Upholding the Australian Constitution Volume Twenty-five

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

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Introduction

Julian Leeser

The 25th Conference of The Samuel Griffith Society was held in Sydney in November 2013.

The 2013 Conference was scheduled to be held in Melbourne. It was moved to Sydney. This was not, as was rumoured, because our board member, Richard Court, agreed with the former Prime Minister, Paul Keating, that "if you are not living in Sydney you are just camping out." It was rather because the Spring racing carnival would have needlessly increased accommodation costs at that time of the year in Melbourne.

The real reason for delaying the Conference from its traditional August outing to November was because of the involvement of a number of board members in the Federal Election.

Regardless of the political party that individual members support, I am sure I can speak for everyone when I say that we were delighted to see our Secretary, Bob Day, elected as a Senator for South Australia. I am confident that Bob will serve both the people of South Australia and the cause of federalism in the States' House very well indeed.

Let me also take this opportunity to thank Bob and Joy Montgomery for all they have done to put together the less glamorous parts of the Conference and maintain the smooth running of the Society in general.

I was also delighted that, for the third year in a row, the Australian Public Affairs Channel (APAC) broadcast the Conference.

We met a weekend before the new Parliament was sworn in – a new Parliament, a new Government and a new Prime Minister.

While the Prime Minister, Tony Abbott, has been one of the strongest defenders of the Crown in our Constitution, he has not been such a fan of federalism. But things seem to be changing. The latest edition of his book, *Battlelines*, excludes chapters attacking federalism. The Prime Minister has also promised –

> To work … with the states, … [to] produce a white paper on COAG reform, and the responsibilities of different governments, to ensure that, as far as possible, the states are sovereign in their own sphere.[1]

This white paper presents the Society with a great opportunity to draw upon 22 years of outstanding scholarship to make a strong submission to the Government about why a federalism that more closely reflects the framers' vision is in our nation's interest. I intend to put to the board a proposal that the Society form a committee to write such a submission. Professor Greg Craven's contribution at this Conference gave us food for thought on this matter.

Samuel Griffith is not just a conference. It is a society. It is where we enjoy the company of like-minded friends on a yearly basis. Sadly, during the course of the past year, three of our members have passed away: Ronald Archer, Christopher Pearson and Charles Copeman.

Let me briefly say something about Christopher and Charles. Christopher Pearson was a deep thinker, a talented writer and a serious wit. He was devoted to the Constitution, conservatism and Catholicism. Christopher spoke at one of the early

meetings of the Society in Adelaide and attended our conference whenever the Society visited his adopted city. Christopher's principal contribution to the defence of our Constitution was as editor of the *Adelaide Review*, a journal read well beyond the borders of South Australia – where he published constitutional defenders including Peter Coleman and John Stone. A serious *bon vivant*, his company was always entertaining especially over a glass of pedro ximinez (the "black sherry" as he used to call it).

Charles Copeman was one of the bravest and most principled men of our age. Charles's work, attempting to improve workplace productivity at Robe River in the mid-1980s, made him bitter enemies and lifelong admirers. As his son, Michael, wrote, "Charles succeeded in reforming Robe River's productivity and turning it into a model for Australian mining operations in the future." In retirement Charles was active in the H R Nicholls Society, Australians for Constitutional Monarchy and this Society. Wherever there was a good cause Charles would be there to lend his enthusiasm, his determination and his passion for Australia.

Charles, with Amy McGrath, was the principal force behind the H S Chapman Society. And, although he did not live to see his goal of a more transparent and fraud-proof Australian electoral system achieved, the events of the 2013 election, particularly in Western Australia, will hopefully give impetus to some of the reforms he pursued. I do not recall Charles ever having missed a Samuel Griffith conference as long as I have been coming to them. Today Charles is much missed by us all. But might I note the considerable pleasure we all drew from Alison Copeman's attendance at the Conference. I am grateful for the many kindnesses the Copeman family have shown to Joanna and me over the years, not least of all Alison's role as Joanna's former French teacher!

At the 2013 Conference we heard from philosopher and biographer, Damien Freeman, about another lion of the Society, the late Roddy Meagher, who helped launch the Society in 1992. Damien's reflections will help us assess whether debates about our Constitution have changed much over the last two decades.

On a happy note we were again indebted to Ron Manners and the Mannkal Foundation for providing scholarships for students to attend the Samuel Griffith Society Conference. The 2013 Mannkal scholars were Genevieve Mitchell, Catarina Canberra, Stephanie Hughes, James Illich, Lauren Reed and Murray Tennent-Brown.

Juel Briggs is also to be thanked. Juel sponsored a Samuel Griffith Scholarship in 2013. We were delighted to welcome Mitch Dudley as the 2013 Samuel Griffith Scholar.

I would like to thank all the speakers at the 2013 Conference. Many prepared their papers in a very short time frame. I am very grateful to them for their industry and their courtesy.

At the opening dinner we were entertained by Dyson Heydon in his first appearance at the Society since his retirement from the High Court. Dyson Heydon's two papers to the Society on Sir Samuel Griffith are classics that will bear study by people who want to appreciate the contribution of a great Queenslander and a great Australian. All of us admire Dyson Heydon's scholarship and his ability to combine great wit and history to bring long dead characters back to life. It is an honour for all of us to be associated with a man of Dyson Heydon's stature and scholarship.

In a change of pace, on Saturday evening we heard from Nick Cater, a senior editor

at *The Australian* until recently and author of *The Lucky Culture*. He discussed the failed experiment that is the Australian Human Rights Commission.

I note that Marcus Einfeld was President of that body from 1986 to 1990. Every Commissioner since that time can be described as a worthy successor to Mr Einfeld. Since the *Brandy* decision[2] in 1995, in which the High Court significantly clipped the Commission's wings, the Commission has been a body in search of a purpose and that purpose most often has been to cause trouble. Rather than appointing more Commissioners, the new Government would be better to abolish the Commission. Its education functions could be performed by the Attorney-General's Department and its conciliation functions could be given to the Administrative Appeals Tribunal.

The most important constitutional issue during 2012-13 was the scandalous but aborted Local Government referendum. Two papers reflected on that referendum. Senator Dean Smith, Convenor of the Parliamentary No Committee, considered the lessons from that referendum. Senator Bridget McKenzie, if I may say, a worthy exponent of the Stoneite tradition in the National Party, looked at the absolute abuse of the process where one side of the debate received $31.6 million of public money and the other side received only $500,000. There is work to do to ensure a blatant attempt to buy the Constitution does not happen again.

The next constitutional change Australians may be asked to consider will be indigenous recognition. Dr Gary Johns, who has a great interest in the Constitution, and indigenous policy, examined what such a referendum will mean for Australia.

One of the issues this Society was established to discuss is judicial activism. One very activist decision of the Mason Court was *Kable*.[3] In that case, contrary to earlier thinking, the Court limited the power of State parliaments to get State courts to do things which would be incompatible with their ability to receive federal jurisdiction. The *Kable* principle has made it more difficult for governments to control organized crime, terrorism and serious violent criminals and sex offenders. It looked like the *Kable* principle was being confined by the Gleeson Court. The former High Court Justice, Michael Kirby, said that *Kable* was "a guard-dog that barked but once."[4] However, under the French Court, the *Kable* principle has been given a second life. Gim Del Villar's paper, "*Kable*: The Dog that won't be silent," illuminated these developments.

In the shadow of the election, it is important to reflect on how complex Senate voting has become and the growing influence of minor parties, some good and some bad. My former political science lecturer, John Paul, provided an historical perspective on independents and minor parties in the Commonwealth Parliament. Professor Ian McAllister, one of Australia's most distinguished psephologists and author of the Australian Election Study, looked at options for Senate voting reform.

Malcolm Mackerras also addressed the Conference on these matters.

Professor Anne Twomey reviewed the dubious constitutionality of some pork-barreling programs which commenced at the end of the Gillard Government.

Having explored issues around a State income tax at the 2012 Conference, Keith Kendall compared how other similar federations handle vertical fiscal imbalance.

The federalism session was capped by a panel of State solicitors-general – the people who are responsible for arguing the case for the States to a High Court that has, since 1920, been less sympathetic to the States' position. The panel provided members with an insight into the challenges and the thinking of the States as they try

to defend the Constitution our framers created in the High Court.

At the end of the Conference, we retraced a small leg of the voyage from Brooklyn to Refuge Bay on the Hawkesbury River that the Queensland Government's ship, *Lucinda*, took in 1891. On Easter Saturday, 28 March 1891, Samuel Griffith, Edmund Barton and Charles Cameron Kingston together with Henry Wrixon, Bernhard Wise, Sir John Downer and A J Thynne drafted the Constitution on the Hawkesbury aboard *Lucinda*. It was our good fortune to enjoy the very agreeable part of Australia where this great document was shaped and began to take a form that we recognize today.

The papers read to the Conference have been prepared for publication by John Nethercote.

Endnotes

1. Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 16 May 2013, 3574 (Tony Abbott).

2. *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245.

3. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 53.

4. *Baker v The Queen* (2004) 223 CLR 513 [54].

Sir Samuel Griffith as Chief Justice of the High Court of Australia

[The Fifth Sir Harry Gibbs Memorial Oration]

The Honourable Dyson Heydon

The judicial career of Sir Samuel Griffith falls into two parts. From 1893 to 1903 he was Chief Justice of Queensland. From 1903 to 1919 he held the office of Chief Justice of the High Court of Australia (not "Chief Justice of Australia", as some of his successors have preferred to style it).

The first phase of this judicial career falls outside the present topic. But it deserves to be briefly mentioned. It did cover 10 years of his 26 years on the bench.

The appointment of Sir Samuel as Chief Justice by himself as Premier was unusual. Sir Harry Gibbs dealt with it in his brief biography of Griffith CJ. Sir Harry was not a man to mince words. He did not evade uncomfortable points. But he had tact. And it is not possible to surpass the tactful way in which he described this episode. "In 1893 Griffith became Chief Justice of Queensland, having first negotiated with the Government of which he was Premier, an increase in salary."[1] Turning to the substance of Griffith CJ's Queensland career, Sir Harry continued in warmer vein: "As Chief Justice, he revealed the mastery of legal principle and soundness and promptness of decision that later marked his career on the High Court". That verdict is confirmed by a detailed analysis of his work as Chief Justice of Queensland carried out by Justice Thomas.[2] His decisions, where not affected by statute or judicial overruling, continue to be cited and read.

But it would not be true to say that the Supreme Court of Queensland either in the 1890s or since has enjoyed fame throughout the common law world. In 1893, Queensland was a relatively new colony with a very small population. Most of the other Australasian colonies were not much larger. The population of Australia was only about one percent of that of the whole British Empire. The common law world was dominated by the English and American courts. The English courts were operating in a tradition 800 years old, at the heart of a vast Empire, in a city which was a great commercial centre. The American courts were operating in a powerful country which was well on the way to developing a new Empire. But Griffith CJ as a judge is not alone in his obscurity.

There are many English decisions of Griffith CJ's era that are still living law. Though there are famous English, Irish and Scottish judges of Griffith's era whose fame survives, their number is low – Lord Macnaghten, Lord Haldane, Lord Sumner, Lord Justice Scrutton, Lord Justice Atkin. As for the United States of America, one of Griffith CJ's contemporaries was the famous Oliver Wendell Holmes Jr, Justice and then Chief Justice of the Supreme Judicial Court of Massachusetts, and then Justice of the United States Supreme Court. But hardly any other American judge of that age remains familiar even to American lawyers. So the obscurity of Griffith CJ now on the world stage is matched by that of most of his contemporaries. But when Griffith CJ's Queensland judgments are examined, they can be seen to approach the best that was being written elsewhere in the common law world of that time. The same is true of his High Court judgments in non-constitutional fields.

Had the Australian colonies never federated into a Commonwealth of States, Griffith CJ's name would be little known today even in Australia. It was the path to federation and the achievement of federation which made him famous locally.

For the Australian people federation was generally beneficial. And it released many creative forces in Australian legal life as well. In form, it is true, federation did not make a radical change in the relationship between the Australian polities and the imperial government. The Australian colonies "had practically unlimited powers of self-government through their legislatures."[3] The limits lay in the *Colonial Laws Validity Act* 1865; the power of the Queen to disallow colonial statutes within one year; and the fact that laws reserved for her pleasure lacked force unless she assented to them within two years. These last two powers were preserved by sections 58-60 of the Constitution. But they have fallen into desuetude. They have been overtaken partly by the convention that the Governor-General acts only on the advice of her Australian Ministers and partly by the gradual movement to full Australian independence – via partial separation of military command in the First World War, participation in the Versailles Peace Conference, signature of the Treaty of Versailles, attendance at the Washington Naval Conference of 1921-22, the Balfour Report of 1926, the Statute of Westminster in 1931, the development of a separate foreign policy, the *Royal Style and Titles Act* 1973 (Cth) and the Australia Acts of 1986.[4]

From 1903 to 1906 the High Court was at its most unified and its happiest. Its overall quality was probably then at its highest. Its three members, Griffith CJ, Barton J and O'Connor J, were all graduates of the University of Sydney. Griffith was 58, Barton 54 and O'Connor 52. They had known and liked each other for many years, though there had been some disagreements, and the reasonable ambition of two of them to be Chief Justice was never fulfilled. On the High Court they lunched together daily. Griffith had drafted the Constitution in 1891. Barton had manoeuvred it through the 1897 and 1898 Conventions. Like Barton, O'Connor had extensive political experience. That is an asset for judicial work which is now sadly underrated. Indeed, it is almost totally missing from the present Australian judiciary.

Opinions differ as to the respective abilities of the first three justices. Barton J is generally seen as the least hard-working. But he did have the experience and ability to be expected of a former Prime Minister. In his bittersweet address at the sitting of the High Court on 13 April 1964 to mark his retirement, Sir Owen Dixon passed on the opinion of Sir Leo Cussen that "Barton's judgments were the best, … they had more philosophy in them, more understanding of what a Constitution was about, more sagacity; … they were well written, and … they were extremely good."[5] Griffith CJ is generally seen as the ablest of the three, but Sir Owen Dixon, though he praised him in various ways on various occasions, said: "I think – speaking for myself – that Mr Justice O'Connor's work has lived better than that of anybody else of the earlier times."[6] Sir Anthony Mason agreed with that last judgment, at least in relation to the foundation Justices, for he thought Isaacs J superior in influence and output.[7]

Whatever the merits of these comparisons, the equipoise of the Court was suddenly upset in 1906, when the membership was increased from three to five with the appointment of Justices Isaacs and Higgins. Isaac Isaacs was a very able, determined and aggressive man. Sir Anthony Mason has recently said that in a judicial career spanning 45 years he has never personally encountered a judge who sought to dominate weaker and compliant colleagues, "though I suspect one or two might have

had aspirations to become so. Nor have I ever encountered a single 'compliant' judge on the High Court. On the other hand, one suspects that Isaacs J may have been a dominant judge … and that in the Isaacs era there may have been compliant judges."[8] He wrote long, argumentative, passionate judgments. They often contained passages beginning, "The policy of the Act is irrelevant to its validity", but then proceeding over many pages to defend that policy very strongly, and to conclude that the legislation was valid. His biographer, Sir Zelman Cowen, said of him: "Even in his own day he stood apart from his brethren in the single-mindedness of his devotion to the cause of advancing the national power".[9] And for him, unlike Griffith CJ, nationalism implied "the strengthening and growth of central power".[10]

The other appointment of 1906, Mr Justice Higgins, was milder-mannered than Isaacs. But though not a member of the Australian Labor Party, he had served under a Labor government. He was in a sense the most left-wing judge ever appointed to the Court until Senator Murphy.

Justices Isaacs and Higgins fell into fairly speedy dissent from the original justices on some key constitutional approaches.

In 1912, Mr Justice O'Connor, suffering from chronic nephritis, and unable to retire because no pension was available, worked himself to death. In 1913, four new justices were appointed. One of them, A B Piddington, did not last long after it came to light that he had indicated to W M Hughes, the Attorney-General in the Fisher Labor Government, that he was "in sympathy with supremacy of Commonwealth powers". Had he not resigned, whatever his centralist sympathies, he probably would have turned out much better than the second new justice. Charles Powers was the least qualified person ever to be appointed to the High Court. Against that background, his performance on the Court was not surprising.

The third new justice, Justice Gavan Duffy, received one fine tribute from Sir Owen Dixon on his advocacy powers: "if ever there was a man who could make bricks without straw in open court, it was Sir Frank Gavan Duffy".[11] But on the bench his career was less distinguished.

The fourth new member was Mr Justice Rich. It is enough to repeat his biographer's bleak summary: "His reputation rested on a talent for stating complex propositions clearly and concisely. Over his 37 years as a Justice of the High Court, he too rarely exploited this talent."[12]

The unity of the first three years was shattered by the appointments of Isaacs and Higgins in 1906. And the high quality of the period between 1903 and 1912 was diluted by the appointments of Powers, Gavan Duffy and Rich. Not until the appointment of Starke in 1920, Dixon in 1929 and Evatt in 1930 did the quality of the Court as a whole begin to rise again to anything approaching that of the first three years.

Griffith CJ played a very influential role on the Court, particularly the early Court. In part this was because of Barton J's self-effacing conduct. It was the practice of those days for the judges to prepare "their individual reasons for judgment separately, and for those separate reasons for judgment to be read out by their authors in order of seniority in open Court on the day of judgment. The practice meant that it could happen that the first time one justice came to know of the reasons of another was when he heard them read out on the day he was to deliver his own".[13] In 1947, R G Menzies said: "Many times, I have reason to believe, Barton wrote separate reasons for

judgment and then, on the Bench, having heard Griffith read his, put his own away, and said 'I concur' ".[14] This practice may have been less than ideal, but Menzies praised it. It tends to refute allegations that Barton was lazy.

Griffith CJ was very active in argument. Sir Harry Gibbs said:

> When presiding in Court, Griffith was dignified, but firm and decisive. He was quick to grasp the point, intolerant of ill-prepared argument, and impatient of mere technicalities. He commenced the practice, followed ever since, of intervening in argument by questioning counsel. He raised the standard of legal argument in Australia. He was prompt in giving judgment.[15]

In contrast, in his speech on being sworn in as Chief Justice on 21 April 1952, Sir Owen Dixon said that when he began to practise before the Court, which was in the time of Griffith CJ, "its methods were entirely dialectical, the minds of all the judges were actively expressed in support or in criticism of arguments. Cross-examination of counsel was indulged in as part of the common course of argument." He stated that while he himself found that system advantageous, many counsel disliked it, and that he came to form the conviction that it was not desirable.

> I felt that the process by which arguments were torn to shreds before they were fully admitted to the mind led to a lack of coherence in the presentation of a case and to a failure of the Bench to understand the complete and full cases of the parties, and I therefore resolved, so far as I was able to restrain my impetuosity, that I should not follow that method and I should dissuade others from it.[16]

The Griffith style has re-emerged from time to time since Sir Owen Dixon's retirement. Sir Harry Gibbs's point about Griffith CJ's promptness in judgment, to which I have twice referred, is devastatingly illustrated by the performance of the Court in its early cases. Let all allowance be made for the fact that at the beginning the Court was not encumbered by long lists of reserved judgments. Let allowance also be made for the fact that the pristine energies of the judges carrying out new roles in the prime of their lives were high. Even so the record is remarkable. If one takes the first few cases reported in volume 1 of the Commonwealth Law Reports, judgment was delivered in the first three cases the day after oral argument closed. Judgment was delivered two days after argument closed in the fourth. Judgment was delivered the day after oral argument closed in the fifth. In the sixth, the important case of *D'Emden v Pedder*, judgment was reserved only for a little over two months. In another case, important because of O'Connor J's magisterial exposition of statutory and constitutional interpretation, *Tasmania v Commonwealth*, judgment was delivered five days after a three-day oral argument closed. Promptness of this kind has not endured into our own day. The modern judiciary at all levels ought to feel a deep sense of shame and inferiority about this.

It is not now proposed to examine in detail Griffith CJ's individual judgments in either non-constitutional law or constitutional law. Instead three particular themes will be picked up. They are the introduction of constitutional judicial review; the distinctive doctrines of the early Court; and the Court's striving for independence.

Introduction of Constitutional Judicial Review

It is a striking feature of both the American and the Australian systems of federal government that the judiciary is accepted to have power to declare legislation unconstitutional and treat individual legislative provisions as nullities. This is known as constitutional "judicial review" – to be distinguished from the ancient power of the courts to engage in judicial review of administrative action and deal with it if it is not supported by the statutory or common law power relied on. In the 19th century there was no power of constitutional judicial review in equivalent systems like the German Federation or in Switzerland. There was no express power of judicial review in the United States Constitution. Article 6 of that Constitution provided that it "shall be the supreme law of the land; and that judges in every State shall be bound thereby". But neither that nor any other provision gave the judiciary power to declare that laws were inconsistent with the Constitution and hence void. Its acceptance in dicta by Marshall CJ in *Marbury v Madison* in 1803 was controversial.[17] It was not asserted afresh or acted on by the Supreme Court for another 54 years.[18]

In Australia it seems that the delegates to the Conventions "intended judicial invalidation of legislation to be an aspect of the constitutional framework."[19] Sir Owen Dixon said that to the framers this was "obvious".[20] Even if these things are so, the intention was not embodied in the text of the Constitution. Sir Owen Dixon argued that the words of section 76(i) of the Constitution "impliedly acknowledged the function of the Courts".[21] Section 76(1) provides:

> The Parliament may make laws conferring original jurisdiction on the High Court in any matter –
>
> (a) Arising under this Constitution, or involving its interpretation . . .

The problem is that the Parliament has not made laws conferring jurisdiction of that kind which would justify judicial review. Even if it had, the conferral could be reversed by another law. Constitutional judicial review depends on finding a Constitution-based power of judicial review, unchangeable by legislation. It could only be found in section 75 of the Constitution, which gives the High Court original jurisdiction in relation to five matters. But none of those matters can be said to support a power of judicial review.

In Australia this has never been treated as a problem. From the outset the High Court followed the view of the Supreme Court of the United States that judicial review was available. No-one ever seems to have argued the contrary. In *Australian Communist Party v Commonwealth*,[22] Fullagar J said: "In our system the principle of *Marbury v Madison* is accepted as axiomatic". Of course, one man's axiom is another man's blind and invincible prejudice.

It would be possible to have a federal system in which constitutionality was not a matter for the judiciary but was simply debated at the political level and treated as a factor relevant to the outcome of elections. That is common in non-federal systems. In America it has been argued that that possibility rests on the idea that legislators sit for short terms, that the legislature has two houses (originally only one of them the result of popular election) acting as checks on each other, that the suffrage has been wide (but for the slaves, and, indeed, the former slaves), that the President was elected only indirectly through the Electoral College, that the President can veto legislation, and that overriding that veto requires a two-thirds majority in the legislature. There are

differences in Australia. Both houses are and always have been popularly elected. There were no slaves. There was no Electoral College. Apart from the now obsolete sections 58-60, there was no veto by the executive. The doctrine of responsible government makes the separation of powers between legislature and executive much less marked. It remains an interesting question whether, in both the United States and Australia, federalism, in the sense of States' rights, would have been stronger if there had been no judicial review, and the matter fought out politically.

Certainly it must be regarded as a serious thing for the humblest and most mediocre magistrate to have the power to declare invalid the most carefully and solemnly considered Commonwealth or State statutes. And it is also a serious thing for invalidation to take place not on the basis of the express language of the Constitution, but on the basis of implications into it not noticed for many decades after its inception.

In the United States, in 1893, a very distinguished member of the Harvard Law School in its golden age, James Bradley Thayer, delivered an important lecture. He analysed competing views about judicial review before and after the time when the United States Constitution came into force. He accepted that judicial review had come into existence, but said that legislation should not be declared void unless there was no room for reasonable doubt about its unconstitutionality. His line of thought rested on the idea that while the judiciary had the primary role of decision on questions of law, the legislature had the role of initiating and enacting legislation. The question was not whether the courts thought legislation unconstitutional, but what degree of judgment the courts should allow to another department of government which had been given the responsibility under the Constitution of making the legislation.[23] This doctrine has been extremely influential in America. It was favoured by Justices Holmes, Brandeis and Frankfurter. To some extent it reflects modern American constitutional law.

What of Australian constitutional law? The courts here practise self-restraint in the sense that the constitutionality of legislation will not be considered unless it is necessary for the outcome, and in the sense that if there are two or more constructions available, one will be selected which renders the legislation constitutionally valid rather than invalid. In *Australian Communist Party v Commonwealth* Fullagar J said that the principle of judicial review was modified "by the respect which the judicial organ must accord to the opinions of the legislative and executive organs".[24] Beyond that, though there have been a few references to a "beyond reasonable doubt" test,[25] it does not bulk large.

At all events, neither Griffith CJ nor his colleagues ever doubted the capacity of the High Court to engage in judicial review of the constitutionality of legislation – and, indeed, the capacity of any Australian court to do this. They saw it as "necessary" that a legal tribunal exist to resolve conflicts between the constitutional powers of the central government and the State governments, they said that the role of the United States Supreme Court as such an arbiter was well known, and they saw themselves as rightfully performing the same role.[26] The utter and superb self-confidence of this claim to the supremacy of the judiciary over the legislature and the executive, then, is the first of the three themes to be stressed.

Distinctive Doctrines of the Early Court

The second theme concerns two doctrines distinctively associated with Griffith CJ's

name.[27] He saw the Commonwealth and the States as each sovereign within their respective field. To be sovereign is to be subject to no power. Hence each was to be free to operate without interference from any other government. Both the Commonwealth and the States necessarily acted through agents – "instrumentalities". These instrumentalities had to be free of burdens imposed by other governments, like the burdens to be found in taxes on the income of public servants. This was the doctrine of "immunity of instrumentalities".

Apart from its correspondence with 19th century American ideas,[28] the doctrine had two sources.

First, the Constitution was seen as an agreement between sovereign powers – the old colonies, now the new States – to give up some power to a central body while preserving sovereignty over what each retained. The only subordination was this: in fields of Commonwealth legislative power, where the States were also free to legislate, Commonwealth legislation prevailed over State legislation in the event of inconsistency, by reason of section 109 of the Constitution.

Secondly, it was a rule of interpretation that statutes did not bind the Crown in the absence of express words or necessary implication. Hence powers granted to the Commonwealth did not bind the Crown in the right of each State.[29]

The theories of sovereignty on which the immunity of instrumentalities doctrine rested correspond with those stated by John Austin in 1832 in his work, *The Province of Jurisprudence Determined*. This may have been one reason why Sir Owen Dixon described Griffith as having "a dominant legal mind . . . a legal mind of the Austinian age".[30] Another may have sprung from the fact that Austin's key doctrine was that law was a command backed by a sanction – a doctrine which Griffith CJ's masterful approach to legal problems may not have found unsympathetic.

Pursuant to the immunity of instrumentalities doctrine, the Court held that State statutes could not tax Commonwealth officers[31] and Commonwealth statutes could not tax State officers.[32] The doctrine was a two-way doctrine.

But even Griffith CJ accepted that some Commonwealth powers could be employed against the States, for if it were not so, those powers would be emptied of utility. A principle of "necessity" was said to compel these modifications.[33] Examples of laws which were valid on this principle included a federal law as to bankruptcy discharging a bankrupt from debts owed to the State;[34] customs duties applying to the States;[35] and laws under the defence power.[36] In addition, from 1906, Isaacs J and Higgins J began to diverge from the immunity of instrumentalities doctrine as applied by the first three justices. Isaacs J's dislike of the immunity had been presaged in his losing argument as counsel in *Deakin v Webb*.[37] Isaacs J came to require heavier burdens to be established if the immunity of instrumentalities doctrine was to apply.[38] Higgins J rejected that doctrine outright.[39]

A second important doctrine of the early High Court was the "reserved powers" doctrine. It can be illustrated by section 51(i) of the Constitution. That provision expressly gives power to the Commonwealth to make legislation concerning interstate and international trade and commerce. It was said to follow that the power to legislate in relation to intrastate trade and commerce was reserved to the States. It was also said to follow that no other head of legislative power should lightly be interpreted so as to permit significant impairment of the States' reserved powers. Griffith CJ stated the reserved powers doctrine thus: "When the intention to reserve any subject to the States

to the exclusion of the Commonwealth clearly appears, no exception from that reservation can be admitted which is not expressed in clear and unequivocal words".[40] On this doctrine the exclusive Commonwealth power over excise in section 90 was read down.[41] So was the trade mark power in section 51(xviii).[42] And so, very significantly for the future, was the corporations power (section 51(xx)).[43] The revival of that power in 1971, in the *Concrete Pipes* case,[44] is a badge of the decline in Griffith CJ's influence in this respect.

There was much more to be said for the reserved powers doctrine than Griffith CJ is usually given credit for. One provision which supports it is section 107. The Commonwealth legislative powers granted by section 51 are expressed to be "subject to this Constitution". Section 107 is not subject to the Constitution, that is, it is not subject to section 51. It provides:

> Every power of the Parliament of a Colony which has become … a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission of the State . . .

That points to a substantial residue of State powers, and points to the correctness of Griffith CJ's "reserved powers" doctrine.

As Gageler J said in his youth, 26 years ago:

> The strict rules of statutory construction, if applied independently of wider considerations, would not unquestioningly dictate an expansive reading of s 51 at the expense of s 107. A strong argument could be made that they point in the other direction.[45]

Perhaps during his long career on the Court which lies ahead, he will be able to develop that argument. On the other hand, Dixon J said that "the attempt to read s 107 as the equivalent of a specific grant or reservation of power lacked a foundation in logic".[46] But Griffith CJ was not contending for a "specific grant or reservation of power" – only a principle of construction requiring clear words for the statement of Commonwealth powers.

Again, both Isaacs J and Higgins J attacked the reserved powers doctrine.[47] Higgins J adopted a metaphor from the law of wills which proved later to be influential, fallacious though it is. He said:

> We must find out what the Commonwealth powers are before we can say what the State powers are. The Federal Parliament has certain specific gifts; the States have the residue. We have to find out the extent of the specific gifts before we make assertions as to the residue.[48]

The early cases developing the immunity of instrumentalities and reserved powers doctrines are significant in another way. They introduce the third theme of Griffith CJ's work.

Striving for Independence by the High Court

In *Deakin v Webb*, the losing party was Victoria. Its legislation taxing a Commonwealth officer's salary had suffered the fate of being struck down because of the immunity of instrumentalities doctrine. Victoria sought a certificate from the Court to permit an appeal to the Privy Council. This was a necessary step pursuant to section 74 of the Constitution. Section 74 provided that no appeal lay to the Privy Council on questions as to the limits inter se of the constitutional powers of the Commonwealth and those

of the States, unless the High Court granted a certificate that the question ought to be determined by the Privy Council. The certificate was only to be granted if there was "any special reason" for doing so. Victoria contended that special reasons were to be found: the five Premiers of the other States supported the grant of a certificate, and so did "the public opinion of Australia". In an unreserved judgment, Griffith CJ said:

> I hope that the day will never come when this Court will strain its ear to catch the breath of public opinion before coming to a decision in the exercise of its judicial functions. If it does so, it will be perhaps the practice, if ever there is a Court weak enough, to adjourn the argument in order that public meetings may be held, leading articles written in the newspapers, and pressure brought to bear to compel the Court to shirk its responsibility, and cast its duty upon another tribunal.[49]

Earlier he referred to the High Court's responsibility in disputes arising out of the limits inter se of the constitutional powers of the Commonwealth in a State. He went on:

> We should be guilty of a dereliction of duty almost amounting to a breach of trust if we were to decline to accept that responsibility unless we were in a position to say in intelligible language that there was some special reason, capable of being formulated, why the Privy Council was, and why we were not, the proper ultimate judges of the question.[50]

Griffith CJ, then, saw the "special circumstances" test as being very difficult to satisfy because of the superior capacity of Australian judges to construe the Australian Constitution. This was judicial nationalism. It insisted that while other issues could go from Australian courts to the Privy Council freely, on inter se questions the High Court was to be the tribunal of ultimate appeal almost always. Indeed, only one certificate was ever granted.

Griffith CJ repeated these themes a little later in *Baxter v Commissioners of Taxation (NSW)*. The background to it was *Webb v Outtrim*.[51] That was an appeal directly from the Supreme Court of Victoria to the Privy Council. The Earl of Halsbury presided. He was the most stern and unbending of Tories. He was then aged 84, but with plenty ahead of him – a massive constitutional crisis over the refusal of supply by the House of Lords as well as another decade's judicial work. The Privy Council disagreed with *Deakin v Webb*. Of *Webb v Outtrim*, Barton wrote in correspondence:

> Old man Halsbury's judgment deserves no better description than that it is fatuous and beneath consideration. But the old pig wants to hurt the new federation and does not much care how he does it.[52]

In *Webb v Outtrim*, Lord Halsbury used some phrases about Griffith CJ which he may later have regretted. He said Griffith CJ's analogy between the cases on the United States Constitution and Australia "fails"[53] and that "there is no such analogy".[54] He said that Griffith CJ had been guilty of "an extraordinary extension of legal principle".[55] He said that the principle underlying the immunity of instrumentalities cases had been "variously stated" in those cases and was "extremely difficult to understand".[56] As we shall see, what Lord Halsbury could do in pejorative courtesies and discourtesies, Griffith CJ could do better.

In *Baxter's* case[57] the High Court refused to follow the Privy Council decision in *Webb v Outtrim* on the ground that the question was an inter se question and the appeal to the Privy Council had been incompetent in the absence of a certificate from the High Court. It was not a small thing to say that the highest court in the Empire had

lacked jurisdiction. Gleeson CJ, in his address to this Society in 2002, said that he strongly commended a reading of *Baxter's* case to "anyone interested … in the personality of Sir Samuel Griffith".[58] It reveals a personality which was pugnacious, acute and independent.

The principal judgment in *Baxter's* case was a vigorously expressed joint judgment by Griffith CJ, Barton and O'Connor JJ. The case was argued for six days, and judgment was reserved for only three weeks. The judgment fell into two parts.

To some degree the first part offered a trenchant summary of the path to federation and the justifications for it. It also summarised the resemblances between the Australian and United States Constitutions, and the differences between the Australian and Canadian Constitutions. These passages were interspersed with allegations that English lawyers, and members of the Privy Council, were ignorant of these things. The judgment stated:

> The object of the advocates of Australian federation . . . was not the establishment of a sort of municipal union, governed by a joint committee, like the union of parishes for the administration of the Poor Laws, say in the Isle of Wight, but the foundation of an Australian commonwealth embracing the whole continent with Tasmania, having a national character, and exercising the most ample powers of self-government consistent with allegiance to the British crown.[59]

The underlying point was that fundamental issues arose in a country with both Federal and State governments. They were different from those in a unitary jurisdiction like England. Further on the judgment said:

> no disrespect is implied in saying that the eminent lawyers who constituted the Judicial Committee were not regarded either as being familiar with the history or conditions of the remoter portions of the Empire, or as having any sympathetic understanding of the aspirations of the younger communities which had long enjoyed the privilege of self-government.[60]

One interpolates – if that does not imply disrespect, what would?

The judgment then explained how, while section 74 left the Privy Council at the apex of the Australian appellate hierarchy in most ways, it gave the High Court control over access to that apex in inter se constitutional questions. This part of the judgment then concluded:

> the High Court was intended to be set up as an Australian tribunal to decide questions of purely Australian domestic concern without appeal or review, unless the High Court in the exercise of its own judicial functions, and upon its own judicial responsibility, forms the opinion that the question at issue is one on which it should submit itself to the guidance of the Privy Council. To treat a decision of the Privy Council as overruling its own decision on a question which it thinks ought not to be determined by the Privy Council would be to substitute the opinion of that body for its own, which would be an unworthy abandonment of the great trust reposed in it by the Constitution.[61]

So the first part concluded that the High Court was not bound by the Privy Council decision in *Webb v Outtrim* to abandon the immunity of instrumentalities doctrine. The second part of the judgment dealt with the question whether, notwithstanding the Privy Council decision, that doctrine should be overruled after being examined afresh. The joint judgment declined to do so. It did so in passages revealing considerable

hostility to the Privy Council in general and Lord Halsbury in particular. In Army circles the expression "dumb insolence" is used. The joint judgment engaged in a fair amount of "speaking insolence". Examples include phrases like "It does not appear … that the Board addressed their minds" to an issue;[62] "So far as we are able to follow the opinion of the Board";[63] "If the learned Lord who delivered the opinion of the Board had read the whole of the paragraph";[64] "we may be permitted to express regret that in a case of such vast importance to the Commonwealth their Lordships did not seek enlightenment from counsel or from the documents the subject of comparison";[65] "Apparently the main ground for this opinion is expressed in the following passage";[66] "we will, out of respect to the learned Board, make some observations";[67] "Their Lordships seem to have thought";[68] and "We confess therefore our inability to understand the language of the learned Board".[69]

One line of reasoning advanced against the immunity of instrumentalities doctrine was that, in lieu of it, reliance could be placed on the monarch's power to disallow legislation, and extend that power to a power to disallow particular parts of an Act. Of this the joint judgment said: "If this is what the Australian Colonies gained by Federation, they indeed asked for bread and received a stone."[70] The joint judgment pointed out that it would require the creation of new bureaux in each State, in the Commonwealth and in London, to determine whether the monarch should be advised to disallow enactments. It said that this "would be dangerous and ruinous for the States, and dangerous and ruinous for the Commonwealth, and would substitute chaos for order, and set up an official in London subject to political accidents in the place of the High Court as the guardian of the Constitution."[71]

In all this there were no doubt inessential things. There was some rhetoric. There may have been some irritation with Isaacs J and Higgins J, whose judgments in various respects disagreed with the joint judgment. There was certainly some vengeance at Lord Halsbury's expense. But the importance of *Baxter's* case is that it took a step down the path of complete independence – national independence and judicial independence. It was right to stress the importance in constitutional questions of local decision-makers. The Privy Council's record in deciding Australian appeals on non-constitutional questions was very good – and the abolition of those appeals has tended to stimulate excessive adventurism in the High Court and in other Australian courts. But the Privy Council's record in constitutional law was, understandably, less impressive. *Baxter's* case showed that Isaacs J was not the only strong patriot on the High Court. And *Deakin v Webb* had shown Griffith CJ's perfectly correct desire to maintain independence from public opinion. Griffith CJ's vindication of the High Court against the Privy Council was matched by a fairly speedy acceptance of its capacity by the State Supreme Court judges, not all of whom were happy with the decision to create the High Court.

Sir Anthony Mason said of the early Court that the "judgments of the foundation Justices exhibit a perceptive appreciation of the relationship between the various branches and institutions of government and of the workings of government and administration".[72] This was a generous tribute, considering that some of Sir Anthony's work was at odds with what the Griffith Court did.

By 1920, the original three justices had all left the Court. In that year both the immunity of instrumentalities doctrine and the reserved powers doctrine were overruled in the *Engineers'* case by a majority – on 31 August, about three weeks after

Griffith CJ's death on 9 August. There was a single judgment of Knox CJ, Isaacs, Rich and Starke JJ. It was rather strident and abusive in form, which betrays the authorship of Isaacs J. It was not entirely convincing. There was a separate judgment to similar effect by Higgins J. Gavan Duffy J dissented.

The successful counsel in the *Engineers'* case was R G Menzies. He had won the case at the age of 25. As Horace Rumpole would have said, he had done it alone and without a leader. No other advocate has ever enjoyed a forensic achievement of such great importance for his country, for good or ill – not Cicero, not great English politician/barristers like Erskine or F E Smith, and not any American.

Let us move on from that romantic note to harsh reality. The *Engineers'* case concerned and disposed of the doctrine of the implied immunity of instrumentalities, but in a brief passage the doctrine of reserved powers was also disposed of.[73] The doctrine of implied immunity of instrumentalities was said to be vague, confused, uncertain and productive of inconsistency in the cases.[74] The new order was said to rest on ordinary principles of construction. It was said that section 107 did not reserve for the States and keep from the Commonwealth whatever fell outside the explicit terms of an express grant of legislative power in section 51.[75]

The essential difference between Griffith CJ and the *Engineers'* case majority is this. He started from the pre-1901 position – the colonies had various powers. Those powers were protected by section 107. They could only be cut down by clear language in section 51. In contrast, the *Engineers'* case majority started with what was created in 1901 – the Commonwealth, endowed with various powers, leaving the States what remained.[76]

This is not the occasion on which to defend or attack the *Engineers'* case. It was very damagingly attacked by Geoffrey Walker at this conference in 2002.[77] The majority judges, in holding that Federal industrial law could bind State government enterprises, could have reached that conclusion on narrower grounds than overthrowing the immunity of instrumentalities doctrine. Hence what the majority said on that doctrine and the reserved powers doctrine was, in a sense, obiter dicta. But what was said has not been treated in that way.

