign functions of the Crown.*

Seventy-two years later, the Mason Court, delivering its judgment in the *Capital Television Case*, felt able to say:

> "The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives. In the case of the Australian Constitution, one obstacle to the acceptance of that view is that the Constitution owes its legal force to its character as a statute of the Imperial Parliament in the exercise of its legal sovereignty…. Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government in which the elected representatives exercise sovereign power on behalf of the Australian people".

The Court pointed to the referendum procedure in s. 128 as the source of popular power over the Constitution, and characterised the *Australia Act* as having *marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people.*

The first statement is admirably simple, perhaps because it speaks to us from a simpler time. Sovereignty belongs to the King; it consists of the sum of legislative, executive and judicial powers and is exercised by the King or his agents throughout His Majesty's dominions. By contrast, the second statement is rather diffuse. It says nothing of the Crown; instead, it speaks of sovereignty as something that used to belong to the Imperial Parliament and which now belongs to the Australian people. Moreover, it appears to consist only in the legislative and executive powers exercisable on their behalf by their elected representatives.

The purpose of this paper is twofold; first, to investigate what happened between these two statements of principle that could so have muddied the waters of legal and political thought in this country as to prompt members of its most august tribunal to find the supreme authority of the State vested in the members of the federal legislature; and, second, to postulate a sounder principle of sovereignty having regard to Australia's status as an independent and federal kingdom.

Since the dissolution of the British Empire and the slow eclipse of the old Imperial sovereignty familiar to the judges of the *Engineer's Case*, a view has gained currency in this country that the federal Constitution has become its fundamental law. This may derive from a tendency, deliberate or otherwise, to compare it with the Constitution of the United States. And the fond contemplation of a great federal charter given to itself

by a people freshly liberated from British imperial tyranny may tempt some of us to try and imbue our own instrument of federation with a similar mystique, to make of it a font of popular sovereignty, and to neglect the warning from 1920 that ours is in reality a radically different system.

First principles

So let us return to some basic rules. First of all, we call the Queen our Sovereign. That means, amongst other things, that she is the source of all legal power in this country. No law is passed, no judgment given, no hideous new development approved, save by Her Majesty's authority. True it is, there is little that Her Majesty can do personally without advisers or witnesses to authenticate her acts, and there is much that over the course of time has been delegated to subordinates; but, with equal certainty, nothing that can be done in the governance of the realm can be done without her consent either in person or by her duly appointed agents.

Second, ever since the settlement of the so-called Glorious Revolution of 1688, the common law of England has recognised what is called the *sovereignty* (or sometimes the *supremacy) of Parliament*—that is, that plenary authority, the power to make and unmake any law whatsoever, reposes in the Queen-in-Parliament. The consequence of this rule of recognition, as generations have been taught at the law schools, is that the British Parliament could pass any law it liked. In a whimsical mood, it might ban smoking on the streets of Paris and exact a fine for it (which it never did); in a fanatical mood, it might pass a bill of attainder to declare a man guilty of high treason and put him to death (which it frequently did). Now, the sovereignty of the Crown and the sovereignty of Parliament is a distinction without a difference because, in law, Parliament is but a council of advisers to the Crown, albeit an indispensable one. It owes its summons, continuance and dissolution to the will of the Crown, and every Bill it passes is in form either a petition or a submission to royal power—*advice and consent*, according to the familiar forms of statutory language. The Crown in Parliament is simply the highest expression of the Crown's sovereign power.

In a unitary state, the concept of the Queen-in-Parliament as the repository of absolute authority is an uncontroversial proposition. In a federation, the matter becomes complicated because it is in the nature of a federation that power is divided between the centre and the regions. In this country, the problem of sovereignty in a federal context, however, could not really have been of any moment under the Empire. So long as the Empire was a unitary State, in the sense that the British Parliament possessed plenary authority to override the laws of any of the Dominions or Colonies, combined with the doctrine of the one and indivisible Crown, the Queen in her Imperial Parliament could rightly be said to exercise complete sovereignty over Australia. In the Colonies, it seems to me, the unity of the Crown was rather an important concept. There was only one King and one sovereignty governing every parcel of British territory, and the evolution of local institutions did not undermine that principle. It merely meant that the people of a colony were subject to two sets of organs, local and imperial, by which the same sovereignty was exercised.

Moreover, the imperial organs which exercised the Crown's sovereignty remained the one supreme and, as it were, authentic, expression of that sovereignty, and the British government and Parliament and the Judicial Committee of the Privy Council respectively retained ultimate executive, legislative and judicial authority over the people of each colony. There was no separate Crown in relation to each colony, only two different channels of authority with one clearly subordinate to the other.

When the people of the Australian colonies framed the federal Constitution, they did not agree to parcel out sovereignty to a new entity called the Commonwealth; they merely agreed that the existing sovereign might exercise aspects (i.e., the federal aspects) of that sovereignty through new organs of government apart from the Imperial and colonial organs of government then existing. Federation may be said to have united one people under one Crown; indeed it is more accurate to say that Federation brought closer union to a people already united under one Crown. It certainly did not erect an additional and separate Crown with an additional and separate sovereignty over them.

Post-Imperial evolution

The unity of the Crown is thus the cardinal principle which formerly bound Australia to the United Kingdom and to the other parts of the Empire in one imperial sovereignty; and, today, it continues to bind the States and the Commonwealth in one national sovereignty. Hand in hand with the dissolution of the Empire went the erosion of this principle as it applied between the Crown in the United Kingdom and the Crown in the self-governing Dominions, such as Australia, so that the Crown in each country ultimately evolved into a separate legal entity linked only in the person of the Monarch. The milestones of this process of evolution are as follows:

- 1926: Resolutions of the Imperial Conference made the Governor-General the personal representative of the King rather than of the British Government, and provided for Dominion Prime Ministers to advise the King directly rather than through the relevant British Secretary of State.
- 1931: The *Statute of Westminster* terminated the power of the British Parliament to legislate for a Dominion without its request and consent, though preserving that right in respect of the Australian States.
- 1968 & 1973: Commonwealth legislation abolished appeals to the Privy Council from the High Court and from any court in matters of federal jurisdiction, though appeals remained from State Supreme Courts in non-federal matters.
- 1986: The *Australia Acts* terminated all residual authority of the United Kingdom in relation to the Australian Commonwealth and its States.

It is an evolution neatly reflected in the changes made from time to time to the Royal Style and Title, as follows:

- Pre-1953: *by the Grace of God, of the United Kingdom of Great Britain and (Northern) Ireland and of the British Dominions Beyond the Seas, Queen, &c.*
- 1953 to 1973: *by the Grace of God, of the United Kingdom, Australia and Our other Realms and Territories, Queen, &c.*
- Post 1973: *by the Grace of God Queen of Australia and of Our other Realms and Territories.*

Realm, of course, is simply French for *kingdom,* and it is entirely accurate to say that, nowadays, the relationship between the United Kingdom and Australia is that of the merely personal union of two separate kingdoms.

No internal separation

By contrast, no such evolution and separation has occurred between the Crown as representing the Commonwealth and the Crown as representing any of the States, and, accordingly, it cannot be correct, in my opinion, to speak of Australia as a so-called heptarchy of seven "Crowns", in the terms once favoured by the *Turnbull Report* on abolition of the monarchy. It is a corollary of that continuing unity, that it is simply wrong to speak of the Queen as in any sense the *Queen of Victoria* or the *Queen of South Australia.* Such a title is not merely superfluous or *infra dig*., it is legally inept. Common sense alone tells us the States are not separate kingdoms.

Like the jettisoning of spent stages in a rocket, the division of the Imperial aspects of the Crown did not disturb the unity of its remaining aspects, Commonwealth and State. So, just as the doctrine once gave legal expression to the political unity that was the Empire, it continues today as the only legal expression of the federal union and of Australian sovereignty. As such, it may rightly be said to represent, in a legal sense, the essence of nationhood in this country.

This point bears careful analysis. It has been suggested by some commentators, and by the *Turnbull Report*, that the separation of Crowns is occasioned and can be identified by a change in the *channel of advice* to the Queen. Thus, it is said that when the Australian Prime Minister became entitled in 1926 to tender advice directly to the Monarch as to the appointment of the Governor-General (rather than through, and with the approval of, the Dominion Secretary), the British and Australian Crowns became distinct. As a corollary of this, it is suggested that when a similar development occurred in relation to the appointment of State Governors, by virtue of s. 7 of the *Australia Acts* 1986, the State and Commonwealth Crowns became, perforce, distinct and must now be regarded in terms of a heptarchy.

This analysis is imprecise and uncompelling as a matter of law, quite apart from the fact that it blithely ignores the political reality that, in 1926, no-one would have dreamt of regarding the Australian and British Crowns as distinct. The *Engineers' Case* itself, which is the High Court's most prominent enunciation of the unity of the Crown, was decided only six years before.

In my view, the most principled basis on which to posit the separation of two Crowns can only be the termination of all legislative, executive and judicial competence of one over the subjects of the other. The Crown of the United Kingdom no longer has any such competence over any of the people of Australia. The people of Australia, however (Territorians aside), continue to be subject to both Commonwealth and State legislative, executive and judicial competence, so the Crown, of which those two competencies, so to speak, are an emanation, remains one. In short, if one is subject to one Crown authority but not to another, the Crowns are separate; if one is subject to the authority of both, the Crowns are one.

We may speak loosely of the *Commonwealth Crown* and the *State Crown* but we mean, in law, the one Crown acting through a particular agency, Commonwealth or State. It is well established of course that the

Crown may deal with or even sue itself in different capacities, with the relevant dealings and suits conducted by the appropriate agent. Indeed, agreements entered into, or litigation instituted, between the Commonwealth and the States is so commonplace that we are inclined to forget that the Crown is really agreeing with itself or sueing itself, and the unity of the Crown becomes somewhat obscure. So, for most purposes, the unity of the Crown does not impress upon the day-to-day operations of government.

I say *for most purposes*; but for some purposes—among which is the sovereignty of the Crown and the attempt to remove the Crown from a Constitution, be it State or federal—the unity of the Crown has, in my opinion, profound implications. In particular, the republican argument that the Crown can be removed from the Commonwealth by the referendum process provided by s. 128 of the federal Constitution, and done, what is more, without affecting the States, is founded on a misconceived view of the nature of sovereignty in Australia. In this context, the distinction has great importance. Following the eclipse of the paramountcy of the Westminster Parliament, there has been a tendency, after the American fashion, to regard the federal Constitution as the paramount law of Australia; and, as a consequence, to regard the people as the ultimate arbiter of the Constitution, and the Crown as merely an emanation or component feature of that Constitution—almost as if the Empire had never existed but that, instead, in 1900 the people of the colonies, by their vote, had created a vacant Australian throne and freely summoned Queen Victoria to ascend it.