However, one misleading analogy used to support the majority conclusion may be noted. It was referred to above. The analogy is between two relationships. The first is the relationship between the express Commonwealth legislative powers and the powers left to the States. The second is the relationship between those who receive specific bequests under a will and those who are residuary legatees. A testator who misjudges his wealth can leave so much by way of specific bequest that nothing is left to the residuary beneficiaries. But it is highly questionable whether this analogy has any useful application to governmental powers in a federation.

As Zines has said:

> It is . . . unbelievable, having regard to the attention given to the States in the Constitution, that they were (with their Parliaments, viceregal representatives and the express limitations on their powers) to be left as impotent governmental ornaments with plenty of glory and no power.[78]

The *Engineers'* case has certainly been influential. Sir Harry Gibbs was always scrupulous to apply whatever the authorities as they stood said. Hence, although he later came to dislike the effect of the *Engineers'* case on the external affairs power, in 1971, in the *Concrete Pipes* case, he followed the *Engineers'* case. He therefore gave

the corporations power a much wider reach than the founding justices, acting in accordance with the reserved powers doctrine, had done in 1909, in *Huddart Parker & Co Pty Ltd v Moorehead*.[79] Indeed, Sir Harry called Griffith CJ's views "extreme".[80]

But the *Engineers'* case has not survived wholly unscathed. Both Dixon J and Evatt J disliked it.[81] In *Melbourne Corporation v Commonwealth (The State Banking Case)* Dixon J said that it would take clear language in the Constitution to authorise the Commonwealth to make a law "aimed at the restriction or control of a State in the exercise of its executive authority".[82] This antipathy to legislation discriminating against the States has been adopted most recently in relation to federal imposts on the superannuation benefits of State judges[83] and members of State parliaments.[84] He also thought that federal laws could not affect a State exercise of the royal prerogative.[85] And Gibbs J went further in saying that the Commonwealth could not legislate, even in a non-discriminatory way, to prevent a State from continuing to exist and function as a State.[86] Debates about the relationship between State and federal power have continued to this day.[87] To that extent the problem Griffith CJ was trying to solve remains alive, even if his precise solutions do not.

The most astonishing thing about the *Engineers'* case is that no full-blooded assault on it has ever been carried out. One opportunity to launch that assault arose in the *WorkChoices* case. The expansion of the corporations power in the *Concrete Pipes* case, which was relied on to uphold the legislation in the *WorkChoices* case, is an illustration of the overthrow of the reserved powers doctrine by the *Engineers'* case. The *Engineers'* case compelled the narrowness of the conciliation and arbitration power in section 51(xxxv) of the Constitution to be outflanked by the intrusion of the corporations power into the vacant space. But in the *WorkChoices* case no application was made to overrule either the *Concrete Pipes* case or the *Engineers'* case.

As Julian Leeser explained some years ago at this Conference, the opportunity was not taken. Perhaps this was because the plaintiffs – trade unions and States ruled by Labor governments – were not sorry to see strong central power being maintained, even at the risk of the WorkChoices legislation being held valid, as, by majority, it was. Perhaps they foresaw, and welcomed, the electoral damage it would cause. Perhaps it was because the doctrines of the *Engineers'* case are so vague, slippery and mercurial as to be difficult to pin down. Neither the *Engineers'* case nor the *Concrete Pipes* case have ever been challenged. If they had been, the thoughts of Griffith CJ would have been invaluable aids to the debate. As it is, confused and vague though the *Engineers'* case is, it has exercised a baleful influence on the Constitution. It lies behind the vast expansion of the external affairs power under section 51(xxix) of the Constitution[88] – a modern tendency which Sir Harry Gibbs abhorred above all others. The view that the Commonwealth has capacity to exercise legislative power in relation to domestic law even though none of the powers to legislate on domestic matters depends on the ideas underlying the *Engineers'* case.

In 1917, Griffith suffered a stroke. He sat on the Court very little thereafter. In 1919 he retired. In 1920 he died. The Court sat in Brisbane in 1919 to mark his retirement. Neither Griffith CJ nor Barton J was well enough to attend. Isaacs J read a farewell message sent by the dying Barton J. In it Barton J spoke of Griffith's display of "ceaseless devotion, . . . unwearied labour, and … matchless ability". He called him "a great Chief Justice".[89] The former Justice Bruce McPherson, whose death in October

2013 is something which all lawyers must mourn, uttered some remarks about Griffith's role as Chief Justice of Queensland which can apply to his role on the High Court: "His judgments frequently delivered orally with books and law reports before him on the bench, show a mastery of legal principle that places him among the two or three leading Australian lawyers of all time".[90] Sometimes there is nothing cheaper in life than judicial flattery. But this praise by Barton J and McPherson is not cheap. And not even Griffith's harshest critics could demur to their estimations.

Endnotes

1. Harry Gibbs, "Samuel Walker Griffith" in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia,* Oxford University Press, Melbourne, 2001, 309 at 310.

2. "Griffith at Work (1893-1903): A Snapshot", in M White and A Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution*, Law Book Co, Sydney, 2002, 203.

3. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1109 per Griffith CJ, Barton and O'Connor JJ.

4. See generally *Sue v Hill* (1999) 199 CLR 462.

5. (1964) 110 CLR viii at xii.

6. (1964) 110 CLR viii at xi.

7. "Griffith Court" in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia,* Oxford University Press, Melbourne, 2001, 311 at 312.

8. "Reflections on the High Court: Its Judges and Judgments" (2013) 37 *Aust Bar Rev* 102 at 109.

9. *Isaac Isaacs*, Melbourne University Press, Melbourne, 1967, 190.

10. L Zines, *The High Court and the Constitution*, 5th ed, The Federation Press, 2008, 18.

11. (1964) 110 CLR viii at xiii.

12. Simon Sheller, "Sir George Rich" in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia,* Oxford University Press, Melbourne, 2001, 605.

13. Stephen Gageler, "Why Write Judgments?", 2013 Sir Frank Kitto Memorial Lecture,

Monday, 11 November 2013, 15.

14. Foreword to J Reynolds, *Edmund Barton*, Angus and Robertson, Sydney, 1948, (xiii).

15. "Samuel Walker Griffith" in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia,* Oxford University Press, Melbourne, 2001, 309 at 310.

16. (1952) 85 CLR xi at xiv-xv.

17. 5 US (1 Cranch) 137 at 176-80 (1803).

18. See F A Hayek, *The Constitution of Liberty*, Routledge & Kegan Paul, London, 1960, 187 and 475-6 nn 44-49.

19. J A Thomson, "Constitutional Authority for Judicial Review: A Contribution From the Framers of the Australian Constitution" in G Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, Legal Books Ltd, Sydney, 1986, 201. See also B Galligan, "Judicial Review in the Australian Federal System: Its Origins and Function" (1979) 10 *Fed LR* 367 at 372-392; Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17 *Fed LR* 162 at 173-4.

20. "Marshall and the Australian Constitution" (1955) 29 *ALJ* 420 at 425.

21. Sir Owen Dixon, "Marshall and the Australian Constitution" (1955) 29 *ALJ* 420 at 425.

22. (1951) 83 CLR 1 at 262. Gibbs J concurred with Fullagar J in *Victoria v Commonwealth* (1975) 134 CLR 338 at 379.

23. "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 *Harv LR* 129. See also Richard A Posner, *Reflections on Judging*, Harvard University Press, Cambridge, Mass, 2013, 51-77.

24. (1951) 83 CLR 1 at 282-3.

25. *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180; *Shell Co of Australia Ltd v FCT* (1930) 44 CLR 530 at 545 (Privy Council); *R v Quinn; Ex p Consolidated Foods Corporation* (1977) 138 CLR 1 at 8. It has been argued that this approach derives from references by Isaacs J in particular to responsible government in the *Engineers'* case (1920) 28 CLR 129 at 146-7 and 151-3 and in *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393 at 411 and 413: see Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17 *Fed LR* 162 at 184-90.

26. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1111 per Griffith CJ, Barton and O'Connor JJ.

27. For what follows, see generally the lucid discussion in L Zines, *The High Court and the Constitution*, 5th ed, The Federation Press, 2008, 1-20.

28. See *McCulloch v Maryland* 4 Wheat 316 (1819); *Collector v Day* 11 Wall 113 (1870); *United States v E C Knight Co* 156 US 1 (1895).

29. *R v Sutton* (1908) 5 CLR 789; *AG (NSW) v Collector of Customs (The Steel Rails case)* (1908) 5 CLR 818.

30. (1964) 110 CLR viii at xi.

31. *D'Emden v Pedder* (1904) 1 CLR 91; *Deakin v Webb* (1904) 1 CLR 585.

32. *Federal Amalgamated Government Railway and Tramway Service Association v NSW Railway Traffic Employees Association (The Railway Servants' Case)* (1906) 4 CLR 488.

33. *AG (NSW) v Collector of Customs (The Steel Rails Case)* (1908) 5 CLR 818.

34. *Railway Servants' Case* (1906) 4 CLR 488 at 505.

35. *R v Sutton* (1908) 5 CLR 789 at .

36. *Farey v Burvett* (1916) 21 CLR 433 at 441.

37. (1904) 1 CLR 585 at 592-600.

38. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1160-1.

39. For example, *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1164-5.

40. *Union Label Case* (1908) 6 CLR 469 at 503.

41. *Peterswald v Bartley* (1904) 1 CLR 497.

42. *AG (NSW) v Brewery Employees Union of NSW (The Union Label Case)* (1908) 6 CLR 469.

43. *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

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

45. Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17 *Fed LR* 162 at 181.

46. *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 83.

47. *R v Barger* (1908) 6 CLR 41 at 84 and 113.

48. *R v Barger* (1908) 6 CLR 41 at 113.

49. *Deakin v Webb* (1904) 1 CLR 585 at 625.

50. *Deakin v Webb* (1904) 1 CLR 585 at 622.

51. [1907] AC 81.

52. G Bolton and J Williams, "Edmund Barton" in Tony Blackshield, Michael Coper and George Williams, *The Oxford Companion to the High Court of Australia,* Melbourne University Press, Melbourne, 2001, 53 at 55.

53. [1907] AC 81 at 88.

54. [1907] AC 81 at 89.

55. [1907] AC 81 at 89.

56. [1907] AC 81 at 90.

57. (1907) 4 CLR 1087.

58. "The Birth, Life and Death of Section 74" in *Upholding the Australian Constitution Volume 14: Proceedings of the Fourteenth Conference of the Samuel Griffith Society*, The Samuel Griffith Society, Lane Cove, 2002, xxix.

59. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1108.

60. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1111-1112.

61. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1117.

62. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1122.

63. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1123.

64. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1123.

65. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1123.

66. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1123.

67. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1124.

68. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1125.

69. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1139.

70. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1132.

71. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1133.

72. "Griffith Court" in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia,* Oxford University Press, Melbourne, 2001, 311 at 312.

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

74. (1920) 28 CLR 129 at 142-5.

75. (1920) 28 CLR 129 at 154.

76. L Zines, *The High Court and the Constitution*, 5th ed, The Federation Press, 2008, 17.

77. Geoffrey de Q Walker, "The Seven Pillars of Federalism: Federalism and the Engineers' Case" in *Upholding the Australian Constitution Volume 14: Proceedings of the Fourteenth Conference of the Samuel Griffith Society*, The Samuel Griffith Society, Sydney, 2002, 1.

78. *The High Court and the Constitution*, 5th ed, The Federation Press, 2008, 15. See also G Sawer, *Australian Federalism in the Courts*, Melbourne University Press, Melbourne, 1967, 199-200.

79. (1909) 8 CLR 330.

80. "Samuel Walker Griffith" in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia,* Oxford University Press, Melbourne, 2001, 309 at 310.

81. *West v Commissioner of Taxation* (1937) 56 CLR 657 at 681-2 and 687-710 respectively. See also G Sawer, *Australian Federalism in the Courts*, Melbourne University Press, Melbourne, 1967, 133.

82. (1947) 74 CLR 31 at 83.

83. *Austin v Commonwealth* (2003) 215 CLR 185.

84. *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272.

85. See Gibbs J's discussion in *Victoria v Commonwealth* (1971) 122 CLR 353 at 418.

86. *Victoria v Commonwealth* (1971) 122 CLR 353 at 424.

87. *Henderson's Case* (1997) 190 CLR 410.

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

89. (1919) 26 CLR v at vii.

90. B H McPherson, *The Supreme Court of Queensland 1854-1960: History, Jurisdiction, Procedure*, Butterworths, Sydney, 1989, 191.

Chapter One

A Federalist Agenda for the Government's White Paper

Greg Craven

This presentation is a bit like the film *Ground Hog Day*, which I have never actually seen, but I grasp the principle of the man who re-lives a single day of his life over and over again.

So, once again, here is Craven pleading for Federalism.

I did the same thing at the first meeting of the Samuel Griffith Society 21 years ago. In preparing for this talk I looked up my paper from 1992 on the web, which, of course, was not invented at that point. I note that about half of the people who were speaking with me at that conference have now died and the other half, including myself, in all decency probably should have died. Julian Leeser at that point would have been about fifteen years old. In terms of Federalism, since that time, generally speaking, things have got progressively worse.

Context and Process around Federalism

In this presentation I am going to make some suggestions around the context and process around Federalism, rather than substance, because any suggestions I have ever made about the substance of Federalism have been spectacularly unsuccessful. We always think about Australian Federalism as a matter of substance – when actually it was the process of Federalism that has been the basis for its success. We so often fail to think about how we ever got six bickering colonies to agree? With the exception of Western Australia, and that is one of those things that goes in front of every sentence about Australia – with the exception of Western Australia – the delegates to the constitutional convention were elected. The Constitution was voted on by the people. The Constitution is, in form, a British Act, but is, in fact, an act of self-determination. As a result, it is changeable only by referendum, passed by the people. Therefore the Australian Constitution had enormous popular ownership and vast democratic authority, unlike, for example, the American Constitution, which has never been voted on by the entire population of the United States. Of course, with the great logic of constitutionalism therefore, our Constitution is largely ignored as a cultural artefact and the American Constitution serves as wall paper on thousands of preparatory school classrooms.

My thesis is that if the greatness of the Australian Constitution lay in that notion of process, then at a time when we are considering Federalism closely in the context of the formulation of the White Paper, perhaps there is some mileage in thinking about influencing the climate in favour of Federalism by process, rather than the usual approach of trying to come up with a series of ultimately unsuccessful substantial changes.

Australian Federalism is not healthy. It has not yet been given the last rites, but the new Chaplain in the hospital probably would be eyeing it hopefully. We know the symptoms of its disease. We know about vertical fiscal imbalance. We know that, historically, we have a High Court deeply biased towards central power, currently a

little more mixed but, no doubt, normal transmission will be resumed at some point. We know, critically, that there was a rather nasty period there, leading up to the *WorkChoices* decision[1] and, indeed, around the *WorkChoices* legislation, where there was a great intensification in the vulnerability of Federalism. It appeared for the first time in our history that neither of the major parties supported Federalism. Both were prepared to make use of any power that was available to them. We also know that we face the "internal moral collapse" of the States. The States have been so repeatedly and regularly bashed that they have not got Stockholm syndrome (where the hostage becomes fond of its captor); it is more that the States stand to attention as they are beaten by the Commonwealth and I think this increases the difficulty for Federalism.

Having said that, it is not entirely without hopeful signs. The collapse of the appalling referendum on the regulation of local government is one such sign and I think there has been a post-Howard, post-*WorkChoices* reflection, especially in conservative circles, but also in Labor circles, about whether the joys of untrammelled central power are quite as high as one might have supposed. One of the lessons of the Rudd-Gillard years has been, in grand-scheme areas like education or water or harmonisation, that the Commonwealth needs to have the States on-side if it is going to get something done. Not because the States are capable of defeating these things but, in a sense, because they can frustrate them by mere passive inertia. I always call it the "Cornwellisation of Federalism"; once you have pushed the Celts to Cornwell and Wales they have not got anywhere else to go and the sheer density of their presence will cause you problems.

The reasons why Federalism has not operated as intended are well known. I have always thought that, although the founding fathers were brilliant, they made certain fundamental design flaws. The fact that the High Court is appointed entirely by the Commonwealth is what is known in the classical legal term as a "mistake". The fact that we have a one-way amendment process that only the Commonwealth can initiate means you only get one type of proposal. The failure to deal adequately with the question of State finance has been well-documented. I might even mention the regrettable practice of electing Senators, which is currently causing some difficulties in parts of the Federation.

All of those have produced a highly centralised, concentrated Australian Federation and all of that has been exacerbated by events like World Wars and economic crisis. We know that Australian Federalism is in an interesting position. The thing that makes it particularly interesting now is we are probably approaching a key point – and a dangerous point.

Australia now faces a serious economic challenge, and serious economic challenges are not good for Federalism. The reason for that is this; first, there is a naive belief in Australia that the worse the economy is, the more a government should centralise power. That is an exceptionally dangerous mindset for Federalism and for the States. We face the hangover of what I call the "Howardisation of Federalism". It is a worry that the conservative forces are not as committed to Federalism in times of crisis as we may have supposed. Over the last few years we have seen the emergence of what I call "Stag centralisation". You all remember Stagflation – where you had inflation and unemployment together. Normal centralisation tends to be a depressing sort of thing, where the Commonwealth gives you some money and you do what the Commonwealth says. Stag-centralism which was practised under the Rudd-Gillard

governments is that you do not give the States any money but you still require them to do what the Commonwealth says. At a time of economic crisis, Stag-centralism is particularly attractive to Canberra.

We have the further factor that the present Prime Minister is something of a Federalism sceptic. He and I have a long-standing friendly disagreement here. But it would be fair to say that Tony Abbott has a very British view of Federalism, that it was merely a 19th century compromise, best discarded. Whereas I tend to believe that it involves a positive belief in United States-style checks and balances in local democracy. Tony Abbott replies that this is simply me retro-fitting a theory of the Constitution to suit my own predilection for the States.

I have to say that there are some signs of re-assessment here. One, in *Battlelines*,[2] where, in the new edition, the Prime Minister has jettisoned some of his bad ideas about Federalism, but also he has made some very interesting references – made in the context of a charming piece the Prime Minister wrote reflecting on the late Christopher Pearson. He said that one of the things that he thought Christopher Pearson had been right about, and that he, Tony Abbott, could be wrong about, was in his insistence on Federalism.

That brings me to talking about substantive changes such as changing the method of appointing High Court judges; States-initiated referenda fixing federal finance, which are all perfectly technically feasible, absolutely right in principle, but are never going to happen because no Commonwealth government is ever going to put forward a referendum that would trample their power in that way.

Changing the atmosphere

This has led me to ask, if substantial changes are so difficult, are there measures that are contextual and process in nature that we might profitably change with a view to influencing Australian Federalism positively inferentially. In other words, if we cannot change the terrain, could we change the atmosphere in a way that would make Australians more protective of Federalism?

I accept that this is not the natural way for a lawyer to think. It is certainly not the natural way for a former Crown Counsel to the Kennett Government to think. But, with this sort of indirect thing in mind, I would like to present three ideas for the White Paper.

The first idea is that Australia should re-commit formally to Federalism – like the renewal of marriage vows. One of the major political problems federalists face is the argument that Federalism is a historical accident. The consequence is that every time you have discussion about Federalism it is easy to dismiss it as a condition whose time has passed. But what if Australia was, very solemnly, to re-commit in an unequivocal way to the fact that Federalism is a good thing and here to stay?

I would suggest that if the White Paper proceeds on the basis that Federalism will continue, which it will, because, just as there is no way to fix Federalism, there is also no way to destroy it. Then, this argument and approach of transitional Federalism is undermined. There are many ways to achieve this symbolically. There might be joint-resolutions of all Parliaments, State and Commonwealth, an Act, an amendment to the preamble – the preamble seems to be very popular as a receptacle for almost anything! We could actually have a little re-commitment to Federalism in there. It has already got an indissoluble federal Commonwealth. It would then be impossible to de-validate

Federalism as an historical accident. This recommitment is not going to change the view of the High Court on Federalism suddenly, but it is an important and useful point.

Ethics of Federalism

Second is the idea of the ethics of Federalism. We are all aware of different types and applications of ethics. There are health ethics, legal ethics, and business ethics; outside New South Wales there are even political ethics! The remarkable thing is that I have never heard a reference in Australia to the ethics of Federalism.

Having reflected on it, I think my outrage over centralism ultimately is based on an ethical grievance. I know the Constitution was meant to operate one way, but it has been deliberately warped to operate another way and I have never quite managed to get over that. It is a sort of an Irish problem I have. In the context of the High Court, because I am a lawyer, I also know that not only has that warping occurred, but the public reasoning behind it – in cases like the *Engineers'* case[3] – is not only wrong but deeply disingenuous; it is as convincing as a work on theology by Eddie Obeid.

My proposal for the White Paper would be that serious consideration be given to enunciating principles of ethical Federalism at both a high and general level as well as a practical and specific level with a view to framing the debate. Such ethical rules would give a moral compass and a reference point to those who wish to argue for Federalism. Let me illustrate this point by describing some broad principles and some specific ones.

Firstly, there should be a formal statement about why Federalism is good. The statement would not only explain that Australia is a Federation but why we are a Federation – because it promotes democracy and competition and diversity and accountability. The purpose of the statement would be to agree that Federalism has these positive features rather than constantly having to re-argue them in the face of absolute cynicism every time a debate begins.

Second, the revenues of constituent elements in the Australian Federation should be commensurate to the proportion of their responsibilities. A general proposition of correlation between revenue and responsibility, and that cooperation between levels of government is to be encouraged. There should be consultation on decisions having implications across federal boundaries. For example, the entry into treaties and the appointment of High Court judges, that type of ethical principle would give some level of moral force to some very weak practices that currently exist. More specifically, inclusion of a general proposition that the external affairs power should be used only as a last resort in the exercise of Commonwealth power and only on matters of genuine international concern.

A final "large" general ethical proposition – truly outrageous – that Senators have particular responsibilities to the representation of the interests of their State. Presently all of these things have to be advanced as contentious propositions but they should become universally accepted truths.

In relation to "specific things", the Commonwealth should not invade traditional areas of the State without due consideration and public articulation of the reasons why. Perhaps there should be some definition of those areas and the requirement for a Federalism Impact Statement which would outline why the Commonwealth is engaging in this action, what it is going to do, and why it should happen. In addition,

the Commonwealth should not impose program responsibilities on States without adequate funding and the States (and these things should be mutual) should rigorously apply Commonwealth funding to required purposes, where there is a required purpose.

There should be a series of principles around COAG – that the States should be able to put things on the agenda that do not go to the bottom and are actually discussed; that the COAG Secretariat should be independent of the States and the Commonwealth; that notice of proposals by the Commonwealth should be commensurate with the size of the proposal; and that at least one COAG meeting should be within a certain period and should discuss the general state of the Federation and what you might call strategic federalism; that grants not be excessively tied with conditions; that programs funded by the Commonwealth through the States should be standard-driven, not by micro stipulation; and that Cooperative Schemes should have real targets, data and accountability attached to it. And I note that a number of those ideas have been put forward to the COAG Reform Council by its Chairman, John Brumby, a former Premier of Victoria.[4]

None of these things is going to change the substance of Australian Federalism, but if there was a genuine public agreement to that, it would certainly fundamentally change the public debate around Australian Federalism.

White Paper and convention

This brings me to my last idea, which is also a process idea. It is crucial that the White Paper goes into the issues in sufficient depth. After it is done, there needs to be a conversation in the real world of Australian Federalism involving participation of the Commonwealth, the States, business people, government experts, economists and even academics. I propose that after the White Paper, a mini Convention be appointed to consider the ideas and comment upon them, elaborate on them, and improve them. The Convention would then report to the Government. I would hope that both the Convention and the White Paper would also consider the other ideas I have talked about: the re-commitment to Federalism, and the notion of State and Federal ethics.

I appreciate that this is not the usual cavalry charge in defence of Federalism that I favour, but it is perhaps the time to move to a more realistic approach.

Endnotes

1. *New South Wales v The Commonwealth* (2006) 229 CLR 1.

2. Tony Abbott, *Battlelines*, 2013, 2nd Ed.

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

4. John Brumby, "Reform or Perish: A Report Card on Five Years of National Reform", Speech to the National Press Club, Canberra, 6 November 2013, at http://mill.cha.org.au/site.php?id=1980.

Chapter Two

Money, Power and Pork-Barrelling: Expenditure of Public Money without Parliamentary Authorisation

Anne Twomey

One of the major problems with our federal system is that the Commonwealth Government regards the money that it raises through taxation and other means as it own money, to be spent for its own political advantage. Hence we have the unedifying spectacle of gross forms of electoral pork-barrelling, be it Ros Kelly's "sports rorts" worked out on a white board, John Howard's regional partnership program that was subject to a scathing report by the Auditor-General prior to the 2007 election[1] and, most recently, promises prior to the 2013 election to fund a multiplicity of surf clubs, aquatic centres and sports grounds, most seeming to need at least $10 million each and nearly all in marginal electorates.[2]

Almost none of this expenditure falls within Commonwealth heads of power. Where is the Commonwealth's responsibility for sport? What is its constitutional role in relation to the construction of surf clubs and community facilities? These matters are for the States and local government to deal with. The framers of the Constitution never allocated such powers to the Commonwealth.

There appear to be two reasons why the Commonwealth is involved in such matters today. First, the Commonwealth raises far more money than it needs in order to fulfil its constitutional responsibilities, so it has plenty of extra money to throw around on matters beyond its responsibilities. Secondly, the Commonwealth sees the funding of such projects as a good way of buying favour in communities and votes in elections.

The extent of the Commonwealth's power to engage in such pork-barrelling has been challenged in recent times. Two cases handed down by the High Court have put a dampener on its ability to do so. One of the Commonwealth's proposed responses, a constitutional referendum to allow it to fund such projects directly through local government bodies, was aborted due to significant criticism and lack of public support. The other band-aid, being legislation to authorise the Commonwealth to spend money on practically anything it wants, is currently under challenge before the High Court.

This paper addresses the constitutional limits on the Commonwealth's expenditure of public money and how a new government might address the question of future Commonwealth expenditure.

Constitutional History

The framers of the Constitution always anticipated that the Commonwealth would receive far more revenue than it needed to fulfil its constitutional functions. They envisaged a small national government of specific limited powers, with the States retaining responsibility for most functions, including the most expensive ones, such as health and education. Yet, at the same time, there was a grass-roots demand for free

trade across the nation and an end to the paying of duties on goods as they crossed State borders. The consequence was that the power to impose duties of excise and customs was given exclusively to the Commonwealth, but as this was the main form of taxation at the time, amounting to more than three-quarters of colonial tax revenue, it meant that the Commonwealth would receive far more revenue than it would ever need and the States would not have enough revenue to fulfil their functions.

The framers of the Constitution therefore included mechanisms in the Constitution for the transfer of money from the Commonwealth to the States. For the first few years, they imposed a book-keeping system. The Commonwealth would credit each State with the customs and excise revenue it collected within the State and then debit the proportion of the Commonwealth's expenditure attributable to the State (calculated by reference to the State's population). The Commonwealth then paid the balance to the State. This method balanced the two competing factors – where money was collected and the needs of the States based upon their populations.

As the framers could not predict the precise impact of these financial changes on the new States, they were less prescriptive about what had to happen after the book-keeping stage ended. Section 94 simply required that the Commonwealth distribute its surplus revenue to the States on such basis as the Commonwealth Parliament should deem fair. Although discretion was given to the Commonwealth about how the surplus was to be distributed – whether it was to be on a per capita basis, or whether it would take into account where the revenue had been collected – the requirement actually to distribute the surplus to the States was mandatory.[3]

There was then an argument about how to make sure that there was a surplus and that the Commonwealth did not just gobble up all the money for its own purposes. Delegates to the Constitutional Convention noted that a system that leaves a government with a large surplus inevitably leads to a "system of waste and extravagance"[4] and gives rise to a temptation that should be kept "out of the hands of the Federal Treasurer".[5] Charles Kingston aptly observed, "there is nothing which conduces more to the reverse of sound finance and good government than an overflowing Treasury".[6]

Others, such as Sir John Downer, thought it unnecessary to impose limits on Commonwealth expenditure because the Commonwealth had very limited powers and responsibilities and could not spend beyond them.[7] This was reflected in section 81 of the Constitution, which limited Commonwealth appropriations to "the purposes of the Commonwealth". As there was a risk that this would not cover the transfers to the States under section 94 and associated provisions, section 81 was altered to make it subject to the "charges and liabilities imposed by this Constitution", such as the obligation to pay the Commonwealth's surplus to the States.[8]

Some delegates were not convinced that this was enough to save the Commonwealth from the temptation of over-spending. A Tasmanian delegate, Edward Braddon, successfully proposed the inclusion of section 87 of the Constitution which stated that the Commonwealth could only spend one quarter of the revenue it received from customs and excise duties, with the rest having to be paid to the States. This guaranteed a surplus of at least three quarters of Commonwealth revenue from customs and excise duties. An attempt was made at the Melbourne session of the Constitutional Convention to limit the effect of the Braddon clause to five years, but this was voted down. It was intended to apply in perpetuity (unless the Constitution

was later amended).

The draft Constitution, as agreed upon at the 1897-98 Constitutional Convention, was then put to a referendum in the different colonies. It received support from a majority of voters in New South Wales[9] but did not reach the requisite minimum support of 80,000 voters (as there was no compulsory voting at that time). It was thus deemed to have failed. At a meeting of Colonial Premiers in January 1899, a number of compromises were reached in order to obtain subsequent agreement from the people to the draft Constitution. Two of those compromises related to Federal-State financial arrangements. The Premier of New South Wales, George Reid, had sought the deletion of the Braddon clause.[10] The compromise reached by the Premiers was to limit it to a minimum of ten years, and thereafter until the Commonwealth Parliament otherwise provided. This turned out to be a very short-sighted move on the part of New South Wales.

The second compromise was to insert section 96 in the Constitution, allowing the Commonwealth to make grants upon conditions to States where this was needed. Such a provision had previously been rejected at the Constitutional Convention in Melbourne in 1898.[11] There was a concern that the States would become supplicants to the "rich uncle" of the Commonwealth who would come to their aid in financial trouble. Richard O'Connor, later a Justice of the High Court, was concerned that this would lead to circumstances where one government could pressure or "exact terms" from the other, as this would produce "the germs of corruption and improper influence".[12] Dr John Cockburn thought that such a proposal would "certainly sap the independence of the states by placing the Federal Parliament as a sort of Lord Bountiful over the states". He was prescient in his warning that "we may as well strike out the provision that all taxation shall be uniform throughout the Commonwealth if we are to contemplate that after the taxation has been raised the proceeds may be handed over to any one colony".[13]

In 1899, the intention behind inserting section 96 was to avoid the necessity of imposing higher uniform Commonwealth taxes (affecting the more prosperous States, such as New South Wales) in order to provide per capita funding to the States at a sufficiently high level to support the more financially needy smaller States (such as Tasmania).[14] It was also seen as a concession to the smaller States, especially Tasmania, "as a *quid pro quo* for the concession made to New South Wales in the limitation of the Braddon clause".[15] It was certainly not intended that section 96 would become the primary means of transferring money to the States. This was the function of section 94, which it was anticipated would involve the distribution of the surplus on a per capita basis, after the transitional period was over. Nor was it intended that the provisions in the Constitution that carefully prescribe that the Commonwealth may not discriminate between the States in imposing taxation were to be undermined by the discriminatory return of the proceeds of taxation to particular States under section 96.[16]

Section 96 was, according to the colonial Premiers, only intended to allow the Commonwealth Parliament "to deal with any *exceptional circumstances* which may from time to time arise in the financial position of any of the States" [17] [emphasis added]. It was thought that such problems would only be likely to arise in the transitional period after federation, while State economies were adjusting to the loss of customs and excise duties. Hence, section 96 was stated to apply "during a period of ten years after the establishment of the Commonwealth and thereafter until the

Parliament otherwise provides". It was intended to be a temporary measure to deal with financial emergencies.

The financial scheme in practice

This careful balancing of the financial system, intended to ensure that the vast bulk of Commonwealth revenue was returned to the States, was swiftly undermined and overturned by the Commonwealth. After the book-keeping period was over, the Commonwealth moved in 1908 to undermine section 94 by ensuring that it had no surplus to transfer to the States. It did this by appropriating all left-over money at the end of each financial year into various trust accounts for future use. This was upheld by the High Court.[18] The Commonwealth has never had a surplus since.

Once the minimum 10 years of the Braddon clause was up, Parliament then "otherwise provided" by getting rid of it.[19] This meant that it could use all of its tax revenue from customs and excise duties for its own spending and did not have to transfer three-quarters of it to the States.

This left section 96 as the sole standing method of transferring money to the States. Critically, it is a completely discretionary provision and it can be made subject to conditions. The High Court has held that as long as the grant itself is consensual, the conditions imposed upon it may relate not only to how the money is used but to any other matters of State policy.[20] This has significantly expanded the Commonwealth's power and made the States subservient to the will of the Commonwealth.

However, section 96 also plays another indicative role in the Constitution. Its inclusion would not have been necessary if the Commonwealth was otherwise able to spend money on grants to States or other matters outside the Commonwealth's specified constitutional powers.[21] There are clearly wide areas of activity that lie outside the Commonwealth's spending power and which may only be dealt with by the Commonwealth through conditions attached to section 96 grants.[22] As Justice Starke noted in the *Pharmaceutical Benefits* case, section 96 would be superfluous if the Commonwealth had the power to appropriate money with respect to any subject matter.[23] These points have most recently been reiterated by the High Court in the *Williams* case.[24]

Purposes of the Commonwealth

The Commonwealth has constantly bridled against this restriction on its power to appropriate and spend public money. It began, particularly in the 1970s, to spend money directly on subjects that were not within its legislative or executive powers. In doing so, it sought to exert pressure on the High Court by establishing a long-standing practice of such expenditure in order to raise the stakes involved in striking it down. It relied on the circular argument that the mere fact that the Commonwealth Parliament had decided to appropriate funds for a purpose was enough to make it a "purpose of the Commonwealth". If this argument were correct, then the phrase, "purposes of the Commonwealth," in section 81, would be meaningless, because all appropriations made by the Commonwealth Parliament would be, by virtue of that very fact, purposes of the Commonwealth.

The question of the meaning of "purposes of the Commonwealth" divided the High Court in the *Pharmaceutical Benefits* case[25] in 1945 and the *AAP* case[26] in 1975, in such a way that there was no majority support for either the broad view (that purposes of

the Commonwealth meant any purposes for which the Commonwealth Parliament decided to appropriate money) or the narrow view (that the Commonwealth could only appropriate money for purposes within the Commonwealth's powers). Those judges that took the broader view were influenced both by the concern that, otherwise, many past appropriations would be invalid;[27] and also by the need for the Commonwealth to fund worthy causes such as exploration and scientific research.[28]

Despite the inconclusive nature of these cases, the Commonwealth took the view that it could spend money on whatever it wanted until such time as it was told by the Court that it was unconstitutional. It, therefore, proceeded, particularly during the Howard era, to start funding schools and local government bodies directly, avoiding the use of section 96 grants to the States. The intention was to use Commonwealth money to buy influence and potentially votes at the local level, by-passing the role of the States, so that the Commonwealth could be seen to be the benefactor and the hero in local communities. There was also an underlying intention to create an even bigger edifice of such payments so that it would be too substantial to be struck down.

The *Pape* case

The Commonwealth's edifice has since been subject to two major hits by the High Court. First, in the *Pape* case, the Court held that section 81 only goes to support appropriation, not expenditure. The Commonwealth needs an additional power to authorise the expenditure of appropriated money.[29] In *Pape,* the legislation granting tax-payers bonus payments was saved by reliance upon the nationhood power, on the basis that it was a response to a national "emergency" arising from the global financial crisis.[30] Such a power, however, is limited in scope and cannot save the many Commonwealth programs, such as its chaplaincy program, which do not fall within the category of a national emergency.

The Commonwealth had contended that its long-standing practice of appropriating money for purposes beyond its powers supported the view that such expenditure was for the "purposes of the Commonwealth" and within its evolving powers. Justice Heydon skewered this argument as follows:

> The other fallacy is the Panglossian belief that what is said to have evolved over time as a matter of governmental practice corresponds with the Constitution. It holds, not only that everything which exists is for the best in the best of all possible worlds, but also that what exists in that world is constitutionally valid. It fails to face up to the fact that, magnificent though the framers' achievement was, the Constitution is not consistent with every human desire. If it is to be changed, section 128 is the means, and the sole means, of doing so.[31]

Heydon J rejected the idea that a "living tree" form of constitutional interpretation can be used to give constitutional support to government practices that move outside the scope of its legislative power. He described such an approach as "a theory of continuous constitutional revolution, in which successive usurpations would be constantly seeking to legitimise themselves by claiming de jure status from their de facto position".[32] He concluded that the "Court decides what the Constitution means in the light of its words. It does not infer what the Constitution means from the way the Executive and the legislature have behaved".[33] Justice Heydon added for good measure that "executive and legislative practice cannot make constitutional that which would otherwise be unconstitutional" and that "practice must conform with the Constitution,

not the Constitution with practice".[34] This was a lesson to which the Commonwealth turned a deaf ear.

The fact that the Commonwealth's legislation was ultimately saved in the *Pape* case perhaps led the Commonwealth into a false sense of security that ultimately the Court would not knock down any of its expenditure. The Commonwealth appears to have assumed that its broad executive power, combined when necessary with its incidental legislative power in section 51(xxxix), would be enough to authorise its expenditure when there was no express head of legislative power.

As a consequence, the Commonwealth took no action to review its expenditure and put it all on a firm footing – either under express legislative power or section 96 grants. Its chickens came home to roost in the *Williams* case.

The *Williams* case

Mr Williams complained that the Commonwealth scheme that paid for a chaplain in his children's school was invalid. The scheme was not authorised by any legislation. It relied upon executive power, plus the appropriation of funds for a fairly vague purpose.

The Commonwealth had argued that the expenditure was supported by its executive power, either under the broad view, that the Commonwealth executive has the capacity of a legal person to spend on any matter it chooses, or, on the narrow view, that the executive can spend public money on subjects that fall within the scope of legislative power, even when no such legislation has been enacted.

In the *Williams* case, a majority of the High Court rejected both the broad and narrow views, deciding that because this involved the expenditure of "public money", parliamentary authorisation was needed and that the chaplaincy funding program was therefore invalid.

Different themes flowed through the Court's judgments. One of the most notable was the renewed concern about "federalism considerations". In the *WorkChoices* case,[35] as Greg Craven so memorably put it, Federalism had been discarded like a used tissue. In *Williams,* however, Federalism became an important consideration again,[36] at least in ascertaining the scope of the Commonwealth's executive powers, if not its legislative powers.

The Court also related this to section 96 of the Constitution, expressing concern about the Commonwealth by-passing section 96 in favour of expenditure based on executive power.[37] Justices Hayne and Kiefel both pointed out that section 96 would be rendered redundant if the Commonwealth executive had power to spend money on whatever subjects it wished and then to legislate to enforce conditions on its expenditure.[38] Section 96 would have no work to do at all, as everything could be done under the executive power and the incidental legislative power. Justices Crennan and Kiefel added that the very presence of section 96 in the Constitution was evidence that the Commonwealth's executive power did not extend so far and that there are large areas beyond the scope of the Commonwealth's executive power.[39]

The High Court also stressed the importance of the accountability of the executive to Parliament, and particularly to the Senate, in relation to expenditure.[40] It noted that the Senate's powers are limited with respect to the appropriation bills for "the ordinary annual services of the Government", but not in relation to legislation that authorises expenditure, rather than appropriation. Interestingly, the High Court appears to be

back-tracking a bit from its acceptance in the *Combet* case that the Commonwealth can appropriate money for purposes that are described in relatively meaningless generality.[41] In the *Williams* case, the money for the chaplaincy program was appropriated for the purpose of achieving the "outcome" that "individuals achieve high quality foundation skills and learning outcomes from schools and other providers".[42] It is incomprehensible to me, and perhaps to the Justices of the High Court, how Parliament could have been expected to know from this description that it was actually appropriating money for a chaplaincy program. Given that the appropriation system now no longer provides an appropriate level of accountability, the High Court is attempting to impose this at the expenditure stage.

The upshot of the *Williams* case was that unless Commonwealth expenditure falls within a defined class of exceptions, being expenditure –

directly authorised by the Constitution;
made under a prerogative power;
made in the ordinary administration of the functions of government; or
(possibly) made under the nationhood power,

then it has to be authorised by a law that is supported by a head of Commonwealth legislative power.[43] As the chaplaincy program did not fall within any of the above exceptions and was not supported by legislation, it was therefore held to be invalid.

The *Financial Framework Legislation Amendment Act (No 3)* 2012 (Cth)

A week after the *Williams* decision was handed down by the High Court, the Commonwealth Parliament passed, almost without any scrutiny, the *Financial Framework Legislation Amendment Act (No 3)* 2012 (Cth).

It inserted section 32B into the *Financial Management and Accountability Act,* which purports to provide parliamentary authorisation for the expenditure of public money on any of the programs or objects listed in regulations. In the days after the *Williams* case, the public servants had been asked to "bring out their dead", listing any programs which were not supported by legislation. Some gave very specific lists. Others, who either did not know or were unprepared to reveal, the nature and extent of their executive spending programs, simply offered up categories such as "Public Information Services", "Regulatory Policy", "Diversity and Social Cohesion", "Domestic Policy" and "Regional Development". The former Chief Justice of New South Wales, James Spigelman, described some of these programs as being "identified in such a general language that they could not withstand constitutional scrutiny".[44]

Not only does section 32B purport to authorise existing expenditure programs that come within these descriptions, but it also seeks to authorise any future Commonwealth programs that can be shoe-horned into one or other of the 400-odd existing categories in the regulations. In such a case, the new expenditure program will have no legislative scrutiny at all. If a change to the regulations is needed, however, this can be done by executive action but will at least run the gauntlet of potential disallowance by either House.

An example arose recently in relation to the proposed spending upon the local government referendum. The *Financial Management and Accountability Amendment Regulation* 2013 (No 3) authorised expenditure by the Executive on a national civics education campaign and a communications campaign by those for and against the then proposed local government referendum.[45] Interestingly, it was not disallowed,

despite the controversy concerning the differential funding for the Yes and No cases. It is not clear, in the wake of the failure of the referendum to proceed, how much of this money was spent and how much returned to the government.

Section 32B is currently under challenge by Mr Williams, who still has Commonwealth-funded chaplains in his children's school. He is arguing that section 32B and the Division in which it is contained are not supported by a head of legislative power.[46] He also contends that there is implied in the Constitution "a limit upon the Commonwealth Executive's power to implement policies and spend money without engagement of the Senate beyond the appropriation process".[47]

At the very least, the authorisation of expenditure by section 32B on those programs that do not fall under a Commonwealth head of power (including the nationhood power) must be invalid.[48] The outcome of *Williams No 2* will most likely turn on whether section 32B is completely invalid or whether it can be read down so that it only applies to expenditure on those programs and grants that fall within Commonwealth legislative power.

In the last parliamentary sitting days of the Gillard Government, an entirely new financial system for the Commonwealth was guillotined through the Senate – the *Public Governance, Performance and Accountability Act* 2013 (Cth). This Act, when it comes into force, will replace the *Financial Management and Accountability Act* 1997 (Cth) and take over the governance of the Commonwealth's financial operations. It is based upon the dubious model of inserting "principles" in the legislation and leaving the detail to rules made by ministers. Accordingly, it is quite opaque and difficult to understand what it actually authorizes, as is presumably intended. It is clear that the Commonwealth has not taken to heart the High Court's call for greater parliamentary scrutiny of the expenditure of public money, as it is doing its best to provide even less.

This Act has been dropped on the doorstep of the new Abbott Government. While passed by Parliament when the last Government was still in office, it has not yet come into force, but will do so automatically if not proclaimed by 1 July 2014. Despite its opacity, it appears that it does not contain an equivalent to section 32B (unless it is proposed to provide such authorization for government programs by way of rules made by the minister). This leaves the Abbott Government with the dilemma of whether or not to enact an equivalent provision to section 32B, knowing that section 32B may well be found invalid by the High Court some time in 2014, or to take some other course.

Options for the Commonwealth

There are a number of alternatives that the Commonwealth could contemplate. First, it could consider enacting special appropriation legislation (as opposed to laws for the "ordinary annual services of the Government") that deals with the funding of particular projects or programs or capital acquisitions. Relying on heads of power other than section 81, such legislation could authorise the terms of the particular project, program or acquisition as well as authorising the expenditure.

Alternatively, it could, where it has a legislative head of power, enact legislation to authorise specific programs or relevant groups of programs (for example, an Act to authorise all foreign aid expenditure) as well as the expenditure under those programs, but leave the appropriations for authorisation in the ordinary annual budget

and supply bills.

The objection would no doubt be made that such action would take too much effort and be a drain on parliamentary time. However, the benefits of having properly organised and set out programs, rather than expenditure based upon back of the envelope or white-board assessments, are likely to be immense. There is a much greater discipline in having a program enacted into legislation. Details need to be worked out and justified. Frolics, thought-bubbles and whims are likely to be abandoned well before a bill is introduced into Parliament. Decisions made under the Act will be subject to judicial review and therefore must be fair, reasonable and able to withstand scrutiny. Money is likely to be saved. Programs are likely to be administered in a more efficient and disciplined way. This is also the preferable course from a democratic point of view, as it allows proper parliamentary scrutiny of, as well as amendment to, new programs involving the expenditure of public money. As Hayne J noted: "Sound governmental and administrative practice may well point to the desirability of regulating programs of the kind in issue in [*Williams*] by legislation".[49]

Where the Commonwealth does not have the legislative power to authorise particular forms of expenditure, it can still negotiate section 96 grants with the States to meet agreed aims. Better still, it could simply decide to cut Commonwealth expenditure in relation to matters that do not fall under its legislative power and pass the relevant money to the States so that they can adequately deal with such subjects, as the framers of the Constitution intended. After all, it is *public* money, not Commonwealth money, and it should be used to fulfil public needs, not just the needs of those who live in marginal seats and the need of the party in government at the Commonwealth level to be re-elected.

This would be far more consistent with the federal system created by the Constitution as well as being far more economically efficient, as it would reduce the size of the Commonwealth bureaucracy and the unnecessary cost involved in administering programs through two levels of government. It would also give the States greater control over expenditure in their areas of jurisdiction, resulting in better planned and managed programs and services.

Governments often bleat about the need for budget savings and the improvement of productivity. One simple way of achieving this within the public sector would be for the Commonwealth to stop spending public money on matters beyond its areas of constitutional responsibility in a vain attempt to buy public favour and, instead, transfer this surplus public money to the States so that they can fulfil their responsibilities in a more efficient and effective manner. Such an idea ought to be attractive to a Liberal Government, but whether it can wean itself from the Commonwealth's addiction to gratuitous spending and vote buying remains to be seen.

Endnotes

1. ANAO, *Performance Audit of the Regional Partnerships Programme,* 2007: http://www.anao.gov.au/Publications/Audit-Reports/2007-2008/Performance-Audit-of-the-Regional-Partnerships-Programme/Audit-brochure.

2. See further: Judith Sloan, "Both parties roll out the pork barrel for marginals", *The*

Australian, 31 August 2013.

3. See: J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, 865; R L Mathews and W R C Jay, *Federal Finance – Intergovernmental Financial Relations in Australia Since Federation,* Nelson, 1972, 52; and *Victoria v Commonwealth and Hayden* (*AAP Case*) (1975) 134 CLR 338, 358 (Barwick CJ).

4. Constitutional Convention, Sydney, 1891, 805 (Mr Bray); and Sydney, 1897, 150 (Mr Hackett).

5. Constitutional Convention, Adelaide, 1897, 45 (Sir George Turner).

6. Constitutional Convention, Melbourne, 1898, 864 (Mr Kingston).

7. Constitutional Convention, Melbourne, 1898, 898 (Sir John Downer).

8. J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, 811.

9. 71,595 people voted in favour of the Constitution with 66,228 voting against it: R L Mathews and W R C Jay, *Federal Finance – Intergovernmental Financial Relations in Australia Since Federation*, Nelson, 1972, 37.

10. J A La Nauze, *The Making of the Australian Constitution*, MUP, 1972, 241.

11. Constitutional Convention, Melbourne, 1898, 1122.

12. Constitutional Convention, Melbourne, 1898, 1109 (Mr O'Connor).

13. Constitutional Convention, Melbourne, 1898, 1119 (Dr Cockburn).

14. R L Mathews and W R C Jay, *Federal Finance – Intergovernmental Financial Relations in Australia Since Federation*, Nelson, 1972, 49.

15. Cheryl Saunders, "The Hardest Nut to Crack: The Financial Settlement in the Commonwealth Constitution" in G Craven (ed), *The Convention Debates 1891-1989: Commentaries, Indices and Guide*, Legal Books, 1986, 171. La Nauze described the insertion of section 96 as a "sop to Braddon": J A La Nauze, *The Making of the Australian Constitution*, MUP, 1972, 246.

16. R L Mathews and W R C Jay, *Federal Finance – Intergovernmental Financial Relations in Australia Since Federation*, Nelson, 1972, 50.

17. J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, 219; R L Mathews and W R C Jay, *Federal Finance –*

Intergovernmental Financial Relations in Australia Since Federation, Nelson, 1972, 38.

18. *New South Wales v Commonwealth* (1908) 7 CLR 179.

19. *Surplus Revenue Act* 1910 (Cth), s 3.

20. *Victoria v Commonwealth* (1926) 38 CLR 399.

21. *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237, 282 (Williams J).

22. *AAP* (1975) 134 CLR 338, 398 (Mason J).

23. *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237, 266 (Starke J).

24. *Williams v Commonwealth* (2012) 248 CLR 156, [243] and [247] (Hayne J); [501]-[503] (Crennan J); [592]-[593] (Kiefel J).

25. *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237.

26. *AAP* (1975) 134 CLR 338.

27. *AAP* (1975) 134 CLR 338, 418 (Murphy J).

28. *AAP* (1975) 134 CLR 338, 394 (Mason J).

29. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [8] and [111] (French CJ); [178]-[183] (Gummow, Crennan and Bell JJ); [320] (Hayne and Kiefel JJ) and [601]-[602] (Heydon J).

30. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [112] (French CJ); [213] and [241] (Gummow, Crennan and Bell JJ).

31. *Pape* (2009) 238 CLR 1, [435] (Heydon J). Note that Heydon J was in dissent, but this does not detract from the force of these comments, as no one in the majority argued to the contrary.

32. *Pape* (2009) 238 CLR 1, [534] (Heydon J).

33. *Pape* (2009) 238 CLR 1, [598] (Heydon J).

34. *Pape* (2009) 238 CLR 1, [598] (Heydon J).

35. *New South Wales v Commonwealth* (2006) 229 CLR 1, [54] and [194]-[196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

36. *Williams* (2012) 248 CLR 156, [54] (French CJ); [143] and [155] (Gummow and Bell JJ); [192]-[199] and [248] (Hayne J); and [395] (Heydon J).

37. *Williams* (2012) 248 CLR 156, [143] (Gummow and Bell JJ); [503] (Crennan J).

38. *Williams* (2012) 248 CLR 156, [243] and [247] (Hayne J); and [593] (Kiefel J).

39. *Williams* (2012) 248 CLR 156, [501] (Crennan J) and [592] (Kiefel J).

40. *Williams* (2012) 248 CLR 156, [60] (French CJ); [145] (Gummow and Bell JJ); [174] and [222] (Hayne J).

41. *Combet v Commonwealth* (2005) 224 CLR 494.

42. *Williams* (2012) 248 CLR 156, [227] (Hayne J).

43. For a close analysis of these categories of exception, see: Anne Twomey, "Post-*Williams* expenditure – When can the Commonwealth and States spend public money without parliamentary authorisation?", 2014, *University of Queensland Law Journal*.

44. The Hon James Spigelman, AC, "Constitutional Recognition of Local Government", Address to the Local Government Association of Queensland, 24 October 2012, 10.

45. See program 421.002A in *Financial Management and Accountability Regulations* 1997 (Cth).

46. *Williams v Commonwealth (No 2),* Statement of Claim, Filed 8 August 2013, para 57.

47. *Williams v Commonwealth (No 2),* Statement of Claim, Filed 8 August 2013, para 58.

48. Note the view of Sir Owen Dixon that it may be competent for Parliament to pass a General Contracts Act *unless* it is desired "to confer a greater contractual power upon the executive than subjects of legislative power at present permit Parliament to give": Commonwealth of Australia, *Royal Commission on the Constitution – Minutes of Evidence,* (Cth Gov Printer, 1929) Vol 3, 13 December 1927, 781.

49. *Williams* (2012) 248 CLR 156, [288] (Hayne J).

Chapter Three

Comparative Federal Income Tax

Keith Kendall

In 2012, I presented a paper to the Samuel Griffith Society that put forward a model in which a State-level income tax may be a feasible option to resolve vertical fiscal imbalance in Australia.[1]

The essence of that proposal was that the Commonwealth would vacate the personal income tax field in favour of the States reintroducing such a tax; the Commonwealth would retain the corporate income tax; and the revenue from the goods and services tax (GST) would also be retained by the Commonwealth. Jurisdiction to tax would be based on residency, hence the need for the corporate income tax to remain at the Commonwealth level, as companies may easily be located in a different jurisdiction compared with their principals.

A question that arises from this proposal[2] is how such a model compares with those used by other federations with a State-level income tax. That comparison forms the focus of this paper.

While there are several federations from which lessons can be drawn, for a number of reasons (comparability of development, economies, federal structure, similarity of legal system), this paper provides a brief examination of Canada, the United States and Germany. The intention is not to be especially comprehensive but, recognising that the idea of reintroducing any form of income tax at the State level in Australia is a significant departure from the fiscal system that has been in place for a substantial period of time, this paper represents something of a good starting point for what will hopefully be a serious consideration of this policy proposal.[3]

Canada

An early observation that may be made about Canada is that there are a number of parallels between both the history of its federation and its federal structure when compared with Australia. Interestingly, though, at many junctures, Canada has adopted a distinctly different, if not a completely opposite, approach from that pursued in Australia, demonstrating that there is nothing either inevitable or necessary about the present Australian system.

Canada is comprised of ten provinces and three territories, with the provinces having a formal status similar to those of the States in Australia. Unlike Australia, the Canadian provinces have constitutionally enumerated powers. A further distinction from the Australian States is that the Canadian provinces enjoy a high degree of fiscal autonomy, with a high degree of control over their spending programs and access to revenue sources, including income tax.[4] As such, it may be noted that Canada's federation is much more inherently decentralised than Australia's, with provincial powers constitutionally protected.

Prior to the First World War, the provinces levied their own income taxes, with the Federal Government entering this realm in 1917. Between the World Wars, little co-ordination between the two levels of government occurred and, with the growth of the

Federal Government's involvement in the income tax field, gave rise to a "tax jungle" with sometimes conflicting requirements.[5] This was a similar situation to that which existed in Australia at the same time.[6]

With the onset of the Second World War, responsibility for the income tax was concentrated in the Federal Government. While a similar situation existed in Australia, it is instructive to note that the Canadian arrangement was achieved with the acquiescence of the provinces,[7] in contrast with the Australian position which was, ultimately, imposed on the States with the support of the High Court.[8]

After the conclusion of hostilities, Canada developed a system based on co-ordination between the levels of government, which, inter alia, involved the Federal Government devolving much of the income tax base to the provinces.[9] Again, this may be contrasted with developments in Australia, where the response to similar challenges and opportunities has been concentration of taxing power in the central government rather than decentralisation.

Another interesting point of difference with Australia is the taxing power under the Canadian Constitution. As with Australia, taxation is a power shared between both levels of government but, in Canada, this is restricted to direct taxes. Australia, while not explicitly restricting State taxing powers, has in effect done so through the High Court's constitutional jurisprudence.[10] It is interesting to note, though, at least for (further) comparison purposes, that the Canadian Supreme Court's interpretation of the term, "direct taxation", has been so wide as to allow the provinces to impose what are normally regarded as indirect taxes, such as consumption taxes. Arguably, this represents a judicial departure from the intentions of the framers of the Constitution, similar to Australia, but with the outcome of expanded subnational government powers, in contrast with Australia.

The centrepiece of Canadian fiscal federalism is a Tax Collection Agreements (TCA) system, first implemented in 1962 following a number of similar but failed attempts at formalising tax sharing arrangements.[11] In the subsequent half century, the purpose behind the TCAs has remained unchanged (a major reform was undertaken in 2001, which is discussed below), being described as "to facilitate the imposition of income taxes by provinces, while maintaining the federal interest of a harmonized national tax system."[12]

The essential features of the Canadian income tax system[13] are that the Federal Government administers and collects the income tax, the value of which is then distributed to the provinces and, in return, the provinces adopt a common tax base, maintain legislation closely aligned with that at the Federal level, and provide the Federal bureaucracy with the necessary powers to collect and administer these taxes. In respect of personal income tax, all provinces and territories except Quebec have entered into a TCA implementing this system; Quebec and Alberta are the only exceptions in respect of corporate income tax.[14] This is especially important for provincial autonomy. The provinces have complete control over the rates that are set.

Taxpayers benefit through simplified compliance procedures, largely illustrated through being required to prepare only a single tax return and being able to access a single audit and review process.[15]

The original model used for the TCA system was the "tax on tax" system, under which the provinces would impose tax as a proportion of the Federal rate.[16] This system provided the provinces with only limited autonomy, undermining the potential

for competitive federalism, although the provinces were able to compete in a limited fashion through the provision of tax credits.[17] Notwithstanding such inflexibility, this system persisted for almost 40 years.

This inflexibility did not extend to the corporate income tax, where the provinces were able to set their own rates independently of the Federal Government.

In 2001, a new series of TCAs was implemented. The major concern with the original TCAs was the inability of the provinces to determine independently the progressivity of their personal income tax scales.[18] In response to this matter, the new TCAs permitted the provinces to set their own personal income tax rates (a "tax on income" system) in much the same manner as that previously (and continued to be) used for the corporate income tax. While the option of using the tax on tax system remained, none of the provinces has elected to use this method.

The Canadian income tax system can be summarised as centrally administered through a series of bilateral agreements, with provinces exercising autonomy over the rates adopted. Most provinces have joined this system.

United States

In contrast with Canada, which may be characterised as a system of co-ordinated independence, the United States is characterised by maximum State autonomy.

The Federal Government has imposed an income tax since 1913, the final form of which was the outcome of a number of constitutional challenges. In contrast, there are no constitutional limits on the taxing powers of the State. At the time of writing, 43 (out of 50) States imposed a personal income tax and 47 imposed a corporate income tax. To illustrate the extreme level of decentralisation in the United States, income tax is also applied at a sub-State level, such as on residents of New York City.

The most notable feature of the income tax in the United States is the almost complete level of independence exerted. Each State (as well as the Federal Government) has its own legislation, although, in practice, most States have tended to follow the Federal model in most significant respects.

Each State has its own bureaucracy administering its income tax, with the result that many taxpayers are required to file multiple returns.[19]

An important element of the interaction between the two systems is that the Federal income tax allows a deduction for State income taxes to be paid. Some States permit a credit or deduction for other States' income taxes paid, although this is not universal.

This independence, as with the international income tax system, leads to the prospect of double taxation.[20] Most State income tax systems use source as the basis for their jurisdiction to assess tax on income, although, again, this is not universal. For example, wages tend to be assessed based on the number of days the individual worked in that State; assessment of business income is often based on the extent to which the relevant business is conducted in that State. While the deduction/credit mechanism mentioned earlier relieves some of this double taxation, this does not occur in all cases.

As with the personal income tax, States exert a great deal of autonomy over their corporate income tax. In general, though, there is a large degree of overlap with the Federal definition of taxable income and the States tend to restrict their taxing authority to business income that is apportioned to that State as well as the non-business income of resident corporations. For instance, for income tax purposes some

States have used the principles enunciated by the Supreme Court of the United States in *Quill Corp v North Dakota*,[21] which held that (for sales tax purposes) a business needed to have a physical presence in that State to be liable to that States' sales tax.

Overall, the United States has a system characterised by a high (if not extreme) degree of autonomy at the subnational level. While this maximises State autonomy, it also has the effect of imposing high compliance costs on taxpayers with further legal complexity. This is mitigated to an extent through some States following a general model, but as this is not universal and is premised on unilateral action, inappropriate outcomes (such as double taxation) can and do occur.

Germany

Germany is comprised of 16 länder (States), which do not exercise fiscal autonomy as such, but rather tend to share in federal level taxes, such as personal income tax, corporate income tax and value added taxes.[22]

The fiscal structure in Germany is very rigid, especially when compared with Australia, Canada and the United States. The German Constitution dictates the länder and the federal governments' respective shares of the total taxation revenue (separated out by type), which is then distributed amongst the länder in an explicit policy of horizontal equalisation, where tax revenue is allocated according to fiscal need.[23] As a result of this policy, large transfers are made from those länder with deemed high revenue capacity to those that score low on this measure. The primary basis for determining revenue capacity is taxpayer residence.

Examples of the split in categories of revenue are as follows:

Income tax on wages and assessed income tax: Federal, 42.5%; länder, 42.5%; municipal, 15%.

Capital gains tax: Federal, 50%; länder, 50%.

Corporations taxation: Federal, 50%; länder, 50%.[24]

Responsibility for the administration of taxes, whether in their own right or on behalf of the Federal Government, falls primarily on the länder.[25]

In contrast with Canada and the United States (and Australia), it may be seen that the German fiscal structure is very rigid, being constitutionally mandated. The länder have little control over rates and, whilst they are in charge of the administration of these taxes, little fiscal autonomy may be exerted in the face of these constitutional requirements and the accompanying policy of horizontal equalisation.

Endnotes

1. Keith Kendall, "The Case for a State Income Tax", *Upholding the Australian Constitution*, vol 24, 2014, 125-150.

2. And, in fact, was raised by Justice Ian Callinan as the first question after this proposal was presented in 2012.

3. Since the 2013 conference, the idea of a State-level personal income tax has been raised elsewhere; see National Commission of Audit, *Towards Responsible Government – Phase One*, Commonwealth of Australia, February 2014, Chapter 6, especially 70-72.

4. Robin Boadway, "Fiscal Equalization: The Canadian Experience" in Núria Bosch and José Durán (eds), *Fiscal Federalism and Political Decentralization: Lessons from Spain, Germany and Canada*, Edward Elgar, 2008, 109, at 109.

5. Paul Berg-Dick, Michel Carreau, Deanne Field and Mireille Éthier, "Tax Coordination under the Canadian Tax System" in Bosch and Durán, above n 4, 169, at 172.

6. Kendall, above n 1.

7. Berg-Dick et al, above n 5, 172.

8. See Kendall, above n 1.

9. Boadway, above n 4, 113.

10. As noted, the Australian Constitution does not enumerate State powers. While the States are regarded as having taxation capabilities, due to the manner in which the High Court has interpreted customs and excise duties (which are restricted to the Commonwealth Government), a State-level indirect tax may be susceptible to a constitutional challenge, although this is yet to be tested; see Miranda Stewart, "Australia" in Gianluigi Bizioli and Claudio Sacchetto (eds), *Tax Aspects of Fiscal Federalism: A Comparative Analysis*, 2011, International Bureau of Fiscal Documentation, 2011, 137, 163.

11. See Berg-Dick et al, above n 5, 173.

12. Ibid, 173-4.

13. See, generally, ibid, 174-5.

14. Ontario was the most recent province to enter into a TCA in respect of its corporate income tax, which took effect from 2009; see http://www.cra-arc.gc.ca/whtsnw/tms/ctao-eng.html.

15. See Berg-Dick et al, above n 5, 175.

16. Ibid, 176.

17. Although the ability to compete in this manner was also limited by a series of guidelines designed to promote national harmonisation to a large extent; see ibid, 177.

18. Ibid, 178.

19. In the author's brief stay as a student in the United States several years ago, he

was required to file one State income tax return (Illinois) and his Federal income tax return. One colleague in his mid-20s reported he was required to file three State returns in addition to his Federal return.

20. In this context, double taxation occurs where two jurisdictions attempt to assert taxing rights over the one receipt.

21. 504 US 298 (1992).

22. Thiess Buettner, "Fiscal Equalization in Germany", in Bosch and Durán, above n 4, 137, 142.

23. *Basic Law of the Federal Republic of Germany* (German Constitution) Article 106; see also ibid.

24. See Alexander Ulbricht, "The Decentralization of Tax Administration in Germany: Consequences" in Bosch and Durán, above n 4, 193, 195.

25. Ibid, 197-8.

Chapter Four

Independents and Minor Parties in the Commonwealth Parliament

J. B. Paul

I accepted Julian Leeser's invitation to address the Society on this subject without a second thought. Had I thought twice about it I might have queried him on a vexing problem: how to compress this subject into a presentation confined to thirty minutes. It follows that my fully prepared statement will have to be published with the other papers.

The first and shorter part of this paper will deal with the House of Representatives; the second and more important part will deal with the Senate.

The House of Representatives

Two factors have limited the role of Independents and minor parties in the House: it comprises single-member constituencies and two succeeding electoral systems have governed its elections. From 1901 to 1918 the simple majority/plurality system applied. This has been misnamed "first-past-the-post": a misnomer because there was no fixed post for the winning candidate to get past. Independents found it difficult to top the poll against candidates endorsed by political parties. Independents found their position more favourable under the preferential system introduced in 1918 especially when a seat was being contested by three or more candidates. If the count went to preferences an Independent could move to a winning position from behind with each distribution. Not that this happened often!

I would isolate two examples when an Independent has succeeded. In the 1922 election, a prominent leader of the Victorian Bar, J G Latham, KC, contested and won the seat of Kooyong, then held by a grandee of the Nationalist Party, Sir Robert Best. Latham styled himself an Independent Liberal Union candidate and campaigned against the Nationalist Prime Minister, W M Hughes, under the slogan, "Hughes must go". By co-operating with the Country Party under the leadership of Earle Page, Latham, as the newly-elected member for Kooyong, succeeded in ousting Hughes from the office of Prime Minister in a deal the Country Party negotiated with the Nationalists to form a coalition. In the 1937 election Percy Spender, KC, as an Independent, won the seat of Warringah, NSW, with the assistance of ALP preferences, thereby defeating the Minister for Defence in the Lyons-Page Government, Sir Archdale Parkhill. Neither Latham nor Spender retained the status of Independent for very long. By the time the next election was due each one had composed his differences with the party he had initially defied. Latham held office in Nationalist and United Australia Party administrations and retired from politics in 1934: as Sir John Latham he was Chief Justice of the High Court from 1935 to 1952. Sir Percy Spender held office in UAP and Liberal governments and retired in 1951 after holding both the External Affairs and External Territories portfolios from 1949. He thereafter served as Ambassador to the United States and as a judge of the International Court of Justice in The Hague.

A significant number of erstwhile Nationalist MPs contested the 1929 election as

Independents after they had combined to bring down the Bruce-Page Government by voting with the Opposition Labor Party to defeat the Maritime Industries Bill. Only two were defeated but then they had to fight against Nationalist and ALP candidates. One of those defeated candidates, E A Mann, styling himself as "The Watchman", became a controversial ABC radio commentator on current affairs Those who were re-elected were assisted by the ALP which did not contest their respective seats.

Minor parties, including those which have split from a major party, have for the most part failed to maintain their presence in the House of Representatives. The Democratic Labor Party, initially the Australian Labor Party (Anti-Communist), was an example of this failure. In the 1930s the Lang Labor Party, inspired and named after the turbulent Premier of New South Wales, J T (Jack) Lang, proved to be an exception. It provided the numbers to defeat the Scullin ALP Government on the floor of the House of Representatives in 1931 and, because of the strength of the Lang machine, its members were able to maintain that party's strength in the House of Representatives. Ultimately, after some fits and starts, it was reconciled with and absorbed into the official ALP and some of its prominent identities held office in the Curtin, Forde and Chifley administrations from 1941 to 1949.

Another two Independents are worth mentioning if only because of the role they played in the Parliament elected in 1940 when the country was again at war and Robert Menzies was serving his first term as prime minister from 19th April 1939. His biographer, A W Martin, recorded:

> Menzies' hopes for a decisive result in the election – clear defeat or sound endorsement of the Government's position – were dashed. The UAP-Country Party coalition on the one side and the combined Labor parties on the other won thirty-six seats apiece. There were two Independents, A. W. Coles, the doughty businessman and [former] Lord Mayor of Melbourne, and Alex Wilson, a Mallee farmer who held the Wimmera seat since 1937. Both were expected to support the Government, but there was nothing to prevent either changing his allegiance on snap issues.

On 3rd October 1941, both those Independents brought down the Coalition Government which had been led by Menzies' successor, Arthur Fadden, for little more than a month. And they did so on more than a "snap issue", namely its Budget. Coles had joined the UAP for a short time but resigned and reverted to his status as an Independent when he registered his disgust at the UAP's "lynching" of Robert Menzies in August 1941. He identified the treatment of Menzies as the principal reason for voting against the Fadden Government. Wilson, who had been assiduously cultivated by Dr H V Evatt, KC, a High Court judge from 1930 to 1940 and ALP member for Barton (NSW) since the 1940 election, spoke critically of the Fadden Government's Budget and emphasized his membership of the Victorian United Country Party and its strong links with the Labor Party, with which I shall deal subsequently. With the Fadden Government's defeat, John Curtin took office as prime minister and, with the support of those two Independents, led a Labor Government until the 1943 election returned that minority administration in a landslide. While the services of Coles and Wilson were thereafter no longer required, they were to be rewarded for their support.

Both Coles and Wilson retained their seats in the 1943 election. In 1937 Wilson, with a background in wheatgrower organizations, had defeated Wimmera's sitting member, Hugh McClelland, who was also his cousin. McClelland had been endorsed

by the federal Australian Country Party while Wilson gained the endorsement of the Victorian United Country Party, the two branches then being at loggerheads. Wilson defeated McClelland again in 1940 and, as noted, retained Wimmera in 1943 after backing the wheat stabilization plan favoured by W J Scully, one of Curtin's ministers. The split between the Victorian and Federal Country parties became especially embittered when John McEwen, who had been elected as a Country Party candidate to the House of Representatives in 1934 before the two parties began their feud, was expelled by the Victorian party for accepting a portfolio in the Lyons-Page UAP-CP coalition government. McEwen, a future prime minister (1967-8) and Deputy Prime Minister (1958-71), did not settle his differences with the Victorian Country Party until 1943. Wilson resigned from the Parliament on 31st December 1945 and the following day assumed office as Administrator of Norfolk Island whose verdant landscape would have been a far cry from the desolate landscape of his Mallee farm. Coles continued to represent the seat of Henty until he intimated to Curtin's successor, Ben Chifley, early in 1946, that he would not be recontesting the seat at the next election. Chifley promptly appointed him Chairman of the Australian National Airlines Commission and, in the resulting by-election, the Liberal H B S ("Jo") Gullett won the seat which his father, Sir Henry Gullett, had previously held until his death in the Canberra air crash of 1941. He retained it until his quit politics in 1955.

Two Independents were elected to the House of Representatives in 1946. Jack Lang won the seat of Reid (NSW) which included his stronghold of Auburn. Maurice Blackburn's widow, Doris, won the seat of Bourke (Vic) as an Independent Labor candidate. Her late husband had held the seat from 1934 as an endorsed ALP candidate until, after his expulsion from the ALP, he was defeated in 1943 by an official ALP candidate. He died in 1944. Neither Lang nor Doris Blackburn was re-elected in 1949. In December 1949 Dr L W Nott was elected member of the newly-created seat of the Australian Capital Territory as an Independent but was defeated in the election called in April 1951. In the 1960s Sam Benson continued as an Independent to represent his seat of Batman (Vic) which he had won as an endorsed ALP candidate in a by-election held in September 1962 and retained at the 1963 election. He became an Independent after being expelled from the ALP for involving himself in an extra-parliamentary group advocating stronger defence which the ALP Federal Executive had proscribed. He was re-elected as an Independent at the 1966 election but he did not recontest his seat in 1969. More recently, Andrew Wilkie won the seat of Denison (Tas) as an Independent in 2010 and retained it in 2013.

The Senate

I turn now to the Senate and, to crib from more than one Goon Show script, "this is where the story really starts". It is undeniably the case that Independents and minor parties have come to exert a greater role in the Senate and this has been directly related to the possibilities opened up by the change in the Senate's voting system to proportional representation in 1948. But it was not until 1955 that this change in the Senate's role became apparent.

The first Commonwealth Electoral Bill introduced into the Senate in 1903 provided for optional preferential voting for House of Representatives elections and proportional representation for Senate elections. In the form in which that Bill finally reached the statute book, however, simple majority/plurality voting was decreed for both Houses.

In 1918 this was changed to preferential voting for both Houses.

Proportional representation had been advocated for the Senate for many years and this was not surprising when you consider the distortions disclosed at successive Senate elections. In 1925 the ALP won no seats with 45 per cent of the valid votes cast: their opposite numbers, the Nationalist Party and the Country Party, together won 22 seats with 55 percent of the vote. In 1937 the ALP won 16 seats with 48 percent of the vote, while the UAP/County Party combination won three seats with 45 percent of the formal votes cast. In 1943 the ALP with 55 percent of the vote won 19 seats while the UAP/CP with 38 percent of the vote did not win any seats. In 1946 the ALP with 52 per- cent of the total vote won 16 seats while the Liberal and the Country parties together won three seats with 43 percent of the vote. The three seats were all in Queensland. As a result of the Senate elections in 1943 and in 1946, Government and Opposition in the Senate divided 33-3.

It follows, then, that a case could be made for changing the Senate's voting system to proportional representation. It has to be recorded, however, that there was nothing high-minded in the motives of the Chifley Labor Government in legislating for this change in 1948. I maintain that you can safely ignore the justification for this change which Government spokesmen propounded, the Deputy Prime Minister, Dr H V Evatt, fulfilling that role in the House of Representatives and Senator Nick McKenna in the Senate. R G Menzies, leading the Opposition in the House, and Senator Walter Cooper in the Senate, exposed the Government's calculations and they were to be vindicated many years later. In 1977 that funny man, Fred Daly, who had sat in the House of Representatives from 1943 until his retirement in 1975, and was one of the few surviving members of the 1948 Labor Caucus, explained in his memoirs, *From Curtin to Kerr*, how this scheme had been sold to the Federal Parliamentary Labor Party behind closed doors. Here is a quotation from Daly's memoirs from which I have deleted his speculation on what Chifley's approach to the issue might have been:

> In 1948 Cabinet recommended to Caucus a redistribution of Federal electorates and that Parliament be enlarged. It was subsequently . . . agreed to increase the Senate from 36 to 60 and the House of Representatives from 74 to 121, plus two members for the Northern Territory and the Australian Capital Territory (eligible for votes on certain issues affecting the Territories).
>
> The Senate was to be elected by proportional representation. This was the brainchild of Arthur Calwell who argued that we would retain a majority after the next elections, due in 1949, and probably into the future . . .
>
> Arthur Calwell . . . won the day by convincing sitting senators that they would be re-elected in 1949 and that the new voting system would favour them in the future. The bait held out to members in borderline seats was that their electorates could be improved by an enlarged parliament. It was a very attractive package.

Jack (John Solomon) Rosevear, a down-to-earth campaigner, opposed the moves. [He featured in my paper on the Speaker of the House of Representatives delivered at the 2012 Conference.] He described the Calwell plan as the "gold brick" proposal – every sitting senator and member to be guaranteed a safe return at the next elections. In the long run he said it would harm the ALP. Rosevear was fighting a losing battle. Calwell, lucid, enthusiastic and effective, had too much to offer and easily won the day.

Time has proved Rosevear right. Proportional representation in the Senate was disastrous for the Labor Party. From a 33 to 3 majority in 1949, except for the period to the double dissolution election in 1951, Labor has not had a Senate majority since and does not look like having one in the foreseeable future. Independents and splinter groups have had an opportunity to play an over-important part in national politics, even to controlling governments.

I should add that Labor's prospects of gaining a majority in their own right in the Senate have since proved to be as abysmal as when Daly wrote in 1977. Surely one should rate this as a grim enough example of poetic justice! What this account does demonstrate is the overweening confidence of Arthur Calwell and those who supported him that the ALP was Australia's party of government which a mere glitch like the expected coalition victory in 1949 – which impelled Calwell to this expedient – would in the long term do little to confound. In the election for half the Senate held in 1953, in which the ALP confidently expected to restore that control of the Senate they had lost in the 1951 double dissolution, Calwell, by then Deputy Leader of the Opposition and of the Federal Parliamentary Labor Party, crowed that Labor by subsequently denying Supply in the Senate to a deeply unpopular Menzies Government could "be in power for the Royal Visit" which had been scheduled for February and March 1954.

All these calculations were confounded, first by Labor's inability to regain control of the Senate in 1953 and, secondly, by the third great split in the Labor Party which proved to be its worst. The best account of this event in my view is still Robert Murray's book, *The Split*, published in 1970. Contrary to the claims of some apologists in the ALP and beyond, the direct cause of this split was not Bob Santamaria but the ALP leader himself, Dr H V Evatt, in his erratic conduct after his unexpected defeat in the 1954 election. The immediate result was the emergence of a minor party when a Tasmanian Labor Senator, George Cole, and seven members of the House of Representatives from Victoria elected as Labor members in 1954 isolated themselves on the corner Opposition benches as the Australian Labor Party (Anti-Communist). This grouping was overwhelmingly Roman Catholic and yet, as the priest-historian Bruce Duncan had recorded: "Compared with the 1951 elections, the Catholic vote for Labor had increased markedly from 72.7 percent to 77.8 percent in Victoria (Labor won 50.3 percent of the overall votes in Victoria) and from 55.3 percent to 64.4 percent of Catholics in New South Wales (the overall vote for Labor being 52.3 percent)." The Victorian branch of the Labor Party could therefore have been acclaimed as the jewel in the ALP crown. And yet Evatt, with dire consequences for his party, professed to find it gravely flawed and embarked on his destructive enterprise.

The Australian Labor Party (Anti-Communist) contested the 1955 election and directed its preferences to the coalition parties; but all seven of its members in the House of Representatives were defeated. It gained 18 percent of the Senate vote in Victoria resulting in the election of Frank McManus who had been Assistant Secretary of the Victorian Branch of the Australian Labor Party until the notorious Federal ALP Conference in Hobart in February 1955 which formalized and consolidated the split. The ALP (Anti-Communist) gained 11 percent of the Senate vote in Tasmania, 9 percent in South Australia and 6 percent nationally. Adopting the name, Democratic Labor Party, in 1956, in deference to its NSW branch, this party continued to win at least one seat at four of the next five Senate elections between 1955 and 1970, the

exception being 1961. There were between one and five DLP Senators in the Commonwealth Parliament continuously from 1955 until the collapse of that party at the 1974 double dissolution election.

And how did the DLP perform? Between 1955 and 1958 Cole and McManus, who were joined by Senator Condon Byrne in 1957 after the ALP split took delayed effect in Queensland, held the balance of power in the Senate but, given the enduring bitterness resulting from the ALP split, collaboration with the Evatt-led Opposition in Senate voting was a rare event. The Menzies Government regained control of the Senate in 1958 when the DLP Senator, Condon Byrne, lost his seat but Senator George Cole was re-elected.

The Menzies Government's control of the Senate continued until the 1964 half-Senate election which was not held conjointly with an election for the House of Representatives because a premature House election had been called on 30th November 1963. The 1964 half-Senate election resulted in the coalition Government led by Menzies dropping a seat to 30 while the ALP Opposition held its 27 seats. There was one Independent. This was R J D "Spot" Turnbull from Tasmania, who had parted company with the ALP after serving as a State Minister for many years and who had been first elected to the Senate in 1961. He continued to sit as an Independent Senator representing Tasmania until 1974, but for a short spell as leader of the Australia Party from August 1969 to January 1970. In addition to Turnbull in 1964 there were two (formerly one) DLP Senators: Vince Gair, a former Premier of Queensland and a victim of the split in that State in 1957, and Frank McManus who regained his place in the Senate after being defeated in 1961.

Allan Martin recorded, "If it came to the crunch, the Government would be dependent on the DLP. On anti-Communism and conscription this would scarcely matter; both agreed wholeheartedly on such issues". On certain other issues, as I shall shortly outline, the DLP was prepared to cut up rough. In 1967 Jack Little was elected a DLP Senator for Victoria and Condon Byrne re-elected a DLP Senator for Queensland. McManus and Gair were re-elected in 1970 when Jack Kane was elected a DLP Senator for New South Wales.