Such sentimental anachronism, representing as it does the yearnings of some for a different past, makes good copy but bad law. So let us take a leaf from *Engineers'* and turn an unsentimental eye to the text of the Constitution.

The significance of the Preamble

Since, as I mentioned earlier, the unity of the Crown is the legal expression of the federal union, and as such of Australia as a nation, it is hardly surprising that it should be one of two essential things and, indeed, the first of two essential things, mentioned in the statute which brought about the union. Thus, the Preamble to the *Commonwealth of Australia Constitution Act* 1900 provides:

> *"WHEREAS the people … have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland and under the Constitution hereby established….".*

Having recited the will of the people as the political desire to create the Commonwealth, the Act stipulates two quite separate things which the new union is to be *under*: A—the sovereignty of the Crown; and B—the new Constitution (as set out in covering clause 9 of the Act). They are the two necessary legal mechanisms to establish the Commonwealth. The sovereignty is the power and the Constitution the manner of its exercise.

Now, Item A, the sovereignty of the Crown, is necessary to the Commonwealth because without the Crown the Commonwealth has no substance. In the contemplation of the law, the Commonwealth *is* the Crown. The "Commonwealth" considered apart from the Crown is only an abstraction. It means no more than the "federal aspects" of sovereign power thought of collectively. The Monarch, on the other hand, is the concrete person in whom all sovereign power, including these conceptually federal aspects, resides.

Item B, a Constitution, is necessary to the Commonwealth in order to enumerate the federal aspects of the Crown's sovereignty, legislative, executive and judicial, and to provide for the organs through which the Crown is to exercise them.

Now, Item B, the Constitution, is comprised in but one clause (cl. 9) of the Imperial statute, and contains within itself (in s. 128) a mechanism for its own amendment through the referendum process. Logically, s. 128 cannot be used to amend anything other than what is contained in covering clause 9 of the Act. It can only be used to amend Item B, the Constitution; it cannot be used to amend Item A, which stands outside the Constitution, any more than it can be used to amend any of the other covering clauses of the Act, i.e., clauses 1 to 8, which, similarly, stand outside the Constitution.

A bar to unilateral federal action

It may be argued against this proposition that the Preamble, being merely a preamble and not a legislative enactment, is no bar to a constitutional amendment impacting on the sovereignty of the Crown; but the riposte to that must be that Item A does not *need* to be enshrined in a legislative enactment to have effect. The full and perfect sovereignty of the Crown over Australia pre-dates Federation and the Constitution; it was not created by, and does not owe its continuance to, the *Constitution Act*. What the Preamble does is to serve as a dictionary to the whole Act and, by clearly distinguishing the sovereignty of the Crown from the provisions

of the federal Constitution, defines something which is at once separate from the Constitution and beyond the reach of s. 128.

In my opinion, the legal process of statutory interpretation by which this conclusion is reached is as compelling as it is common-sense:

(a) Parliament does not legislate in vain—i.e., when specific words are used they are there for a reason.

(b) "Crown" is mentioned separately from "Constitution" because the two are different things. If they were not—i.e., if the Crown were merely a part of the federal Constitution—there would be no need to make separate mention of it.

(c) What, then, is the distinction between Crown and Constitution? It is, quite simply, the difference between the repository of sovereign power and the rule-book for its exercise. The Commonwealth is *under* both of them, but neither of them is in any sense *under* the other. Thus, the Crown is bound to comply with the Constitution in the exercise of its power, whilst the Constitution can *only* ever provide for the exercise of a power vested in the Crown.

I have said that s. 128 cannot be used to amend anything in the Act other than Item B. It goes without saying that it cannot be used to introduce into Item B anything inconsistent with Item A. By definition, as I have said (contained in this dictionary Preamble), the Constitution is a document enumerating powers which are elsewhere stated to belong to the Crown. Amendments may amplify or restrict the powers, but they cannot withdraw them from the person to whom they belong. That might be true if the sovereign powers of the Crown were creatures of the Constitution, but they are not.

In this regard, special mention should be made of ss. 1, 61 and 71 of the Constitution, which "vest" the pre-existing sovereign powers of the Crown of a "federal nature"—legislative, executive and judicial—in the Parliament, in the Queen and in the High Court and other federal courts, respectively. Cannot these sections—or, indeed, only ss. 1 and 61 (since, although the courts are Her Majesty's Courts, no express mention of the Queen's function in relation to them is made in s. 71)—be amended pursuant to s. 128 to remove references to the Queen? Do these sections not create the powers of the Crown? Do they not "clothe" the Queen with authority which can as easily be removed by an appropriate amendment?

The answer is, in my opinion, that these sections do not create the sovereign powers of the Crown. Again, they merely provide for the manner of their exercise. This is most clearly demonstrable in s. 61, which states that the executive power of the Commonwealth *is vested* in the Queen. It is declaratory of a pre-existing state of affairs. The Queen would still have had the executive power if s. 61 had not been enacted. The distinction, in this regard, between the language of s. 61 (*is vested*) and the language of ss. 1 and 71: (*shall be vested*) merely reflects the fact that the Crown's legislative and judicial powers must, according to the common law, be exercised through institutions (Parliament and Courts) which, on the enactment of the Constitution, were yet to be brought into existence. Nevertheless, those powers, too, existed already. Prior to the summons of the first federal Parliament, some federal legislative powers were exercised by existing State Parliaments, and federal jurisdiction, in the three years prior to the creation of the High Court, by the State Supreme Courts. By contrast, for the exercise of executive power, the common law asks only the presence of a witness, and if nothing had been said about it in the Constitution, nothing more need technically have been done for the authentic exercise of federal executive power than that the Queen have a Great Seal struck and delivered into someone's possession, so creating the requisite responsible Minister and an Executive Council of one.

A bar to unilateral State action

Support for the proposition that the sovereignty of the Crown cannot be altered by merely altering the federal Constitution is to be gained from a rigorous analysis of the consequences of the opposing view. If I am wrong, and the Preamble is legally ineffective to restrain the use of s. 128 to abolish the sovereignty of the Crown in the Commonwealth, then it follows that the Preamble must likewise be ineffective to prevent a State from abolishing the sovereignty of the Crown in relation to the State; for there is certainly nothing in the body of the *Commonwealth of Australia Constitution Act* or in any other legislation which would prevent a State from so doing.

The unilateral abolition by the act of a State Parliament of the monarchy's functions in respect of the State, if not restrained by the legal doctrine expressed in the Preamble, by which the *entire* constitutional structure of the country is placed in a very real sense *under the Crown,* is legally restrained by nothing. To be sure, such action could have no effect on the continued functions of the Crown in its federal aspects over the people of the State. So its effect would be, not a secession of the State from the union, but a severance of the

unified sovereignty of the Crown and the creation of a dual sovereignty over the State, exercised jointly by the people of the State (or whatever new sovereign is proposed) and the Crown in right of the Commonwealth—a *condominium,* as it is called, like New Hebrides under Anglo-French rule.

No-one, I dare say, would be prepared to suggest that the Parliament of a State has or ought to have the competence to pass such a law. To put it broadly, one has a "bad feeling" about conceding the right of a single State to abolish the monarchy "off its own bat".

This "bad feeling" will invariably be for one of two reasons, which are critical to a significant aspect of the republican position. Briefly stated, one reason (and, I think, the more compelling) is that the States *alone* cannot abolish the monarchy for the same reason that the Commonwealth *alone* cannot do so—**because unilateral rejection of the Sovereign goes right to the heart of the intended nature of the federal union as being a union under *one* Sovereign. That is what was *intended*, because that is what is recorded as having been *agreed*, and the Preamble is the very place where that agreement is recorded.**

An alternative reason for the "bad feeling", which prompts one to disallow such unilateral power to the States but which does *not* pose a corresponding restriction on the Commonwealth, finds favour with the republic cause. According to this argument, the Commonwealth (by which is meant the federal institutions of the union) can change the Sovereign through amendment to the federal Constitution, but the States, individually, cannot, even in respect of the purely State aspects of sovereignty. This is not because the States are constrained by any express legislative enactment prohibiting their Parliaments from doing so, but rather because the States are *inherently inferior* in status to the Commonwealth. The identity of the Sovereign, so the argument runs, is a matter for the Commonwealth alone, and not in any respect for the States.

'Thin line' mysticism

This argument of inherent superiority finds no warrant, in my opinion, in any provision of the *Commonwealth of Australia Constitution Act.* One manifestation of it is what I have heard described as the *thin red line theory*, according to which red lines emanate from the throne beyond the seas, a thick one to the Commonwealth but only a thin one to each of the States. This is all very picturesque but I, for one, cannot find any justifiable foundation for the supposed inherent superiority of the Commonwealth. Of course, federal law prevails over inconsistent State law, but that is merely an adjustment of the rights of competing agencies of the Crown. One cannot extrapolate from that that the sovereignty of the Crown itself must be the province of one only of those agencies, to be altered by simply amending the Constitution of that agency.

Again, no doubt we are inclined to think of the Commonwealth as an altogether grander idea than the State. The Governor-General has precedence before any Governor. The Governor-General is the representative of the nation abroad. Indeed, nowadays, he is a Head of State and, as such, an international person in a sense in which a Governor can never be. His wife is an "Excellency" in her own right. But these are only matters of custom and manners; they are not the basis of constitutional principle. Things might be different if we had adopted the Canadian model of having Provincial Lieutenant-Governors appointed by the Governor-General, so that one could conceive of sovereign power as having been delegated wholesale by the Queen to the Governor-General, and thence strained and sub-delegated in part to the Lieutenants. But in Australia, the red lines emanate direct from the throne, each as thick as the other; there is no straining process, because the Governor-General does not partake in any measure of the authority conferred on the Governors.

The extreme adherents of the "thin red line" theory adopt the view that if the thick red line from the throne to the Commonwealth is severed, *ex hypothesi* the thin ones to the States snap as well—rather as if the whole structure of the union were suspended from the Crown by seven threads, of which only one was thick enough to support its weight. This translates into the notion canvassed in the *Turnbull Report* that, if the Crown is abolished at the Commonwealth level, it is automatically abolished Australia-wide. In reality, there is no warrant for this idea in law or principle or even theory. It is only a fond conclusion drawn from an asserted, but unsubstantiated, superiority of federal institutions and, perhaps, a conviction that s. 128, as a source of popular sovereignty, is, and should be, capable of achieving anything.