Until the 1972 election, the DLP was able to keep Labor out of office in any election where its preferences were vital to a coalition victory. During this period, when the Liberal Party and the Country Party both endorsed candidates in a particular electorate, the DLP occasionally alternated between those two parties as the beneficiary of its first preferences. This resulted in Country Party victories in the Victorian seats of Indi and Wimmera in 1958 and in Moore and Canning in Western Australia in 1963. Labor's exclusion from office over this period might seem quite an achievement in itself but it was marked by a significant failure. As that more than friendly observer, Bob Santamaria, put it, the DLP's "essential *raison d'être* was to carry through a strategy of attrition, the aim of which was to bring about the re-unification of Labor on the basis of acceptable principles". In that respect it failed and became a victim of its own attrition as veterans of the 1955 split died in increasing numbers. Consequently, by failing to attract supporters who were untouched by those events, the party's electoral base steadily diminished.

There were many instances of the DLP's cutting up rough where the Coalition Government was concerned. I witnessed one such incident on 24th August 1967 when, as a Treasury officer, I attended the Senate on the understanding that a matter of vital

concern to my Department was to be considered. Instead, to my annoyance, the Senate was in the Committee stage of consideration of a Wireless Telegraphy Bill dealing specifically with a section providing that those charged with operating pirate radios should be proceeded against with summary jurisdiction. An amendment before the Senate was to give those charged the option of trial by jury. (For those interested in that debate, consult *Commonwealth Parliamentary Debates*, Senate, vol 35, 220-229). Senator Ken Anderson, Minister for Customs and Excise, had to combat the arguments of Senator Lionel Murphy and Senator Sam Cohen, Leader and Deputy Leader of the Opposition. Time prevents me from quoting them and also mimicking them. There was also an occasional intervention from a Liberal Senator from Tasmania, Reg Wright, whom I would also dearly love to quote if only to mimic him. The DLP, namely Senator Gair, its leader, and Senator McManus, made no contribution to the debate but they joined Senators Wright and Turnbull in voting with the Opposition in favour of the proposed amendment which was thereby carried in the teeth of the Government's objections. The Bill was reported with that amendment and the Third Reading moved by Senator Anderson was carried on the voices. The Senate, instead of taking up my Treasury matter, as I had hoped, then proceeded with a Navigation Bill while I cooled my heels in the King's Hall. There I encountered Senator Gair with whom I was already acquainted. I then said, "Well, Senator, that was quite a blow you and your party struck in that last division on a time-honoured principle of British justice". At this Senator Gair hammed it as his eyes protruded like organ stops while his jaw dropped so that his dewlaps flapped and he responded (and I mimicked him), "Ah, well! Yer never can tell, can yer! Might be in the dock myself one of these days!" Put aside, if you can, any image of Vince being apprehended by the authorities while operating a pirate radio beyond the Gold Coast's three-mile limit and consider this: Would Frank McManus have made such an observation even in jest? On another occasion, Gair remarked, in my hearing, as he was about to return to the office he shared with McManus, "I expect I'll find him sitting there holding an open book in one hand and another open book in the other hand". As this would indicate, those two were conspicuously different personalities and their final clash contributed significantly to their party's demise.

Some of you may recall a controversy involving the Holt Government and its use of a special flight known as VIP aircraft. This particular matter arose for one reason only and on Senator Gair's initiative alone. His nose had been put out of joint when he himself had been refused a VIP flight. I can also recall Senator Gair giving his fellow Queenslander, Dame Annabelle Rankin, the Minister for Housing, a very rough ride over her handling of her portfolio, leaving her blustering helplessly under his questioning.

But the most significant setback the DLP administered to the Holt Government was in successfully contributing to defeating its referendum proposal in 1967 to break the nexus between the House of Representatives and the Senate. The nexus, embodied in section 24 of the Constitution, provides that the number of members in the House of Representatives shall be, "as nearly as practicable", twice the number of senators. This proposal had the backing of the ALP Opposition and, for this reason alone, it stood a very good chance of being carried by referendum. It suited the DLP, in its calculation that the Senate would be the only chamber in which they could continue to be elected, to ensure that its membership should not remain fixed. And, with the

assistance of the Melbourne *Herald* media network and some disaffected government backbench senators, it succeeded in having that referendum proposal resoundingly defeated.

The DLP's relationship with the Gorton Government was a stormy one, especially after Gorton's Minister for External Affairs, Gordon Freeth, made a remarkably naive statement on foreign policy in which he claimed that any build-up in Soviet naval forces in the Indian Ocean should not give rise to concern.

The DLP's time of reckoning was deferred until the election of the Whitlam Labor Government in 1972. The DLP's long-standing objective of keeping the ALP out of office was thereby thwarted and the party lost its "essential *raison d'être*". Relationships with the coalition Opposition led by Billy Snedden were less than harmonious but the DLP ultimately self-destructed over the so-called Gair affair.

In 1974, Paul Reynolds of the University of Queensland published a standard text on the DLP, *The Democratic Labor Party*. Reynolds recorded therein that Vince Gair vacated the leadership of the party in October 1973 and was replaced as leader by Frank McManus. It would seem that Reynolds' book went to press shortly afterwards and that therefore the book, when published in 1974, made no reference to developments in the early part of that year. When Gair accepted Whitlam's offer of appointment as Ambassador to Ireland, he was promptly expelled from the DLP. He defiantly responded, "I've carried you bastards for years and now you can go to (expletive deleted)".

As matters panned out, Gair secured his Dublin posting but the Queensland Premier, Joh Bjelke-Petersen, quickly moved to frustrate Whitlam's purpose in utililizing that appointment to force Gair to vacate his Senate seat. Bjelke-Petersen advised the Governor of Queensland to issue the writs for five, not six vacancies, in the forthcoming half-Senate election. Whitlam had counted on gaining that sixth vacancy as a stone certainty for the ALP to win. Gair meanwhile had contrived to delay his resignation from the Senate until after the writs for five vacancies had been issued. The remaining DLP senators should have let matters rest there but, driven by hubris and miscalculation, they gave the Snedden-led coalition Opposition the numbers they needed in the Senate to block Supply to the Whitlam Government and they were wiped out in the election following the double dissolution which Whitlam promptly sought and obtained, in contrast to his comportment when the Senate denied his government Supply in 1975.

The next minor party of significance to obtain representation in the Senate, but not in the House of Representatives, styled itself the Australian Democrats. It first fronted the electorate at the election called in 1977 to bring House and half-Senate elections back into alignment. Its first standard-bearer was the former Liberal member for Hotham (Vic), Don Chipp, who had been a minister in the Holt, McEwen, Gorton, McMahon and Fraser governments, and a member of the shadow Cabinet from 1972 to 1975. But Malcolm Fraser had omitted him from the ministry he formed after the 1975 election although he had previously retained him as a minister in his caretaker administration following the dismissal of the Whitlam Government and pending the double dissolution election Fraser had obtained as caretaker Prime Minister.

Nick Cater, in *The Lucky Culture*, has chronicled those events he saw as driving Don Chipp as a backbencher in 1977 to abandon the party with which he had been identified for so long (pp 168-7). In counter-factual mode – that is, in posing the

question, "What if?" – I am moved to use the words immortalized by the rough-and-ready and resolutely non-aspirating Field Marshal Sir William Robertson, "I've 'eard different!" And to me the issue can be resolved by exploring two questions. First, why did Malcolm Fraser dump Don Chipp after the 1975 election? And would events have panned out differently if Fraser had overcome his scruples and given Chipp a portfolio which would have proved a serviceable outlet for his energy and enthusiasms? Fraser, by leaving Chipp with the settled conviction that his ministerial career was finished, acted in a way which proved very harmful to the interests of the coalition parties.

Malcolm Fraser, I believe, had good reason, policy differences aside, if they were at all significant, to conclude that Chipp had compromised himself to the Liberal Party's detriment and he formed this conclusion before he toppled Billy Snedden from parliamentary leadership of the Liberal Party. In Whitlam Government circles a certain *femme fatale*-cum-odalisque was very conspicuous and sexually promiscuous and, as events were to prove, had bestowed her favours in a true spirit of bipartisanship. All this came to a head with the appointment of Lionel Murphy to the High Court in February 1975. Those members of the shadow Cabinet who were keen to make a public issue of it – and rightly so because the appointment was an unmitigated disgrace – found themselves up against at least two colleagues who dreaded the thought of this *femme fatale* being brought into the spotlight by any such controversy. They successfully carried the day in urging their colleagues in the shadow Cabinet that the Opposition should let the issue die.

This determined abstention was confirmed by the conduct of the Opposition in the House of Representatives from 11th February 1975 after the Cabinet, in rushing through Murphy's High Court appointment the previous weekend, had exploited a vacancy on that Court as a convenient bolt-hole for a colleague they knew to be thoroughly compromised, and even corrupt. Whitlam attempted to justify that appointment in the light of Murphy's ministerial record as a legislator and by claiming, correctly enough, that he was the fifth former Attorney-General to be appointed a High Court judge – as if any Attorney-General had a right of reversion to such an appointment. The four former Attorneys-General to take up High Court appointments were Sir Isaac Isaacs, H B Higgins, Sir John Latham and Sir Garfield Barwick. It was a ludicrous proposition for Whitlam to claim that Murphy could be considered in the same league as those four. It is a melancholy fact that only one Opposition frontbencher raised the issue of Murphy's scandalous appointment and, then, in very muted terms.

The only Opposition member who felt free to oppose Murphy's appointment vigorously was the independent and redoubtable Bill Wentworth who was not a member of the shadow Cabinet. His speeches on this subject in the House of Representatives are worth reading (see *Commonwealth Parliamentary Debates* Vol. H. of R. 93, 91-93, 276-277, 342-343 and 535-538). When Wentworth claimed that "Murphy has beaten the rap", he came into conflict with the Speaker. Fred Daly, as Leader of the House, successfully "gagged" him. But in a later speech Wentworth was able to claim, "I think Mr Murphy resigned in order to beat the rap. I believe that he resigned because he hopes to have in the High Court a refuge from investigation into his prior misdeeds". All too true! For that was the very reason the Cabinet rushed through his appointment! And yet not one member of the shadow Cabinet was prepared to raise that particular issue even obliquely!

Bert Kelly, the Liberal member for Wakefield, South Australia, and then a

backbencher, in directing a question without notice to the Prime Minister, referred to Murphy's ill-starred raid on ASIO during the ides of March 1973, and to his inept handling of the Gair affair during the ides of March 1974. He then added, "Will the Prime Minister assure me that his transfer of the Attorney-General to the High Court was not activated by the imminence of the ides of March 1975 rather than the legal eminence of his accident prone colleague"? D J (later Sir James) Killen, a shadow minister, attempted to draw the Prime Minister on whether Murphy as a judge would decline to sit in litigation arising from legislation with which he had been closely identified as Attorney-General. Ian Viner, who in 1972 had, as a Liberal, defied the pro-Labor nationwide swing by snatching the seat of Stirling in Western Australia from the ALP frontbencher, C H (Harry) Webb, raised the issue of Murphy's appointment during a debate on the Adjournment but very ostentatiously declined publicly to raise any matters of controversy of a scandalous nature. At the same time he referred obliquely to reservations which might well have been the same as those on which Wentworth had been most eloquent.

On the day Murphy's High Court appointment and consequent resignation from the Senate were announced to senators by the Leader of the Government in the Senate, Senator Ken Wriedt, members of the Opposition front bench uttered not one word. The maverick Liberal from Queensland, Senator Ian Wood, sought leave to make a statement on this announcement and was rebuffed by Senator Wriedt. This was ironic because it was almost certain that Wood, who was on friendly terms with Murphy, and had privately congratulated him on his elevation to the High Court, would have spoken of it in favourable terms to the annoyance of his coalition colleagues. Wriedt, by denying leave to Wood, demonstrated his reluctance to encourage any comment on Murphy's controversial elevation. Senator Peter Durack, a Liberal from Western Australia and a future Attorney-General, did no more than question Murphy's right as a judge to sit in the forthcoming Petroleum and Minerals Authority case.

At all events, and in view of his shadow Cabinet colleagues' deliberate obmutescence on the issue of Murphy's High Court appointment, Malcolm Fraser then made up his mind about at least one of the shadow Cabinet, Don Chipp, and when he felt free to do so, marginalized him with consequences with which we are now only too familiar. It appeals to my highly-developed or, as some would opine, over-developed, sense of the ridiculous to trace the origins of the Australian Democrats all the way back to Chippy's nooky with Junie.

What is beyond dispute is that Chipp found reasons of his own to resign from the Liberal Party, decided not to recontest Hotham in 1977 but, as adopted leader of the newly-formed Australian Democrats, successfully ran for a Victorian Senate seat and joined Colin Mason from New South Wales in forming that party's parliamentary nucleus

Oddly enough, they were not the first Democrats to take their seats in the Senate for they did not do so until 1 July 1978. Janine Haines, as a Democrat, was appointed to the Senate in December 1977 to fill the vacancy left by the resignation of Raymond Steele Hall who, having rejoined the Liberal Party, unsuccessfully contested a House of Representatives seat. He had been elected a Liberal Movement Senator in 1974. She remained in the Senate only until 30th June 1978 for she did not contest her seat at the election of 10th December 1977.

Chipp and Mason had no significant role in that Parliament because the Fraser

Government still had a workable majority in the Senate. This was lost in the 1980 election when the Democrats increased their Senate numbers, campaigning under the slogan, "Keep the Bastards Honest". Chipp and Mason were joined by Janine Haines (South Australia), Michael Macklin (Queensland), and John Siddons (Victoria). The Democrats gained the balance of power in the Senate, sharing it from July 1981 to March 1983 with Brian Harradine who had sat as an Independent from Tasmania since 1975. The Democrats held it in their own right from March 1983 to June 1993.

I should interpolate that Michael Townley was elected as an Independent Senator for Tasmania in 1970 after being denied pre-selection by the Liberal Party. He was re-elected as an Independent in 1974. He rejoined the Liberal Party in February 1975 and retired from politics at the 1987 election. I should also mention Syd Negus who was an Independent Senator for Western Australia from 1971 to 1974. He campaigned in the 1970 half-Senate election on an anti-inheritance tax platform and he stands out as an Independent Senator with no previous party backing. Brian Harradine continued to be re-elected an Independent for Tasmania until he retired in 2005. He holds the record as the longest serving Independent in the Commonwealth Parliament. From July 1993, the Senate's balance of power was shared by the Democrat, Green and Independent senators. As the label "Bastards" had been applied to the coalition parties, the policy of maintaining honesty was not applied as vigorously to the Hawke and Keating governments from 1983 to 1996. Perhaps it was a sense of the joys of the hunt being a thing of the past that prompted Chipp to quit politics in 1986 to be succeeded as leader of the Australian Democrats by Janine Haines who was to give us a foretaste of the Greens' Christine Milne with her fixed stare and whining monotone.

But, as Nick Cater has remonstrated, "What, however, did the Democrats want to keep the bastards honest *about*?" And, having already questioned Cater on Chipp's motives for deserting the Liberals in 1977, I am more than happy to quote him here with approval:

> . . . Not fiscal policy, trade or employment, or indeed anything central to the productive economy. Welfare or industrial relations hardly featured on the Democrats' agenda. Chipp's speeches in the Senate catalogue the middle-class anxieties of the 1970s and 1980s: the Armenian genocide of 1915, the Indonesian occupation of East Timor, Pol Pot's atrocities in Cambodia and the apartheid regime in South Africa are roundly condemned. There were failed motions to prevent nuclear warships entering Australian waters and to stop aircraft carrying nuclear material flying overhead. Chipp called for a moratorium on uranium mining after the accident at Chernobyl and warned of the coming nuclear winter that 'could block out all forms of life for centuries'. The rainforests of Queensland must be protected, and the Franklin remain un-dammed; indeed Tasmania's jurisdictional rights must be overturned if necessary, since letting Tasmanians decide the fate of the Franklin was 'about the same as letting the population of Alice Springs or Darwin vote by referendum to have Ayers Rock crushed by bulldozers'. The Chipp manifesto is a catalogue of symbolic causes: multiculturalism, a bill of rights, land rights for indigenous people, and opposition to vivisection, cruel farming practices and animals in sport He preached the politics of the dinner party and his objective was the warm inner glow.
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> The Democrats were not so much a party as a moral enclosure, a rich measure of

> virtue upon which the middle class could graze. By declaring that the Democrats would resist special pleading and vote according to what was right, Chipp cornered the growing market of *identity politics* among the expanding tertiary-educated middle class. They rallied not around ideology but a totem. To belong to the Democrats was less a political statement than an expression of personal virtue and . . . [Chipp's] utterances were unsullied by grubby everyday politics.

All this aside, it has to be acknowledged that, as a parliamentary party, the Democrats proved to be a particularly fractious lot. Almost every outgoing leader detested the person succeeding to the leadership, and vice-versa. John Siddons (Vic), with a background in business, was, I suppose, more earth-bound than most of his colleagues, although, here, I would make the same claim of Andrew Murray who was elected to the Senate in 1996 but declined to seek re-election in 2007. Siddons was defeated in the 1983 double dissolution election but returned to the Senate in 1985. He was deputy leader from 15 August to 16 November 1986 but resigned, becoming an Independent. He stood unsuccessfully for the UAP in the election of July 1987. David Vigor (South Australia) was a Democrat Senator from July 1985 to June 1987. He also stood unsuccessfully for the UAP in the July 1987 election, having dissociated himself from the South Australian Division of the Australian Democrats.

Janine Haines brought her political career to an end by recklessly and unsuccessfully contesting the South Australian seat of Kingston in the 1990 election. She was succeeded as leader by Janet Powell, who died recently. Powell filled the Senate vacancy left by Don Chipp on his resignation in August 1986 and was elected to sit from July 1987 to June 1993. She was leader of the party from 1 July 1990 to 19 August 1991. As Judith Ireland put it in her obituary in the *Sydney Morning Herald* on 2 October 2013, Powell quit the party on 31 July 1992 "after internal ructions". The background to these "internal ructions" had been her liaison with a parliamentary colleague, the lugubrious Sid Spindler, which proved to be more than *une amitié amoureuse*. Indeed, there was more than just a little nooky there! She sat as an Independent before being defeated at the 1993 election. Significantly she joined the Greens in 2004.

In this context I would draw attention to an excellent paper delivered to the 2005 conference of this Society by John Nethercote which was subsequently published with its proceedings. Entitled "Senate Vacancies: Casual or Contrived", it was a deadly attack on the working of Section 15 of the Constitution as amended by referendum in 1977. He emphasized that where a senator appointed to a casual vacancy prior to that amendment was required to face the electors at the next election, be it for the House of Representatives or for half the Senate, under the amended section 15 "the new Senator would inherit the entire balance of the term of the predecessor". Further into his paper he elaborated on the advantage of incumbency:

> This advantage is seen very clearly among the cross-bench parties. It is perhaps most visible, ironically, in the case of the Australian Democrats who hardly wince when it comes to turnover of parliamentary representation by means of party selection rather than popular election. Of the 26 Australian Democrat Senators in the Senate since 1977, no fewer than eight have first entered via s. 15, seven before winning the support of the electors at the polls. This number included former party leaders Janine Haines, Meg Lees, Natasha Stott-Despoja and Andrew Bartlett.

I should mention that Janine Haines's entry into the Senate in 1977 highlighted yet another egregious shortcoming in the amended Section 15. Those who drafted that amendment had to confront the issue of how a casual vacancy could be filled if the party to which the outgoing senator had belonged had ceased to exist. Those drafting it effectively consigned that conundrum to the "too hard" basket and made no provision for it at all. Yet, at the first occasion the amended section 15 came to be enforced, that very problem was present! The South Australian Premier, Don Dunstan, decided to nominate the Australian Democrat, Janine Haines, because she had been placed second to Raymond Steele Hall on the Liberal Movement ticket at the time of his election in 1974. In short, and contrary to the intention of the amended section 15 that the State parliaments should be bound by the dictates of political parties in the filling of casual Senate vacancies, on this occasion the discretion was left in the final analysis to the Government and the Parliament of South Australia.

The Democrats came to be threatened not so much by the major parties as by rivals who aspired to displace them as the party of the warm inner glow. Peter Garrett's nuclear disarmament party, although unsuccessful, put the wind up the Democrats who claimed plausibly enough that they were anti-nuclear too. The 1996 election, which saw Bob Brown first elected as a Tasmanian Green Senator, was a bitterly fought contest between the Democrats and the Greens. Brown, however, was not the first senator with a green outer colouring. The West Australian Greens were represented in the Senate from 1990 to 1999 by Christobel Chamarette and Diane Elizabeth (Dee) Margetts. I have a hazy recollection that they were nicknamed "Tinkerbell and Wendy". An article appeared under Liz Young's name in the *Australian Journal of Political Science*, Vol. 34, No. 1, 7-27 entitled "Minor Parties and the Legislative Process in the Australian Senate: A Study of the 1993 Budget". I quote in part from the article's introductory abstract:

> In 1992, minor parties in the Australian Senate played a prominent role in negotiating changes to the ALP government's budget. The term 'obstructionist' was widely applied by the media and the Labor Party in describing these actions, particularly when it came to the Greens' (WA) efforts to change aspects of the budget bills.

To return to the Democrats. Cheryl Kernot had been elected a Democrat Senator for Queensland in 1990 to succeed Michael Macklin. On 30 April 1993 she was elected to succeed as party leader an eco-nut from South Australia, John Coulter, who resigned his seat on 20 November 1995. The Australian Democrats held their 20th Anniversary National Conference in Canberra on 17-19 January 1997. As Professor John Warhurst recounted, "The party mood was ebullient because 1996 had been an excellent year. The March 1996 federal elections had led to the election of five Senators and the consolidation of the Democrats' position in the Senate". Senator Kernot, as party leader, said, in her opening address, "After 20 years we are entitled to say with confidence that we are here to stay and, after 1996, we can say with equal confidence that our best is yet to come".

Well, the party was to stay for about another ten years, but without Cheryl! After she had made that confident prediction, she resigned from the party and from the Senate on 15 October 1997 and joined the ALP. She claimed that in leading a minor party in the Senate she "had a limited capacity to help minimize . . . the damage being done to Australia by the Howard Government". She also professed to find in the ALP a

greater sense of purpose and camaraderie. There was, however, more to it than that. Indeed, it could be said that this turn of events revealed at the parliamentary level a sexually transmitted change in party allegiance. Kernot was the ALP member for Dickson (Queensland) from 1998 to 2001.

The Greens were able to keep up the pressure on the Democrats and, from the *Tampa* episode on, to outflank them as bleeding hearts promoting the interests of boat people and stridently questioning the Howard Government's successful border protection policies which had effectively undermined the callous conduct of people smugglers. Meg Lees led the Democrats from 1997 to 2001 when she was succeeded by Senator Natasha Stott-Despoja, or "Stock Despoiler" as I have called her. Natasha deserves to be remembered for urging in the 1999 referendum campaign that Australia should become a republic like Canada. Lyn Allison took over as Acting Leader from 2003 to 2004 and led the party until its demise in 2008. Allison is, I believe, the only Federal parliamentary leader to have admitted to having had an abortion.

The outgoing Democrats speaking at the valedictory in 2008 were predictably and understandably self-congratulatory. They emphasized their very hard work on committees. Senator Nick Minchin contributed to the debate by recalling his experience as State Director of the Liberal Party in South Australia in successfully campaigning against Janine Haines in 1990: "That campaign in Kingston proved to me that, if you put the spotlight right on the Democrats and some of their more odd policies, you can take them down". This surely is the way to set about taking down the Greens.

I shall not lengthen this already overlong paper by giving detailed consideration to the Greens. After all, have not those of us who have had to endure their antics over the past three years and even earlier a just claim to having had a gutful of them.

In 2010 Julia Gillard, as Prime Minister leading a minority ALP government, negotiated a deal with the Greens as a guarantee of their support. This deal included legislating for a carbon tax which was in direct conflict with her promise during the 2010 election campaign that no government she led would introduce one. Why she needed to negotiate such a deal must remain a mystery! There was no likelihood that the Greens would give their support to the coalition parties under Tony Abbott's leadership. So Gillard could have counted on Green support unconditionally. This particular deal recalls the experience of the Australian Democrats after their leader, Meg Lees, negotiated with and, within the compass of that negotiation, co-operated with the Howard Government in passing through the Senate its legislation introducing a new tax system featuring a goods and services tax. Those supporters of the Democrats who relished the warm inner glow felt that their purity had been defiled by Lees's cooperation with the Howard Government. The Gillard Government's deal with the Greens seems to have much the same result and for the same reason. The ALP's support plummeted to such a degree that only seven of the seats it won in 2013 were on the primary vote alone. All the other seats they won depended on preferences. And the Greens's total vote declined by 28 per cent.

Two Independents from New South Wales, Tony Windsor (New England) and Rob Oakeshott (Lyne), also undertook to support the Gillard minority ALP Government. The contrast between those two and Arthur Coles and Alex Wilson could not be more marked. Coles and Wilson, in bringing down the Fadden coalition Government in 1941, and installing John Curtin as a Labor prime minster, were both so in tune with

their respective electorates that they successfully recontested them at the next election in 1943. Windsor and Oakeshott could not claim the same rapport with their electorates after 2010. Both were, in effect, to concede this. In the election in 2013, Tony Windsor chose not to recontest New England and Rob Oakeshott felt constrained to the same decision respecting Lyne.

Campbell Sharman recently produced for the Parliament of Australia a paper entitled *The Representation of Small Parties and Independents* in which he dealt with the subject with a greater earnestness than I have been able to muster. It is on the internet if you wish to consult it. I have to agree with him that, for all their awkwardness and sheer bloody-mindedness, minor parties and Independents have made the Senate a more effective house of review than it was prior to 1955 when the consequences of the changes to the Senate's electoral system enacted in 1948 first became apparent. At the same time it has to be acknowledged that, since the 2013 election, the Greens have embarked on an obstructionist policy against mandated policies of the coalition government led by Tony Abbott. And in this they have enjoyed the co-operation of the Australian Labor Party.

Chapter Five
Reforming the Senate Electoral System

Ian McAllister

The 2013 Senate election saw the highest non-major party vote since the introduction of proportional representation in 1949. It resulted in the election of seven minor party and independent candidates. This paper argues that two factors contributed to this outcome: a long-term desire among a significant group of voters to ensure that the Government (of whatever political complexion) does not control the Senate; and the evolution of the Senate electoral system into a semi-closed party list system. Five reforms to the electoral system are considered: the introduction of a new plurality system; a change to a closed party list system; the introduction of a vote threshold for election; changing the rules around the registration of political parties; and increasing the cost of nomination. A change to a closed party list system combined with a vote threshold are viewed as most likely to achieve the desired outcome and to be politically acceptable.

The 2013 Senate federal election saw almost one in three first preference votes cast for a minor party or an independent candidate. This was the highest non-major party vote since the introduction of proportional representation for Senate elections in 1949. The outcome was the election of seven minor party and independent candidates, from six separate groupings, plus four candidates from the Greens.[1] This was the highest level of minor party representation since 1987.[2] Two of the candidates who were elected – the Australian Sports Party and the Australian Motoring Enthusiast Party – received just 1.0 percent and 3.8 percent of the first preference vote, respectively, in their States.[3] The election of candidates who attracted such small initial votes raises questions about the efficient operation of the Senate electoral system.

The election of so many minor party and independent candidates attracted widespread criticism. The outgoing Minister for Foreign Affairs, Senator Bob Carr, characterised them as "pocket-handkerchief political effusions" (*AFR*, 24 October 2013), while the Greens leader, Christine Milne, warned of "an extraordinary array of people whose policies nobody's got any idea about" (*The Australian*, 9 September 2013). The Independent Senator from South Australia, Nick Xenophon, who had attracted 1.76 of a quota in South Australia, talked of the process by which these candidates had been elected as "bizarre and demeans our democracy" (*The Australian*, 9 September 2013). However, derogatory comments about Senate candidates has a much longer history: in 1992 Paul Keating famously called the Senate "unrepresentative swill", while Joan Child in 1983 talked of Senate elections offering choices between "candidates from the flat earth society and the radical bomb throwers and collectors" (quoted in Farrell and McAllister, 2005: 43).

The success of the minor parties in 2013 was made possible by two factors: long-term changes in voter behaviour combined with technical changes to the electoral system dating back to 1983. In terms of voter behaviour, the strength of partisan loyalties has been declining since the 1980s. Lifetime voting for the same party has declined significantly, from 72 percent in 1967 to 52 percent in 2010 (McAllister, 2011:

52). At the same time, voters are more likely to support different parties in the House of Representatives and the Senate. In the 1990s, just over one in 10 voters split their votes in this way; since 2001, the proportion has been just under one in five (McAllister, 2011: 14). Changes to the Senate electoral system have also contributed to the outcome. The system was changed in 1984 from proportional representation based on the single transfer vote (STV or "Hare-Clark"), to what is in practice a semi-closed party list system. This change has enabled the parties to negotiate the transfers of votes without reference to the wishes of voters.

This paper examines the reasons for the increasing success of minor party and independent candidates in Senate elections and evaluates the ways in which the system could be reformed. The first section examines the evolution of the Senate electoral system, focussing particularly on the 1984 reforms and their consequences. The second section outlines voters' views of the system and charts the rise of split-ticket voting. The third section traces patterns of voting in Senate elections since 1949, while the fourth section identifies how the Senate electoral system might be reformed and assesses the likely consequences of these changes for party representation.

The Evolution of the Senate Electoral System

The Senate electoral system has experienced a variety of changes since federation in 1901. The Conventions of the 1890s had largely ignored the issue of electoral system design. At one level this was driven by expediency, and a desire to obtain agreement on the institutional framework and to leave the design of the electoral system until later. This was embodied in the "wonderfully permissive s.9 of the Constitution" which allowed the Parliament to decide on a uniform electoral system for itself (Uhr, 1999: 29).

A further consideration was the issue of the franchise, which was complicated by South Australia's decision to allow women the vote, and a wish not to disenfranchise any section of the electorate. The net effect was that the constitutional framers were anxious to avoid questions about uniform electoral systems which would upset some of the States, and thereby threaten the ratification of the Constitution (Crisp 1949: 65).

From the outset, a preferential electoral system was regarded as the best system for the House of Representatives. This stemmed from three factors. First, Australia was heavily influenced by debates about preferential voting in Britain, particularly the 1917 Speaker's Convention on electoral reform. Second, prior to 1901, the colonies had engaged in considerable experimentation in electoral system design, notably in Queensland and Tasmania during the 1890s. Third, there was the key influence of three figures: a campaigner, Catherine Spence; a legislator, Andrew Inglis Clark; and a theorist, Edward Nanson, each of whom promoted the adoption of preferential systems. While some have suggested that Australia's contributions to electoral system design were borrowed from overseas (see, for example, Hancock, 1947: 81), it is unlikely that preferential voting would not have been adopted without the efforts of Spence, Clark and Nanson.[4]

While the 1901 election was conducted using the electoral systems then in place in the colonies, it was left to the newly elected Parliament to devise an electoral system for the House of Representatives and the Senate. Nanson had a particular influence over the adoption of preferential voting for the House of Representatives, and a proportional system for the Senate, as enshrined in the *Commonwealth Electoral Act*

1902. Nanson's aim was to avoid the disproportional outcomes common in plurality systems, while preserving the link between the elected representative and the constituent in the lower house. However, after much controversy and heated debate, these proposals were rejected and first-past-the-post voting was adopted for both houses, using single member plurality (SMP) for the House of Representatives, and block voting for the Senate.

Table 1: House of Representatives and Senate Electoral Systems since 1901

Period	State	Type of Electoral System
House of Representatives		
1901	NSW, Vic, WA	First-past-the-post, single member constituencies
	Qld	Contingent voting, single member constituencies
	SA	First-past-the-post, block voting
	Tasmania	Hare-Clark
1903–18	All States	First-past-the-post, single member constituencies
1918–	All States	Preferential, single member constituencies
Senate		
1901–17	All States, except Tasmania in 1901	First-past-the-post
1919–31	All States	Preferential block majority/optional preferences
1934–46	All States	Preferential block majority/compulsory preferences
1949–83	All States	Proportional representation/compulsory preferences
1984–	All States	Proportional representation/ticket preferences

Source: Farrell and McAllister (2005).

The adoption of first-past-the-voting for the two houses was viewed as a temporary measure, necessitated by the failure to secure agreement on a permanent system, and debate about the design of the electoral system continued. The debate surfaced in, among other places, a royal commission report (1914-15), parliamentary motions (1909, 1911, 1914), and in a government bill (1906).[5] Preferential voting was eventually adopted in 1918 for the House of Representatives, following the "Flinders Deal" between the Nationalist Party and the Victorian Farmers' Union, by which it was agreed to nominate only one non-Labor candidate. The preferential system that was adopted was identical to the one proposed by the Barton Government in 1902, with the exception of replacing optional with the compulsory expression of preferences. Since 1918, this electoral system has remained in place for the House of Representatives.

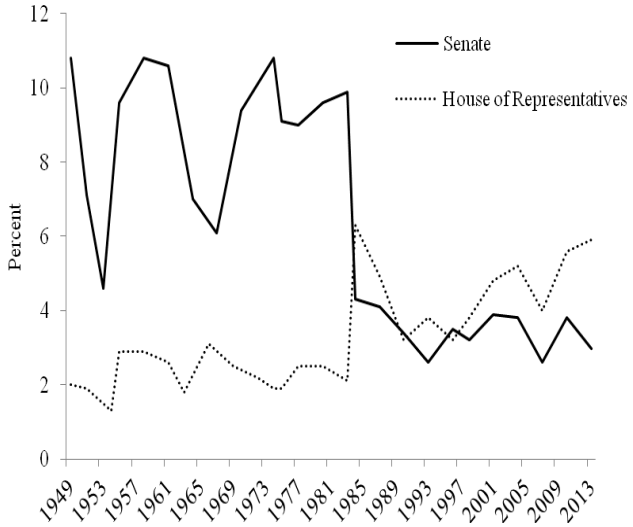
The Senate electoral system, by contrast, has generated continuous controversy. In 1919 a preferential block majority system was introduced; the idea was, first, to allow voters to rank order the candidates in the same manner as under majority preferential voting and, second, to ensure that each candidate was elected with an overall majority. In effect, what this produced was a series of mini-elections, one for the election of each candidate. All the votes of the winning candidate were transferred to the

remaining candidates, based on the next preferences and then there was a fresh count to see which of the remaining candidates had an overall majority of the vote. The process continued until the required number of candidates were elected. This electoral system institutionalised the "windscreen wiper" effect – of one party winning all or most of the Senate seats in one election, only to lose all or most in the next election – and elections in the following thirty years were to produce dramatic shifts in representation in the Senate based on relatively small moves in voting support.

The next change in the Senate electoral system came in 1948. The change was initiated by concerns about the impact of the "windscreen wiper" effect on an enlarged Senate (Crisp 1978: 219), as well as a desire by the Chifley Labor Government to gain partisan advantage (Uhr, 1999). The system adopted was largely based on that of Tasmania, with two exceptions: the use of random transfers at full value rather than the Gregory method; and the use of compulsory rather than optional preferences. This system remained in place until the election of the Hawke Labor Government in 1983, which proposed a series of reforms relating to party funding, boundary redistribution, the establishment of an electoral commission, party registration, ballot paper design, and the operation of the Senate electoral system.

The reform to the Senate electoral system was the most far-reaching. Concerns had been mounting about the high levels of invalid (or "informal") votes in Senate elections, due to the complexities of the Senate ballot paper and the requirement to express preferences for all candidates. Other contributing factors included the differences in the State and federal electoral systems and the frequency with which elections are carried out which, coupled with compulsory voting, means that some 95 percent of registered voters have to attend a polling place about once every 18 months. Although levels of invalid voting had always been high for Senate elections (McAllister and Makkai, 1993), in elections in the 1970s invalid votes were constituting about one in 10 of all of the votes cast (see Figure 1). To try and reduce the numbers of informal votes, a modified PR list system was adopted, to give voters the option of expressing just one preference for a party "ticket" instead of the laborious task of having to rank-order all the candidates on the ballot paper.

Figure 1: Levels of Informal Voting, 1949-2013



Sources: Barber (2011); Australian Electoral Commission.

The impact of the change in the Senate system was immediate and dramatic, with the proportion of informal votes declining from 9.9 percent in 1983 to 4.3 percent in 1984. However, the change in the Senate ballot paper also caused confusion among some voters in their completion of the House of Representatives ballot paper, and informal votes trebled, from 2.1 percent in 1983 to 6.3 percent in 1984. It subsequently declined, but since 2001 informal votes have made up about one in 20 of all votes cast for the House of Representatives, historically a high figure. While the 1983 change undoubtedly made the act of voting in Senate elections simpler, it also effectively transformed the existing PR STV system into a semi-closed party list system, in which the rank-ordering of the candidates was determined by the political party rather than by the voters.

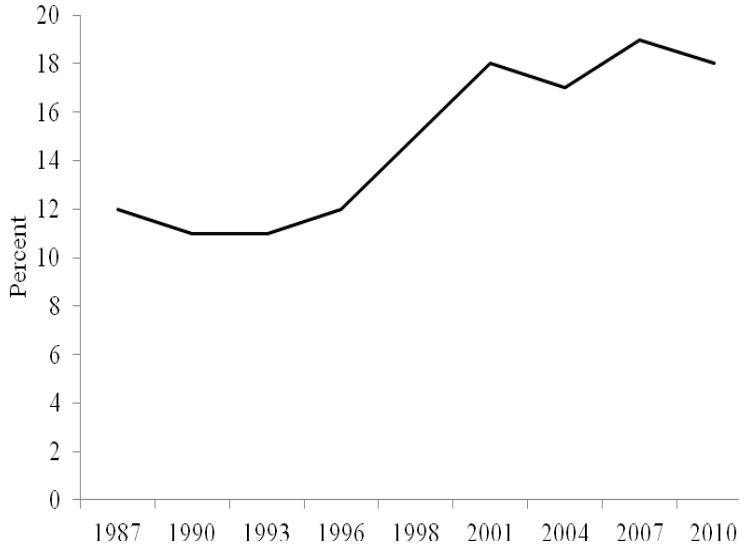
The Senate electoral system has therefore experienced a range of changes since federation, while the House of Representatives electoral system has largely remained unchanged since 1918. The current Senate system, following the 1984 changes, is no longer what it was intended to be in 1949, namely STV. In practice it is now a party list system, with voters choosing a party ticket rather than individual candidates. While the choice of ordering individual candidates remains, relatively few voters exercise that choice. How the public views the system and how it affects electoral outcomes are examined in the next two sections.

Patterns of Split-Ticket Voting

The electoral system provides the opportunity for voters to cast a ballot for one party in the House of Representatives, and for a different party in the Senate. Such split-ticket voting reflects a desire to ensure that the government of the day does not control the Senate and therefore enact its legislative agenda without proper scrutiny. In terms of bringing the possibility for split ticket voting to the attention of the public, Sharman (1999: 358) sees the 1955 election of a Democratic Labor Party senator as a turning point: "once a minor party had been elected to the Senate and had held the balance of power, a clarion call was sent to parties and voters that PR in the Senate could be used by a minor party with great effect to influence government policy."

Despite this early indication that divided government could affect governance, split-ticket voting did not increase significantly until the mid-1990s, as Figure 2 indicates. Between 1987 and 1996, split-ticket voting was stable at between 11 and 12 percent of the electorate, increasing to 15 percent in 1998 and 18 percent in 2001. In the 2007 and 2010 elections, almost one in five voters opted for a different party in the House of Representatives and the Senate. While comparisons using survey estimates prior to 1987 are less accurate, the evidence suggests that there were lower levels of split-ticket voting in the 1960s and 1970s. For example, when asked in a 1979 survey about their voting intention, only nine percent of the respondents said that they would split their vote between the House of Representatives and the Senate. As in the United States and other countries, then, split-ticket voting appears to be a relatively recent phenomenon.

Figure 2: Split-Ticket Voting, 1987-2010

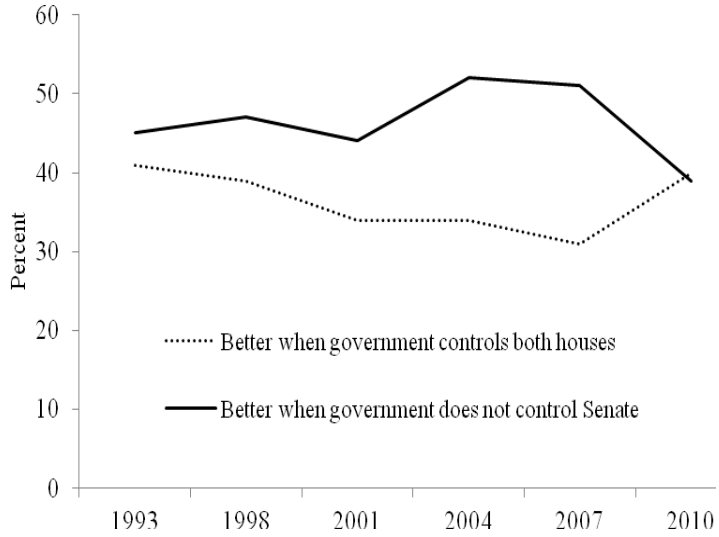


The Liberal and National parties are treated as a single party.
Sources: 1987-2010 Australian Election Study surveys.

The international research suggests that the phenomenon of split-ticket voting is a symptom of declining popular trust in parties. Fiorina (1992) argues that this widespread suspicion of parties is reflected in a preference for divided government, so that no single party possesses the capacity to govern unhindered. Australian research has endorsed the view that voters' motivations are tactical and positive rather than dysfunctional and negative. Bowler and Denemark (1993) use aggregate data to argue that the electoral systems of the upper and lower houses create very different structural opportunities for voters to cast their ballots tactically, and are unrelated to dealignment. Similarly, Bean and Wattenberg (1998) show that Australian split-ticket voters are largely motivated by a desire to see power shared between the parties, in line with the "keep the bastards honest" slogan that became the watchword of the Australian Democrats during its heyday in the 1980s and 1990s.[6]

Since 1993 the Australian Election Study has asked a question about whether the respondents favour a situation where the federal government controls both houses or where the government does not hold power in the Senate. As Figure 3 shows, until 2010 there was a gradual increase in the proportions preferring an outcome which leaves the government without a majority in the Senate; by 2007 the gap had increased considerably, with 51 percent preferring divided government and just 31 percent government control of the Senate. The gap closed once again in 2010, with 40 percent believing that it was better if the government had control of both houses. This may reflect the indecisive election outcome in 2010 and the dependence of the incumbent Labor Government on the support of three independent candidates in the House, all with differing priorities and views.

Figure 3: Attitudes Towards Government Control of the Senate, 1993-2010



"Which do you think is better – when the Federal Government has a majority in both the House of Representatives and the Senate, or when the Federal Government in the House of Representatives does not control the Senate?" The question was not asked in 1996.

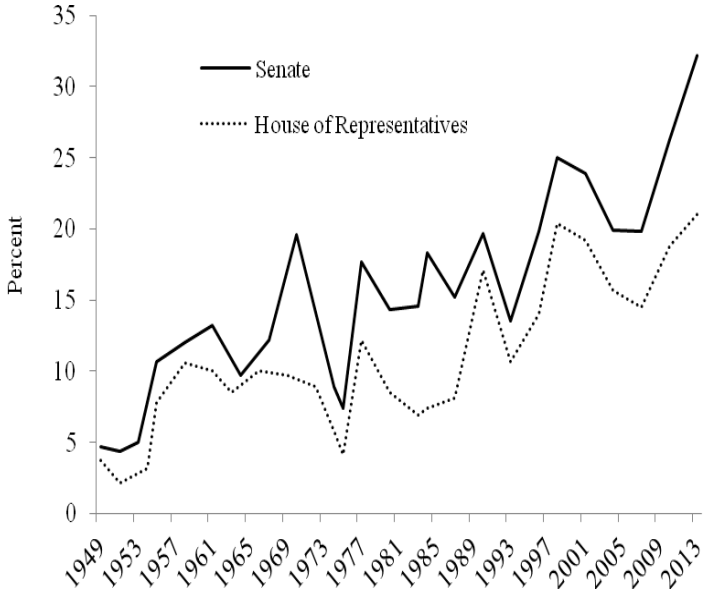
Sources: 1993-2010 Australian Election Study surveys.

How voters perceive political institutions is one factor that affects how they will choose to use the electoral system. One explanation for the representation of minor parties following the 2013 Senate election is the rules surrounding the counting of votes. However, the opinion poll results presented here also show that a significant number of voters value the opportunity of ensuring that a governing party does not control the Senate. These wishes need to borne in mind when evaluating any changes to the Senate electoral system.

Patterns of Voting in the Senate since 1949

The adoption of the single transferable vote for Senate elections in 1949 had no immediate effect on patterns of voting. In the election immediately prior to the change, the 1946 election, the two major parties attracted 95.3 percent of the vote and won all of the available seats; in the 1949 election the major parties attracted 95.4 percent of the first preference vote and again won all of the available seats. Even in the 1951 election, which, unlike 1946 and 1949, was a full Senate election, the major parties attracted 95.6 percent of the vote. However, Figure 4 shows that support for minor parties and independent candidates in Senate elections was gradually gaining ground, and consistently exceeding the non-major party vote in House of Representatives elections.

Figure 4: The Non-Major Party Vote, 1949-2013



Sources: Barber (2011); Australian Electoral Commission.

The 1984 change in the Senate electoral system had little immediate effect in increasing the vote for minor parties and independents. In the 1983 Senate election, 14.6 percent of the first preference vote was cast for non-major parties and, in 1984, following the change, there was a small increase, to 18.3 percent, followed by a decline, to 15.2 percent, in 1987. The most significant post-1984 changes came in the 2010 and 2013 elections: in 2010 the minor party vote jumped to 26.3 percent, and, in 2013, to 32.2 percent of the first preference vote. These increases in the non-major party votes coincide with an increasing sophistication among the minor parties in how to benefit from transfer arrangements based on group tickets. One element in this recent success has been the advice provided by a company called Independent Liaison, led by Glenn Druery.

Since the late 1990s Druery has specialised in providing advice to minor parties about how to maximize their Senate vote. Prior to the 2013 election, Druery had four meetings with the minor parties and provided advice to them on how to use the preference system to maximum advantage (*Guardian*, 13 September 2013). Called the "preference whisperer", Druery first came to prominence in the 1999 New South Wales State election when he registered 24 minor parties, which resulted in one of the largest ballot papers ever seen in Australia and one of the largest in the world (*Sydney Morning Herald*, 10 September 2013). The purpose of these parties, "relying on nothing more than attractive names to gain votes" (Smith, 2006: 136), was to direct preferences to Druery's own Republic 2000/People First Party. In the event Druery failed to win election, but a surprised candidate from the Outdoor Recreation Party, Malcolm Jones, did win a seat with just 0.2 percent of the first preference vote.[7]

The direction of preferences is an effective tactic because the vast majority of voters cast an "above the line" vote, that is, they opt for a party ticket. Their unused votes are then directed by the parties in a complex scheme of alliances. While preference arrangements have to be registered with the Australian Electoral Commission and are available on their website[8] and in polling stations, in practice voters will have no

knowledge of where their vote will ultimately go. In turn, voters have little option other than to vote for a party ticket because of the complexity and size of the ballot paper. To lodge a valid vote below the line, the voter is required to number all of the candidates in order of preference; in the 2013 New South Wales Senate election, this would have required the voter to number no less than 110 boxes. In the 2010 Senate election (2013 figures are not yet available at the time of writing) 96.1 percent of voters cast a ticket vote and just 3.9 percent voted below the line. These figures have been constant for many years.[9]

The evolution of the Senate electoral system into a semi-closed party list system has provided multiple opportunities for minor parties to "game" the system through the direction of preferences, particularly since the late 1990s. However, it should also be noted that the major parties have also found the direction of preferences useful, by directing preferences to and from smaller parties that they wish to favour or punish. In recent years the minor parties have simply mirrored the strategies of their larger cousins.

Options for Reform

Since 1901 there have been five separate Senate electoral systems, with the current system now 29 years old, the second oldest system of the five. Coupled with the debate about preferencing and the representation of minor parties in the Senate, this may be an opportune time to consider reform. Electoral system design is, of course, a complex area and there are a myriad of possibilities for change. Five main reform options and their consequences are considered here: changing the electoral system into a plurality system; changing it into a closed party list system; introducing a vote threshold; changing the rules around the registration of political parties; and increasing the cost of nomination.

Plurality Electoral System. If the Senate electoral system is not delivering the outcomes that are seen as consonant with good governance, then the obvious solution is to change the system. One option would be to introduce a plurality or majoritarian system, as existed prior to 1949. This would have two advantages. First, it would simplify the whole voting system and bring the Senate more into line with the House of Representatives, thus reducing the high level of informal votes, particularly if both systems permitted optional preferences. Second, it would usually result in one party winning a Senate majority, thereby ensuring that the Government could enact its legislative program and thereby enhancing the clarity of accountability for voters (unless it was the Opposition which had the majority).

The main disadvantages of any move to a plurality electoral system would be threefold. First, that it would contradict an aspiration among a significant proportion of voters for divided government, as demonstrated in successive public opinion surveys. Second, there would inevitably be large swings in party representation in the Senate and a high turnover in members, particularly in the event of a double dissolution election. This "windscreen wiper" effect was what the 1949 change to PR was designed to avoid. Third, it would reverse an international trend towards the use of proportional rather than majoritarian electoral systems.

Closed Party List Electoral System. A second option for changing the electoral system would be to recognize what the system has evolved into – a semi-closed party list system – and to redesign it to become a closed party list system. This would involve removing the option to vote below the line; voters would only have the option of voting for one or more parties above the line, with the parties deciding on the rank order of their candidates. An advantage of this change would be to simplify the ballot paper greatly, thus reducing the burden on voters and the level of informal ballots. Such a change could be accompanied by optional preferencing, as occurs in most other party list systems. A version of this has been proposed by the former Greens senator, Bob Brown.[10]

The introduction of a closed party list system would effectively mirror the reform to the Legislative Council in New South Wales following the 1999 election, although below the line voting remains an option.[11] The effect of this change has been progressively to reduce the representation of minor parties in the NSW Legislative Council; in the 2011 State election, for example, the party with lowest vote to gain representation was the Christian Democratic Party with 3.1 percent of the first preference vote.

One consideration in the adoption of a party list system is whether it would be constitutional. Section 7 of the Constitution states that the Senate must be directly elected. It could be argued that the election of parties rather than candidates contravenes the requirement for direct election. However, in the 1984 McKenzie judgment, the High Court ruled that group voting tickets were not contrary to section 7 of the Constitution and upheld the "above the line" voting option introduced in the 1984 reform. While any further reforms would need to be tested legally, it seems likely that, based on McKenzie, a party list system would be deemed constitutional.

Threshold for Election. A common method of reducing the number of parties is to introduce a minimum vote threshold that parties must meet before they can gain parliamentary representation. Within the 34 countries that form the OECD, 19 have some form of election threshold; these countries, together with the threshold and the electoral system currently in operation, is shown in Table 2. Most of the 19 countries operate some form of proportional representation, usually an open or closed party list; none of the countries use a majoritarian system and none use STV.

Table 2: Electoral Thresholds in 19 Countries

Country	Percent vote threshold	Type of Electoral System
Austria	4	Open list (D'Hondt)
Belgium	5	Open list (D'Hondt)
Czech Republic	5	Closed list (D'Hondt)
Denmark	2 (or wining one constituency)	Open list (preferential)
Estonia	5	Open list (Hare quota)
Germany	5 (or winning three constituencies for compensatory seats)	Mixed member proportional
Greece	3	Semi-proportional
Hungary	5	Mixed member proportional
Iceland	5 (for compensatory seats)	Closed list (D'Hondt)
Israel	2	Closed list (D'Hondt)
Italy	4	Semi-proportional
Netherlands	First seat cannot be remainder seat	Closed list (D'Hondt)
New Zealand	5 (for compensatory seats)	Mixed member proportional
Norway	4 (for compensatory seats)	Open list (Saint-Lague)
Poland	5 (8 for alliances)	Open list (D'Hondt)
Russia	5	Mixed member proportional
Slovakia	5 (7 for two-party alliances, 10 for multi-party alliances)	Semi-open list
Slovenia	4	Closed list (D'Hondt)
Turkey	10 (none for independents)	Closed list (D'Hondt)

Source: Derived from http://electionresources.org.

Among the 19 countries listed in Table 2, the thresholds range from two percent (Denmark, Israel) to 10 percent (Turkey) of the vote, with a median threshold of between four and five percent of the vote. Several countries place caveats on these thresholds. In Iceland, New Zealand and Norway, the threshold applies only to compensatory seats, not seats won in a constituency vote. Denmark and Germany dispense with the vote threshold if at least one seat is won. The threshold is often increased for party alliances; in Slovakia, for example, the threshold doubles from five to ten percent in the case of multiparty alliances. In Italy, the threshold is doubled for elections to the upper house, the Senate.

The main advantage of introducing a threshold is its simplicity and ease of administration. However, thresholds also have a number of disadvantages. First, they increase disproportionality in election outcomes and contribute to wasted votes (Anchar, 1997). Second, thresholds discourage new parties from contesting elections and arguably limit the choices of voters in an election. Voters may be discouraged from supporting a minor party in order not to waste their vote. Third, the level at

which a threshold is set can often be arbitrary. A related consideration is whether a vote threshold in the current Senate system should apply to group voting tickets or to individual candidates.

The effect of introducing an election threshold of, say, five percent of the valid vote in Australia for parties would reduce the representation of minor parties from seven senators in the 2013 election to four. Those losing their seats in 2013 would be Family First, the Liberal Democrats, the Australian Motoring Enthusiast Party and the Australian Sports Party; the Palmer United Party, the Liberal Democrats and the Xenophon Group would all retain their seats. In other words, the impact of a vote threshold on the outcome of the 2013 Senate election would be modest, paralleling the impact of a similar reform in Belgium in 2002 when a five percent threshold was introduced.[12]

Registration of Political Parties. The formal registration of political parties in democracies serves to regulate political funding and to control the party names (and sometimes emblems) which appear on ballot papers. To gain registration in Australia, a political party must have a written constitution and either at least one federal member or 500 members who are on the electoral roll and who are not members of another party. Currently there are 54 parties registered with the AEC.[13] The political consultant, Glenn Druery, regards these rules as overly lax and has argued that "the reason we have so many groups registered is because forming a party is so easy" (*Guardian*, 13 September 2013).

The introduction of more stringent rules for the registration of political parties would be administratively easy, perhaps requiring a larger number of registered members. Russia, for example, required a registered political party to have at least 50,000 members, but this requirement proved too stringent and was reduced to 500 members in 2013. The main problem with increasing the membership threshold for registration is that it is relatively easy to circumvent; any increase would have to be modest, perhaps from 500 to 1,000 members. Another problem, shared with the introduction of an election threshold, is that it would discourage new parties from contesting elections.

Cost of nomination. Requiring a deposit from a candidate, refundable if a minimum number of votes is reached, was gradually introduced in most democracies during the twentieth century in order to discourage frivolous candidates. In Britain, the current deposit is £500, refundable if the candidate wins five percent of the valid vote. In Canadian federal elections the deposit is $1,000, refundable if Elections Canada receives properly completed financial returns on time. In Australia, the deposit is $2,000 for a Senate candidate and $1,000 for a House of Representatives candidate. The deposit is returned to a Senate candidate if the candidate or their group ticket attracts four percent or more of the formal first preference vote.

Increasing the cost of nomination would be administratively easy, but it is unclear whether it would deter many minor parties from contesting elections, unless the cost became excessive. Moreover, the current level of deposit is broadly in line with that found in comparable democracies.

Conclusion

In bicameral systems with strong upper houses, who gains election to the upper house is obviously crucial to the success of the government's legislative program. Along with Germany, Switzerland and the United States, Australia counts as one of only four advanced democracies with an upper house that can exercise any significant legislative authority (Farrell and McAllister, 1995). In practice, the Senate acts as an institutional veto player and its composition can have major implications for governance. In this context, the method of election to the upper house takes on a greater significance than is the case in other democracies.

Since 1949 the Senate electoral system has gradually evolved from a candidate-centred PR system to a semi-closed party list system. The preference distributions that so benefitted the major parties after the 1983 introduction of ticket voting are now being used strategically by minor parties to gain election with small parcels of first preference votes. These perverse outcomes confirm the views of many critics of STV who have argued that the direction of preferences inherent in the STV system results in a choice of winners that is "semi-chaotic" (Dummett, 1997: 142). The 2013 Senate election result exemplified this outcome by electing a candidate who received just 108 first preference votes in his State, when the quota for election was 187,183 votes.

While this paper has shown evidence to support the view that a significant group of voters wishes to see divided government and about one in five vote strategically to achieve that goal, it is difficult to argue that this outcome is what these voters had in mind. Moreover, if voters cast a ballot above the line, there is little transparency about where their vote will ultimately go. This paper has canvassed five reforms to the electoral system intended to minimize these perverse outcomes and to restrict minor parties "gaming" the system. Among these five changes, the replacement of PR STV with a plurality system is perhaps the least politically acceptable and it would result in large swings in party representation in the Senate. Among the other reforms, tightening the rules surrounding the registration of political parties and increasing the costs of nomination would be relatively easy to circumvent by a determined group of individuals. These reforms also start to restrict the freedom to stand for democratic election which is a cornerstone of the democratic system.

The most effective and politically acceptable changes involve either the introduction of a closed party list system or the introduction of a threshold for election, or a combination of both. The introduction of a closed party list system would formally recognize what the system has already evolved into, and institutionalize that change. It would, however, give control of who gets elected solely to the political parties and remove the option for voters to pick their preferred candidates. The introduction of a threshold for election would follow common practice in other open and closed party list systems and effectively exclude minor parties that did not reach the threshold. The main disadvantage is that it would increase disproportionality.

Endnotes

1. The result in Western Australia is likely to be tested in the Court of Disputed Returns since a recount found that 1,375 votes had been lost.

2. The 1987 election was a full Senate election: all elections since then have been periodical elections for half the Senate.

3. The Australian Sports Party candidate received 0.01 of a quota in Western Australia and the Australian Motoring Enthusiast Party candidate received 0.04 of a quota in Victoria.

4. See Farrell and McAllister (2005). For biographical and historical accounts of these individuals, see Haward and Warden (1995); McLean (1996); Reid and Forrest (1989).

5. All these debates have been well-documented: see, for example, Reid and Forrest (1989), and Uhr (2000).

6. The slogan was coined by the Australian Democrats' founder, Don Chipp, at a press conference in 1980.

7. Jones's victory came about thanks to preferences from 22 other parties, including the Marijuana Smokers Rights, the Three Day Weekend Party, the Gay and Lesbian Party (which apparently had no gay and lesbian members), Animal Liberation, the Four Wheel Drive Party, the Marine Environment Conservation Party and the Women's Party/Save the Forest. See Antony Green blog, http://www.abc.net.au/news/2013-09-11/green-hand-the-power-of-preferences-back-to-the-people/4951020

8. There is also a website providing this information, http://www.belowtheline.org.au/

9. Voters in Tasmania and the ACT are least likely to vote above the line: 79.8 percent and 75.9 percent, respectively, voted above the line in 2010. This is partly because these jurisdictions have many fewer candidates (24 in Tasmania and 9 in the ACT in 2010), and partly because of a familiarity with the STV system since it is used for State and territory elections.

10. Brown's proposal is to allow voters to number the parties above the line in order of preference, with a minimum of six preferences being required in order to cast a valid vote. "Below the line voting could be maintained, or abolished if this is needed to minimise confusion for ordinary voters" (*Sydney Morning Herald*, 11 September 2013).

11. A minimum of 15 preferences below the line are required in order for the vote to be valid.

12. The Belgium reform in 2002 introduced a threshold of 5 percent of the national vote (though it does not apply to three constituencies). The change was motivated by a desire to reduce the parliamentary representation of anti-system parties. In the 1999 lower house election, 12 parties stood for election and 11

gained one or more seats in the lower house. In the 2003 election, following the reform, 12 parties again stood for election with 10 gaining one or more seats. In effect, then, the reform had little direct effect on parliamentary representation.

13 See http://www.aec.gov.au/parties_and_representatives/party_registration/Registered_parties/

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Chapter Six

Electing the Australian Senate: In Defence of the Present System*

Malcolm Mackerras

The purpose of this paper is to enter a strong defence of the current electoral system for the Australian Senate.

Two minor proposals for change

In opposing what I call "radical reform", however, I do not want it to be thought that I oppose all change. In fact, I do favour two minor changes. The first relates to the ballot paper.

In my opinion there is one criticism of the present system which is correct: the elector is not given a reasonable opportunity to vote below the ballot line. My mantra is, "Voting is a right, not a burden," so I seek to reduce the burden on the voter.

Take two examples of ballot papers from the September 2013 Senate election. In New South Wales and the Northern Territory (indeed, in all States and territories) above the ballot line and on the extreme upper left-hand corner it reads: "YOU MAY VOTE IN ONE OF TWO WAYS". Below that it reads: "EITHER", and below that "**Above the line**" and below that "By placing the single figure **1** in one and **only one** of these squares to indicate the voting ticket you wish to adopt as your vote" and then the parties and their squares are listed in rows to the right.

In New South Wales there were 110 candidates. Consequently the words below the line read "OR" and below that it reads: "**Below the line** By placing the numbers **1 to 110** in the order of your preference". In the Northern Territory there were 24 candidates so the words below the line read "OR" "**Below the line** By placing the numbers **1 to 24** in the order of your preference".

My proposal is that the words above the line remain the same. Below the line I would have (for all ballot papers) these words: "OR" "**Below the line** By placing the numbers **1 to 15** in the order of your preference. You may, if you wish, vote for additional candidates by placing consecutive numbers beginning with **16** in the squares opposite the names of those additional candidates in the order of your preference for them."

My second proposal for change relates to the registration of political parties. At present registration requires a party to demonstrate that it has 500 members. I propose that the number be raised to 2,000. I propose also to increase the required fee from $500 to $2,000. Also, I think there should be stiffer documentation required to register a party. By making it more difficult to register a minor/micro party the size of the ballot paper could be reduced. I think also that Julia Gillard's late-January calling of the 2013 general election had the effect of increasing the size of Senate ballot papers. I criticised that calling at the time on the ground of the disrespect it showed towards the Governor-General. As a good constitutional monarchist I cannot imagine that Tony Abbott would make the same mistake in 2016.

Present System for Electing the Senate: the Defence

My defence of the current Senate system starts with the Constitution of Australia. It is quite clear on the kind of electoral system the future Commonwealth of Australia should have. Section 7 provides: "The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate." Section 24 provides: "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators."

The words to note are "directly chosen by the people". Those words command that only candidate-based electoral systems are acceptable and that applies to both the Senate and the House of Representatives. Within that constraint the Parliament may make its own decision, in accordance with section 9. It provides: "The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing senators for that State."

Technically speaking we have had three electoral systems for our House of Representatives and six for the Senate. However, I think it is more sensible to say that we have had three Senate electoral systems which can be described as "winner takes all" (up to 1946), "single transferable vote/compulsory voting/compulsory preferences" (1949 to 1983, inclusive) and "single transferable vote/compulsory voting/ticket preferences" (1984 to 2014, inclusive). I argue that this third system, (the present one, which I call "the second STV system"), has been by far the most successful.

The effects of "winner takes all" were best illustrated by the general elections of 1910, 1943 and 1946. In 1910 Labor carried all six States and so won every one of the 18 seats then contested. In 1943 Labor again won all six States and so won every one of the 19 seats then contested. (The 19th seat was the consequence of a death in Western Australia. In that State the first three elected served the six-year terms. The fourth elected – Dorothy Margaret Tangney – filled the casual vacancy and was thus required to seek re-election in 1946.) In 1946, Labor won five of the six States and so won 15 of the 18 seats then contested. The consequence was that, when the electoral system was reformed in 1948, the situation was one of 33 Labor Senators sitting on the government benches and three Coalition Senators (all elected from Queensland in 1946) sitting on the Opposition benches.

So the first of our three systems was a failure. My task now is to demonstrate that the current system (the third) is superior to the second system which operated at Senate elections from 1949 to 1983, inclusive.

In one respect, level of informal voting, my task is easy. Under the previous method (1949-83), informal voting ran at a rate of nine percent. Since 1984, informal votes have been 3.5 percent of the total.

However, given the current propaganda against the system, a more general defence is clearly needed. So, what are the characteristics of a good electoral system? I argue that a good system should, while maintaining the sensible checks and balances of the Constitution, bring a reasonable level of harmony between the House of Representatives and the Senate. On this score the first STV (1949-83) system fell down.

There were far too many double dissolutions. These occurred in 1951, 1974, 1975 and 1983. By contrast, there has only been one double dissolution under the current system – and it occurred in 1987 which was early in the life of the system. From 1949 to 1983 every change of government occurred at a double dissolution election (1975 and 1983) or, if it occurred at a House of Representatives election, or a House of Representatives plus half-Senate election, it was next followed by a double dissolution election (1949 followed by 1951 and 1972 followed by 1974). By contrast, under the current system, all three changes of government have occurred at a House of Representatives plus half-Senate election, in 1996, 2007 and 2013. So far none of these has produced a double dissolution.

I am struck at how often I hear it said that the current Senate is dysfunctional and that it is all the fault of that dreadful system which first operated in December 1984. My response is to ask the person to say whether he or she thinks Australian democracy has been more prone to choose bad policies since 1984 than it was in the period from 1901 to 1984. Almost always the response is that the reverse is the case. That seems a pretty good answer for me. The Australian Parliament has operated better since 1984 than was the case from 1901 to 1984. In that circumstance no reform is needed.

In defending the operation of the current Senate electoral system I begin by considering the Greens. They won three Senate seats in 2007 (one each in Western Australia, South Australia and Tasmania) with nine percent of the Senate vote. Then, in 2010, they won six Senate seats (one from each State) with 13 percent. At the 2013 they have won three Senate seats (one each in Victoria, South Australia and Tasmania) with 8.6 percent. So their vote is down but the rotation of Senators means they keep nine seats, Scott Ludlam (WA) being defeated but Janet Rice (Victoria) replacing him next July. (Note: As a consequence of the re-run of the periodical election of Senators in Western Australia in 2014, Senator Ludlam retained his place.)

Purely as an exercise in arithmetic I decided to add together the 1,667,315 Senate votes for the Greens in 2010 to the 1,159,502 in 2013 and express it as a percentage of the combined formal vote of the two elections. In other words, over the two elections, they won 10.8 percent of the Senate vote. For that they are rewarded with nine Senators which is 11.8 percent of the Senate of 76.

The Greens are not the most unreasonable complainers, however. That title must go to the Liberals in New South Wales who complain that David Leyonhjelm has been elected using the title, "Liberal Democrats". From the way they are carrying on one would think he had taken the seat of Arthur Sinodinos. Not so. Sinodinos (Liberal Party, third on the Coalition's joint ticket in NSW) has been elected through the well-worn process of preference harvesting so, in actual fact, Leyonhjelm will take a seat from Labor. Why on earth would the Liberals complain about that? It seems to me they should get used to the Liberal Democrats just as the Australian Labor Party has been compelled to get used to the Democratic Labor Party.

Senator Helen Kroger (Liberal, Victoria) and Senator Don Farrell (Labor, South Australia) has each been defeated and I am personally sorry about that. However, let us face it. They are party machine appointees to the Senate: Kroger, an accountant from the most blue-ribbon Liberal seat in Melbourne; and Farrell, a trade union official from Adelaide. Both Kroger and Farrell will have no trouble re-entering the Senate at

the next election or earlier if another vacancy arises. The most persistent complaint about the Senate electoral system, however, comes from those who think it is a wicked thing that Kroger should have been defeated by Ricky Muir of the Australian Motoring Enthusiast Party. I think this complaint is quite misguided – as I explain below.

A friend from South Australia recently sent an e-mail letter to me in which he said that "the SA Senate result was a complete shock to me and a clear case of people not getting what they voted for, and demonstrating the need to reform the system." I disagree with him completely and, next time we meet, I shall explain why and explain it in great detail.

I go further, however. I assert that the South Australians have given themselves the most capable collection of Senators elected for any State. In order of election the Senators in question are Cory Bernardi (Liberal), Nick Xenophon (Independent), Penny Wong (Labor), Sarah Hanson-Young (Green), Bob Day (Family First) and Simon Birmingham (Liberal).

Here I must divert myself. I wrote above as though it were a fact that Senator Scott Ludlam had been defeated but that, as a consequence of a re-run of the periodical election of Senators in Western Australia, in April 2014, he retained his place. The fresh periodical election arose because, as a consequence of a close contest, and loss of 1,370 ballot papers, the September 2013 election has been declared void by the High Court sitting as a Court of Disputed Returns.

That initial result in Western Australia was entirely defensible in democratic terms. Those elected were: David Johnston (Liberal); Joe Bullock (ALP); Michaelia Cash (Liberal); Linda Reynolds (Liberal); Zhenya Wang (Palmer United Party); and Louise Pratt (ALP). However, had the missing votes incident not occurred, I would have had no difficulty defending the recount result in democratic terms. As it is I shall have no need to do so. Suffice it to say that, on Monday 4 November 2013, the positions were declared and Zhenya Wang and Louise Pratt were not among the winners. Instead their places were taken by Scott Ludlam and Wayne Dropulich of the Australian Sports Party. I gave Dropulich no chance of winning a seat at the fresh election and Ludlam only about one chance in five.

In the event, at the re-run, Labor won only one seat and Ludlum kept his.

Those who demand radical reform to the system seem to me to be in two categories. There are those who are very steeped in the details of the system. I think they are too much preoccupied with individual trees so that they cannot appreciate the beauty of the forest.

Then there are those who are peeved for some reason. They think Senators who are machine appointees of the big parties are more worthy than a blacksmith from Ballarat (John Madigan, DLP) or a sawmill operator from central Gippsland (Ricky Muir, Australian Motoring Enthusiast Party).

Two types of reform have been proposed. One is to place a threshold below a party's vote and cut out any party with less than, say, three percent. The trouble with that proposal is that it would be unconstitutional. My basis for that assertion is section 7 of the Constitution: "The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate." The words, "directly chosen," command a candidate-based election. Few people seem to understand this point but the fact is that the

present system is candidate-based. Once you put in a threshold you change it to a party-list system and Senators would then no longer be "directly chosen by the people".

The other proposed reform is to import the system operating for the New South Wales Legislative Council, the details of which I do not have the space to elaborate. I think that is a goer but I shall oppose it. It is true that when it was implemented in New South Wales I did not oppose its introduction so I had best explain why.

There have been three successful elections under that system, in 2003, 2007 and 2011, each for 21 members at a half-Council election. Take the 2003 result. There were 15 groups and 284 candidates. The result of the election was the return of ten candidates from the Labor group, seven from that of Liberal/National, and two from the Greens. Then there were elected John Tingle from Group C (Shooters Party) and Gordon Moyes from Group N (Christian Democratic Party). The point is that, with 21 to be elected, the quota for election is only 4.6 percent of the vote. Consequently, the NSW system does not discriminate against minor parties. Indeed, in the present Legislative Council, there are 19 from the Coalition, 14 Labor, five Greens, two Shooters and Fishers, and two Christian Democrats.

Once you import that system to a Senate election for only six places you WOULD discriminate against minor parties. I do not dispute that radical reform is supported by distinguished electoral analysts. Indeed, I seem to be the only one opposed. Nevertheless, I still think it is just a means whereby big party machines would take back seats they have lost to smaller parties.

People might think me unreasonable to use the term "radical reform". I say a reform is radical if it is unconstitutional. In the case of New South Wales, the system for their Legislative Council is consistent with their optional preferential vote for their Legislative Assembly. It is not consistent in principle with the full preferential vote for the federal House of Representatives which has operated successfully since 1918.

The reality of our recent election (September 2013) is that it showed the existence of a substantial body of Australians who intensely dislike all of the Liberals, the Nationals, Labor and the Greens. That is why there will be eight "other" Senators from 1 July 2014. So let me quote the overall percentages and the seats compared with the 1996 election, the last time a Labor Government was thrown out of office. In 1996 the Coalition won 44 percent of the Senate vote and 20 of the 40 seats; Labor won 36.2 percent and 14 seats. That left six for "others". In 2013 the Coalition won 37.7 percent of the vote and 17 seats and Labor won 30.1 percent of the vote and 13 seats. That left ten for "others", three Greens, three Palmer United Party, Leyonhjelm, Muir, Day and Xenophon.

I referred above to the blacksmith from Ballarat and the sawmill operator from central Gippsland. There I was referring to John Madigan (elected in 2010, defeating the Liberal incumbent, Senator Julian McGauran) and Ricky Muir (elected in 2013, defeating the Liberal incumbent, Senator Helen Kroger). I have met Madigan and was most impressed by him. I have not met Muir but, no doubt, I shall. They are the Senators who are disparaged because, it has been alleged, they enjoyed so little electoral support. When radical reform comes they would be out of their seats and replaced by suitable party machine appointees from the Liberal Party who would be lawyers, accountants or merchant bankers living in Kew, Brighton, Malvern or Toorak – unless, of course, Labor takes one of the seats in which case the new Senator would

be yet another trade union official.

Let me stress again that our Constitution commands we have a candidate-based electoral system. And what were the votes for Ricky Muir and Helen Kroger? Here they are: 17,083 for Muir and 1,456 for Kroger. Who is to say that Kroger has been unfairly done out of her seat? I think the reality is that both Kroger and Muir engaged in preference harvesting – but Muir beat Kroger at that game. I am not offended. I do admit a threshold of three percent would cut Muir out – since the Australian Motoring Enthusiast Party received only 0.51 percent of the formal vote in Victoria which was 0.0354 percent of a quota. Those statistics cut no ice with me.

The reality is that Victoria has become the weak link for the federal Liberal Party. This is true for both the Senate and the House of Representatives. In 1975, the Fraser-led Coalition defeated the Whitlam-led Labor Party in a landslide, while in 2013 the Abbott-led Coalition had the weakest win of the three. John Howard's 1996 victory comes in the middle. (For those interested in percentages, 36 Labor seats in 1975 constituted 28 percent of 127, 49 seats in 1996 constituted 33 percent while 55 seats in 2013 is 37 percent.)

What is striking is that in 1975 there was no State giving Labor a majority of seats in the House of Representatives. In 1996 there was one, the smallest State, Tasmania. By contrast, in 2013, Victoria did give Labor a majority. The Labor and Greens total in 2013 is 20 seats – or 54 percent of the Victorian seats. The four seats won by Labor in 2013 but not won in 1996 are Ballarat, Bendigo, Chisholm and McEwen. Melbourne is now Green where it was Labor in 1996. It is true that the Liberals in 2013 did re-gain three seats (Corangamite, Deakin and La Trobe) which Labor had won in August 2010 but these were blue-ribbon Liberal back in the days when Victoria was the jewel in the crown of the Liberal Party. (The reason why there are 14 Victorian Liberal seats now compared with 19 in 1996 is that the Liberals in 2013 failed to win Ballarat, Bendigo, Chisholm, Indi and McEwen.)

The reality of Victoria in 2013 is stark for the Liberal Party. Back in November 2007 (an election the Liberals lost nationally), they were able to get three Victorian Senators elected, Mitch Fifield, Helen Kroger and Scott Ryan. Then, in September 2013 (an election they won nationally), they were not able to get the three elected. Only in Victoria did the Liberals suffer such a humiliation, one which was unimaginable back in the days when Menzies, Fraser and Howard were winning elections. There is a simple explanation. In 2013 the Liberals received only 40 percent of the Victorian vote which was 2.8 quotas. On the votes they did receive, they did not deserve to get three Senators elected.

In each election since (and including 2014), the Coalition's Senate vote has declined – from 45.1 percent in 2004 to 39.9 percent in 2007, to 38.6 percent in 2010 and, finally, to a mere 37.7 per cent in 2013. As a consequence of their 2004 vote they actually won a Senate majority in the 41st Parliament, John Howard's last term. They were not asking for sympathy then. Their clear over-representation was their right! As a consequence of their 2007 vote they had 37 Senators in the Rudd Parliament (from 1 July 2008) so they had 48.7 percent of the seats for 39.9 percent of the votes. As a consequence of their 2010 vote they had/have 44.7 percent of the seats for 38.6 percent of the votes – 34 Senators out of 76 in the Gillard Parliament. As a consequence of their 2013 vote they will have, from 1 July 2014, just 43.4 percent of the seats for their miserable 37.7 percent of the vote – 33 Senators out of 76.

Consequently their over-representation has diminished slightly, from 8.8 percent in the Rudd Parliament, to 6.1 percent in the Gillard Parliament, to 5.7 percent in the Abbott Parliament. However, they remain, as always, over-represented.

The re-run early in April 2014 of the periodical election of Senators in Western Australia (in effect, a by-election) will be the tenth Senate by-election. Earlier cases were in 1908 (one seat in South Australia), 1963 (one seat in Queensland), 1966 (one seat in each of New South Wales and Queensland and two seats in each of Victoria and Western Australia), 1969 (one seat each in Victoria and South Australia) and 1972 (one seat in Queensland).

These elections all stemmed from the need to fill a casual vacancy. The 2014 event is the first case in which a re-run of a periodical election of Senators in any State has been required.

Note

* This paper is abridged. The full version with relevant tables is available at: http://samuelgriffith.org.au/docs/vol25/vol25chap6-unabridged.pdf

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Chapter Seven

The *Kable* Case

Gim Del Villar

In September 1989, Gregory Wayne Kable stabbed his wife to death. He was arrested and charged with her murder. He pleaded guilty to manslaughter on the basis of diminished responsibility. In August 1990 he was sentenced to imprisonment for a period of five years and four months. His sentence was to expire on 4 January 1995.

In prison, with his release in prospect, Mr Kable wrote a series of threatening letters to his wife's relatives. The New South Wales Government was so concerned that it enacted legislation to deal with the situation.

The legislation was unusual. It was directed at Mr Kable and only Mr Kable. It allowed the NSW Supreme Court, upon application by the Director of Public Prosecutions, to make a preventive detention order that Mr Kable be detained in prison for a specified period if the Court was satisfied on reasonable grounds that he was more likely than not to commit a serious act of violence and that it was appropriate, for the protection of particular persons or the community generally, that he be held in custody. The Court was to be satisfied on the civil standard, and the rules of evidence applied, subject to exceptions for medical and prison records or reports, which might not otherwise have been admissible.

Mr Kable challenged the validity of the law. He failed before a single judge of the NSW Supreme Court and the Court of Appeal, but succeeded in the High Court (by a 4-2 majority).[1] The case gave rise to what is known as the *Kable* doctrine. At its simplest, it means that a State cannot confer functions on a State court that would undermine its suitability as a repository for federal jurisdiction; that is, as a court exercising jurisdiction conferred upon it by the Commonwealth under sections 75 and 76 of the Constitution.

The doctrine was a significant departure from earlier case law. Before the decision in *Kable*, the position was that the States were free to confer any functions they desired upon their courts. Thus, in *Commonwealth v Hospital Contribution Fund*, Mason J stated:

> Generally speaking, the Parliament of a State may in the exercise of its plenary legislative power alter the composition, structure, and organization of its Supreme Court for the purposes of the exercise of State jurisdiction. It is in the exercise of this power that provisions of the kind already discussed have been enacted. **Chapter III of the Constitution contains no provision which restricts the legislative competence of the States in this respect. Nor does it make any discernible attempt to regulate the composition, structure or organization of the Supreme Courts as appropriate vehicles for the exercise of invested federal jurisdiction**. It is therefore sensible and natural to read the expression "any Court of a State" in s. 77(iii) as referring to State courts in the sense explained by Gibbs J. in *Kotsis*.
>
> His Honour there observed that the exercise of federal jurisdiction did not call for

> a curial organization different in kind from that established for the exercise of State jurisdiction (1970) 122 CLR, at p 110. In this situation there is every reason for supposing that the framers of the Constitution **intended to arm the Parliament of the Commonwealth with a power to invest federal jurisdiction in a State court as it happened to be organized under State law from time to time**. Although the Commonwealth Parliament has no power to alter the structure or organization of State courts, its freedom of action is completely preserved. It has the choice of investing State courts with federal jurisdiction or of establishing appropriate federal courts. Moreover, it may condition the investment of federal jurisdiction on the existence of a suitably structured State court - see, for example, s. 39(2) of the *Judiciary Act 1903* (Cth), as amended.[2] [emphasis added]

But, although the *Kable* doctrine restricted the States' power to confer functions on their courts, the High Court did not use it to strike down any other State legislation for more than a decade.[3] Its practical impact was therefore thought to be limited. In *Fardon v Attorney-General (Qld)*, McHugh J observed that the decision in *Kable* was of "very limited application" and resulted from legislation that was "almost unique in the history of Australia".[4] In *Baker v The Queen*, Kirby J went so far as to complain that the doctrine was "a constitutional guard dog that … [barked] but once".[5]

That was in 2004. Much has changed since that time. In three cases decided since 2009 (coincidentally, after Kirby J retired), the High Court has struck down State legislation conferring functions or powers on State courts or judges.