The entrenchment of sovereignty

Those who maintain the insignificance of the Preamble sometimes point to the fact that its reference to the *Crown of the United Kingdom of Great Britain and Ireland* is already obsolete as the result of the process of evolution referred to above. But the argument has never been that the Preamble, or the principle embodied in it, cannot be changed at all. It is only that it cannot be changed *by means of s. 128.* And the fact that it *has*

changed really bears out this view. Thus, whilst there is no doubt that the abovementioned words must now be read as a reference to the *Crown of Australia,* it is equally true that none of the changes involved in that process of evolution were achieved by means of s. 128. The legal process of implicit amendment by which these words in the Preamble must now be read as *Crown of Australia* is the result of the legislative changes by which the evolution was accomplished, and those changes were implemented not by s. 128 but by the undisputed authority of the Imperial Parliament, acting either alone or in concert with local legislatures.

There is no doubt that, since 1986, the authority of the Imperial Parliament in Australian affairs has entirely ceased. That does not mean, however, that we are in any sense doomed to a sovereignty which cannot be lawfully withdrawn from the Crown and vested elsewhere. This brings me to the most notable feature of our constitutional arrangements, and that is the system of entrenchment.

One attribute of legal sovereignty is the inability of a sovereign legislature to bind its successors. Perfect sovereignty is the power to make and unmake any law whatsoever. It is axiomatic that the British Parliament had this power, and that attempts to entrench legislative provisions within the United Kingdom were therefore inevitably fruitless. Not so in the colonies however. The *Colonial Laws Validity Act* 1865 *(Imp.)* prohibited a colonial Parliament from legislating contrary to any Imperial statute extending to the colony. It also allowed, by the so-called *manner and form* requirement, for colonial Parliaments to entrench their own legislation, which has been used in some States, for example, to prohibit the abolition of the Upper House except by referendum.

Now, the *Statute of Westminster* and the *Australia Acts* repealed the *Colonial Laws Validity Act* in its application to the Commonwealth and the States, with two effective exceptions. They preserved the manner and form requirement for the States (*Australia Act*: s. 6) and, more importantly, they provided that (apart from whatever amendments may be made to the federal Constitution from time to time under s. 128) no Parliament in Australia could repeal or amend the Constitution, or the *Constitution Act*, or the continuing provisions of the *Statute of Westminster*, or the *Australia Acts*, except by Commonwealth legislation passed with the consent of the Parliaments of all the States (*Statute of Westminster*: s. 8; *Australia Act*: ss. 2 & 15).

This consequence is of vital importance to the proper understanding of Australian constitutional theory because, in my view, it forms the true fundamental law of this country. The mirror image of the old Imperial Parliament is nowadays to be found in the Parliamentary Concert of the Commonwealth and the States. It is in this combination of legislative will that the authority can be found literally to do anything. By this procedure, the Parliaments in concert could remove the fetters that prevent amendment of any part of the Constitution or the Constitution Act, and do so, what is more, without referendum. Indeed, in theory, they could repeal and replace s. 128 itself without reference to the people.

Politically, such an eventuality might be fancifully remote but, legally, it is possible. To that extent, s. 128 can be viewed in its proper place as an inferior source of constitutional authority to s. 15 of the *Australia Acts*. This, in my opinion, is not a theory to be shrunk from, but one to be embraced, particularly as it precludes the debacle of the 1999 republic proposal with its undemocratic complications and implications for the Crown in the minority States. For reasons which I have given, it is the only lawful method (with or without a referendum) by which to abolish the monarchy in Australia—in other words, to change the identity of the Sovereign authority in the federation.

This argument was more fully treated and endorsed in the 1996 Report of the South Australian Constitutional Advisory Council on proposals for an Australian republic. I had the honour to serve on that Council, which was chaired by Associate Professor Peter Howell, a member of this Society. The report rewards careful study, and I commend it to anyone who wishes to enquire into this field more closely.

This "section 15 legislature" is, in my view, an appropriately supreme and appropriately federal organ in which to recognise the sovereign power of the Crown. In the necessary participation of the States, it neatly reflects the original political compact of the people of the separate colonies, as well as having, to my mind, an irresistibly elegant consonance with our British inheritance of common law constitutional theory. The Queen in Parliament, as the omnicompetent legal sovereign of the United Kingdom and of the old Empire, now has a fitting counterpart in Australia. The Queen in Parliament—that is, the Queen acting with the advice and consent of all of her Australian Parliaments—is the true omnicompetent Sovereign of Australia.

Chapter Eleven

Thoughts on *Terra Nullius*

Dr Geoffrey Partington

Disputes about the meaning and significance of words cannot always be resolved by resort to dictionaries. Words used very frequently in political discourse, such as "liberal" or "conservative" or "multiculturism", have had and still have very different meanings according to time and place. We cannot expect our own favoured stipulative definitions to gain universal usage, but it is very important that there should be some agreement on which meaning is being used at any one time. This is very much the case with *terra nullius*, a term used frequently in recent Australian controversies about land rights, but not current in 1788 or the early years of British colonization.

Definitions of *terra nullius*

Over centuries, indeed millennia, the human race followed what Walter Scott called, in *Rob Roy,* the "good old rule" of history: "The simple plan/That they should take who have the power/And they should keep who can". Few invaders enquired about local customs, laws and property rights in lands they over-ran or conquered. By the late 18th Century, however, some international conventions had been formalized in Europe by which states might lay claim to new territories, and by which other states might accept or challenge those claims.

The most widely respected legal opinion in Britain in 1788 on such matters was that of the recently deceased Sir William Blackstone. Blackstone never used the term *terra nullius,* but he was largely responsible for the important legal distinction between conquered or ceded colonies, and colonies of settlement. In one version of his *Commentarie*s he wrote:

> "In conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws, but till he does actually change them the ancient laws of the country remain, unless such are against the law of God, as in the case of an infidel country".[1]

In practice, in many conquered states regarded by Christians as infidel, the English Crown permitted the continuance for many years after the establishment of its sovereignty of not only existing property rights, but also of practices, such as polygamy and suttee, that were illegal in England. Ceded or conquered territories were usually parts of organised states, often ones recently defeated in war. On the other hand, Blackstone maintained, that in "colonies of settlement", or "plantations", all the English laws "are immediately in force".[2]

Blackstone wrote that "colonies of settlement" included all cases when "an uninhabited country be discovered and planted by English subjects", but his definition also included lands very sparsely populated, lands without sovereignty or property rights, and lands lacking cultivation of the soil. Justice Blackburn held in 1971, in *Milirrpum v. Nabalco Pty Ltd and The Commonwealth of Australia,* that Blackstone's definition of "desert and uncultivated", or colonies of settlement, had "always been taken to include territory in which live uncivilized inhabitants in a primitive state of society", not simply or mainly territory which is unoccupied.[3] Wilfred Prest suggested in 2005 that "this was the longstanding legal interpretation or fiction which (Henry) Reynolds sought to overthrow".[4]

Emerich de Vattel, in his 1758 *Law of Nations*, and before him John Locke, held that failure to cultivate the soil meant there was no pre-existing title to land. Vattel considered that:

> "Nations incapable by the smallness of their numbers to people the whole, cannot exclusively appropriate to themselves more land than they had occasion for".[5]

Locke wrote:

> "He that in obedience to this Command of God subdued, tilled and sowed any part of it, thereby annexed to it something that was his Property, which another had no Title to, nor could without injury take from him".[6]

Blackstone's opinion was close to those of Locke and Vattel. This category of settled colony was also very similar to what a century later was called *terra nullius.*

Blackstone recognised, of course, that any actual classification of the population and culture of any particular territory might well be open to dispute. When Cook sailed for the Pacific in August, 1768 he was instructed, like earlier British explorers in that ocean, such as Byron, Wallis and Carteret:

> "… with the Consent of the Natives to take possession of Convenient situations in the Name of the King of Great Britain, or, if you find the Country uninhabited take Possession for His Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors".

Blackstone wrote all the versions of his *Commentaries on the Laws of England* before the 1788 British colonization of New South Wales. He never expressed an opinion on how New South Wales should be classified. During his lifetime there had been many European discoveries, conquests and claims to sovereignty. It was often very difficult for statesmen or lawyers in Europe to determine from reports of explorers and mariners whether, or to what extent, previously unknown places were populated or fell under the sovereignty of an identifiable state or ruler. Before the construction of the telegraph, many months might pass before the colonizing government received reliable information about conditions in far away lands and could make decisions about whether to claim sovereignty over them and how to classify them.

Being unoccupied was in itself insufficient for a new claim to sovereignty: Britain would have strenuously objected to an attempt by another power to occupy one of the Hebrides or Shetlands on grounds of there being no permanent occupants. Neither Cook nor any Aboriginal coastal dwellers had any knowledge of what the interior of Australia might be like. British lawyers and statesmen tried to apply the distinctions made by Blackstone fairly. Where, as in parts of West Africa and New Zealand, the best information was that identifiable political units exercised sovereignty, then claims to possession were based on conquest or cession, usually after formal treaties.

In 1926 M F Lindley defined *territorium nullius* as follows, but it also applies to *terra nullius:*

> "… if a tract of country were inhabited by isolated individuals who were not united for political action, so that there was no sovereignty to exercise there, such a tract would be *territorium nullius* … As the facts presented themselves at the time, there appeared to be no political society to be dealt with; and in such conditions, whatever 'rudiments of a regular government' subsequent research may have revealed among the Australian tribes, occupation was the appropriate method of acquisition".[7]

Lindley was mistaken in talking about "isolated individuals", since Aborigines were very much members of tribes rather than isolated individuals, but his point about sovereignty was valid.

Alan Frost's explanation in 1970 was:

> "… if the indigenous had advanced beyond the state of nature only so far as to have developed language and the community of the family, but no further; if they had not yet mixed their labour with the earth in any permanent way; or if the region were literally uninhabited, then Europeans considered it to be *terra nullius*, in which they might gain permanent title by first discovery and effective occupation".[8]

Those definitions are quite compatible with Blackstone's "settled" colony, provided that it is understood that they do not apply only to completely uninhabited land. There was little justification for Michael Connor to condemn Blackstone as "unclear in language" and "limited in scope", or to refer dismissively to "the familiar and limited Blackstone classifications which had hindered legal thinking".[9]

Henry Reynolds asserted in his *The Law of the Land* that sovereignty and land ownership could be torn apart and treated separately. Michael Connor commented, "In our beginning, the British government assumed sovereignty over the territory and Crown ownership of the land at the same time".[10] Reynolds was right that sovereignty and land ownership could be separated by the Crown, as in its Indian conquests, but Connor was right that no such separation was made in New South Wales or in other Australian colonies. New Holland was considered an exemplary case of a settled colony: land without identifiable territorial units or recognisable forms of government, and virtually devoid of cultivation of the soil or domestication of animals. This was the type of territory later described as *terra nullius*.