In *International Finance Trust Co Ltd v NSW Crime Commission*,[6] a majority of the High Court struck down section 10 of the *Criminal Assets Recovery Act* 1990 (NSW). That section empowered the New South Wales Crime Commission to apply to the Supreme Court of New South Wales for a restraining order in respect of some or all of the property of a person suspected of having committed a serious offence. It also required the Supreme Court to hear and determine, without notice to the persons affected, applications for restraining orders made ex parte by the Commission. Such restraining orders could only be set aside in limited circumstances. For the majority, the section was invalid principally because it required the Supreme Court to make ex parte orders for the sequestration of property upon suspicion of wrongdoing, for an indeterminate period, without any effective enforcement of the duty of full disclosure.[7]

The other two cases involved members of what are sometimes called outlaw motorcycle gangs. In *South Australia v Totani*, a majority of the High Court dismissed an appeal from a decision of the Full Court of the Supreme Court of South Australia that had held that section 14(1) of the *Serious and Organised Crime (Control) Act* 2009 (SA) was invalid.[8] Under that Act, the Commissioner of Police could apply to the Attorney-General for a declaration against an organisation. The Attorney could make a declaration if satisfied that members of the organisation associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and the organisation represented a risk to public safety and order in the State. Once a declaration was made, the Commissioner could apply to the Magistrates Court for control orders against named individuals who were members of the organisation and by section 14(1), the Magistrates Court had to make a control order with certain features. The Magistrates Court was required to make the order.

The majority of the High Court held that the law was invalid because it authorised

the Executive (the Commissioner of Police and the Attorney-General) to require the Magistrates Court to implement the decisions of the Executive. As it was up to the Executive to decide whether and why an organisation should be declared, the only question to be determined by the Magistrates Court was whether a person was a member of a declared organisation. This, in the words of Crennan and Bell JJ, had "the effect of rendering the [Magistrates] Court an instrument of the Executive".[9]

In *Wainohu v New South Wales*,[10] a majority[11] struck down the *Crimes (Criminal Organisations Control) Act* 2009 (NSW) ("the Act"). This Act permitted the Commissioner of Police for New South Wales to apply to a judge of the Supreme Court of NSW for a declaration under Part 2 of the Act in respect of an organisation. The declaration sought was an administrative, not a judicial, act and the judge acted as *persona designata*. The judge was not required to provide reasons. If the eligible judge made the declaration which was sought then, under Part 3 of the Act, the Supreme Court would be empowered, on the application of the Commissioner of Police, to make control orders against individual members of the Club. The majority of the Court held that because a Supreme Court judge was not required to provide reasons, the Act violated the *Kable* doctrine.[12]

Even apart from those cases, however, the Court has over the years progressively expanded the *Kable* doctrine and, until recently, resisted attempts by the States to confine its operation.

In *Forge v Australian Securities and Investments Commission*, a case that involved an unsuccessful challenge to the validity of the appointment of an acting judge of the New South Wales Supreme Court, Gummow, Hayne and Crennan JJ said:

> [A]s is recognised in *Kable*, *Fardon v Attorney-General (Qld)* and *North Australian Aboriginal Legal Aid Service Inc v Bradley*, the relevant principle is one which hinges upon maintenance of the defining characteristics of a "court", or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to "institutional integrity" alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.[13]

It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal.

There was no suggestion that the application of the *Kable* doctrine would be very limited, and subsequent cases have demonstrated that to be the case. Furthermore, as various commentators have pointed out, the focus of the doctrine shifted from the fitness of State courts to exercise federal jurisdiction to the "defining characteristics" of courts.[14]

In *K-Generation Pty Ltd v Liquor Licensing Court (SA)*, moreover, five members of the High Court were at pains to emphasise that the States may not establish a "court of a State", within the meaning of Chapter III of the Constitution, "and deprive it, whether when established or subsequently, of those minimum characteristics of the institutional independence and impartiality identified in the decisions of this Court".[15] In doing so,

they rejected submissions from Queensland and Western Australia that would have confined the *Kable* doctrine to the Supreme Court on the basis that other courts were not required to exist.

I propose to describe the *Kable* doctrine by reference to the case of *Assistant Commissioner Condon v Pompano Pty Ltd* and to outline some difficulties with the doctrine. In making those criticisms, I doubt that I will be adding to what others have already said.

Assistant Commissioner Condon v Pompano Pty Ltd

The most recent description of the *Kable* doctrine is found in the case of *Assistant Commissioner Condon v Pompano Pty Ltd*.[16] That case involved a challenge to provisions of the *Criminal Organisation Act* 2009 (Qld) that permitted the Supreme Court to declare certain information to be "criminal intelligence"[17] and enabled that information to be used in applications under the Act, including applications for a declaration that an organisation was a "criminal organisation".[18] It also included a challenge to the provision that authorised the making of a declaration that an organisation was a "criminal organisation".

Pursuant to the statutory scheme, the Commissioner of Police could apply to the Supreme Court for a declaration that particular information was "criminal intelligence".[19] Evidence was given on the application at a special closed hearing before the Court, and the Court, if it was satisfied that the information is "criminal intelligence", had a discretion whether to make the declaration.[20] In exercising that discretion, the Court might have regard to whether matters such as prejudice to a criminal investigation[21] outweigh any unfairness to a person who might have orders made against them under the Act (such as control orders, fortification removal orders or public safety orders).[22]

The Commissioner of Police could also apply to the Supreme Court for a declaration that a particular organisation was a "criminal organisation". Evidence was given at a closed hearing of the links between the serious criminal activity and criminal convictions of members of the organisation in question. The Court could make a declaration that an organisation is a "criminal organisation" if it was satisfied that the statutory requirements have been proven.[23]

On 1 June 2012, the Assistant Commissioner of Police, Michael Condon, applied to the Supreme Court for a declaration that the motorcycle club known as Gold Coast Chapter of the Finks was a "criminal organisation". The application identified Pompano Pty Ltd as a part of the organisation. It listed several distinguishing features of the organisation, including the rules of the organisation, the clothing worn by the members, and the membership structure.

The Finks challenged the *Criminal Organisation Act* 2009 (Qld) in the High Court, alleging that it infringed the *Kable* doctrine by conferring functions on the Queensland Supreme Court which were incompatible with the Court's independence and impartiality, and impaired its institutional integrity. Reliance was placed upon the remarks of the joint judgment in *Forge*, previously quoted.

French CJ acknowledged that the defining characteristics of courts, although rooted in the text and structure of the Constitution, were not absolute, and even foundational principles of independence and impartiality such as the requirements of procedural fairness might be qualified if, in the circumstances, other considerations required it. His

Honour stated:

> . . . the defining characteristics of courts are not and cannot be absolutes. Decisional independence operates within the framework of the rule of law and not outside it. Procedural fairness, manifested in the requirements that the court be and appear to be impartial and that parties be heard by the court, is defined by practical judgments about its content and application which may vary according to the circumstances. Both the open court principle and the hearing rule may be qualified by public interest considerations such as the protection of sensitive information and the identities of vulnerable witnesses, including informants in criminal matters.[24]

French CJ upheld the legislation, noting that the Supreme Court is exercising judicial power, in part because it has a discretion to refuse to make the declaration sought, is required to form its own assessment of the evidence and not merely to accept the opinion of members of the Executive, and can choose whether or not to have regard to confidential criminal intelligence, having regard to the degree of unfairness to the respondent.[25]

The joint judgment of Hayne, Crennan, Kiefel and Bell JJ contains a concise summary of the *Kable* principle:[26]

> As Gummow J explained in *Fardon*, the State courts (and the State Supreme Courts in particular) have a constitutionally mandated position in the Australian legal system…. [I]t follows that "the Parliaments of the States [may] not legislate to confer powers on State courts which are *repugnant to or incompatible with* their exercise of the judicial power of the Commonwealth". As Gummow J further pointed out, and as is now the accepted doctrine of the Court, "the essential notion is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system".

Their Honours accepted that it was not possible to define the notions of repugnancy and incompatibility, or of institutional integrity, in terms which necessarily dictated future outcomes.[27] They opined that:

> Independence and impartiality are defining characteristics of all courts of the Australian judicial system. Thus, State courts must be and remain free from external influence; in particular, they cannot be required to act at the dictation of the executive.[28]

However, because a separation of powers does not apply to the States in the same way as it does at Commonwealth level, it was possible to accept that State courts sometimes performed functions which went beyond those that could constitute an exercise of the judicial power of the Commonwealth.[29] In the result, their Honours upheld the legislation because it did not alter the duty of the Supreme Court to assess the cogency and veracity of the evidence that is tendered in an application for a declaration of an organisation as a criminal organisation.[30] The Supreme Court retained the capacity to act fairly and impartially, and that was critical to its continued institutional integrity.[31]

The final judge in *Pompano*, Gageler J, succinctly described the basis of the *Kable* principle in these terms:

> [Chapter III] allows the separated judicial power of the Commonwealth to be vested in courts other than those created by the Commonwealth Parliament. All

> State and Territory courts are able to be vested by the Commonwealth Parliament with the judicial power of the Commonwealth. They are all "Ch III courts".
>
> That structural expedient can function only if State and Territory courts are able to act "judicially". To be able to act judicially, a court must have institutional integrity: it must "be and appear to be an independent and impartial tribunal".
>
> There lies the essentially structural and functional foundation for the implication that has come to be associated with *Kable v Director of Public Prosecutions (NSW)*. **The implication is a practical, if not logical, necessity**. **To render State and Territory courts able to be vested with the separated judicial power of the Commonwealth, Ch III of the Constitution preserves the institutional integrity of State and Territory courts.** A State or Territory law that undermines the actuality or appearance of a State or Territory court as an independent and impartial tribunal is incompatible with Ch III because it undermines the constitutionally permissible investiture in that court of the separated judicial power of the Commonwealth.[32] [emphasis added]

His Honour differed from the other judges in saying that the unfairness of the process was cured only by the capacity of the Supreme Court to stay a substantive application in any case in which practical unfairness becomes manifest.[33]

Problems with the *Kable* doctrine

The *Kable* doctrine is the law of the land. Until the High Court decides to reconsider it, practitioners must take it into account in advising their clients, and judges must apply it.

It is, however, important to consider the reasoning supporting any constitutional doctrines in order to understand how that doctrine may be developed or qualified in the future, and in order to determine whether attempts should be made to have the Court reconsider it.

The starting point for any analysis of *Kable* is that constitutional implications should have a secure textual or structural basis. In *APLA v Legal Services Commissioner*, Hayne J said, by reference to the words of Mason CJ in *Australian Capital Television v Commonwealth*:

> The critical point to recognise is that "any implication must be securely based". Demonstrating only that it would be reasonable to imply some constitutional freedom, when what is reasonable is judged against some unexpressed a priori assumption of what would be a desirable state of affairs, will not suffice. Always, the question must be: what is it in the text and structure of the Constitution that founds the asserted implication?[34]

In the same vein, Callinan J emphasised that an implication must not only be reasonable but "necessary".[35]

The *Kable* principle is an implication derived from Chapter III of the Constitution.[36] But, as an implication, it lacks clear textual and historical support and generates myriad uncertainties. In short, there is much to be said for the view that it is not "securely based".

First, the *Kable* doctrine is premised on all components of the integrated judicial system being equal. Gaudron J, for instance, said in *Kable*:

> To put the matter plainly, there is nothing anywhere in the Constitution to

> suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by the Parliament.[37]

A similar point was made by Gummow, Hayne, Crennan and Bell JJ in *Wainohu v New South Wales*:

> The principle [in *Kable*] applies throughout the Australian integrated court systems because it has been appreciated since federation that the Constitution does not permit of different grades or qualities of justice.[38]

That premise, however, is questionable. The Constitution does not, in terms, deal with the defining characteristics of State courts. By contrast, the Constitution does speak to the characteristics of federal courts. Section 72 of the Constitution secures the tenure and remuneration of judges who are appointed to federal courts. The importance of these provisions for the independence and impartiality of the federal judiciary has been emphasised on several occasions.[39] In *Harris v Caladine*, for instance, McHugh J observed:

> [T]here is a real difference between the exercise of jurisdiction by State courts invested with federal jurisdiction and the exercise of jurisdiction by the High Court and federal courts created under s 71 of the Constitution. **To fail to perceive the difference is to overlook the unique role which the federal judiciary plays in a federal system of government and the need to ensure that the federal judiciary is independent of the federal Parliament and the Executive Government of the Commonwealth . . .**
>
> Those who framed the Constitution were aware of the need to insulate the federal judiciary from the pressures of the Executive Government of the Commonwealth and the Parliament of the Commonwealth so that litigants in federal courts could have their cases decided by judges who were free from potential domination by the legislative and executive branches of government …
>
> It was to ensure the independence and impartiality of the Justices of the High Court and the judges of the federal courts that the framers of our Constitution enacted s 72 so as to give security of tenure and remuneration to the federal judges who were to exercise the judicial power of the Commonwealth. It is plain that the framers intended that the judicial power of the Commonwealth should be exercised only by courts composed of Justices and judges appointed in accordance with s 72 or State courts invested with federal jurisdiction under s 77(iii) of the Constitution. Though the Parliament might confer federal jurisdiction on a State court whose members did not have the security of tenure and remuneration afforded by s 72, **this result would ensue only because the State concerned did not want its judicial officers to have the same security of tenure as given by s 72**. But the exercise of the judicial power of the Commonwealth by federal courts was another matter.[40] [emphasis added]

The absence of an equivalent provision for State courts suggests that there is a clear distinction between the kinds of courts that exercise federal jurisdiction. Dawson J recognised this in his dissent in *Kable*, where he stated:

> The suggestion that the Constitution does not permit of two grades of judiciary exercising the judicial power of the Commonwealth, or that Ch III does not draw the clear distinction between State and federal courts which it has hitherto been thought to, simply ignores the fact that the Constitution ensures security of tenure

> and of remuneration in respect of judges of courts created by or under Ch III but does not do so in respect of judges of State courts invested with federal jurisdiction. It equally ignores the fact that the Constitution does not require that State courts only exercise judicial power. The suggestion that the Act is invalid because it compromises the institutional impartiality of the Supreme Court of New South Wales ignores the fact that the mechanisms for ensuring judicial impartiality and independence – security of tenure and remuneration, and separation from the other arms of government – are not constitutionally prescribed for State courts notwithstanding that they are prescribed for courts created by or under Ch III. It is difficult to conceive of a clearer distinction.[41]

Nor does the presence of an integrated judicial system entail that the courts within that system must share similar defining characteristics. In *Re Wakim; Ex parte McNally*, Gummow and Hayne JJ observed:

> [W]hen it is said that there is an "integrated" or "unified" judicial system in Australia, what is meant is that all avenues of appeal lead ultimately to this Court and there is a single common law throughout the country. This Court, as the final appellate court for the country, is the means by which that unity in the common law is ensured.[42]

In this respect, the position of the High Court today is not relevantly different from the position of the Privy Council in the British Empire before federation. In *Trimble v Hill*, the Privy Council opined that it was "of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same".[43] The courts from which appeals lay to the Privy Council were not, however, defined by a common set of characteristics, except that they could make orders and pronounce judgments; under the relevant imperial enactments, the Privy Council could "give leave to a suitor to appeal from any decision of *any Court whatever* in a colony or possession" [emphasis added].[44]

Secondly, in any event, as the late Professor Winterton pointed out, the Constitution does not *oblige* the Commonwealth under section 77(iii) to invest any State court with federal jurisdiction.[45] If the Commonwealth is concerned about the institutional arrangements in a particular court, it can decide either not to invest it with jurisdiction or to withdraw the conferral of federal jurisdiction.[46] To imply that all State courts, regardless of their position in the State hierarchy, are immunised from interference by the legislatures and executives because of their *potential* to exercise federal jurisdiction is not an implication that flows naturally or, indeed, logically from the provisions of Chapter III. Indeed, to discover such an implication, as Callinan J observed in *APLA*, requires "the drawing of a very long bow".[47]

Thirdly, the historical materials undercut the doctrine. It has never been doubted that, after federation, courts of summary jurisdiction could validly exercise federal jurisdiction.[48] Yet, until recently, courts of summary jurisdiction in the States were staffed by justices of the peace or magistrates.[49] The latter were members of the State public service, and were subject to executive direction and discipline.[50] In some jurisdictions, they were not even required to be lawyers.[51] The former often had no legal training at all. It was for this reason that the Commonwealth enacted section 39(2)(d) of the *Judiciary Act* 1903 (Cth), which (before its repeal) provided:

> The federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate, or

> some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction, or an arbitrator on whom the jurisdiction, or part of the jurisdiction, of that Court is conferred by a prescribed law of the State, within the limits of the jurisdiction so conferred.

As Heerey J explained in *Commonwealth v Wood*:

> [T]he fact that Parliament thought it necessary to impose such a condition suggests that at the time of the drafting of the Constitution a few years earlier it was contemplated that even honorary justices, who had no security of tenure at all, would, in the absence of such a condition, constitute a court of a State.[52]

This history demonstrates that Gibbs J was correct when he observed that a court "composed of laymen, with no security of tenure, might effectively be invested with jurisdiction under s 77(iii)".[53]

Furthermore, as the Convention Debates reveal, the immediate purpose of the reference in section 73(ii) to "any other Court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council" was to ensure that appeals lay to the High Court from the Local Court of Appeal of South Australia.[54] This court, although virtually obsolete at federation, consisted of members of the Executive Council apart from the Attorney-General.[55] To suggest that it is a defining characteristic of all courts in the Australian legal system that they display independence and impartiality from the other branches of government is difficult to reconcile with this fact.[56]

Fourthly, it is no answer to these difficulties to claim, as French CJ did in *Totani*, that the framers assumed that State courts would be independent and were therefore willing to allow for the autochthonous expedient.[57] Such an unqualified claim is difficult to reconcile with the framers' acceptance of the Local Court of Appeal from South Australia that fell within Chapter III of the Constitution. In any event, the framers did not expressly provide for the independence of State courts in the Commonwealth Constitution, whereas they did provide for the independence of the federal courts through security of tenure and a strict separation of powers.[58]

Fifthly, there is no clear "practical necessity" for the *Kable* doctrine. The existence of such a principle was unheard of for the first 93 years of federation. In that time, the Commonwealth conferred federal jurisdiction on State Supreme Courts and other State courts. No one could say that the *autochthonous* expedient was seriously compromised. And that was despite States occasionally passing laws such as those at issue in the *Builders' Labourers Federation* case in NSW in 1986.[59] Those laws required the NSW Supreme Court to uphold a ministerial order that had been challenged by the Builders' Labourers Federation (the "BLF") in pending proceedings, and to award costs against the BLF. They infringed on characteristics of courts that would now be regarded as being protected by the *Kable* doctrine; but, as Professor Jeffrey Goldsworthy has observed, "it did not occur to anybody at the time, or subsequently, that one effect of the legislation was that the Supreme Court had ceased to be a court".[60]

Sixthly, and self-evidently, the *Kable* doctrine impinges seriously on the ability of States to experiment with their court systems. Justice Heydon in *Public Service Association v Director of Public Employment* expressed the point in these terms:

> A federation is a system of government permitting diversity. It allows its

> component units to engage in their own legislative experiments. It leaves them free to do so untrammelled by what other units have done or desire to do. And it leaves them free to do so untrammelled by what the central legislature has done or desires to do, subject to a provision like s 109 of the Australian Constitution.
>
> In 1996, *Kable v Director of Public Prosecutions (NSW)* cut into that concept of the Australian federation by reducing the legislative freedom of the States. Statements in that case have been much debated in this Court over the last 16 years. Some of them have been invoked successfully to strike down State legislation.[61]

Finally, the *Kable* doctrine is highly uncertain in its application. Consider the recent formulation of the principle in the joint judgment in *Condon*. There are uncertainties at two levels: what is meant by "repugnancy" and what is meant by "the constitutionally mandated position of State courts". Such indeterminate concepts invite sharp differences of judicial opinion and reduce the ability of governments and other entities to plan their affairs.[62] In *Momcilovic v The Queen*,[63] for example, three members of the High Court would have struck down a provision of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) that gave the Supreme Court of Victoria the power to declare that a statutory provision could not be interpreted consistently with a human right.[64] For the majority, however, that function posed no such problem.[65]

The result of the *Kable* principle may be that State laws restricting the capacity of Supreme Courts to grant equitable relief are invalid, and that laws directing courts to awards costs in certain circumstances are invalid. It may even mean that State tribunals established as courts of record, the predominant functions of which are non-judicial, can be precluded from exercising those functions on the basis of a need to preserve their essential characteristics as a court. That a doctrine can create such uncertainty over so many areas is another factor suggesting that it may not have a sound basis.[66]

Endnotes

1. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The majority consisted of Toohey, Gaudron, McHugh and Gummow JJ; the minority of Brennan CJ and Dawson J.

2. (1982) 150 CLR 49 at 61.

3. *Kable* was, however, applied by the Queensland Court of Appeal to strike down s. 30 of the *Criminal Proceeds Confiscation Act 2002* (Qld): *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 39.

4. (2004) 223 CLR 575 at [43].

5. *Baker v The Queen* (2004) 223 CLR 513 at 535 [54].

6. (2009) 240 CLR 319.

7. French CJ, Gummow, Heydon and Bell JJ; Hayne, Crennan and Kiefel dissenting.

8. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J dissenting.

9. (2009) 240 CLR 319 at [207].

10. (2011) 243 CLR 181.

11. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J dissenting.

12. (2011) 243 CLR 181 at [67]-[69] (French CJ and Kiefel JJ), [109] (Gummow, Hayne, Crennan and Bell JJ).

13. (2006) 228 CLR 45 at [63] – [64] [footnotes omitted].

14. S McLeish SC, "The Nationalisation of the State Court System", paper presented at Melbourne University Law School, 21 July 2011, 9-10; J Goldsworthy, "Kable, Kirk and Judicial Statemanship", paper presented on 15 August 2013, 11.

15. (2009) 237 CLR 501 at [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

16. (2013) 87 ALJR 458.

17. Part 6 of the *Criminal Organisation Act* 2009 (Qld).

18. Section 10 of the *Criminal Organisation Act* 2009 (Qld).

19. This term is defined in s 59 of the *Criminal Organisation Act* 2009 (Qld).

20. Subsection 72(1) of the *Criminal Organisation Act* 2009 (Qld).

21. And other matters set out in s 60 of the *Criminal Organisation Act* 2009 (Qld).

22. The types of applications which may be made against a person are defined in s 75 of the *Criminal Organisation Act* 2009 (Qld).

23. The Court must be satisfied, on the balance of probabilities, of three matters: the respondent is an organisation; members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity; and the organisation is an unacceptable risk to the safety, welfare or order of the community.

24. *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 *ALJR* 458 at [68] (emphasis added).

25. Ibid., at [87].

26. Ibid., at [123] (emphasis added).

27. Ibid., at [124].

28. Ibid., at [125].

29. Ibid., at [126].

30. Ibid., at [168].

31. Ibid., at [167].

32. Ibid., at [181]-[183].

33. Ibid., at [212].

34. (2005) 224 CLR 322 at [389].

35. (2005) 224 CLR 322 at [469]-[471].

36. See, for example, *Northern Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at 163 [29]: "It is implicit in the terms of Ch III of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal".

37. (1996) 189 CLR 51.

38. (2011) 243 CLR 181 at [105].

39. See, for example, *Waterside Workers Federation of Australia v JW Alexander* (1918) 25 CLR 434; *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1.

40. (1991) 172 CLR 84 at 157-159.

41. (1996) 189 CLR 51 at 82 (footnotes omitted).

42. (1999) 198 CLR 511 at [110].

43. (1879) 5 App Cas 342 at 345.

44. *Parkin v James* (1905) 2 CLR 315 at 331 (emphasis added). In *Kamarooka Gold Mining Company, No Liability v Kerr* (1908) 6 CLR 255 at 256, the High Court accepted that the Victorian Court of Mines was a court from which appeal lay, as a matter of special leave, to the Privy Council.

45. G Winterton, "Justice Kirby's Coda in *Durham*" (2002) 13 *Public Law Review* 165 at 167-168.

46. In *Commonwealth v Hospital Contribution Fund* (1981) 150 CLR 49 at 61, Mason J also pointed out that the Commonwealth "may condition the investment of federal jurisdiction on the existence of a suitably structured State court".

47. (2005) 224 CLR 322 at 484 [469].

48. See, for example, *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 347, 348; *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at 82 [82].

49. *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at [82] (Gummow, Hayne and Crennan JJ).

50. *Northern Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at 165 [37] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

51. *Northern Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at 153 (Gleeson CJ) (noting that it was not until 1955 that new recruits to the magistracy in New South Wales had to be legally qualified); *Commonwealth v Wood* (2006) 148 FCR 276 at 293 [72] (noting that in some jurisdictions the requirement to be a lawyer was not imposed until the 1970s).

52. (2006) 148 FCR 276 at 293 [72].

53. *Commonwealth v Hospital Contribution Fund of Australia* (1981) 150 CLR 48 at 57.

54. Quick and Garran, *Annotated Constitution for the Commonwealth of Australia*, 1901, p 742.

55. *Parkin v James* (1905) 2 CLR 315 at 330.

56. In *Forge* (2006) 228 CLR 45 at 82-83 [84]-[85], Gummow, Hayne and Crennan JJ claimed that the methods for securing independence and impartiality differed between courts, and in the case of inferior courts independence and impartiality was sought to be achieved through the Supreme Court's supervisory and appellate jurisdictions and the application of the apprehension of bias rule in particular cases. They added that the differences in history did not deny the importance of real and perceived independence in defining a "court" in Chapter III; all they denied was that the *Act of Settlement* terms of appointment were the defining characteristics of every Chapter III court. It is, however, curious to claim that for well over seventy years after federation magistrates who lacked guaranteed tenure and who formed part of another branch of State government — the executive — would satisfy any test of actual and perceived independence.

Furthermore, their Honours do not explain why the Local Court of Appeal was a "court" within Chapter III.

57. *South Australia v Totani* (2010) 242 CLR 1 at [59]-[65]. His Honour's reliance on the Convention Debates at [63] for such an assumption is particularly problematic, given that the Debates concerned a provision that was not inserted into the Constitution.

58. See also J Goldsworthy, "Kable, Kirk and Judicial Statemanship", paper presented on 15 August 2013, 14-16.

59. *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

60. J Goldsworthy, "Kable, Kirk and Judicial Statesmanship", paper presented on 15 August 2013, 13.

61. (2012) 87 ALJR 162 at [61]-[62].

62. Given the indeterminacy, it is also unsurprising that the joint judgment in *Condon* warned against "taking what has been said in explanation of the decisions in other cases about other legislation to its apparently logical end" and thereby severing the applicable principle from its constitutional roots: (2013) 87 ALJR 458 at [137].

63. (2011) 245 CLR 1.

64. Ibid., at [175]-[188] (Gummow J), [280] (Hayne J), [457] (Heydon J).

65. Ibid., at [96]-[97] (French CJ), [592]-[606] (Crennan and Kiefel JJ), [661] (Bell J).

66. Compare *Sweedman v Transport Accidence Commission* (2006) 226 CLR 362 at [51].

Chapter Eight

The Human Rights Commission: A Failed Experiment

Nicholas Cater

What would William Wilberforce make of the modern human rights movement and the compassion industry that drives it? Today's social improvers would like to imagine they are cut from the same cloth as the nineteenth century social reformers; that they possess special insights into social evils and a noble calling to fight them. Yet Wilberforce would find today's moralisers a very odd breed indeed.

Despite his own deep Christian conviction, Wilberforce would have been uncomfortable with their intemperate self-righteousness and ceaseless condemnation of their fellow men. He might also have trouble coming to grips with the wrong they are trying to right, for, while abolishing the slave trade was (so to speak) a black and white issue, the elimination of racism unfortunately is not.

The lexicon of the new crusaders is an insight into the way they see themselves and the cause they have adopted. Wilberforce, for example, would not have been described as an "anti-slavery champion", a "crusader for social justice" or a "defender of the oppressed". He was content with the modest title of "reformer". He would not have been satisfied if he had merely "made a difference", "raised awareness" or "sent a message" – phrases that betray the limited practical ambition of our times. Wilberforce lacked the conceit to imagine that he, or anybody else for that matter, could end slavery, since God alone had the power to deliver us from evil. Instead, the nineteenth century campaigners simply sought to stop the "slave trade", an odious form of commerce that could be outlawed.

By contrast, the work of Julius Salik, a former minister in the Pakistan government whose profession is now described as "champion of human rights", illustrates the fecklessness of modern social crusaders. Unlike Wilberforce, Salik's chief aim seems to be to protest against the evils of the world, rather than to eliminate them. His actions seem purely symbolic. *The Gulf News* reports that he protested against strikes by US drones by wiping ash, soot and mud all over his face and hands. He was "trying to get the attention of media pundits all over the world", a task at which he succeeded.

The Gulf News catalogues Salik's previous exploits: he hung himself on a cross to protest civilian killings; he locked himself in a cage to protest against the war in Afghanistan; he wore an outfit made of jute for more than 12 years to express solidarity with the massacred Muslim families of India.

The newspaper comments that Salik's extraordinary endeavours [seem] to have "no limits or bounds". He disconnected the electricity to his own home to express solidarity with slum residents; he donned black robes for more than a month to raise awareness of the plight of Muslims in the Philippines; he addressed a crowd for 16 hours straight in Lahore and then changed tactics by spending months without saying a word. Finally, he was moved to protest against the Pakistan government by "bringing camels into his own living room". From this evidence, *The Gulf News* concludes that

Salik's life is "a true example of courage, hope and conviction".[1]

Before embarking on the case for reform of the human rights industry, it is helpful to understand the moral character of the post-modern emancipists. Salik's actions are highly unlikely to have any practical effect – indeed, *The Gulf News* notes: "his protest and the strikes continue unabated". The campaign by Wilberforce and the abolitionists was directed towards changing laws in the British Parliament; Salik's campaign is directed toward demonstrating *compassion*.

Modern social protest is characterised by what the political scientist, Kenneth Minogue, described as "goodwill turned doctrinaire . . . philanthropy organised to be efficient". To advertise that one has *compassion towards asylum seekers* requires no act of charity or personal sacrifice; it is a political manifesto and a badge of cultural identity. The suffering of others no longer requires an act of *mercy* , a practical action to relieve suffering. It simply demands that we are *concerned*. To be concerned is not an involuntary emotional response to the suffering of others; it is a badge of cultural identity.

For the last 40 years, conservatives and democratic liberals have largely failed to appreciate the insubstantial nature of this crusade. They have lacked the courage to confront its sanctimonious arguments lest they be ranked among the oppressors rather than the oppressed. The dispiriting consequences of victimhood – enforced helplessness, fatalism and entitlement – have been painfully apparent. Yet a collective failure of nerve has made them hesitant about challenging a philosophy they knew in their hearts was wrong.

Hansard records the discomfort felt by admirable public figures at the introduction of human rights legislation but, when push came to shove, they opted for appeasement. Yet the moral crusaders can never be appeased. They, after all, are the makers of history. Minogue compared the moral campaigners to the legend of St George:

> The first dragons upon whom he turned his lance were those of despotic kingships and religious intolerance.
>
> These battles won, he rested a time, until such questions as slavery, or prison conditions, or the state of the poor, began to command his attention . . .
>
> But, unlike St George, he did not know when to retire . . . He *needed* his dragons. He could only live by fighting for causes – the people, the poor, the exploited, the colonially oppressed, the underprivileged and the underdeveloped. As an ageing warrior, he grew breathless in his pursuit of smaller and smaller dragons – for the big dragons were now harder to come by.[2]

Those words sing loudly above the confusion of our times. Yet they were published half a century ago at the start of Minogue's first book, *The Liberal Mind*. It is a book that pays revisiting, not least because it has stood the test of time. It is remarkable, too, for its prescience, providing a record of the intellectual climate in which the fixation with human rights was about to take hold. Writing early in the 1960s, Minogue sensed the direction in which liberalism – by which he means social liberalism or progressivism – was heading as it marched bravely uphill to seize the high moral ground. The modern international human rights movement was more than a decade away, but Minogue identifies the building block from which the edifice would be constructed. "The point of suffering situations," Minogue wrote, is to "convert politics into a crudely-conceived moral battleground." [3]

Those caught in a *suffering situation* are the people we think of now as *victims*, a phenomenon Minogue examined in his last book, *The Servile Mind*.[4] The victimhood club does not accept applications for individual membership. To join, and enjoy the many benefits membership offers, one has to be part of a "minority". The word "minority" in this instance is a figurative expression since the first victim category is women.

The second category is the ethnic minority or, as we are supposed to call them these days, the *visibly distinct*. One category, indigenousness, is recognised by the United Nations as a separate victim category. Unlike other ethnic minorities, however, indigenous people do not have to be visibly distinct, as Andrew Bolt learned to his cost in 2011.

Next in Minogue's analysis is a class of victim labelled miscellaneous, a category that is expanding. Matters concerning sexual disposition and gender are especially vulnerable to mission creep. First comes LGB, then LGBT, and now LGBTI, demonstrating the dangers of turning a private matter into a badge of cultural identity. Confusion reigns. The organisation, Beyond Blue, ran a clever campaign promoting community tolerance towards gay, lesbian, bi-sexual and trans-sexual people using the slogan, "Imagine being made to feel like crap just for being left-handed".[5] Then the Leader of the Opposition, Bill Shorten, spoils it all by demanding quotas for homosexual candidates in pre-selection contests. Will Labor also be introducing an Emily's List for the left-handed?

Disability is the growth area in the anti-discrimination industry these days; the number of grievances presented to State government bodies is growing all the time. Not all of them are frivolous, but in my business – journalism – it is the nutty ones that catch the eye. Take the case of Cecil, the disgruntled Santa Claus, who was employed by a department store in Adelaide to ply his jovial trade. The South Australian Equal Opportunity Commission took up Santa Cecil's case:

> Cecil . . . was asked if he could work without his glasses because they "were playing up with the photos". Cecil refused as he could not see without his glasses . . .
>
> He made a complaint of impairment discrimination to the Commission. The store management said that . . . the photos had to be reprinted after many complaints by the customers.[6]

Having listened to the evidence, the Commission adjourned to consider who had been naughty and who had been nice. Cecil left with $600 of compensation in his pocket.

All up, Minogue calculated in 2010, about 73 percent of the British population are members of the victimhood club. In 2013, Nicola Roxon's failed Human Rights and Anti-Discrimination Bill took victimhood to a new level of codified absurdity. To qualify for protection, you must have a listed *protected attribute,* and I was miffed to discover than none of them applied to me.

I am unlikely to take up breastfeeding, for example, not least because there is little chance of me becoming pregnant, another attribute in which I am deficient. Political views are a protected attribute, yet political disagreement is the consequence of pluralism, not prejudice, and demands the right to argue back. Immigrant status? Race? Forget it – I think the test case has already been run on "pommy plonker." The ruling, as I recall, was "suck it up you whingeing shower dodger", or words to that effect.

There is, however, a hint of afternoon light for middle-aged, able-bodied, Anglo-Scot, heterosexual males. One day, along with our pensions and discount bus passes, we will be eligible to claim the protected right of *age*.

I have one last hope of qualifying for the Victimhood Club – and I will throw this one out in case anyone wants to take it up *pro bono*. It seems to me that I have been excluded from the Victimhood Club purely on the grounds of my protected-attribute deficiency. Surely it is time to take seriously the plight of the protected-attribute challenged in our community?

It would be comforting to be able to say that Roxon's preposterous draft bill served a purpose in life; that this was not just 179 pages of legislative adventurism but a lesson to us all in what happens when this dismal line of reasoning is pushed to its absurd conclusion. Might it be said, for instance, that Roxon's bill showed that it is extraordinarily difficult to define racial discrimination and outlaw it by legislative means? That social attitudes and mental habits do not readily lend themselves to codification and statutory prohibitions?

Yes, but we have known that from the start. On 31 October, 1975, the day the *Racial Discrimination Act* was proclaimed, Gough Whitlam used exactly those words.

It is, of course, extraordinarily difficult to define racial discrimination and outlaw it by legislative means. Social attitudes and mental habits do not readily lend themselves to codification and statutory prohibitions.[7]

In that case, if you will pardon my impertinence, what the devil was it all about? What was the mischief the Act was trying to stop? After all, as Whitlam went on to say:

> I hope it will not be thought that by enacting this law we imply any low opinion of the tolerance and good nature of Australians. We are on the whole an exceptionally generous and understanding people.
>
> When we look at the history of our immigration program and compare our record with that of any other multi-racial society, it is remarkable how smooth and harmonious this great experiment has been . . .
>
> Without complacency of any kind, we can fairly claim that the Australian people are among the most tolerant in the world.[8]

Let us pause, for a moment, and consider the logic of what Mr Whitlam said on that fateful day in his penultimate week as prime minister. It was the day he announced that Al Grassby would head the Community Relations Commission, the forerunner of the Human Rights Commission. The essence of Mr Whitlam's admission was, first, that Australia is a pretty friendly place and, second, that even if it was not, the law can do precious little to fix it. The Act's provisions, Mr Whitlam conceded, were "necessarily symbolic and exemplary".

Only now, with the Act safely passed and assented to by the Crown, only now, 11 days before his dismissal with the nation's attention on other matters, distracted by the consequences of blocked supply, does Whitlam state clearly his intention: the *Racial Discrimination Act* 1975 was a Trojan Horse for a charter of rights:

> Unlike the United States, we have no Bill of Rights. Unlike the US, our Constitution says nothing about civil liberties. There is a need to spell out in an enduring form the founding principles of our civilization . . .
>
> If our Bill lacks the rhetorical grandeur of the American documents, it will have, I trust, the same compelling and lasting force.[9]

This legislation was not meant, after all, to protect human liberty, to right wrongs or

bring transgressors to account. It was Whitlam's surreptitious way of fulfilling the aims of item 24.1 of the Labor Party's National Platform, which demanded that "The Constitution . . . be amended to provide for the protection of fundamental civil rights and liberties".[10]

It has been noted before that the effect of the *Racial Discrimination Act* is to serve as a quasi-Bill of Rights. What has not been fully appreciated until now, however, was that Whitlam's exploitation of the external powers loophole in section 51 of the Constitution was more than just a means of extending the Commonwealth's jurisdiction over the States. It was a device used with the express intention of bypassing democratic scrutiny. Whitlam knew it would be hard to persuade the electorate to amend the Constitution to protect human rights. By ratifying an international agreement, and then assuming an obligation to honour its intention in domestic law, Whitlam could avoid taking the matter to a referendum. In my opinion it amounted to an act of subterfuge by the Whitlam Government that demonstrated a contempt for the popular will and a reckless disregard for due process.

Whitlam's words to the 1977 Labor Party National Conference leave no room for doubt about his reasons for employing the external affairs provision in the Constitution. It was a back-door way of bringing constitutional force to bear without the tiresome business of gaining majority support in the majority of States. Whitlam moved a motion recommending removal of item 24.1 from the Labor Party's platform. The barriers to constitutional reform were so great that any amendment that could be passed "would be a very insipid one indeed," said Whitlam. He went on:

> We know it is very difficult to carry referendums . . . You know how easy it would be to alarm certain sections of the Australian population as to laws we would be making on colour or race, sex, creed or politics . . . you can imagine the opportunities for mischief and confusion which would be presented during a referendum campaign.
>
> Accordingly, we think the more practical way to bring about amendments in our laws is to seek international conventions. International conventions are very much wider in their applications, as anyone can see by reading them, than any of the Acts which have been passed by any Australian Parliament.
>
> Once you get a convention through, and once you get it ratified by the requisite number of countries, then the Federal Parliament can pass the law to carry it out, but we believe this is a much more likely way to bring about amendments.[11]

Quasi-constitutional change in Australia would be achieved through the dubious exploitation of the external affairs provision in the Constitution with the connivance of New York and Geneva. I submit, therefore, that the *Racial Discrimination Act*, upon which the entire bureaucratic edifice of the Human Rights Commission and its wannabe imitators is built, is undemocratic and is illiberal to its very core. Illiberalism and intolerance are congenital faults of the Commission, a body conceived in a manner the draftsmen of our Constitution would neither have intended, imagined nor endorsed.