Aborigines and the land

Keith Windschuttle overstated his case when he implied that the absence in Aboriginal languages of terms corresponding to western proprietorship of land shows that Aborigines had little or no sense of proprietorship. The problem was that the British could not detect from their ships, or after they landed, any clear links between people and fields, buildings, livestock or other goods that could identify stable Aboriginal groups or

political entities with whom treaties might be made or proprietorship defined.

Very soon after the British settlement of Australia began, some Aboriginal groups showed willingness, indeed eagerness, to leave their traditional areas in order to have access to the wonders introduced by the newcomers. W E H Stanner noted that the reported arrival of Europeans "was sufficient to unsettle aborigines still long distances away", and that, "for every aborigine who, so to speak, had Europeans thrust upon him, at least one other had sought them out".[11] Professor Stanner judged that Aborigines' "appetites for tobacco and to a lesser extent for tea became so intense that neither man nor woman could bear to be without", and as a result "individuals, families and parties of friends simply went away to places where the avidly desired things could be obtained". Henry Reynolds agreed that:

> "European goods like steel axes and knives; pieces of iron, tins, cloth and glass were all eagerly sought and used by Aboriginal tribes even before contact had been made with settlers on the advancing frontier. Western food, tobacco and alcohol also exerted a tremendous attraction".[12]

Stanner considered that "voluntary movements of this kind occurred widely in Australia", so that "we must look all over again at what we suppose to have been the conditions of collapse of Aboriginal life". He concluded that:

> "… disintegration following on a voluntary and banded migration is a very different kind of problem from the kind we usually picture—that of the ruin of a helpless people, overwhelmed by circumstances".

One idea Stanner thought needed "drastic revision" was that "to part an Aboriginal from his clan country is to wrest his soul from his body".[13]

Ron Brunton cited "instances of people who are known—from unassailable documentary sources—to have occupied new lands within the life-time of their elders, but who flatly deny that they, or their ancestors, lived anywhere else".[14] Identification of links between Aboriginal groups and land was soon made even more difficult by the smallpox epidemic of 1789, which killed many Aborigines and scattered many others. There is dispute still about whether the smallpox had moved southwards from Macassar contacts or had been brought by the British, but there is no dispute that the number of Aboriginal dead was very high.

Anthropologists have often been deeply divided about Aboriginal customs about land. For example, Radcliffe-Brown held that Aborigines usually had a "very rigid system", characterized by a "small group of persons owning a certain area of territory, the boundaries of which are known, and possessing in common proprietary rights over the land and its products".[15] Tindale held that groups commonly occupied a "discrete territory with finite limits beyond which members have a sense of trespass".[16]

Other scholars disagreed. Lauriston Sharp held that Yir-Yomont clans had "multiple countries which are not contiguous", and exercise the "right of exclusion" only in "exceptional cases in which there is an actual or pretended drain on the resources of the land".[17] Sharp claimed that clans could:

> "… forbid a man crossing clan territory to get from one of his own clan territories to another, but no example of such extreme action could be cited. People gather and hunt, ordinarily, in whatever country they will. Thus there is practically a standing permission which opens a clan's country to all, but this permission may be withdrawn by the clan for those who are *persona non grata*".

Peter Sutton called into question "the very concept of the self-contained tribe". He claimed that, "while most of the [sacred] sites were clustered together, a significant number were separated by sites belonging to other descent groups, while some sites were owned by more than one descent group".[18] Ronald Berndt oscillated between a restricted definition of sacred sites as "secret-sacred" places believed to be dangerous and only to be visited by fully initiated Aborigines, and an extended one of land that was shaped by spirit beings. The extended definition might cover the entire continent.

Warfare was endemic in much of pre-1788 Australia, but was usually limited in scope, largely because captive males could not be put to work in hunter-gatherer societies. If the vanquished were allowed to hunt with the victors, they would very likely try to reverse their earlier defeat. However, women and young boys were often seized and attached to victorious groups. Sutton and Kingsley Palmer were among anthropologists who drew attention to inter-tribal violence among Aborigines. Sutton claimed that peoples such as the Warlpiri and Pitjantjatjara engaged in "imperialism". Palmer described the Walmatjarri as "the greatest colonisers" of the Kimberleys.[19] Few, if any, Aborigines appear to have envisaged any form of sovereignty of the conquerors over the defeated in battle.

The Finniss River case was the first time the Aboriginal Land Commissioner heard a case in which separate and rival groupings of Aborigines pressed claims to the same tract of land. The two opposed Aboriginal groupings were the Maranunggu and the Kungarakany/Warai, each claiming exclusive traditional ownership

of a defined area of land. The case hinged on whether takeover of land by an incoming group was possible in Aboriginal tradition. There was documentary evidence to show that the Maranunggu were interlopers, whereas the Kungarakany were indisputably descendants of a group who had held the contested area in traditional ownership at and after the time of first contact.[20]

Sansom claimed that "the essential issue in the takeover of land in Aboriginal Australia is the process by which *de facto* use and occupancy by an incoming group are converted into ownership as of right and by which *de facto* use and occupancy can be converted into ownership as of right from time immemorial". He observed that "the anthropology of Australian land rights" had recently become "less an applied anthropology of authoritative citation, and more a creative anthropology of inventive interpretation".[21]

H C Coombs acknowledged that the idea of a single unified Aboriginal people is a recent one, and admitted that "it is well known that Aborigines rarely identify themselves simply as Aborigines, but rather as Nyungah, Wiradjuri, Warlpiri, Yolngu, Murri, Koori and so on". Indeed the concept of a nation, with all its attributes, is clearly derivative, and a sense of common Aboriginality developed only out of a shared difference from white Australians. These considerations did not prevent Coombs from invoking a single Aboriginal Nation, with which the Commonwealth should make treaties.

Given that correct interpretation remains difficult even now for professional anthropologists, it was harsh of Reynolds to condemn the earliest British explorers and colonists for failing to understand the many differing Aboriginal customs on kinship. One can almost sympathize with the majority of the High Court of Australia when they decided to hand down their decisions in *Mabo* without troubling themselves too much with all the complications of Aboriginal ties to land, and instead confined detailed inspection to the very manageable Meriam Island.

Coombs believed that all Aborigines, including those who have no recollection whatsoever of any particular land, have land rights. He noted that:

> "While Aboriginal land-owning groups are predominantly made up of those who share a common patrilineal descent, this is not always so. There will also be real, if imprecise rights vested in a range of other persons outside that group".[22]

Coombs conceded that "much of the politicking of Aboriginal society seems to have been and probably still is concerned with the development and extension of claims to the land of other groups". In recent enquiries into native title, conflicting claims have often been made by competing Aboriginal groups, guided and supported by professional anthropologists. In many cases the claimant groups had lost contact with the disputed lands, and depended on accounts of land and traditional knowledge garnered by anthropologists many years ago and now given new currency by their successors.

Evidence from the Northern Territory over recent decades suggests that land rights as such do little to make Aboriginal people more autonomous. In fact, in many areas Aborigines had significantly less employment than before land rights were conceded. Royalties combined with welfare payments are often sufficient to make wage labour or self-employment on the land unattractive. Few of the small Aboriginal businesses set up with government subsidies have had much chance of success, even when Aborigines were eager to make them succeed, because they are situated in remote locations in which the most resourceful entrepreneurs would have found it difficult to survive. Large groups of Aborigines in country towns remain unemployed, not only because many refuse any work, but also because such communities cannot generate the number of jobs required. Most other Australians when unemployed finally move, even if reluctantly, to places where there are jobs, although they would otherwise prefer to stay where they are. If Aborigines will only take jobs which they really like and which permit them unlimited time off for ceremonial and family occasions, and only in places where they most want to be, they may simply commit themselves to permanent unemployment. That would be a strange path towards autonomy.

The separation, whether voluntary or compelled, of many Aborigines from the lands their ancestors had traversed before the colonial era was a major reason why British sympathizers, such as Earl Grey and T F Buxton, did not support attempts to base some form of native title on pre-contact occupancy. Instead they recommended a pursuit of a benevolence that could only be exercised if the Crown held radical title to the land.

South Australia

During the half century between the British settlement of New South Wales and those of South Australia and Western Australia, uncertainty persisted about the relationship between Aboriginal peoples and the land.

In 1835 James Stephen told the South Australian Commissioners, who were responsible for the mechanics of colonization, that the venture "presupposes the existence of a vacant Territory and not only recognizes the Dominium of the Crown, but the Proprietary right to the soil of the Commissioners or of those who shall purchase lands from them…".[23]

Stephen, acting for Sir George Grey, was concerned that there was no limit on the distance inland of this new South Australia, so it might be that it might prove to include territory with a dense population living in organised states, although no rumour had been heard of them. Colonel Torrens replied for the Commissioners that there was no need to worry, since the whole tract consisted of "waste and unoccupied lands", at any rate for legal purposes. Torrens claimed that "it has invariably been assumed as an established fact that the unlocated tribes have not arrived at that stage of social improvement in which a proprietary right to the soil exists".[24] Torrens assured Lord Glenelg that he would "protect the Natives in the unmolested enjoyment of their right of property in Land, should such a right be anywhere be found to exist", which it nowhere would. Perhaps Torrens was disingenuous, but hopes that Aborigines would take quickly and successfully to modernity had already been grievously disappointed and grounds for optimism were slight.

For their part, the South Australian Commissioners recommended that colonization "by industrious and virtuous settlers, so far from being an invasion of the rights of the Aborigines, is a necessary preliminary to the displacement of the lawless squatters, the abandoned sailors, the runaway convicts, the pirates … the worse than savages that now infest the coasts and Islands".[25] This consideration was, doubtless, not the major one for the Commissioners, but the problem was real, even though many lawyers and academics today seem unaware that random violence and anarchy were a serious danger.

Savagery

The descriptions most often applied in the late 18th and much of the 19th Centuries to the peoples of New Holland and Van Diemens Land were "Stone Age people", "barbarism" and "savagery". Savagery did not necessarily denote ferocity. Some tribes were considered to be peaceful savages, but others not so. Some western thinkers such as Montaigne and Rousseau thought in terms of "the noble savage", but more agreed with Thomas Hobbes, in *Leviathan* (1651), that without sovereign power there could be "no arts; no letters; no society; and which is worst of all, continual fear and danger; and the life of man, solitary, poor, nasty and brutish".

Some of James Cook's comments on Aborigines virtually defined what was then thought to constitute savagery:

> "Their houses are mean small hovels not much bigger than an oven … we see this country in the pure State of Nature, the industry of Man has had nothing to do with any part of it".

Cook wrote that the people he saw "do not appear to be numerous, neither do they seem to live in large bodies, but dispersed in small parties along by the riverside".

Cook's claim that along the eastern coast of New Holland "we never saw one inch of Cultivated Land" became a common justification for British occupation. Yet Cook also held that, despite their wretched appearance, the Aborigines "were in reality more tranquil and far happier than Europeans".[26] Cook's relatively warm appreciation of Aboriginal life may have owed something to his adverse reaction to the indolent luxury of Tahiti, and to the courage shown by the first Aborigines he encountered at Botany Bay.

Sir Joseph Banks wrote that the Aborigines he met "seem to have no fixed habitation but move about from place to place like wild beasts in search of food", and:

> "Of Cloths they had not the least part but naked as ever our first father was before his fall; they seemed no more conscious of their nakedness than if they had not been the children of Parents who eat the fruit of the tree of knowledge".[27]

Yet Banks at one point came close to the "noble savage" position:

> "Thus live these I had almost said happy people, content with little, nay, almost nothing. Far enough removed from the anxieties attending riches. From them appear how small are the real wants of human nature".

As well as the absence of agriculture, animal husbandry and settled dwellings that generally denoted the state of savagery, some Aboriginal beliefs seemed to confirm their lowly classification. Some Aboriginals believed British ships were "huge winged monsters" or trees growing in the sea; that the British were their dead kinsmen who had "jumped-up" white; that they themselves might return to earth after death as whites with all their powers and goods; and that smallpox and other epidemics were the work of sorcerers from other

Aboriginal groups, who could kill, even from a distance, with bullocks' teeth, sheep jawbones and fragments of glass.[28] White medical practitioners found it very hard to help sick Aborigines, many of whom would not take recommended medicines at all, or, if convinced of their value, would insist on swallowing the whole lot at one gulp. Anthropologist Josephine Flood has suggested that among some Aboriginal groups religious taboos restricted attempts to change their modes of life because they had been created in the Dreamtime.[29] Flood drew attention to marriage practices such as the ritual deflowering of girl brides given in marriage to much older men. Among some groups a bride's new women kinsfolk pierced her hymen with a digging stick before presenting her to her new husband.

In 1837 a Select Committee of the House of Commons described the Aborigines of New South Wales as:

> "… forming probably the least-instructed portion of the human race in all the arts of social life. Such, indeed, is the barbarous state of these people and so entirely destitute are they of even the rudest forms of civil policy, that their claims, whether as sovereign or proprietors of the soil, have been entirely disregarded".[30]

In 1854, at the laying of the first stone of the State Library of Victoria, Sir Redmond Barry said:

> "Seventeen years have scarcely elapsed since the foundation of the colony which was then inhabited by savages. Probably in the world's history no country has attempted to found both a university and a Public Library within a score of years of its first settlement".[31]

Lord Stanley, then Whig Colonial Secretary and later, as Lord Derby, Conservative Prime Minister, wrote in 1844:

> "There are many gradations of 'uncivilized inhabitants', and practically, according to their state of civilization, must be the extent of rights which they can be allowed to claim, whenever the territory on which they reside is occupied by civilized communities. And it cannot be denied that, among the 'uncivilized nations', the New Zealanders hold a very high place, certainly above the inhabitants of the other Australian Colonies … The aborigines of New Holland generally are broken into feeble and perfectly savage migratory tribes, roaming over boundless extents of country, subsisting from day to day on the precarious products of the chase, wholly ignorant of or averse to the cultivation of the soil, with no principles of civil government, or recognition of private property…".[32]

Such comparisons were not confined to English Whigs and Tories. The American anthropologist Lewis Henry Morgan considered the Aborigines were "several strata below barbarism into savagism, and are nearer to the primitive condition of man than any other investigated".[33] Frederick Engels followed Morgan in dividing the human past into "three main epochs, savagery, barbarism and civilisation", and in dividing savagery into a "lower", "middle" and "upper" stage. No direct evidence remained, they held, of the lower stage of savagery, which had to be postulated as a transitional stage from ape-like ancestors, but "the Australasians and many Polynesians are to this day in this middle stage of savagery".[34] Until the 1970s pre-historians, including the Australian Marxist archaeologist V Gordon Childe, used terms such as "savage" and "barbarian" in much the same way as 19th Century anthropologists and social scientists had done. In 1965 Professor D P O'Connell of the University of Adelaide wrote, "Since the Australian Aborigines were held incapable of intelligent transactions with respect to land, Australia was treated as *terra nullius*".[35] In 1968 Elizabeth Evatt wrote of Aborigines in 1788 as "scattered unorganised tribes".[36]

The opening sentence of Manning Clark's *History of Australia*, published in 1962, is: "Civilization did not begin in Australia until the last quarter of the eighteenth century". By July, 1988 in an essay entitled *The Beginning of Wisdom*, Clark was complaining that:

> "We were all dupes of the myth of the beneficial role of British civilization. The British, we were told, brought civilization to a country where hitherto barbarism had prevailed for thousands of years".

Clark added sarcastically that Australia had supposedly "received the gift of free institutions, the rule of law, civil liberty, tolerance—and the British virtues of justice, decency and fair play". Yes, that is what most Australians supposed, and still suppose.

Clark paid special tribute to Henry Reynolds for having "nailed the lie" that "before 1788 Australia was a land of no people", although Clark did not name any of those who told that lie. Clark praised Reynolds and other historians who had ensured that "the descendants of the British have discovered the evil in their past", so that "the horrors are being faced". As a result, Clark said with pride:

"In all the history departments of the universities and colleges of advanced education, teachers and students are burrowing away in libraries to find more examples of white barbarism and cruelty against the Aborigines".

This is still true, and extends to many courses in English, Geography, Sociology and the various forms of social studies and social sciences.

Political correctness has made it hazardous to discuss why Australian Aborigines' ways of life seem to have changed so little over many millennia. The French philosopher Montesquieu held that it was in temperate zones of moderate fertility, neither too severe nor too bountiful, that human genius most flourished, whilst abundance too easily gained inhibited intellectual rigour and physical exertion, and encouraged indolence and decadence. Harsh environments such as equatorial forest, tundra or desert made it very difficult to cross the ditch. However, although much of the Australian continent is hostile to human comfort, many areas are much better favoured.

The rising of the seas and the submergence of the land bridges between Australia and Asia, and between what are now Tasmania and the Australian mainland, made diffusion of ideas and techniques much more difficult. However, Arnhem Landers learned a few new artifacts and techniques, including dugout canoes, from Macassan traders from across the Torres Strait seeking trepang (sea slugs). Some Aborigines adopted new cultural practices as well, including pipe smoking, songs, wooden sculpture and other art forms. Josephine Flood argues that "Australian soils and climate permit modern agriculture and were amenable to Stone Age horticulture: plants available included taro, arrowroot, yams, wild rice and native millet". Animals that might have been domesticated included brush turkeys, ducks and geese.[37] If these advances had occurred, and had the British made their first Australian colony in Arnhem Land, the land might not have been regarded as a colony of settlement, but one of conquest.

What should have been done?

No Aboriginal group had formal educational institutions, since all the practical knowledge required in adult life was acquired by observation and imitation. The nearest approaches to formal education were rites of passage at puberty, when the young were initiated into the religious lore of the group. Initiation was often a painful procedure that might include tooth avulsion, nose piercing, circumcision, fire ordeals and removal of fingernails.[38] Future warriors had to be able to withstand pain, as had future mothers. No questioning of traditional belief was permitted in traditional Aboriginal upbringing.

Roger Sandall has familiarized us with the concept of "crossing the ditch", the huge gap between hunter-gathering and tribalism on one side and agriculture, domestication of animals, permanent dwellings, literacy and division of labour on the other.[39] That ditch had not been crossed by any Australian Aborigines before 1788. Once New South Wales became organised sufficiently to consider how to educate the children of convicts and free settlers, thoughts were addressed to what, if any, provision should be made for Aboriginal education. Officials and missionaries often started with feelings of optimism, sometimes fuelled by the facility many Aborigines showed in acquiring the English language and in translating one Aboriginal language into another. Their tracking abilities and skill with horses were also recognised. Governor Macquarie believed that, if "cultivated and encouraged", Aborigines would quit their "Wild wandering and Unsettled Habits" and "live in a State of perfect Peace, Friendliness and Sociality".[40] However, early optimism about the prospects of sharing modern ideas and techniques with Aborigines was usually soon quenched, although a number of Aborigines "crossed over" the ditch without being counted. Excessive hope was succeeded by excessive despair.

The American psychologist Jerome Bruner identified two major types of thinking: the narrative and the paradigmatic (or analytical or logico-scientific).[41] The first is concerned to tell a story, the second to analyse experience through empirical induction or deductive logic. The first emerged historically long before the second, just as it precedes it in the individual development of each child. The first is universal, although it may wither or degenerate in some conditions, but the second relatively rare and recent. Story telling is adequate in societies with little or no division of labour that rely on what another American psychologist, Mervyn Donald terms biological memory: recollection of personal experience and oral traditions. However, in more complex societies external memory becomes necessary, as storage devices are developed that can only be utilised by means of intellectual tools forged in disciplined study rather than derived from everyday experience.[42]

Donald noted that:

> "The first step in any new area of theory development is always anti-mythic: things and events must be stripped of their previous mythic significance before they can be subjected to what we call 'objective' theoretical analysis".

He added:

> "Nothing illustrates the transition from mythic to theoretic culture better than this agonising process of demythologisation, which is still going on, thousands of years after it began. The switch from a predominantly narrative mode of thought to a predominantly analytic or theoretic mode apparently requires a wrenching cultural transformation".[43]

Many Aborigines were skilled in narrative, but their cultures had little or no place for this second mode of thought. Abstract knowledge developed slowly and gradually in other continents, whereas the Aborigines were suddenly confronted with techniques and ideas very difficult to accommodate within traditional belief systems. It would have been very difficult for Aborigines to "cross the ditch", even had all the colonists been outstanding examples of western civilization. The period of transition was traumatic, but evasion of its challenges has been, and remains, tantamount to accepting perpetual disadvantage. One major dilemma has been that, in order to enable a new generation to transcend tribal thinking, it seems essential to "catch them early"; but to do this, however scrupulously, may lead to denunciations of kidnapping, racism, even of "cultural genocide".

Many of our politically correct commentators hold that the British settlers and governments were always wrong, whatever policy they adopted. If they tried to share their knowledge with Aborigines, the colonists are accused of wilful undermining of traditional Aboriginal customs; but failure to help Aborigines to cope with modernity is used as evidence of contempt for Aborigines and neglect of their welfare.