The *Racial Discrimination Act* was, by Whitlam's own admission, a lopsided beast, protecting certain rights but not others, like the right to freedom of speech. At the start of 2013, when the Human Rights Commissioner, Gillian Triggs, appeared before a Senate committee, the then shadow minister for legal affairs, Senator George Brandis, rammed home the censorious tendencies of the Commission in an inspired line of

questioning. The Roxon Bill, Brandis observed, listed political opinion as protected right. Did it mean that the Human Rights Commission had woken up at last to the need to defend free speech? Sadly, the answer was no:

> We would like to make the point that not all political opinion is protected. The right is not absolute; it is subject to certain constraints.[12]

Triggs warned that, if public order or the maintenance of a civilised workplace is threatened, "decision makers will have to put limits".

It would be nice to know who these decision-makers were going to be. How would the decision-makers be chosen? And to whom would they be answerable? Not you nor me, that is for sure, for like Immanuel Kant, the Human Rights Commission is nervous about leaving these sorts of decisions to vulgar opinion. Parliament will have no say in the matter, if the human rights brigade get their way. For, as Catherine Branson, Triggs's predecessor, let slip in a speech in 2012, some things are "much too important to leave just to governments." [13]

Let us conclude, then, by considering the $33 million question.[14] What is the new Attorney-General supposed to do? To be blunt, the Human Rights Commission is beyond repair, but it is unrealistic to expect the Abbott Government to burn precious political capital to bring about its demolition when the Commission's failings are not yet apparent to the public. The lily-livered Right has failed to prosecute the case. It has been inclined to curl into a ball and hide under the table at the very mention of the words, "human rights".

The then Opposition legal affairs spokesman, Senator Ivor Greenwood, made a robust case in the Senate against the illiberalism of the *Racial Discrimination Act* in 1975. The provisions it contained, he said, were "repugnant to traditional freedoms." [15] Yet, when it came to the crunch, the Coalition declined to use its majority in the Senate to block the bill. Greenwood, choosing his words carefully no doubt, said the Opposition was "in complete accord with the *proclaimed* virtue" of Australia's first human rights legislation [emphasis added].

As is the pattern on these occasions, it fell to a Queenslander to say what had to be said. Senator Glenister Fermoy Sheil, known to friend and foe alike as "Thumpa", was a doctor and a part-time rabbit farmer. He was not afraid to speak his mind:

> The passage of this Bill would take some fundamental rights away from us, such as the right of free speech, free discussion and publication. Far from eliminating racial discrimination . . . the Bill will . . . create an official race relations industry with a staff of dedicated anti-racists earning their living by making the most of every complaint.[16]

Thumpa's uncannily accurate prediction was dismissed as "Neanderthal grunts" [17] by Labor's Senator Jim McClelland. Yet, had his voice prevailed, there might never have been a Community Relations Commission that grew up to become the Human Rights Commission. It was, as we well know, within the Coalition's power to block it. If the Right stood up for what it knew to be true, instead of what it thought could be acceptably said, the public consensus would already have moved against the Human Rights Commission, allowing Tony Abbott's Government to put it out of its misery here. In this field, as in so many dispiriting avenues of progressive thinking, the Right is paying the price for decades of intellectual bludging.

Yet this is no time to become despondent, for the argument is clearly turning. The Government's intention to repeal the so-called Bolt provisions in the *Racial*

Discrimination Act and to appoint a Freedom Commissioner are important steps. I vividly recall the experience of sitting on the verandah of Australia's finest hotel, The Imperial in Ravenswood in far north Queensland, 15 months ago, to write the chapter on human rights in *The Lucky Culture*. As the evidence drew me firmly to the conclusion that the only honest observation to make was that the Human Rights Commission should be abolished, I hesitated at the keyboard, thinking I was climbing out on a limb.

Yet by the time the book was published in May 2013, the debate had turned dramatically. The defeat of Roxon's bill was a highly significant moment. For the first time legislated adventurism in this field had been blocked, and few on her side of politics were prepared to come to its defence. Other events, like the decision of Myer's Bernie Brooks and his board to stand up to a nasty little social media campaign engineered by the Disability Commissioner, Graham Innes, are signs that the wind is changing.

We should take courage. Bad ideas can be changed. If I may be allowed to borrow from the lexicon of the activist, the human rights *farrago* has reached tipping point. And Thumpa was clearly on the right side of history.

Endnotes

1. Malik Alik Ayub Sumbal, "Pakistan minority rights champion protests against drones", *The Gulf News*, 2 November, 2013, online edition, accessed 8 November, 2013.

2. Kenneth R Minogue, *The Liberal Mind*, Random House, New York, 1963, 1.

3. Minogue, 1963, 8.

4. Kenneth Minogue, *The Servile Mind*, Encounter Books, New York, 2010.

5. https://www.beyondblue.org.au/for-me/stop-think-respect-home/is-it-ok-to-be-left-handed-

6. "Santa Claus told not to wear glasses," Government of South Australia Equal Opportunity Commission, 11 August, 2010. http://www.eoc.sa.gov.au/eo-resources/complaint-summaries/santa-claus-told-not-wear-glasses-photos-children, accessed 8 November 2013.

7. Gough Whitlam, "Proclamation of the Racial Discrimination Act," speech, 31 October 1975.

8. Ibid.

9. Ibid.

10. Australian Labor Party, "Platform, Constitution and Rules as approved by the 27th Commonwealth Conference Adelaide", August XXIV:1, 28.

11. Australian Labor Party, Transcript of 32nd National Conference, Party, 4 – 8 July 1977, 305.

12. Legal and Constitutional Affairs Legislation Committee, Human Rights and Anti-Discrimination Bill 2012, *Parliamentary Debates (Hansard)*, Parliament of Australia, 24 January 2013.

13. Catherine Branson, "20 Years of Mandatory Immigration Detention", speech to the Australian Refugee Association, 22 June, 2012.

14. Human Rights Commission, Annual Budget 2013-14. Source: Human Rights Commission Annual Report, 2012-13.

15. Ivor Greenwood, *Parliamentary Debates (Hansard)*, Parliament of Australia, Senate, Canberra, 14 May 1975.

16. Glen Sheil, *Parliamentary Debates (Hansard)*, Parliament of Australia, Senate, Canberra, 14 May 1975.

17. Jim McClelland, *Parliamentary Debates (Hansard)*, Parliament of Australia, Senate, Canberra, 27 May 1975.

Chapter Nine

Meagher, Mabo, and Patrick White's Tea-cosy Twenty Years On

Damien Freeman

Battlelines, *Roddy's Folly*, and *Antonin Scalia's Jurisprudence*

Valuable though the proceedings of this conference are, they are unlikely to find their way into the popular press. Things were not always so. Twenty years ago, the proceedings of the Samuel Griffith Society were to be found splashed across the front page of the *Sydney Morning Herald*, under the headline, "The republican debate: wigs v tea-cosies".[1]

The front-page report was accompanied by two photographs: one of R P Meagher, QC, wearing a horsehair wig; the other of the Nobel Laureate, Patrick White, wearing headgear that might have been mistaken for a tea-cosy. The report informed readers that, in a description of prominent republicans, Meagher told the conference in Melbourne:

> There was Patrick White who could be coaxed out of his mansion, an old curmudgeon with a tea-cosy on his head, and persuaded to denounce, in a fusillade of rather verbless sentences, the social system which had always cocooned him in immense wealth.[2]

This was followed up with a letter to the editor from Professor Ivan Shearer, which informed readers:

> Justice Meagher is the author of many witticisms, but not the one about Patrick White with which you credit him. When your reporter heard His Honour, in a speech made in Melbourne earlier this year, refer to Patrick White as a 'curmudgeon with a tea-cosy on his head', he failed to detect the quotation marks in the speaker's voice.
>
> For it is a reference to Barry Humphries's lines on the death of Patrick White, published in *Neglected Poems and Other Creatures* (1991). This 'threnody' begins: 'In a Federation bungalow beside Centennial Park, With its joggers in the daytime, perves and muggers after dark, Lived a famous author hostesses pretend that they have read; A querulous curmudgeon with a tea-cosy on his head.' [3]

In 1992, Roddy Meagher, then a Judge of Appeal of the Supreme Court of New South Wales, had been invited to launch the first volume of *Upholding the Australian Constitution*, which contained the proceedings of the inaugural conference of the Samuel Griffith Society, held in 1991. Meagher's address is published in the 1993 volume of *Upholding the Australian Constitution*. Thus, it seems timely to reflect on what has happened since the remarks were published twenty years ago.

In 2002, Murray Gleeson, then Chief Justice of the High Court of Australia, addressed the Society's tenth Conference Dinner on the abolition of appeals to the Privy Council.[4] Roddy Meagher sat next to me at that dinner, but I cannot recall his saying anything memorable. Almost ten years later, he died, in 2011.

Last year, 2012, Tony Abbott launched *Roddy's Folly: R. P. Meagher QC – art lover and lawyer*, my biography of Roddy Meagher, at a cocktail reception held in the Assembly Hall at the Old Sydney Law School,[5] at which Her Excellency the Governor (then Administrator of the Government of the Commonwealth of Australia) and Justice J D Heydon (then of the High Court) also spoke.

In October 2013, when I arrived back in Sydney from Cambridge, I had some time to kill in Phillip Street, before an appointment at the Crown Solicitor's Office, so I went into the Co-Op Bookshop. As I walked in, I was confronted by a display of three books facing the entrance. In the centre was *Battlelines* by Tony Abbott. On the left was *Roddy's Folly*. And, on the right, was *Antonin Scalia's Jurisprudence: Text and Tradition*, by Ralph Rossum.

In *Roddy's Folly*, I quote Murray Gleeson, who offered the following assessment of my subject:

> I think he has been influential in the same kind of way that Justice Scalia has been influential in constitutional law in the United States. That is to say, he has been such an articulate critic of certain kinds of error that what he has said has served as a warning to people who otherwise would have gone too easily and too quickly down a certain judicial path. He has been a powerful restraining influence. I'm not saying that he has persuaded everybody to his point of view, but because he has expressed his point of view so forcefully, sometimes even dramatically, even people who haven't been persuaded that he's correct, have been more cautious than otherwise they would have been.[6]

The Co-Op's book display offered me a moment of serendipitous inspiration, and I think it would be well to consider the relationship between a few ideas in *Roddy's Folly*, *Battlelines*, and *Antonin Scalia's Jurisprudence*, with a view to arriving at some conclusions about the wigs v tea-cosies debate that graced the front page of the *Sydney Morning Herald* two decades ago.

Meagher, *Mabo* and the Constitution

Meagher's address to the Samuel Griffith Society also attracted more serious attention in the popular press. Sir Ronald Wilson, former Justice of the High Court, President of the Human Rights and Equal Opportunity Commission, and co-author of *Bringing Them Home*, the 1997 report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, was master of ceremonies at the presentation of the 1992 Human Rights Medal and Awards at Sydney's Powerhouse Museum. The Melbourne *Age* carried the following report of the ceremony in Sydney:

> Sir Ronald Wilson . . . emotionally defended the judges in Sydney last week when awarding the human rights medal to the surviving Mabo plaintiffs and their lawyer.
>
> Sir Ronald was reacting to a speech by Mr Justice Meagher . . . which slammed the Mabo judgment and accused the judges of making up the law.
>
> 'I want to say something in their defence because the judges can't defend themselves', Sir Ronald said. Mr Justice Meagher's claim was untrue, he said. The courts had always developed the common law over time, building on established legal principles adapted to contemporary values. And that's just what the judges did in Mabo.[7]

Let us revisit three of the paragraphs from the address in which Meagher accused the judges of making up the law, and which elicited this emotional defence on their behalf. The first concerns *Mabo's* case,[8] and the High Court's approach to its role in declaring the common law of Australia. Meagher said of Sir Gerard Brennan's judgment in *Mabo*:

> His Honour said there were two ways of approaching the question of whether the natives in question owned the land in question. One way was to apply the existing legal authorities. One would be pardoned for thinking that a lawyer would find such a course attractive, particularly if it was his duty to apply the law. But his Honour spurned such a course and thought it more palatable to invent a new law. Why? Because, he said, it was required by two imperatives: 'the expectations of the international community' and 'the contemporary values of the Australian people'. This is all a mite curious. As for 'the international community', who are they? How does one discover their 'expectations'? Their views were not handed down by Moses and the prophets, nor does his Honour seem to be referring to the prominent international lawyers. And even if one could locate such a body and discover its views, why should its views take precedence over those of the 'Existing authorities' which in fact lay down the law? In this struggle between the 'existing authorities' and the 'Expectations of the international community', one has the uneasy feeling that all which is meant by the latter term is the overseas members of the chattering classes, Miss Sontag, Mr Chomsky, the unspeakable Pilger and the like. And in determining the 'contemporary values of the Australian people' where does one go? Not to the past Justices of the High Court, not to the judges of the lower courts, not to the States of Australia, not to the people on referendum, but, again, one feels, to one's very own chattering classes, who have thus ceased to be a mere nuisance and have become translated into a source of law.[9]

Secondly, Meagher also addressed the Court's approach to its role as interpreter of the Constitution of Australia and the implication of rights in that document in the *Australian Capital Television* case.[10] After surveying the so-called Mason Court's approach, he concluded:

> None of this has anything to do with what our founding fathers intended, but that apparently does not matter. None of it has much to do with interpreting the written document which is our constitution, but that apparently does not matter either. Armed with this anarchy, and fortified by the right to disregard all decided cases which Sir Gerard Brennan perceived in *Mabo*, the High Court gives the appearance, perhaps, of swinging violently between extreme positions – now (as in *Mabo*) abolishing rights we always had; now (as in *Australian Capital Television Pty Limited v Commonwealth of Australia*) protecting rights we never had; punishing the people for rejecting a bill of rights by inflicting up to seven new bills of rights on us like it or not; with the prospect of being guided in their endeavours by the siren song of the chattering classes.[11]

Finally, there was a paragraph directed toward the Chief Justice of the High Court of Australia, Sir Anthony Mason, himself. In a famous speech, Sir Anthony discussed

another famous speech by Sir Owen Dixon, and explained why he felt justified in departing from Sir Owen's approach to legal reasoning.[12] Meagher remained faithful to Sir Owen, as did the Samuel Griffith Society, and he told the Society:

> But now the current Chief Justice has suggested 'that legal reasoning should not be pursued so far, and that decisions must take into account "fundamental values".'[13]

He then went on to summarise the problems that Professor Cooray identified in Sir Anthony's approach, in a paper contained in the volume that Meagher was launching.[14] It seems that these remarks cost Meagher his long and valued friendship with Mason.

These remarks attracted the attention of the popular press because they were controversial and colourfully expressed. They are, in many ways, of a piece with the writings of Justice Scalia. So I should like to consider them in the context of Scalia's jurisprudence, and then a specific remark that Scalia made about the place of aspirational language in the Constitution, which, I believe, might shed some light both on Tony Abbott's approach in *Battlelines*, and the infamous wigs v tea-cosies debate.

Atonin Scalia's Jurisprudence

Justice Antonin Scalia is the senior Associate Justice of the Supreme Court of the United States, having been appointed in 1986, on the nomination of President Ronald Reagan. Like Roddy Meagher, he is famously conservative in his approach to the law. Also, like Meagher, he is a member of the Roman Catholic Church, and was educated by the Jesuits (although he is of Italian ancestry, rather than Irish ancestry as Meagher is).

Scalia's jurisprudence has been concerned primarily with the correct way for the Supreme Court to interpret both the Constitution and Acts passed by Congress. He is a "textualist" and an "originalist". When interpreting a document, he maintains, what matters is the meaning of the text. The meaning of the text is the meaning that the words originally had when they were written down. However, this meaning is not what those drafting the document *intended* the document to have, but the meaning that the settled text of the document *actually* had for a readership at the time it was drafted. If a reader at the time would have understood the meaning of the text in a way that was different from the meaning that those drafting the text intended the text to have, then what matters is the meaning that it actually had for a contemporary reader. When the document being interpreted is the Constitution, this means that Scalia rejects the idea of the "Living Constitution", according to which the Justices of the Supreme Court are charged with responsibility for determining what current circumstances require of constitutional arrangements, rather than determining the demands that the constitutional arrangements impose on current legislators and current citizens' lives. When the document is a piece of legislation, it means that the Court should not be concerned with trying to piece together from the legislative history what the legislators were intending to achieve when they passed the legislation, but rather they must be concerned with what the text of the statute ended up saying, irrespective of whether or not the statute actually reflects the intention of those who voted for it in Congress.

When Gleeson points to the similarity between Meagher and Scalia, he is not so much concerned with their shared jurisprudence as much as their shared style of

writing and speaking. It is the forcefulness – sometimes verging on irreverence – that has commanded attention, even from those who profoundly disagree with them. This forthright style is evidenced, for example, by Scalia's comments to the Senate Judiciary Committee about the doctrine of the "Living Constitution", when he told the Senators that the Constitution is not a "bring-along-with-me statute" that nine justices are free to fill with "whatever context the current times seem to require".[15] (One dreads to think what Meagher might have said had he faced a Confirmation hearing.)

Meagher's major contribution to jurisprudence concerned equity, not constitutional law. In this respect, he is famous for his formulation of the fusion fallacy.[16] In this area, he did move into public law, because he was concerned with the jurisdiction, and how the law could be changed by Parliament or the courts. Meagher was adamant that a judge could not usurp the power of the legislature to fuse the principles of equity and the common law to form a single body of law: only the legislature could do that. When interpreting an Act of Parliament that fused the administration of two distinct bodies of law by a single court, Meagher displayed a "terrier-like tenacity" when insisting that a court was obliged to interpret the meaning that the text had at the time that the Act was passed, not to interpret the effect of the Act according to some notion of what meaning would best suit current circumstances.[17] If the jurisprudence of the law is to change in favour of a fusion of legal and equitable principles, this can only be achieved by an Act of Parliament.

The similarity with Scalia's approach to the institutions that should be responsible for the development of new theories of justice is apparent in the following passage from Rossum's study:

> According to Scalia, the role of the Court is not to articulate a theory of justice and discover new rights based on that theory but to ensure that the majority does not contract the sphere of rights traditionally protected. If new theories of justice are to be articulated and if the sphere of protected rights is to be expanded, such expansion should be done by the will of the majority, not the Court.[18]

Meagher was committed to the old idea of the sovereignty of Parliament, and the conviction that democracy requires questions concerning political values, social values, fundamental values, or any values other than those legal values enshrined in the common law, to be resolved by the legislature and not the judiciary, because only the legislature has a democratic mandate.[19]

The similarity with Scalia could not be clearer. Concerning the interpretation of statutes, Scalia told Senator Kennedy at his Confirmation hearing:

> The more specific Congress can be, the more democratic the judgment is, because if Congress is not specific, the judgment is made by the courts, and the courts are not democratic institutions.[20]

And concerning the interpretation of the Constitution, Scalia wrote:

> A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect 'current values.' Elections take care of that quite well. The purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to be required for a constitutional amendment before those particular values can be cast aside.[21]

The great threat, Meagher believes, is the "chattering classes" at home and abroad. His concern about the effect of the expectations of "the overseas members of the chattering classes" on the Courts resonates with Scalia's admonition that the Court cannot

> look over the heads of the crowd, and pick out its friends . . . The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry.[22]

Finally, I should like to identify an area where I am not aware of a direct parallel, but in which I believe Meagher would have agreed with Scalia. In *A Matter of Interpretation*, Scalia responds to a criticism by L H Tribe,[23] who rejects Scalia's "textualism" in favour of what he called an "aspirational" theory of constitutional interpretation. In responding to the idea that the Constitution should be understood in terms of the American people's aspirations, Scalia writes as follows:

> If you want aspirations, you can read the Declaration of Independence, with its pronouncements that 'all men are created equal' with 'unalienable Rights' that include 'Life, Liberty, and the Pursuit of Happiness.' Or you can read the French Declaration of the Rights of Man . . . There is no such philosophizing in our Constitution, which, unlike the Declaration of Independence and the Declaration of the Rights of Man, is a practical and pragmatic charter of government.[24]

In this passage, Scalia is contrasting the Constitution of the United States with the Declaration of Independence. His purpose is to point out that, whereas the Declaration is properly understood as a statement of aspirations, the Constitution is properly understood as a practical and pragmatic charter of government. As we all know, the Constitution of Australia was modelled on that of the United States. In many important respects, the pragmatics of Australian government drew on the approach that had been successfully adopted in America. But it is not only in certain details that there is a similarity between the American and Australian constitutions. There is a more profound similarity in the fact that both documents are practical and pragmatic charters of government. Neither contains a statement of the nation's aspirations.

Although we are well aware of the similarities, we are also well aware of the most striking difference: the absence of a bill of rights in Australia. The collection, *Don't Leave Us with the Bill*, edited by Julian Leeser and Ryan Haddrick, leaves us in no doubt that this difference is likely to endure for some time, as it is inconceivable that Australia will adopt a statutory or constitutional bill of rights in the foreseeable future.[25] However, we are less well aware of another difference. The United States has not only a Bill of Rights, but also a Declaration of Independence. So, we can say that, in the United States, there is a constitutional document that prevents the federal legislature from encroaching on certain fundamental rights of its citizens, but this is not so in Australia. And we can also say that, in the United States, there is a constitutional document that sets out the aspirations of the American nation, but this is not so in Australia. It does not follow that, just because Australia is better off without a bill of rights, Australia is also better off without a statement of national aspirations.

Tony Abbott and Australia's National Aspirations

That Australia lacks an equivalent of the Declaration of Independence looks like a serious problem. It means that we have no statement of national aspirations. That does not mean that Australia is a nation lacking in aspirations. But it does mean that we cannot point to a constitutional document that articulates the aspirations that we share as a nation. In his three books, *The Minimal Monarchy*, *How to Win the Constitutional War*, and *Battlelines*, Tony Abbott has addressed this issue, and provides one way of understanding the Australian experience of national aspirations.

The Constitution's failure to provide an account of Australia's aspirations as a nation is not lost on Abbott, and he is aware that this has affected how others have conceived of the Constitution. In *The Minimal Monarchy*, he notes:

> Malcolm Turnbull described the Australian Constitution as a 'rule book for a colony'. Sir Isaac Isaacs described it as the 'birth certificate of a nation'.[26]

Abbott's own take on the situation is as follows:

> Although Federation did not, in fact, mark complete and final legal independence, it marked our beginning as [an] organised national entity. Before 1901, Australia was a geographical entity, a state of mind perhaps, certainly a goal most eagerly sought – but it was not an extant national entity. In that sense, 1901 is every bit the milestone to Australians that 1776 is to Americans, and Federation is as important to us as the Declaration of Independence is to them.[27]

Federation, he says, is as important for Australians as the Declaration of Independence is for Americans. This is not because Federation marks Australia's independence from Britain, in the way that the Declaration of Independence marks America's independence from Britain. The sense in which they are similarly important lies elsewhere.

How are we to understand Australia's national aspirations, at the time of Federation, if they are not articulated in a constitutional document analogous to the Declaration of Independence? Abbott believes that Australians did have national aspirations. They lay in Australians' sense of being British:

> In those days, there was no contradiction between being 'British' and being 'Australian'. For Australians, 'Britishness' did not mean wearing bowler hats to work or speaking with fruity accents. It meant participation in a supra-national association with common bonds, a common language, and the common law system – the finest and fairest yet evolved.[28]

According to Abbott, when Australians saw themselves as "British", they were not primarily making a statement about their racial origins, their (Anglican) religion, or their cultural practices. Rather, they were making a statement about their values; values that found expression in the English language, English law, and English history. And it was the centrality of these values to "Britishness", he believes, that enabled Australians to distinguish the British Empire from earlier empires:

> In the eyes of most Australians, the British Empire was unlike any that had gone before. The Empires of the Assyrians, the Romans and even the Greeks had been built on conquest and exploitation but the bits of red on the world's map were linked by shared values as much as by shared interests.[29]

If Abbott is right, that what mattered to Australians about being part of the British Empire was that it incorporated them into an organisation of shared values, it also enables him to explain why being British continued to matter to Australians, even if they were disappointed, at times, by the decisions and actions of the Parliament at Westminster, the Whitehall bureaucracy, 10 Downing Street, the Privy Council, the British Army, or the Royal Navy:

> few Australians felt any instinctive hostility to Britain itself. If the British were wrong, it was because they'd failed to match the ideals which Britons and Australians had in common.[30]

The point is that, if "Britishness" is a matter of shared values, then any British institution (or individual) could fail to realize the values to which British people aspired. Few of us ever achieve all that we aspire to, but that does not (or ought not to) diminish our aspirations.

As we know, the Commonwealth of Nations was the successor to the legal entity that was the British Empire. However, in *Battlelines*, Abbott also speaks of an "anglosphere" which might be understood as the successor to the group of nations (including the United States) that shares British values, a grouping which goes back at least to Churchill's four-volume *History of the English-Speaking Peoples*:

> The absence of tribalism is one of the key characteristics of English-speaking cultures. The bonds between the countries of the anglosphere arise from patterns of thinking originally shaped by Shakespeare and the King James Bible, constantly reinforced by reading each other's books, watching the same movies and consuming the same international magazines. It's a solidarity based on ideas in common and even mutually shared differences of opinion rather than on race, religion or economic self-interest.[31]

With this understanding of "Britishness", or the "anglosphere", we are well placed to appreciate why Abbott would not perceive the need for a formal statement of aspirations in 1901. The Preamble to the Constitution begins:

> Whereas the people . . . humbly relying on the blessing of Almighty God, 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 . . .[32]

The Australian people agreed to unite under the Crown. The Crown was the symbol of "Britishness". "Britishness" was an expression of the shared values to which British people aspired, and exemplified by the English language, law, and history. So, on Abbott's analysis, there was an implicit acknowledgement of the aspirations of the Australian people: they aspired to live according to their shared values of "Britishness".

Federation was an act, not a document. The importance of an act is liable to fade over time in a way that the importance of a document is not. So, perhaps, it should not be surprising that Americans are more immediately aware of the aspirations contained in the Declaration of Independence than Australians are immediately aware of the aspirations that inspired their forebears in the act of Federation. Abbott is right that Federation is every bit as important to Australians as the Declaration of

Independence is to Americans. And he is right that its importance does not lie in its declaration of Australian independence, but in its expression of Australian aspirations.

Flash forward a hundred years from the era of the Federation movement, and we find the Australian Republican Movement agitating to remove the Crown from the Constitution. By and large, the members of the ARM were happy with the practical and pragmatic charter of government that the Constitution provided for Australia. Or, at least, if they believed that the practical and pragmatic charter could be improved, they did not believe that removing the Crown would improve it. Rather, their aim was to keep the practical and pragmatic charter of government completely intact, so far as possible. So what were they aiming to do, if not alter the practical and pragmatic charter of government?

In *How to Win the Constitutional War*, Abbott claims that the ARM succeeded in two aims. First, they had helped convince the Australian people that the Constitution of Australia works well, and should be kept intact. Secondly, they had succeeded in convincing the Australian people that the Australian Constitution is in need of significant change. In 1997, Abbott concludes:

> The only pressing problem with the Australian Constitution is that about half the Australian people have been persuaded that they should no longer be happy with it . . . [33]

Abbott accepted that many Australians were captured by the republicans' slogan, "Resident for President". His concern was to preserve the Constitution's practical and pragmatic charter of government. However, he believed that this was compatible with satisfying the demand of a "Resident for President". He proposed introducing legislation to declare that the Governor-General was the President of Australia, in addition to her other titles. In this way, we could ensure that Australia had a "president" who was always a "resident" (and an Australian citizen) without in any way altering the practical and pragmatic charter of government contained in the Constitution. He believed that his proposal would bring constitutional theory more perfectly in line with constitutional practice (and meet the mood for a significant public declaration).[34]

But what was this "significant public declaration" that there was a mood for? It could not have been a declaration concerning the practical and pragmatic charter of Australian government. If it were so, Abbott could not claim to meet the mood without changing the Constitution's practical and pragmatic charter of governance. What Abbott saw was the mood for a significant public declaration of Australia's national aspirations; something that could match the American Declaration of Independence.

This insight is crucial to understanding the reason why advocates of the Australian Republican Movement constantly seemed to be at cross-purposes with advocates of Australians for Constitutional Monarchy. These republicans claimed to be advocating the need for an act that would establish Australia's national aspirations, whereas the anti-republicans claimed to be advocating the need for preserving the practical and pragmatic charter of government contained in the Constitution (which seemed to satisfy many – if not most – republicans).

That the debaters should have ended up at cross-purposes in this way is hardly surprising. It can be traced back to the fact that the Crown is a central (albeit theoretical) component of the practical and pragmatic charter in a Westminster system of government and that it was also the symbol of "Britishness", and hence of

Australians' aspirations for their new nation at the time of Federation.

The mood suggested to Abbott that, even if the Crown still fulfils its role in the practical and pragmatic charter of government, it was no longer serving its other role as the symbol of "Britishness", and hence of Australia's national aspirations. Even if Australia is still part of the "anglosphere", no one thought that "Britishness" captured the aspirations of Australians as a nation by the 1990s. If a "Resident for President" could capture the shared aspirations of Australians in a way that "Britishness" once did, Abbott was happy to embrace it, so long as it did not detract from the practical and pragmatic charter of Australian government, and the Crown's role therein.

Alienation is the price that is paid if citizens feel that they cannot identify with their nation's aspirations, and Abbott recognises this is no less serious a threat to Australia than that of undermining Australia's practical and pragmatic charter of government. In *How to Win the Constitutional War*, he writes:

> The problem with remaining precisely as we are is that millions of Australians no longer support what should be [the] country's foundation document. A liberal democracy cannot leave even substantial minorities permanently alienated – hence the need to win the constitutional war, but not in a way which replaces one disaffected group with another.[35]

In *The Minimal Monarchy*, Abbott connects this mood with a loss of faith in the monarchy. But this problem is not a phenomenon that is limited to loss of faith in the monarchy. It is a problem that extends to all Australian institutions:

> This is the age of irreverence. Church, Parliament, courts and police have lost respect just as fast as the Crown. The challenge, surely, is to make these institutions work – not dump them and start again . . .
>
> The desirability of an Australian republic is far from clear. What's urgently needed, however, is renewed faith in Australian institutions.[36]

By the time that he writes *How to Win the Constitutional War*, two years later, Abbott has come up with a proposal for renewing faith in the institution of the Governor-General, by making her the "Resident for President". However, another twelve years later, he has come to see that the whole republican project is fundamentally flawed. In *Battlelines*, he writes:

> The republicans' fundamental problem . . . is that change undramatic enough to succeed is too dull to bother with.[37]

In 1901, there was nothing incompatible about the Crown serving a role in our practical and pragmatic charter of government and also serving a role as the embodiment of our national aspirations as the symbol of "Britishness". Abbott does not deny that the Crown is no longer the embodiment of Australians' national aspirations. Furthermore, he acknowledges the need to find a new way to give expression to Australia's national aspirations. However, he sees that the republicans would not succeed in giving expression to Australia's national aspirations in the twenty-first century. The problem is that any undramatic change to the role of the Crown in the practical and pragmatic charter of government will be too dull to satisfy the mood for an expression of Australia's national aspirations.

Recognition of Australian aspirations

In *The Minimal Monarchy*, Abbott wrote:

> There is just one issue on which constitutional argument should turn: what is best for Australia?[38]

In *Battlelines*, he asks:

> What, now, needs to be done to make Australia stronger and truer to its best ideas? How can Australians individually and collectively come closer to being their 'best selves' and what can the Liberal Party do to bring this about?[39]

So, when we are engaged in deliberation of constitutional matters, we should always be primarily concerned with determining what will be best for Australia. In doing so, we need to recognize that what is best for Australia involves making Australia stronger and truer to its best ideas. And this requires us to ask how the Constitution can help Australians individually and collectively come closer to being their best selves. It would hardly be surprising to find that a statement of Australia's national aspirations might help Australians to come closer to being their best selves, collectively, if not individually.

On 24 August 2013, Tony Abbott told a gathering at the annual Garma Festival of Traditional Culture, held in northeast Arnhem Land:

> Indigenous recognition won't be changing our Constitution but completing it.[40]

The Garma Festival takes its name from the Garma ceremony of the Yolngu people; a ceremony aimed at sharing knowledge and culture, and opening people's hearts to the message of the land at Gulkula. The site at Gulkula has profound meaning for Yolngu: set in a stringybark forest, with views to the Gulf of Carpentaria, Gulkula is where the ancestor Ganbulabula brought the *yidaki* (didgeridoo) into being among the Gumatj people. The festival encourages the cultivation of traditional song (*manikay*), dance (*bunggul*), and art and ceremony (*wangga*) on Yolngu lands in northeast Arnhem Land. Song, dance, art, and ceremony are important to the Yolngu not because they are essential for the practical and pragmatic government of the Yolngu, any more than they assert the fundamental rights of the Yolngu. Singing, dancing, making art, and participating in ceremonies are vitally important to the Yolngu because this is how they give expression to their shared Yolngu aspirations. The shared aspirations of the Yolngu are no less important than the practical and pragmatic aspects of their shared and individual lives, or their fundamental rights. So, participating in Yolngu culture is vital to Yolngu men and women being their best selves. And understanding and valuing Yolngu culture is no less important for Australians at large being their best selves. Thus, Abbott might rightly wonder what the Liberal Party can do to bring this about.

What did Abbott mean when he told the Yolngu, "Indigenous recognition won't be changing our Constitution but completing it"? In order to understand this claim, we need to analyse the meaning in two parts: first, what "won't be changing our Constitution" means; and, secondly, what "completing it" means.

When Abbott says that it "won't be changing our Constitution", he means that it will not in any way affect the practical and pragmatic charter of government that is the Constitution of Australia (*viz.* existence of the Commonwealth and its organs of government, the separation of powers at the federal level, and the relationship

between the Commonwealth and the States).

When he says, "but completing it", he means that it will provide a statement of aspirations to complement the practical and pragmatic charter of government – just as the Declaration of Independence provides the statement of aspirations that underpins the Constitution's practical and pragmatic charter of government in the United States.

Currently, we lack aspirational language in our constitutional documents. This is partly because, as Abbott shows, the aspirational action of Federating has stood in for a document that contains statements of aspiration; and also because the Constitution's Preamble contains the aspirational language – ". . . under the Crown of Great Britain and Ireland" – which incorporates Abbott's aspirational sense of "Britishness". That we do not currently have a statement of national aspirations is not to say that we ought never to adopt one.

We can recognize that Indigenous Australia has not had a good enough deal in the first two centuries after British settlement in Australia. Indeed, we can acknowledge that the deal they received fell very far short of the shared values that Abbott maintains constituted "Britishness" at the time of Federation.* And we can recognize the need to redress this profound deficit in the life of the Australian nation (as well as the separate practical imperative of improving the living conditions of Indigenous Australians).

We might also recognize the possibility that redressing this deficit in our national life might be connected with the aspirations of Australia as a nation in the twenty-first century, in the way that the Australian Republican Movement was convinced that a "Resident for President" and reconstituting Australia as a republic was connected with the national aspirations of Australia in the 1990s.

However, even if we accept that recognition of Indigenous Australians, and their relationship with the land, is not only inherently desirable, but fundamental to Australia's aspirations as a nation in the twenty-first century, it does not follow that recognizing these aspirations necessarily requires a change to the practical and pragmatic charter of government contained in the Constitution of Australia.

Justice Scalia rightly advised Americans that if they wanted aspirations, they should read the Declaration of Independence, not the Constitution. So, too, Australians should not look to their Constitution for a declaration of national aspirations.

However, as Abbott has acknowledged, national aspirations are important. If the mood of even a significant minority of Australians leads them to feel that the aspirations of Australia as a nation are no longer being given adequate expression,

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* It is worth recalling that the symbol of "Britishness", King George III, issued instructions to Arthur Phillip, in 1787, which included the following passage:

> You are to endeavour, by every possible means, to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.

Perhaps in this regard, more than any other, the Australian people failed to live up to their shared values of "Britishness". [The Instructions are reproduced in G B Barton, *History of New South Wales from the Records*, Sydney, Charles Potter, Government Printer, 1889, Vol. I, 481-87.]

then there is a need to address this, lest they become alienated from the Australian nation.

When Abbott says, "Indigenous recognition won't be changing our Constitution but completing it," what he is saying is that Indigenous recognition will not alter our practical and pragmatic charter of government, but it will "complete" our Constitution, by providing an expression of Australia's national aspirations in the twenty-first century; national aspirations that might not have changed all that much since the early twentieth century, but which are in need of renewed expression. Once, the Crown gave expression to Australia's national aspirations, as the symbol of our shared values of "Britishness". Now, those shared values demand new expression. That might mean a formal statement of aspirations, such as the American Declaration of Independence. It might mean something else; some act which can give expression to Australia's aspirations in the next century.

Upholding the Australian Constitution might mean upholding *the* practical and pragmatic charter of Australian government (against those who would change it). It might also mean upholding the Constitution *as* a practical and pragmatic charter of government (against those who would interpret it "aspirationally"). Upholding the Constitution in either of these senses is compatible with acknowledging that aspirations are important and that Australia currently lacks a statement of aspirations. That we have had a perfectly good substitute in the past does not mean that we should not be open to embracing aspirational language now. Nor does it mean that a statement of aspirations would be incompatible with upholding the Constitution. But, in order for an acknowledgement of our national aspirations to be compatible with upholding the Constitution, that acknowledgement would have to avoid interfering with the practical and pragmatic charter of government contained in the Constitution.

Abbott has reason to back Indigenous reconciliation as a means of reinvigorating the expression of Australia's national aspirations (in addition to the intrinsic significance of recognizing Indigenous Australia) in a way that he could not bring himself to back the republic as a means of reinvigorating the expression of Australia's national aspirations. Because Indigenous reconciliation need not necessarily alter the practical and pragmatic charter of government, it can provide the drama of national aspirations without the dullness of pragmatic arrangements – something the republican cause could never have achieved.

Wigs v Tea-Cosies – Twenty Years On

Why might one suppose that this long excursus into the jurisprudence of Antonin Scalia and Tony Abbott sheds any light on the debate between the wigs and the tea-cosies then or now?

Most obviously, the themes in Roddy Meagher's address range across the republic, Indigenous Australia, fundamental values, and the practical and pragmatic charter of Australian government. It is notable, however, that Meagher does not speak to the issue of how we give expression to Australia's national aspirations. What he had to say about this, over the years, was mostly negative, and is found in his attacks on political correctness. I discuss Meagher's approach to political correctness in *Roddy's Folly* and, at some further length, in "Larger than Life", my 2012 address to the Sydney Institute. I have nothing more to add to what I have already said on the subject.[41] But I should like to revisit one part of his attack on political correctness: his approach to the use of

politically-correct language.

In an interview for *Roddy's Folly*, Jim Spigelman, then Chief Justice of New South Wales, said to me, in a conversation about Meagher's insistence that women on the Bench should be given the title "Mr Justice", and his continued reference to Aborigines as "Abos":

> Everyone would accept that it's important to have some sort of change more than a gesture, but the facts are that symbols matter, and nobody who believes in the monarchy can doubt that. And the symbolic language matters. The very fact that he thinks 'Mr Justice' matters, he should understand that the 'Mr' would matter to others in the opposite way. His own predilection for the significance of language and the symbols associated with language are manifested not in 'Abos' but in 'Mr Justice'. The 'Abos' – this is just degrading.[42]

For one who was so gifted in the use of language, Meagher seems to have had a blind spot when it comes to our aspirational use of language. Although he was keenly aware of the way in which political correctness can involve manipulating the way we use language as a tool to control the way we think about ideas, he simply could not see that the way a society uses language can also serve to empower or disempower individuals whose voices are otherwise marginalised in that society. In other words, sometimes we affect individuals' ability to be their best selves by the way we use language to talk about them. And I think he was equally blind to the symbolic use of language; the way that language can express (or fail to express) our national aspirations. In other words, sometimes a nation's collective ability to be their best selves is affected by the way they talk about themselves and their aspirations. If you read *Roddy's Folly*, you will find ample evidence to demonstrate that Meagher was not sexist, racist, or homophobic. But you will also see, I suspect, that he was wilfully blind to the fact that how we use language can disempower individuals and diminish the expression of our national aspirations.

It would be a mistake for us to underestimate the importance of how we give expression to our shared values, as I believe Meagher might have done. Nevertheless, it is also possible that, however important our shared values are, it might not be the business of the High Court to give expression to them. Meagher's legitimate conviction that the High Court had no business in giving expression to Australia's "fundamental values" cost him his long and valued friendship with Sir Anthony Mason. It might have formed the basis for his cultivating a friendship with Justice Scalia. (I heard that they once had dinner together in Sydney.) Some will say that Meagher's weakness lay in his rejection of the Mason Court's attitude to fundamental values. I suggest, however, that his weakness might not lie in his rejection of the Mason Court's approach, but in his inability to affirm the enduring significance of shared values for our national life, in the way that the Crown once served Australians as the symbol of "Britishness", and in which the Declaration of Independence continues to serve in the United States.