Professor Geoffrey Bolton in his 1981 *Spoils and Spoilers* set very high standards. He blamed British colonists and officials in London for being "unequipped to guess at the subtlety and complexity of traditional Aboriginal adaptations to their environment". The colonists also failed in his opinion to appreciate that Aborigines "communicated across distance with a speed suggesting telepathy". Bolton conceded that "sympathetic and patient observers conducted interviews, compiled vocabularies, and wrote down what they could discover about Aboriginal myths and legends", but he regretted that "the recorders were not trained to ask the right questions or to understand the implications of what they were told". And, "too often Aboriginal folklore was seen as merely picturesque and fanciful, and not as an account of practical responses to environmental problems".[44]

The core of Aboriginal policies of Australian governments from the mid-19th Century to the end of the Second World War consisted of protection and segregation. However, as so often occurs, there was a big difference between government policy and the flow of life. Aborigines and non-Aborigines often interbred, and many of their offspring moved into the mainstream of Australian life.

For two decades from the 1950s onwards new policies, articulated most prominently by Paul Hasluck, aimed at greater integration of Aborigines, especially part-Aborigines, into that mainstream. The careers of Sally Morgan, Kathy Freeman, Charles Perkins, Pat O'Shea, Doug Nicholls, Lois O'Donoghue, Gordon Briscoe and John Moriaty are among many stories of success. Hasluck noted that during about forty years from 1930 onwards the question of land rights was seldom raised by Aborigines or whites. He held that:

> "The concept of land belonging to the Crown was valued by most Australians because in the history of land settlement it had been the principle by which land-grabbing had been checked, the squatter had been restrained, the free settler and small selector had been given a chance to obtain land, and citizens had found security of tenure".[45]

From the 1970s onwards, many anthropologists and other social scientists decided that policies of integration or assimilation undermined traditional Aboriginal culture. Instead of helping Aborigines to cross over the ditch, much Aboriginal education was redirected to strengthening their "Aboriginality". The very use of words such as "uncivilized" and "primitive" became politically incorrect and grounds for accusations of racism. All peoples at all times were deemed civilized, and no society was to be deemed primitive, scattered or unorganized. Articles and books appeared with "Aboriginal civilisation" in their title.

Confusion and self-contradiction

Keith Windschuttle and Michael Connor have exposed many examples of academic self-contradiction on *terra nullius* and related issues.[46] Bain Attwood claimed that Windschuttle "has not provided any evidence that academic historians have compared the British colonization of this country to Nazi Germany's treatment of Jews", even though Attwood himself in 2000 had described Australian treatment of Aborigines as "what can be and should be called a holocaust".[47] In her *The Original Tasmanians*, Professor Lyndall Ryan claimed the original Tasmanians were "victims of a conscious policy of genocide".[48] Lloyd Robson claimed that the Aborigines were "dispossessed and destroyed by their invaders and conquerors in an impressive example of extermination".[49]

Dr Dirk Moses, too, claimed that "no Australian historian contends there was an Australian holocaust". That was in 2003, but three years earlier he had written that "Australia had many genocides, perhaps more than any other country". Dr Moses surmised that:

> "… the extremism of statements by (Ron) Brunton, (Hugh) Morgan and Windschuttle suggests that this analysis should be extended by asking whether such figures experience castration anxiety, that is a fantasised danger to their genitals".[50]

Only a few months separated two contradictory claims made by Cassandra Pybus. In 2002 she told Channel Nine viewers that:

> "The Aboriginal people of Tasmania were all but wiped out. I mean it was one of the clearest cases of genocide that we know of and recognised as such at the time".

In 2003 she said of the Tasmanian Aborigines, "I don't want to call it genocide, but I'm not going to tidy it up either".[51]

However, first prize for self-contradiction should go to Henry Reynolds. Some thirteen years ago I drew the attention of a Samuel Griffith Society conference to a large number of inconsistencies in Reynolds' opinions on British and international law at the time of British colonization of Australia, and on whether some form of native title was accepted in Australia between 1788 and the 1992 *Mabo* judgment. To the best of my knowledge, neither Reynolds nor his supporters have ever tried to deny my charges.[52]

Was Britain justified by prevailing concepts of international law in claiming sovereignty over eastern Australia in 1788? "Yes", wrote Reynolds:

> "The British claim of sovereignty over the whole of Australia was not surprising given the attitudes of European powers. It would have been unexceptional at any time in the nineteenth century".[53]

And "No", he wrote:

> "… since Grotius in 1738, Heineccius in 1743 and Wolff and Vattel in the 1760s held that British sovereignty could only extend to the power of keeping out other European or 'civilized' powers, and only then 'as far as the crest of the watershed flowing into the ocean on the line of the coast actually discovered' ".

Was there native title in Australia after 1788? Of course not, Reynolds explained. His statements included:

- "The official view is clear. The British claimed not only the sovereignty over New South Wales—then comprising the whole eastern half of Australia—but also the ownership of all the million and a half square miles contained therein".
- "Mr Justice Isaacs … declared: 'So we start with the unquestionable position that, when Governor Phillip received his first Commission from George III on 12th October 1786 the whole of the lands of Australia were already in law the property of the King of England' ".
- "The commonly accepted view has always been that the Aborigines had no land rights because they were not farmers, did not enclose the land and did not till the soil".
- "Further research may eventually turn up a relevant case or two, but it is reasonable to assume that no colonial court ever defended the Aboriginal right of occupancy". [54]

On the other hand, according to Reynolds:

- "The fact that the blacks were the prior owners of Australia was accepted by many settlers and received official recognition in both Britain and the colonies in the 1830s".[55]
- "The mainstream view has been that native title arose from the incontrovertible fact of occupation".[56]
- "It is beyond doubt, then, that the doctrine of native title was well known and understood in leading legal and political circles in the 1830s and 1840s. Moreover, it was 'fully admitted' to be part of the colonial common law which applied throughout the Empire".[57]
- "Australia started with the land owned by the Aborigines under English common law".[58]

Reynolds was just as ardent in arguing that native title had always been recognised in Australia, as he was in claiming that it had never been acknowledged. You pay your money and you take your choice. Reynolds claimed that his 1981 book, *The Other Side of the Frontier*, was "based on extensive research among a vast array of historical records", but he conceded that it:

> "… was not conceived, researched or written in a mood of detached scholarship. It is inescapably political, dealing as it must with issues that have aroused deep passions since 1788 and will continue to do so into the foreseeable future".[59]

Despite being caught out in errors of citation by reporters Andrew Stevenson[60] of *The Sydney Morning*

Herald and Christopher Bantick[61] of *The Mercury*, Reynolds accused Windschuttle of the very faults of which he himself was guilty. Most ludicrous, in the light of the passages I have cited, he attacked Windschuttle as particularly flawed on "views about Aboriginal land ownership current among the colonists of the nineteenth century".[62]

The invented *terra nullius*

Michael Connor's *The Invention of Terra Nullius* cites numerous Australian historians and others who, following Reynolds, denounced the idea of *terra nullius*. These included Henry Reynolds, Alan Atkinson, Paul Coe, Charles Rowley, Neville Bonner, Barbara Hocking, Greg McIntyre, Rosemary Hunter, H C Coombs, Ann McGrath, Tim Rouse, Peter Read, Stuart Macintyre, Anna Clark, Felicity Collins, Therese Davis, Melanie Lazarow, Lisa Jackson, Jeanette Ward, Chris Cunneen, Jim McAllister, Genevieve Ward, Ben Wadham, Irene Watson, Melissa Nursy-Bray, Christopher Kelen, Merete Borch, Dorothy Parker, Barbara Miller, Martin Crotty, Paul Delfabbro, Andrew Day, Steve Mickler, Lyndall Ryan and Lionel Murphy. Several, although by no means all of these asserted that British claims to Australia were based on the false belief or pretence that in 1788 the land was *terra nullius* in the most radical sense of being unpopulated.

Melissa Nursy-Bray claimed that:

"The declaration of *terra nullius* or 'land of no people' by Captain Cook in 1788 gave a mandate for 'white' Australians to ignore indigenous rights".

It is pleasing to learn that James Cook survived what had been thought a fatal attempt on his life in Hawaii several years earlier.[63]

Paul Coe told the High Court of Australia in 1978 that before British colonization Australia "was occupied by the sovereign Aboriginal nation". His claim for the renewal of that sovereignty was rejected by the then Justice Mason as "inconsistent with the accepted legal foundation of Australia".[64] Just what our former Chief Justice considers now to be the legal foundation of Australia, I do not know.

Notable efforts have been made by others, particularly through The Samuel Griffith Society and the Bennelong Society, to challenge separatism in Aboriginal policy, but Keith Windschuttle has been at the forefront in combating both separatist policies and rackety research. Some academics and publicists were shocked that such ideas should get a public hearing. Alan Atkinson expressed concern that the views of Michael Connor and Windschuttle "should be presented as they have been, with such brazen ease" to a wider public. Atkinson claimed that Windschuttle "turns all to excrement and venom" in his critiques of "black band" Australian history.[65]

Mabo

The majority in *Mabo* claimed that major errors of fact had been made in the legal underpinning of the British colonization of Australia—errors both about the existence of laws among Aborigines and about whether the land was occupied or not.[66] Brennan J urged his colleagues on the High Court to "overrule the existing authorities, discarding the distinction between inhabited colonies that were *terrae nullius* and those that were not".[67] He claimed that by *terra nullius* "the indigenous inhabitants of a settled colony were thus taken to be without laws, without sovereignty and primitive in their social organisation".[68] Aboriginal peoples were not assumed by all the colonial authorities to be without laws, but many of their laws were difficult to understand and some, such as group vengeance, were repugnant to English law once they were understood. And Aborigines were then "primitive in their social organisation", even though Brennan J claimed that it was "discriminatory denigration" to suggest that they "were lower in the scale of social organisation" than Meriam Islanders.

Brennan J urged that International Law be used to put right the defects of Australian courts, especially when international law declares the existence of universal human rights. It is very likely that Brennan J believes that education ranks among "universal human rights". But does he believe that Aborigines enjoyed this universal human right to education during the millennia before 1788? Does he think that traditional initiation of the young into tribal custom, and into the skills of the chase or of food preparation, fulfilled that universal human right?

Toohey J[69] recommended an African concept advanced by Mr Bayona-Ba-Meya, a diplomat from Zaire: "the ancestral tie between the land, or 'mother nature', and the man [sic] who was born therefrom and must one day return thither to be united with his ancestors…". All very spiritual, although not very favourable to multiculturalism. It would bring migration practically to a standstill.

Deane and Gaudron JJ gave great emphasis[70] to "two propositions" that played a major role, they claimed, "in the dispossession and oppression of the Aborigines". One of these propositions was "that the territory of New South Wales was, in 1788, *terra nullius* in the sense of unoccupied or uninhabited land, for legal purposes"; the second was that "full legal and beneficial ownership of all the lands of the Colony was vested in the Crown, unaffected by any claims of the Aboriginal inhabitants". Their Honours alleged that acceptance of these propositions led to Aborigines being treated as a "different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands…".

However, the Crown did not assert that New South Wales was unoccupied or uninhabited, but that it lacked sovereignty, identifiable boundaries, cultivation of the soil and the rudiments of civil society. The second proposition does accord with what was held in 1788, but arose from the absence of evidence of property rights that the Crown could identify. Aborigines were certainly treated as though they were different from the colonists in customs and social organisation, but they were very different. If in 2007 anyone proposed that Aborigines should be expected to live as their ancestors did in 1788, Justices of the High Court would be among the first to condemn that as forcing them to live a "lower life".

Deane and Gaudron JJ[71] held that, had Mabo been "any ordinary case, the Court would not be justified in reopening the validity of fundamental propositions which have been endorsed by long-established authority and have been accepted as a basis of the real property law of the country for more than one hundred and fifty years". Apparently, however, "past injustices" had still so heinous an effect on Aborigines that their reform was too urgent to leave to Parliaments or electorates. It was necessary for the High Court to proclaim that "the lands of this continent were not *terra nullius* or 'practically uninhabited' in 1788". It seemed to be a matter of regret for their Honours[72] that "the validity of the act of State establishing a new Colony cannot be challenged in the domestic courts". That day may yet come.

Deane J and Gaudron J did not try to conceal that they had repudiated what they termed "a basis of the real property law of this country for more than one hundred and fifty years". The essence of what they rejected was the legal doctrine that the original British claim of sovereignty extinguished all prior rights to property, so that after 1788 all titles, rights and interests whatsoever in land were the consequence of some grant from the Crown. Their Honours referred to "the conflagration of oppression and conflict which was, over the century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame". They concluded that "the nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices".

Schools and universities

Earlier I quoted Manning Clark's claim that:

> "In all the history departments of the universities and colleges of advanced education, teachers and students are burrowing away in libraries to find more examples of white barbarism and cruelty against the Aborigines".

That remains the case (apart from the elevation of Colleges of Advanced Education into universities), but the burrowing seems to have become less enthusiastic and very little distinguished scholarship has resulted from it.

In 2006 the Commonwealth Minister of Education, Julie Bishop, convened a "summit conference" on Australian history in our schools. I was invited to take part and was able to do so. Julie Bishop did not invite several of the main combatants in "the history wars" to this "summit" on the grounds that they are extremists. I believe that the Minister ought to have invited them, but the academic Left seemed well represented, as it was almost bound to be, given the ideological balance in our schools and universities.

A keynote paper was presented by Professor Greg Melleuish, one of our ablest historians. In line with the Prime Minister's argument that students need a strong sense of narrative that includes knowledge of key events, issues, dates and people, Melleuish set out what he believes all Australian students should be taught about Australian history. Dr Kevin Donnelly has described the Melleuish paper as "a clear, succinct and convincing outline of what constitutes essential learning in Australian history". Donnelly was disappointed that, "Instead of detailing essential understanding and skills that all students should be taught in relation to Australian history, the majority of the participants agreed to define the curriculum by a series of open-ended questions".[73] Dr Mark Lopez, who attended the conference, claimed that the meeting had been hijacked by the "Left establishment view" of history teaching.[74]

Keith Windschuttle praised Melleuish's paper as "a perfectly accurate and eminently teachable model, but a caucus at the summit successfully dumped it in favour of a curriculum based not on narrative and politics but on 'issues and questions' ".[75] Windschuttle regretted that the majority at the summit "agreed to define the curriculum by a series of open-ended questions", such as, "How did convict society change into a free society?", and "What were the relationships between settlers and Aborigines?". Richard Allsop of the Institute of Public Affairs commented that:

> "In rejecting the narrative approach of the Melleuish paper in favour of a question-based model proposed by Professor John Hirst, the participants demonstrated that they were largely content to see the collectivist assumptions behind much of what is taught in our schools remain unaddressed".[76]

Greg Melleuish expressed his disappointment at the outcome of the "summit" in *The Australian*:

> "To me the questions approach is just another version of the issues and themes approach that the summit was meant to remedy. It is the lowest common denominator form of history. My paper, it is claimed, is too advanced and sophisticated. Does this mean that we have to move to a boneheaded approach to the study of Australian history?".[77]

If a left-wing "caucus" hijacked the conference, I was unaware of it. To me the remarkable feature of the gathering was that some critics of the left-wing grip on history teaching got a reasonable hearing for once. With support from John Hirst, I argued that Melleuish's proposed syllabus was too detailed for its purpose. Its adoption might improve breadth of content, but would also ensure superficiality, unless school timetables gave history far more time than at present or in the past. I also argued that narrative logically follows the framing of significant questions. As an example, I suggested some questions on which to base teaching of Australian pre-Contact history:

- How long have Aboriginal peoples lived in what is now Australia? Did they migrate from elsewhere, perhaps when there was a land bridge between Australia and South-East Asia?
- What were their means of livelihood? Did these differ in various parts of Australia? Did these change over the generations?
- What were their family and group structures? Did these change over the generations?
- What did they believe about the origins of life and its meaning?

Do such questions imply a collectivist outlook or bone-headedness? Different questions might be asked, but we must have some questions in mind before we can narrate coherent stories or histories. It is strange that some of our most able liberal-conservative historians should press for detailed central control of the content of history syllabuses in our schools. Of course, "bottom-up" reform is slow and unspectacular, but "top-down" policies are likely to play into the hands of political activists. Those who have done most to politicize our schools and universities are quick to allege that any attempt at reform constitutes unacceptable political intervention. Many other teachers, too, however, would legitimately resent detailed prescription of the content of history courses.

Summary conclusions

In 1788 the British government annexed New South Wales as a "colony of settlement". This concept was very similar to the meaning most often applied over a century later to the term *terra nullius.* It was a mixture of mischief and ignorance that led to the farcical assertion that the Crown and British colonists had denied the very existence of Aborigines in New Holland. Once that straw man was erected, the next step of progressive academics was to prove that Aboriginal people did indeed exist then and continue to do so. How could the British have been so stupid as not to notice them?

The British government did not maintain in 1788 that there were no human inhabitants of New South Wales. What they did believe was that the territory possessed no settled population, no cultivation of the soil, no political units with which negotiations could take place or treaties be signed, and none of the attributes of civilization. If it had been possible in 1788 to identify political units with determinate boundaries and to make treaties with them, and/or to attribute land ownership to particular individuals or corporate bodies, this would probably have been attempted, and it was carried out in New Zealand and parts of West Africa. By the time traditional relationships between Aboriginal peoples and land were more clearly identified, many of those links were already rapidly dissolving. Earl Grey and many philanthropic minds held that it would have added further injustice to past injuries to make continuity of connection with the land the determining factor in the future of Aboriginal peoples, since fortuity played so great a part in continuity or severance of traditional links with land.

If early attempts to provide a significant number of Aboriginal children with some of the knowledge and skills required to cross the ditch had been more successful, far more Aborigines would have been much more fully integrated into the wider Australian society, yet still able, if they wished, to retain some important features of traditional customs. Some significant advances were made in the "Hasluck era" from the early 1950s until the early 1970s, but since then the separatist ideas advanced by H C Coombs have generally prevailed, although they have enjoyed but little success. It is hard to find anyone who believes that, even with massive governmental financial support, there have been minor, let alone significant, advances in Aboriginal education, health, employment or quality of life during the last twenty years or so.

Most Australians value the national past and are proud that large numbers from every other continent wish to become Australians. Many of us resent the vile treatment the country receives from many of its historians. Before 1788, so far as we can ascertain, the ways of life of Australian Aborigines had scarcely changed for many thousands of years, during which time great transformations had taken place elsewhere in the world. The great geographical discoveries of the 18th Century were bound to bring Australia into a world system. Whichever country had colonized Australia, the period of transition would have been extremely difficult for the Aborigines, and not very easy for the colonists either. Yet today it would be hard for Aboriginal people, or any other Australians, to name a country with greater potentiality than their own to assist their cultural and material advancement.

Concentration on grievances, and expressions of contempt for the many advantages in law and grants of money that Aboriginal people have now received for more than a generation, will not lead to better and happier lives. Other Australians possess no special land rights, but many families have become prosperous and optimistic by embracing opportunity whenever it presents itself. Many ethnic groups that entered Australia as refugees with very few possessions have made great successes of their lives. Several groups suffered great pain and misery before entering Australia but, whilst not forgetting the past and respecting many traditional values, they looked forward to a better future and have succeeded in achieving it. Most of the early British emigrants to Australia were poor, and many were criminals, but within a century of 1788 Australians enjoyed one of the best standards of living in the world. Most Aborigines missed out on that, much to the regret of that large majority of their fellow citizens. Yet two hundred years is not a long time span in the history of the human race, and there is time enough left for Aboriginal Australians to seize some of the wonderful opportunities for a better life that are available to us. Let past misfortunes inspire us to make a better future, rather than lament what we cannot undo.

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Concluding Remarks

Sir David Smith, KCVO, AO

Our nineteenth conference got off to a flying start with a stirring address by Professor Geoffrey Blainey, Australia's pre-eminent historian, at our opening dinner on Friday night. He reprised the story of our origins as a nation, and our progress since then. He reminded us that our Constitution and the federation which it created might not be perfect, but that they are better than any of the alternatives.

Our first session on Saturday morning dealt with the subject of **Work Choices and the Federation.**

Julian Leeser's paper *Work Choices: Did the States run dead?* reminded us just how important the *Work Choices Case* in the High Court was to the States. He argued for the need to overcome the High Court's reluctance to overturn earlier decisions in the *Engineers'* and *Concrete Pipes Cases*. He suggested that the States, the Territories and the unions could have mounted a much stronger case before the High Court in arguing against the federal government's Work Choices legislation, but they failed to do so because they could see political advantages in the legislation for a future federal Labor Government.

John Gava followed Julian and asked *Can Judges resuscitate Federalism*? He discussed the dissent judgments in Work Choices by Justices Ian Callinan and Michael Kirby, and their views as originalist federalists. He invited us to consider the implications of a High Court comprised of activist originalists or activist federalists, and the consequent decades of constitutional litigation that would ensue. He concluded that federalism is in dire straits in Australia today, but that it is not the role of judges to resuscitate it.

Professor James Allan, in his paper *When Does Precedent become a Nonsense?,* posed the question whether we wanted total certainty in the law, or total flexibility, or something in between. He noted that respect for precedent tended to be stronger in common law systems, and that certainty of outcome was a desirable principle of the common law. Yet the outcome of a century of High Court judgments has been to shift the Commonwealth/State balance of the federation quite drastically. He argued that the time has come, post *Work Choices*, to overturn the accretion of Commonwealth power since the *Engineers' Case*, but his pessimistic view was that this was unlikely.

Eddy Gisonda gave us a "courageous" paper entitled *Work Choices: A Betrayal of Original Meaning?* He suggested that the Constitution should be interpreted in light of the original meaning given to the text by its framers. He conceded that the task of ascertaining original meaning in the minds of the framers was not an easy one, but it certainly was possible. He concluded that industrial relations were very much to the fore in the minds of the framers at the time of federation: they didn't give all of the industrial relations powers to the Commonwealth then, and the principle of original meaning would not have given them to the Commonwealth now.

Saturday afternoon's sessions covered the themes **Federalism in a Centralist Environment** and **Bills of Rights.**

The Hon Dr David Hamill, in his paper *W(h)ither Federalism*?, concentrated on the capacity of the different levels of government to legislate, administer and finance their respective constitutional responsibilities. He suggested that the division of heads of powers was not as clear-cut as some might think, and that the actual allocation of powers today was different from what it was at federation. He placed great emphasis on the shift in fiscal powers towards the centre as the major contributing mechanism in bringing about this change. He felt that the growth of State dependence on Commonwealth grants, with their associated conditions, has substantially limited the capacity of the States and Territories to discharge their powers and functions. He concluded that the process undermined accountability and was contrary to the principle of good government.

Ben Davies spoke to us on *The Politics of Federalism.* He argued that the growth of Commonwealth power and the diminution of State authority has resulted in the States becoming fiscally lazy—happy to tolerate a loss of responsibility so long as they were given the money. He attributed this political ineptitude to a decline in the quality, and range of experience, of State politicians, and their consequent reluctance, or inability, to stand up to the Commonwealth.

The final session on Saturday afternoon was given by Dr Charles Parkinson on the topic *Bills of Rights: Some Reflections on Commonwealth Experience.* He reminded us that the debate on a Bill of Rights usually polarised around competing rhetorical questions. This, he contended, was hardly conducive to informed public debate. He invited us to consider how a citizen's human rights are protected in a liberal democratic society such as Australia, and gave us some powerful examples of competing human rights, and competing public policy roles of Parliament and the judiciary. He concluded that the adoption of bills of rights in the "newer" Commonwealth countries was for political reasons not applicable to Australia. For us the choice is between Parliament having the ability to balance competing human rights, or handing this role to an unelected judiciary. This, he said, was a debate which Australia is yet to have.

Saturday night's dinner audience was treated to a most entertaining *tour de force* by Paul Houlihan, under the title *A Constitutional Fairy Tale, with Apologies to Joseph Jacobs.* With the decline in trade union membership presented to us as a one-man pantomime based on the Henny-Penny children's fairy story, Paul showed us that he is as good a comedian as he is an industrial relations advocate. He certainly has a second career should he decide to give up his day job.

The Sunday morning sessions were devoted to **The Crown in Australia** and **The Aboriginal Question.**

Dr Anne Twomey spoke to us about *The Queen of Australia*. She reminded us of the determination of Sir Samuel Griffith, as one of the founding fathers, to ensure that the Australian States and their Governors did not become subordinate to the federal government and to the Governor-General, as was the case in Canada. She also reminded us of Sir Samuel's role as Chief Justice of the High Court in developing the role of the Crown in Australia, and in identifying the different manifestations of the Crown in Australia. This was later rejected by the High Court in its notorious *Engineers' Case*, when it reinstated the notion of an indivisible Crown. It took the Imperial Conferences of the 1920s and 1930s to restore the notion of a divisible Crown. In exploring the roles of the British government, the Australian government and the State governments in their tortuous progress towards the *Australia Acts* 1986, Anne has exposed yet another, and very disturbing, level of ignorance about our constitutional arrangements on the part of State Premiers, their Attorneys-General and other legal advisers, and the very bureaucrats charged with the responsibility of administering those constitutional arrangements.

Michael Manetta took us back again to the hapless *Engineers' Case* and the High Court's notion of the indivisible Crown in his paper *Sovereignty in the Australian Federation.* He reminded us of the sovereignty of the Queen in Parliament. He argued that today the Crown combines the sovereignty of the federal Parliament and the sovereignty of the State Parliaments in a single sovereignty of the Australian Crown, and he rejected the notion that the Crown could be divided on the basis of different sources of advice to the Monarch. It was reassuring to hear that Australia has one, and not seven, Crowns, and that the authority and sovereignty of the Crown predates Federation and the adoption of the Constitution. His views on s. 128 of the Constitution *viz-a-viz* s. 15 of the *Australia Act* 1986 would be a useful topic for this Society to explore at a future conference.

Our final paper was by Dr. Geoffrey Partington on *Thoughts on Terra Nullius.* He reminded us of the various ways in which English law applied to different kinds of settlements and colonies, particularly in relation to the use of land, and depending on whether the new colony had been previously settled and on how its land had been used by its original inhabitants. He noted that New Holland's original inhabitants, with no recognised form of government or organised use of land, had often been described or referred to in pejorative terms, even by those who were otherwise sympathetic towards them—a practice which often continued today. He reminded us of the policy of Sir Paul Hasluck, as Minister for Territories in the 1950s and early 1960s, of attempting to integrate Aborigines into the Australian mainstream. Regrettably, some anthropologists and historians thought it more important to preserve Aboriginal culture in all its primitive forms, with all its limitations on health, education, housing, and economic advancement. Today we are still reaping the evils resulting from this misguided policy.

I am reminded of the words of the late Neville Bonner, Australia's first Aboriginal member of the federal Parliament, who often said that that the British settlement of Australia, with all of its problems for his people, had dealt much more kindly with them than any of the other colonising contenders would have done.

We are once again indebted to John and Nancy Stone for yet another brilliantly conceived, well-organised and timely conference, and on your behalf I thank them most sincerely.

Appendix
Contributors

1. Addresses

Professor Geoffrey BLAINEY, AC was educated at Ballarat High School, Wesley College and the University of Melbourne, where he subsequently took up what was to prove an illustrious career both as an academic historian and an author. After 15 years in the Economic History department (1962-77), the last nine of them as Professor of Economic History, he became the Ernest Scott Professor of History in 1977. In 1987 he retired from this post (and as Dean of the Faculty of Arts) in the face of the storm of malignant criticism arising from his public remarks about the serious future problems being created for Australia by our immigration and official multiculturalism policies. Both before that time, and since, he has been a prolific author, with such works as *The Peaks of Lyell* (1954), *Mines in the Spinifex* (1960), *The Tyranny of Distance* (1966), and *Triumph of the Nomads* (1975). More recently, he has produced such best-sellers as *A Short History of the World* (2000) and *A Very Short History of the World* (2004). He is today a Governor of the Ian Potter Foundation and a member of the Council of the Australian War Memorial, among many other activities.

Paul HOULIHAN was educated at St Patrick's College, Ballarat but managed to escape what today passes for a university education. He has worked in industrial relations for over 30 years, beginning with the Federated Clerks Union of Tasmania, where he was appointed State Secretary from 1972 to 1979, and continuing with an eight-year spell at the National Farmers Federation, during which he was involved in some of the major industrial disputes of the era, including the famous Mudginberri dispute. In 1988 he established his own industrial relations consultancy, First IR, and has been in private practice since then. In March, 1996 he was involved in providing significant practical input into the creation of the federal *Workplace Relations Act* 1996, the so-called Reith-Kernot Act. In 1998, he was appointed a Director of P&C Stevedores, the NFF backed company which set up in competition to the established waterfront players at Webb Dock in Melbourne and which, in the teeth of the ACTU and the Federal Court, won the great battle against the Maritime Workers' Union which has since transformed the Australian waterfront. Today he is a director of IR Australia, a national workplace relations consultancy based in Sydney, where he has been engaged in a wide range of industrial and commercial negotiations.

2. Conference Contributors

Professor James ALLAN, a Canadian by birth, was educated at WA Porter Collegiate, Scarborough, Toronto and at Queen's University, Ontario (BA, 1982; LLB, 1985), the London School of Economics (LLM, 1986) and the University of Hong Kong (PhD, 1994). After working at the Bar in Toronto and in London, he has since taught law in New Zealand, Hong Kong, Canada and the United States before appointment as Garrick Professor of Law at the University of Queensland in 2004. The author of numerous articles in professional legal journals, he says that, since moving to Queensland, he "has been revelling in a country not burdened with a Bill of Rights".

Ben DAVIES was educated at Melbourne High School, at the University of Melbourne (BA, 2001) and at Monash University (LLB, 2005). In 1996 he won the Australian Universities Debating Championship, and represented Melbourne University in the 2000 World Universities Debating Championship. A man of widely diverse interests (film-making, car restoration), he has been an adviser to two federal Ministers (Hon Tony Abbott and Hon Kevin Andrews), as well as being a member of the Victorian "No" Campaign Committee for the 1999 Republic referendum. A member of the Board of The Samuel Griffith Society since 2003, he was the inaugural winner, in 2005, of the Governor-General's Prize for essays on the Australian Constitution. He now works as a solicitor in Melbourne.

Sir David SMITH, KCVO, AO was educated at Scotch College, Melbourne and at Melbourne and the Australian National Universities (BA, 1967). After entering the Commonwealth Public Service in 1954, he became in 1973 Official Secretary to the then Governor-General of Australia (Sir Paul Hasluck). After having served five successive Governors-General in that capacity, he retired in 1990, being personally knighted by The Queen. In 1998 he attended the Constitutional Convention in Canberra as an appointed delegate, and subsequently played a prominent role in the "No" Case Committee for the 1999 Republic referendum. While a visiting Scholar in the Faculty of Law of the Australian National University, his research has done much to clarify the role of the Governor-General in Australia's constitutional arrangements, culminating in his book *Head of State* (2005).

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 has served on its Board of Management since its inception in 1992 and is Editor and Publisher of its Proceedings.

Dr Anne TWOMEY was educated at Sacred Heart College, Shepparton and at the University of Melbourne (BA/LLB (Hons), 1989); the Australian National University (LLM, 1996); and the University of New South Wales (PhD, 2006). As a constitutional lawyer, she has worked for the High Court of Australia, the Commonwealth Parliament and the NSW Cabinet Office. She is currently an Associate Professor at the Law School of the University of Sydney. She is the author of *The Constitution of New South Wales* (2004) and *The Chameleon Crown—The Queen and Her Australian Governors* (2006). Now completing a book on the *Australia Acts* 1986, she intends to write her next book on procedural and jurisprudential issues concerning constitutional amendment.