Roddy Meagher and Patrick White were both very good haters (although Roddy once said to me, "Although I am a very good hater in public life, I'm not a very good hater in private life"). They were cousins, but that did not stop either hating the other. Meagher hated White's verbless sentences as much as White's betrayal of the social system which had always cocooned him in immense wealth. But I think he also hated White's aspirations for Australia. White hated Meagher's "creepiness" as much as his "florid Tory attitudes". But, I suspect, he also hated the Queen's Counsel's insensitivity

to the need for appropriate expression of personal and national aspirations.[43]

Patrick White was an artist. I find it hard to believe that he could really have been that excited about the dull details of Australia's practical and pragmatic charter of government. But I can believe that he would have been deeply concerned about the drama of what are the appropriate aspirations for Australia as a nation, and how these might find adequate expression. (Thomas Keneally, more than Patrick White, exemplified the artist's passionate assertion of the republic as a new expression of Australia's national aspirations.)[44] But it would be a mistake to privilege the drama of aspirations over the dullness of pragmatics. That anyone could ever have made this mistake lies, I believe, in the fact that the Crown was central to the drama of national aspirations and remains central to the dull pragmatics of government. Roddy Meagher was a Queen's Counsel. I suspect that, where the famous author with a tea-cosy on his head was guilty of privileging the drama of giving expression to national aspirations over the dullness of a practical and pragmatic charter of government, the silk with a horsehair wig was guilty of privileging the dull legal charter over the dramatic expression of aspirations.

The relative merits of wearing a tea-cosy or a horsehair wig remains a moot point. The proper attitude to a practical and pragmatic charter of government or an expression of national aspirations is not.

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Chapter Ten

Double Celebration
The Referendum that did not Proceed

Dean Smith

7 September 2013 marks the election of the Abbott coalition Government. For me it gave cause for a double celebration. Had the now former Labor Government had their wish, this election date would also have seen Australians voting to recognise local government in the Australian Constitution, a long-held Labor Party dream which they felt was at long last within their reach. Fortunately – and this was easily former Prime Minister Rudd's best decision – Labor's decision to hold the election on 7 September meant the referendum could not proceed.

This was something I reflected on recently. Sir Samuel Griffith, a former Premier of Queensland, is best known as one of the principal authors of our Constitution and as the first Chief Justice of Australia's High Court. In all of these positions, Sir Samuel was a committed federalist and a bulwark against attempts by the Commonwealth to centralise power. Sir Samuel, I suspect, would have very quickly seen right through the rhetoric used by the supporters of the now abandoned local government referendum. He would have clearly understood the dangers lurking behind the words used by those who tried to convince Australians to change their cherished Constitution.

After all, we were told this was merely a minor change designed to ensure our Constitution reflected modern political realities. It would not threaten the power of the States, we were told. We were reassured that it would not result in any additional power for the Federal Government. We were assured also that it would not increase the power of local governments or threaten the system of checks and balances our founding fathers so carefully, consciously, deliberately established when they framed our Constitution.

Proponents of the change told us and constantly reassured us that none of these things was an issue, which only left one question: why did we need to make this change at all? Looking back, I think it was the question that Labor, the Australian Local Government Association and various other supporters were hoping would not be asked because it was at that point when this question was posed that the wheels came off the referendum bandwagon. They simply did not have an answer.

Supporters of constitutional recognition made many errors, in my view, which I will come to shortly. But their most fundamental error, one to which political elites are all too often susceptible, was to underestimate the basic common sense of the Australian people. If Australians are going to be asked to change their cherished Constitution, a Constitution that has underpinned the political stability of their nation for 112 years, then you have to offer them a compelling reason to do so. It seemed to me that the best the proponents of the referendum could muster was that somewhat nebulous claim that to vote "no" was a vote against local communities. If that is the best you can manage then, frankly, you are going to have a tough time persuading the majority of Australians in the majority of States that this is a change they need to embrace.

I still find it quite extraordinary given the length of time that discussions about constitutional recognition of local government have been running that the former Labor Government and the body which badges itself as the premier local government body, the Australian Local Government Association, could not agree on why this change was needed. The case that ALGA had pushed all along was that constitutional recognition of local government was needed because the *Williams* and the *Pape* decisions of the High Court posed a direct threat to council funding from the Commonwealth. ALGA unambiguously said that the only way around this was to recognise local government formally in our national Constitution. So I was rather surprised when, in the course of questions in Senate estimates in May 2013, the minister at the table, Labor Senator Lundy, responding to questions from an esteemed Senate colleague, said that the *Williams* decision was "not one of our justifications at all in pursuing constitutional change". Senator Lundy's view was, indeed, borne out by the wording of the Government's bill and the accompanying explanatory memorandum, neither of which mentioned the High Court nor the *Williams* nor the *Pape* decisions. So we had a situation where the two strongest proponents of constitutional recognition, the Labor Government and the Australian Local Government Association, fundamentally disagreed on why this change was needed. If they could not agree, why should the Australian people be expected to take a risk and change a Constitution that has served their nation well since 1901?

If the supporters of the referendum had damaged their cause from the start by failing to establish the case for change adequately, then the terminal blow was delivered by what they chose to do next. The Labor Government's decision to weight the level of public funding that would be provided to the "yes" and "no" campaigns based on the numbers voting for and against the referendum in the House of Representatives was a watershed moment, a death knell for the referendum. People, most particularly journalists, who had until that point been unengaged or uninterested in the constitutional principles at stake, quickly got the sense that the fix was in.

The model the Labor Government used was wholly contrived and without precedent. Public funding for "yes" and "no" campaigns at a referendum is actually a relatively recent phenomenon, having occurred for the first time in the 1999 republic referendum. On that occasion, the Prime Minister, John Howard, awarded public funding to the "yes" and "no" cases on a 50-50 equal basis. This was despite his well-known and well-founded personal preference for retaining Australia's existing constitutional arrangements. To most Australians, this seems obvious. If a government is going to fund one side of an argument, then, in the interests of democratic fairness, it must fund the other side to the same extent. We all know that the notion of a fair go is amongst the most cherished of Australian ideals. While the constitutional issues at stake in terms of recognising local government were not well understood by many – if not most – voters, it was very easy for them to understand that a Labor government that already had a reputation for dishonesty was trying to pull a fast one.

The "no" case had many strengths and I will come to some others in a moment. I believe no single argument was more important in effectively defeating the referendum than the appalling manner in which the Labor Government and groups such as the Australian Local Government Association handled the question of public funding.

I am especially pleased by one notable fact from these events. The official "no" campaign did not spend one cent of taxpayers' money during this whole process. This

was in stark contrast to those on the other side of the debate, for instance, the Australian Local Government Association, which is now seeking to be reimbursed for its expenses. I find it truly extraordinary that any organisation would spend money on a referendum campaign prior to the issue of any writ for a referendum, and then expect taxpayers to pick up the tab for their own imprudent decisions, yet this was the position of the Australian Local Government Association. I look forward to continuing discussions over this piece of unfinished business from the abandoned referendum.

Even if you do not understand the constitutional issues, common sense tells you that if constitutional recognition is as simple, is as positive, as its proponents were making out, then there would be no need to stack the deck so heavily in favour of one side of the argument. It was this dodgy funding deal that caused many Australians to take a second look at what until that point was being presented as a simple *fait accompli*.

Of course it was not only growing political debate which favoured the "no" case. As Australians came to understand, there were very sound constitutional and logistical grounds for opposing what Labor had put forward. Despite the spin, this proposed change to our Constitution was not about services nor was it about lower rates for ratepayers or the better running of councils and the services they deliver. To claim, as some did, that Canberra would not have any more power because funds are requested by local communities overlooks the salient fact that the wording of the proposed constitutional amendment explicitly stated that the Commonwealth grants were to be made on: ". . . such terms and conditions as the Parliament thinks fit".

In other words, it would have equipped the Federal Government with the constitutional power to attach any strings it wished to funding provided to local councils.

Despite the efforts of the referendum's supporters to present constitutional recognition as something that had near unanimous support of local councils around the nation, there were a significant number of local councils across our country which spoke out against the change. None of these councils did so because they wished to deny their communities improved services; they did so because they rightly feared a loss of autonomy for local communities. They feared, with justification, I believe, that the imposition of a typical Canberra one-size-fits-all approach to local government services would be to their detriment. They did so because they wished to remain what local councils should be – representatives and advocates for their local communities, not merely local branch offices of the Federal Government forced to submit to Canberra's whims simply to remain viable.

There was another important factor in the success of the "no" case building its public support, one that was not dissimilar to what we saw during the 1999 republic referendum. Constitutional recognition of local government is largely an obsession of political elites. It was very difficult to identify public supporters of this proposal who were not members of parliament, mayors, councillors, employees of local governments or members of various local government associations representing local councils. In other words, the chorus of enthusiasts for this proposal started and ended with the political elite, most particularly those who had a vested interest in further centralising power in Canberra. Many of these elites tend to view our Constitution through the prism of symbolism, of recognising things and of obsessing over having an Australian head of state. Yet none of these things will make a jot of difference to the day-to-day

lives of Australians.

The Constitution is and should remain simply a rule book that sets out how our country is governed. There is a great danger in rushing to change it if it is not undertaken with full, considered and public discussion of the risks of that change. Advocates of constitutional recognition try to pretend that there was only one side of the story and that those who thought otherwise were, in the words of the Western Australian Local Government Association, "fringe groups", parliamentarians and individuals who might want more oxygen than they deserve. This sort of intemperate rhetoric is not generally a sign of people who are confident of the strength of their argument and who believe they have right on their side.

Indeed, it is worth recalling just who some of these alleged oxygen thieves were. It is a brave person who suggests that the former Prime Minister of Australia, John Howard, who won four elections on the back of his ability to connect with mainstream Australia, represents a "fringe group". Yet Mr Howard clearly warned against constitutional recognition of local government, saying:

> . . . even a casual reference to local government in the Constitution would end up having legal implications far beyond what might be advocated by the proponents of such a change.

They are not my words; they are Mr Howard's words. Ian Callinan, a name well-known to many senators as a former High Court judge, gave a clear warning that what Labor had proposed would give rise to "endless litigation between the states, the Commonwealth and the new empowered local authorities as to who is entitled to do what and, equally important, where."

Supporters of the "yes" case had their cause further undermined when those on the left of Australian politics, who were naturally assumed to be on board, started giving voice to their own concerns. A case in point was the lack of enthusiasm by local government in Tasmania. The Deputy Premier, Bryan Green, said that he and his colleagues had ". . . made it pretty clear that we have some reservations about this matter passing".

It brought me great comfort to see over the course of the debate the former Labor Government clearly spooked by the rising tide of opposition which was quickly exposing the hollowness of its case.

I am very pleased that the Deputy Prime Minister, Warren Truss, as the minister responsible for local government, has now confirmed that the new Abbott coalition Government will not be proceeding at any point in the future with Labor's referendum.

I believe that there are a number of lessons that constitutional conservatives can take from the experience of this referendum debate and the effective defeat of this proposal. I think the biggest and most lasting of these is a simple one. Bipartisanship is a vastly overrated political commodity. Bipartisanship acts to extinguish counter-views quickly, isolates dissenters and, most dangerously, deters proper analysis and enquiry. Naturally, I am all for working constructively with those from other parties and those with other views. Partisanship purely for the sake of partisanship is rarely productive and can often inflict long-term damage. But there has been, unfortunately, a trend in our country over recent times to view bipartisanship as an inherently good end in and of itself. That simply is not true and is not demonstrated by the facts.

The period of the first Rudd Labor Government was particularly notable in this regard. The former Prime Minister would proclaim a great crisis was imminent and

demand bipartisan support for whatever it was that he proposed. We recall that until the end of 2009, for example, there was bipartisan consensus that Australians should be taxed on their carbon emissions, rather than dealing with the issue in any other way. However, just because a bipartisan consensus exists in Parliament does not mean that there is a consensus in the wider community. This was something now Prime Minister, Tony Abbott, clearly recognised when he changed the Liberal Party's approach. It is something he also recognised before the referendum was dumped by Labor when he clearly picked up on community concerns over constitutional recognition of local government and said to Australians: ". . . if you don't understand it, don't vote for it".

Bipartisanship might be nice to have but it should never come at the expense of sound policy or the stability of Australia's constitutional arrangements. It would have been very easy for those of us in the Parliament who voted "no" to the referendum to shrug our shoulders and say, instead, that the party has decided to support this in a bipartisan way and let the matter rest. But that would have absolutely been the wrong approach. Had those of us opposed to constitutional recognition not spoken out and voted accordingly in the Parliament, then there would not have been any official "no" case put to the people if the referendum had proceeded. In all likelihood, this would have ensured the referendum's success, if only by default.

The other lesson I took from what occurred with local government recognition was how important it is to challenge assertions that are being dressed up as fact. All too often those who cluster under the umbrella of "progressives" construct their arguments around sound bites, not logic. Those of us who see ourselves as constitutional conservatives can never be afraid to highlight this fact. In a legal case, the burden rests with the prosecution. Those who are proposing any constitutional change must be forced to demonstrate comprehensively the need for it, and not be allowed to slide through with glib lines and glossy brochures.

As I said, those of us in the Parliament who voted against this referendum were a small group. It is never easy to walk across the chamber and vote differently to one's colleagues. But the rewards that followed with the effective defeat of Labor's proposal were well worth the short-term discomfort.

I suspect there will be other constitutional debates in the next several years that will again prove challenging for those of us committed to maintaining the stability of our nation's constitutional arrangements. It may be that some of us again find ourselves called upon, first, by our conscience and, second, by those we represent to stand apart from the fashion or the consensus and pose difficult questions. However, despite the headlines about disunity or splits I do not think genuine disagreement automatically spells disaster.

Nor do I subscribe to the view that debate has to be damaging or divisive. One of the things I am most proud of in relation to the debate about recognition of local government is that those advocating the "no" case were entirely respectful of our opponent's point of view. But the conclusion from our experience is that we should never be afraid to challenge assertions that are presented as fact, and should never neglect core principles for the sake of a nice headline about bipartisanship.

As I have said to other audiences since becoming a senator, while it may well be true that you cannot govern if you do not win, perhaps the more interesting question is: why do you want to win if you will not then use the opportunity of governing to

pursue your core beliefs and principles? I do not yet have an answer.

Finally, can I just acknowledge some very noble Australian citizens who did not run away from their constitutional convictions, who formed the membership of the Citizens' No Case: the Hon. Nick Minchin, Mr Tim Wilson, Mr Ben Davies, Professor David Flint, Mr Rene Hidding, Mr Julian Leeser and Professor Greg Craven. Our Constitution is forever in safe hands as long as that collection of fine Australian citizens remains committed to their principles.

Chapter Eleven

Rigging the Referendum:
How the Rudd Government Slanted the Playing Field for Constitutional Change
The Abuse of the *Referendum (Machinery Provisions) Act*

Bridget Mackenzie

On 17 May 2013, the playing field for constitutional change was slanted as Parliament assented to the Gillard Government's proposed amendments to the *Referendum (Machinery Provisions) Act*. While purporting to be simple and minor efficiency tweaks, these amendments allowed a practical application that could upend the integrity, and tradition of fairness, that has characterised the Australia referendum process for more than 100 years. By redefining the allocation of funding and limiting the distribution of information to the Australian public, this legislation paved the way for legitimised exploitation of the proposed referendum for 2013.

The changes

In particular, the passing of the bill made allowance for the Government to adopt a campaign arrangement financially weighted to the YES side of the debate by a factor of 20. By legislating away the restriction on the provision of funding for education, information, and advertising of the referendum question, the Government was empowered to fund the campaign disproportionately in favour of their desired result. And, with a reduced distribution of the YES/NO pamphlet also being assented to, being sent now only to households rather than to each individual voter, there was greater purchase created for the alternative methods the Government could chose to employ - a mighty combination. The people of Australia are central to constitutional matters. Limiting or biasing the information available means a citizenry that is ill-prepared to vote from a well-informed perspective. It effectively disenfranchises the nation.

The possibilities created by the two amendments and the gross delinquency of the process by the Rudd/Gillard governments leading up to the federal election and proposed referendum date, created an exploitative climate. Their preparations prior to the amendments being passed by the Senate and the ensuing referendum bill were characterised by procrastination, poor timing and bald-faced bribery. Was this intentional or simply the function of a government in disarray? Notwithstanding, the abuse of parliamentary process and the resultant abuse of Australian notions of egalitarianism and fairness signal the need for review of the *Referendum (Machinery Provisions) Act* and of the processes for putting a question before the Australian people.

Of the forty-four referenda put to the Australian people, only eight have been successful. Those that have succeeded share the qualities of being nation-building, pragmatic and necessarily a direct reflection of constituent values. Successful referenda

have increased and simplified voter franchise rather than seeking to restrict it. Voters have been engaged with the proposed questions. Our first referendum, in 1906, was very successful; it asked a practically new nation whether elections for the Senate should be held at the same time as the House of Representatives.* At this early stage, having only experienced two federal elections as a nation, Australian voters decided to minimise the number of times voting was required. Questions allowing the Commonwealth to make laws for Indigenous people, granting Territorians a vote in referenda, and proposing to fill Senate vacancies have achieved a positive result, while power grabs by federal governments have been soundly rejected.

The intent and capacity for empowerment, on a grassroots level, of the referenda process, is clearly defined in the original *Referendum (Machinery Provisions) Act*. In the original version of the Act, section 11, subsections (1), (2) and (3) provided that the Electoral Commission must, in the prelude to a referendum, print and post to each elector an impartial pamphlet outlining the arguments to support the Yes and No cases; and conduct the referendum and educate the public on the details of casting a vote. Sub-section 11(4) limits the capacity of the Commonwealth to spend money in relation to a referendum other than on production and delivery of the Yes/No pamphlet. There is demonstrated therein a commitment to the veracity and impartiality of information that is an essential component for informed decision-making on any level. There is a confidence in the Australian citizenry, not simply as a valuable resource, but as the very source of political and constitutional change.

The regulation of our referenda traces a democratic history rich in the development of freedom and franchise for all Australians. It was in 1912 that a particularly ambitious Labor Prime Minister, Andrew Fisher, introduced a legislative reform to the Referendum Act, activating the production and dissemination of the Yes/No pamphlet. This 2000 word document has stood the test of time in putting forward the for and against case for most questions of constitutional change. Through this publicly-funded pamphlet, Prime Minister Fisher imagined "that the case will be put forward from both sides impersonally and free from any suggestion of bias or misleading on the one side or the other."[1] Fisher saw the necessity of an educated and informed Australian citizenry. If people could comprehend the question at hand, they could cast a genuine vote and, thereby, ensure a genuine result. Putting aside his assumption that questions put forward by Parliament automatically are a reflection of the community's will, he was convinced of the merits to be gained through public engagement with the question for conducting an effective referendum.

The role of the Yes/No pamphlet is an important aspect of informing the public of the official cases for referendum questions. It is one part of an education campaign that community, Parliament and stakeholders participate in throughout referenda discussions. As Alfred Deakin explained in 1912, the people "should be invited to hear all they can, to read all they can, and to think as much as they can in this regard. The more thoroughly they do that, the better it will be for us and the better for future Parliaments".[2]

2013 – the proposed referendum recognition of local government. Unfortunately, the question being put to the Australian people in 2013 was one that they had already rejected twice. It was a political fix rather than a response to any deficiency in the Constitution as it related to our current practice, arising from concerns regarding the financial sustainability of local governments, particularly those in regional areas. One

method of addressing this issue was for the Commonwealth to fund local government directly, currently prohibited under the Constitution. This paper will not examine the merits of the proposal to recognise local governments in the Constitution. Rather, it will focus on the issues of abuse of process through amendments to the Act governing the conduct of referenda, the committee reporting process and the Parliament itself. As an issue, the recognition of local government in the Constitution was to address a political problem for the new minority government, and had strong support from regional independents in the wake of the 2010 election. The Federal Government began, and botched, the process of conducting the referendum, flagrantly ignoring recommendations from their own committees with respect to funding, timing and processes. The Gillard Government's bill proposed two amendments to the Referendum (Machinery Provisions) Act. Firstly, that the Yes/No pamphlet be delivered to each household only. Secondly, that the current limitation on government spending imposed by subsection 11(4) of the Act, be temporarily suspended until 2013 election day.

The amendments were in line with two recommendations put forward in December 2009 in a report by the Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No*. Recommendation 3 of this report, which was not supported by the Coalition, advised that the Yes/No pamphlet be delivered to each household rather than to each individual elector. Recommendation 11, which sought to remove the limitation on spending imposed by subsection 11(4) of the Act, had bi-partisan support. Submitters at the time stated "the restriction on Commonwealth expenditure is a barrier to the development of better and more effective referendum process. They argued that the limitation on expenditure should be lifted to allow advertising, information and education campaigns in addition to the Yes/No pamphlet.[3] There is no doubt that since the establishment of the Yes/No pamphlet in 1912, the development of new technologies offers many more opportunities to communicate and engage effectively with the public. However, in the amendments to the Act, as passed in Parliament on 17 May 2013, there was no reference to a stipulation that the equal funding for the Yes/No campaigns that were to be financed by lifting expenditure restrictions until election day, 2013.

The lack of qualifying details surrounding the amendments to the *Referendum (Machinery Provisions) Act* legitimised the options for abuse of the referendum process and, by proxy, the Australian people. The arguments put forward by the Government to justify the new legislation were, however, not supported by the details of a proposal.

In fact, there were no costings, modelling or strategy. The opportunity to scrutinise the vague amendments was curtailed as there was undue haste in passing the bill to ensure all would be in place come election day. There were also delays in communication between the Opposition and the Government which compromised effective debate and clarification of the proposed amendments. Members and Senators were asked to vote on an amendment to allow for education and advertising funds, with no defined details or indication of the Government's intentions. The poor approach to governance was noted by Shadow Special Minister for State, Bronwyn Bishop, during debate in the House of Representatives: "Although the committee in 2009 proposed that any additional expenditure be provided equally for the Yes/No case, there is no provision for that in this amendment."[4] The bill was dropped at short

notice, on the last day of sitting in the Senate, with only an hour's notice to the Opposition that the Government wanted it passed that day.

Whether by accident or design, the potential for the subversion of democratic intent was invested in the amendments. For a Government failing in the polls, heading to a certain defeat, the support of 562 local councils, their 4500 councillors, and their 145 000 staff through the proposed referendum which, if successful, would allow the Commonwealth to fund local councils directly, was too tempting. The Federal Government allocated $11 600 000 of public money to support the Yes campaign, while only $500 000 was allocated to the No campaign despite Members and Senators voting No to the referendum question itself.

The usual practice had been for equal funding if the vote in Parliament on the referendum question itself was not unanimous. The Joint Select Committee on the Constitutional Recognition of Local Government received many submissions on the methodology for funding the Yes/No case. The Australian Local Government Association submission proposed that funding for the Yes/No cases be allocated on the basis of the proportion of parliamentarians who voted for or against the referendum legislation. They reasoned that this would "be an equitable distribution of Commonwealth funding reflecting the will of Parliament",[5] flying in the face of evidence that on matters of constitutional change the will of the Federal Parliament rarely reflected the will of the Australian people or of the States. It flagrantly debases the core tenet of our Constitution that posits that the will of the Australian citizenry be demonstrated through any referendum process. The proportional funding suggestion was not taken up by the committee. It recommended education in a timely manner, public engagement through a variety of media, and negotiation with the States as the best method to ensure the success of the referendum.

A central precept of democracy is the concept of free and informed debate on issues of importance. In the 2009 report, *A Time for Change*, the democratic intention of the Yes/ No case is encapsulated in their statement: "The Committee considers it important to ensure that the same principles of equality and fairness continue to apply once the limitation on Australian Government expenditure is removed. The Committee therefore supports equal funding of the Yes/No cases, irrespective of their Parliamentary support. This is in line with the original intention of the Yes/No pamphlet as well as consistent with democratic ideals of informed debate." [6]

In 2009, the Rudd Government-controlled committee, reflected the original intent of the Yes/No document. Symptomatic of the Government's malaise was rejection of its own advice. The Government surprised the Parliament with the announced funding arrangements.

Various committees and their subsequent findings and reports marked the progression towards a 2013 referendum. The abuse of process involving committees, federal relations and the Parliament by the Rudd/Gillard governments in the lead up to the proposed referendum is highlighted by an overarching lack of action or engagement with standard procedures. An expert panel, appointed in August 2011, to examine the question of local government recognition in the Constitution delivered the final report to the Gillard Government in December 2011. In November 2012, almost a full year later, the Joint Select Committee on Constitutional Recognition of Local Government was appointed to deliver a preliminary report on the likelihood of success for the 2013 referendum. Their report was handed down only a month later, in January

2013.

It is important to note in the timeline towards failure the Gillard Government-controlled committee was supportive of a 2013 referendum provided that two conditions were met. Firstly, that negotiation between the Federal Government and the States was essential to achieving support for any proposed question. Secondly, that the Government needed "to achieve informed and positive public engagement with the issue."[7] Coalition members of the committee expressed concern about the integrity of the public consultation, "highlighted by the excessively rushed process this Committee has agreed to put in place, which includes the perverse outcomes of holding a hearing and the delivery of a preliminary report prior to the closing date for submissions!"[8] The abuse of process compromising the success of the proposal continued when Prime Minister Gillard, in January 2013, called the election for 13 September 2013.

Two months later the Committee on Constitutional Recognition of Local Government submitted its final report to the Government. On 21 March, with less than six months until the referendum, no public awareness campaign had begun, and many States had signalled their opposition. And yet the Gillard Government ambitiously, against advice, introduced the *Referendum (Machinery Provisions) Amendment Bill*. The evidence was stacked against the success of the referendum question. How would the Government rectify the obvious disadvantage its incompetence had brought to bear?

Ignoring recommendations and observations from their very own committees, the Gillard Government's chaotic legislative agenda extended from this abuse of the committee process to an abuse of federal relations. Garnering the support of all the States is vital to securing a successful referendum. Negotiations with States and territories had been recommended by committees and expert panels as early as 2011. In their preliminary report of January 2013, the Expert Panel on Constitutional Recognition of Local Government underlined the rudimentary nature of this process stating, "given the importance of securing state and territory support, the Committee further recommends, Commonwealth Government Ministers immediately commence negotiations with state and territory governments to secure their support for the referendum proposal".[9] Despite this urgent recommendation in response to the Government's tardy consultation and federal process, the minister delayed corresponding with the States until three weeks later, straining the success of the referendum even tighter.

This perplexing inattention to sufficient timing also marked the Gillard Government's referendum preparations on a parliamentary level. Important supporting information was withheld from the parliamentary process, creating a murky and disorganised forum for decision-making. A financial impact statement was not provided. Nor was a detailed proposal to support the bill. And the inexplicit wording of the amendment to "not prevent" the Government from expenditure in "respect of things done" in connection with referendum proposals up to election day, 2013, did not inspire overarching confidence.

Former local government minister, Anthony Albanese, attempted to assure the "conspiracy theorists" that the amendment was a "simple piece of housekeeping",[10] going on to insinuate that the Government was being generous in its allocation of funding for both cases. "The government has received advice that it was appropriate that we had proportionate funding in accordance to the support in the parliament for

the cases. However, we are going to err on the side of generosity and the government will offer up to half a million dollars to the proponent of the no case to assist it to promote the no case to the community".[11]

This is immediately problematic on two levels. Firstly, Mr Albanese in his grandiose announcement defined the Parliament as limited to the House of Representatives. Secondly, this plan goes against all the funding advice of the committee, which advocated equal funding for the Yes/No cases irrespective of the proportional parliamentary vote.

Six months earlier the Standing Committee on Legal and Constitutional Affairs acknowledged the tight timing, stating that *"further delays in the development of referendum materials by the AEC could impact the quality of these products which may result in uninformed votes."*[12] Given that all Australian citizens, whether they be actively interested or wholly uninterested, are required to vote. It is therefore highly desirable to have an informed public casting a considered vote on matters of constitutional change. Central to any referendum is the engagement of the citizenry in the question and the exhibition of public debate around the topic. Concerns that the impending referendum was not addressing an accessibly topical issue were raised by the Victorian Local Governance Association. Regarding the lack of public debate around this question, it observed: "*we think that the only way to secure a successful vote is to have the public understand this issue in a way that is meaningful for them – what is the impact for them directly as ratepayers and citizens? And if that campaign has not commenced then we are concerned about the timing?"* [13]

The ambiguity continued till the end. On 15 May 2013, Senator Jacinta Collins's comments demonstrate the Government had still to decide on a course of action, four months from the proposed date for referendum: "… the amendments contained in this Bill are necessary to keep open **the option** of holding a referendum at the next election" [emphasis added].[14] Coming from behind, against all advice, the only way to win was to stack the deck.

The ultimate casualty in the abuse of processes thus far demonstrated is the principle of democracy, the people of Australia and their representatives. The changes to the Act went against our egalitarian culture and notions of fairness. The changes allowed for disproportionate funding and discretionary spending of extravagant proportions.

There is no doubt of the truth that the people of Australia are sovereign and that Australia is an egalitarian nation built on principles of fairness and franchise. The duty of a government within this proposition is to support and extend this franchise by facilitating what is principled over what is expedient. The amendment to section 11(2), in sending material to the household only, restricts knowledge, whilst section 11(4), which no longer has effect post-election 2013, with its permissively undefined spending power, gives a government too much persuasive sway. Both of the amendments to the *Referendum (Machinery Provisions) Act* which passed the Senate in May 2013, without clarification, have the potential to affect the central position of the Australian citizenry as sole arbiters on how our federation is structured.

By pushing through the amendments to section 11, the Gillard Government was authorised to manipulate the dissemination of knowledge through the Yes/No campaign, and by so doing support their own agenda. Knowledge is inextricably linked to power. The dangers of government controlling the distribution of knowledge

to the public is well-documented throughout history. As Thomas Jefferson said, "If a nation expects to be ignorant and free, in a state of civilisation, it expects what never was and never will be".[15] It is deeply revealing that the Gillard Government intended to influence the outcome of the referendum through a selective apportioning of knowledge to the general public via their unequal funding system for the Yes/No cases and the reduced distribution of the Yes/No pamphlet.

When the former Government announced its proposed referendum funding, it was widely criticised for its departure from democratic principles. Adjunct Professor J. R. Nethercote of the Australian Catholic University invoked the wisdom of philosopher John Stuart Mill who argued that: "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind".[16] In questions of constitutional change, it is not up to government to back one side of the debate so disproportionately – in this instance, by a factor of 20. It smacked of "cheating" and the Australian public like nothing more than a fair fight. The Government was rightly criticised. The Australian Government should not silence an argument just because it is unpopular or not in their political interests.

Open and unbiased transmission of knowledge about the choice available is a government's duty to the population in referenda. Equality of funding is important because money means political influence. Money can buy advertising spots, printing fees, internet addresses and marketing campaigns. While it cannot buy political engagement, it can still have an impact, particularly on those who are less engaged.[17] The rise of the Palmer Party at the recent 2013 federal election is testament to this fact.

The future

It is imperative to ensure that the *Referendum (Machinery Provisions) Act*, specifically section 11, reflects our egalitarian culture and supports a fair go for both sides of an argument. Currently, if a Constitution Amendment Bill is passed unanimously, that is, where no member of Parliament has voted against it, there will not be an official "No" case presented to the public. This occurred in the referendums in 1967 on various matters affecting Aboriginals, and in 1977. The Yes/No argument takes franchise and ownership out of the people's hands and creates a function of elitist rule. This is not in keeping with our national tenets. Fully understanding the consequences and reasons for and against a change to the Constitution is an issue of great importance and should have full regard for the lives of those it affects. Thus, irrespective of parliamentary representation on the issue, equal funding for both cases should still be provided. The natural conservatism of human nature to "say no when in doubt," and the subsequent jeopardy to referendum success, must be counteracted by a vigorous and continuing public education campaign.

George Williams and David Hume see the prerequisites of successful referenda being bipartisanship, popular ownership and engagement, a sensible question and reform of the process in conducting referenda.[18] Whilst this question did have bipartisan support, at least at the beginning, the botched timing of process reform, the lack of popular ownership and engagement meant the matter of local government inclusion in the Australian Constitution failed for the third time, not even getting to the vote, despite money being spent and time and political capital being wasted.

In fact, fundamental to the effectiveness of any change to process is the need for

education of the public. It is their will that should be determined at the ballot box. A national civics education proposal that will improve knowledge and understanding of the Australian Constitution *has* bi-partisan support and must result in real action. Research suggests that only 76 percent of voters recognised that Australia has a Constitution. The necessity of co-ordinating an active and informed citizenry, constitutionally engaged, is foundational to genuine systemic improvements. The development of the National Curriculum may provide an opportunity in addition to ensuring it is a core facet of any teacher training program and a long-term plan of adult education.

From this base of political education, dissemination of referendum information to the public gains vitality. At the time of their introduction, the Yes/No pamphlets were innovative and necessary to inform the electorate about the two cases. However, as the commissioning of the report, *Time For Change: Yes or No*, pre-empted, it is time to ask what needs to be done to effect amendments that will preserve the original intent of section 11 of the *Referendum (Machinery Provisions) Act*, promote communication of impartial information to the public, and protect the Australian citizenry from attempts at hegemonic practices.

The preparation of clear, concise Yes/No arguments are an indispensable element of fair referenda. There are a variety of options for delivery of such information to suit the diversity of the public's needs and preferences. New technologies offer media that could be utilised to enhance the franchise and freedom of an electorate when approaching a referendum. The advancement of engagement strategies to incorporate minority groups is especially possible through technological options. The illiterate, the homeless, those with language barriers; all would be passed over by the arrangements for the Yes/No pamphlet, yet all could be reached and informed by an extension of information delivery options.

The need to disseminate information about the conduct and process of the referendum should be in addition to a publicly funded neutral information campaign about the issue itself. Objective information is difficult to define, but a non-partisan body which provided a clear description of both the pros and cons of any referendum question put before the people is an idea worthy of public spending, leaving the persuasive argument for the official YES/NO cases where it is clear that strategy will be to persuade and to convince.

In the face of a 96 percent failure rate of referenda questions, the ALP[19] must grapple with their desire for "progress" against the evidence of success in constitutional change. Parliament must discuss and resolve the issues of YES/NO campaign funding, civics education funding, examining the role of the States in any constitutional change and technological advancement in ways that keep people and States central to decisions, increasing engagement. Rather than rushing recklessly towards "good ideas", ensuring our systems and processes are suitable and effective will mean less waste of taxpayers' dollars. Similarly, repealing section 11(4), thus removing restriction on Federal Government spending, is desirable. In its place there should be a section that requires the development of a strategy and budget for communication, education and costs in conducting any proposed referendum. Holding referenda simultaneously with election campaigns increases the propensity for partisanship in the election environment and subsequent abuse of budget, process and the question itself. Holding referenda separately from elections, whilst more expensive

potentially, avoids the distraction of election debate. This would be beneficial when matters of constitutional change are before the people.

The abuse of the *Referendum (Machinery Provisions) Act* by the Rudd/Gillard governments is conclusive. The ramifications are grave whether it was enacted as an electoral distraction, as a result of minority government negotiations, as a strategy to garner support of local councillors and press, or whether it was simply the product of a government in disarray. This abuse was directly enabled by the amendments to the Referendum (Machinery Provisions) Act assented to on 17 May 2013. In seeking to secure indiscriminate and unregulated funding for the referendum, the Government was implicated in attempts to manipulate parliamentary numbers, and implement stronger, targeted, persuasive messaging for the Australian people. That the local government referendum died before the 7 September 2013 election was not because Parliament stood up, but because entrenched provisions in the Constitution stood in the way.

Over the course of our history constitutional change has been met with resistance. Our people are canny, suspicious of power, and know their own minds. They remain true to the spirit of our Constitution, even if at times parliamentarians do not. Amendments are required to the Act to keep the referendum process relevant to, and effective in, this advanced technological age whilst retaining the original intent of a fair fight in referendum votes. By combining a commitment to amending the Referendum (Machinery Provisions) Act and a long-term bi-partisan commitment to civics education, the principles of freedom and the sovereignty of the Australian people will be preserved.

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Chapter Twelve

Recognition
History yes, Culture no

Gary Johns

To those who want to have Aboriginal people recognised in the Australian Constitution I say, "relax, neither does anyone else get a mention". In case the proponents remain unpersuaded, however, it is important to have an alternative argument.

I proceed, therefore, on the assumption that a referendum to recognise Aborigines in the Constitution has a real possibility of success. The task is to draft a "Yes" case that eliminates the flaws of those on offer, which generally can be characterised as forms of "cultural" recognition. That is, they endeavour to describe the characteristics of a people.

The here-proposed history "Yes" case is that the mention of the historical fact that an Aboriginal people lived on the continent prior to its settlement by the British should be recognised in a preamble to the Constitution. Describing characteristics of Aboriginal people in the body of the Constitution, the cultural "Yes" case, should be opposed. The risk of the culture "Yes" case is that, while it may purport to seek protection for some individuals on the basis of particular characteristics, in doing so, it introduces group rights. Group rights are both inequitable and illiberal.

Group rights are inequitable because they increase the likelihood that people in similar circumstances will be treated differently. In 2013, Ernest Munda of Fitzroy Crossing was sentenced to seven years and nine months with a non-parole period of three years and three months for killing his wife. He complained to the High Court that his Aboriginality had not been sufficiently considered in mitigation. The High Court sent him away empty-handed because the law can and did take into account a person's circumstances in sentencing.[1] Recognising Aboriginal characteristics in the Constitution, however, may get Munda, but not others, even less time in gaol.

Group rights are also illiberal. The Constitution of Australia places limitations on government power. Group recognition may be used to protect some citizens from government actions, but inevitably government will use any extension of power to intervene in the lives of all. According to the Human Rights Commission, the Constitution contains no protections against racial discrimination and the Parliament is capable of suspending statutory protections. The Northern Territory Emergency Response in its original application, for example, was not subject to the *Racial Discrimination Act*. Recognition may improve the chances of stopping some allegedly illiberal acts such as the Emergency Response, but it is highly likely to increase government power to intervene in the lives of all other Australians, specifically through taxation, because all other Australians, including successful Aborigines, continue to pay for government programs. It is most unlikely that there will be fewer programs for Aborigines as a consequence of "cultural" recognition, and such programs are arguably the cause of much Aboriginal strife.

Above all, the culture "Yes" case would be an abuse of the Constitution as a legal instrument. As well as placing limits on government power over citizens, the Constitution is a guide to the distribution of powers and responsibilities among governments. It is not a guide to the distribution of powers and responsibilities among people. The Constitution is not a storybook; it is a rulebook, and every Australian should play by the same rules.

Should Aboriginal leaders reject the history "Yes" case, the Government would be faced with the following options and possible outcomes.

1. It could withdraw the offer to hold a referendum. In doing so, it would create the impression that Aboriginal leaders had a veto over the process, disenfranchising other Australians.
2. It could put the cultural case to a plebiscite. Many Australians would vigorously oppose the option at a plebiscite and, if it fails, the Government would be justified in letting the matter lapse. If it succeeds, the No case would be given time to gather its forces.
3. It could put the history case to a plebiscite. Depending on the result, the Government could proceed to referendum, or let the matter lapse. Australians, however, would not feel disenfranchised.
4. It could put both the "culture" and the "history" cases in a plebiscite. Depending on the result, the Government could proceed to a referendum, or let the matter lapse.

Other matters

The suggestion that the word "Aborigine" be substituted for the word "race" in Section 51(xxvi), as a way of maintaining Commonwealth powers to make laws in favour of Aborigines, is arguable. It is, however, unlikely to satisfy the desire for recognition. It could, nevertheless, be a further option, joined to the history "Yes" case.

I believe that all agree that Section 25 should be removed.

A new broad anti-discrimination provision recommended by the expert committee is a separate matter to recognition per se and should be debated on its merits. It should be not allowed to sneak in under cover of a recognition debate.

Political judgments

Those thinking of supporting a "No" case from the outset should be very careful because this referendum may succeed.

The group, *Recognise*, is the officially sanctioned propaganda arm of the Australian Government. *Recognise* self-promotes as "the people's movement to recognise Aboriginal and Torres Strait Islander peoples in our Constitution".[2] It is hardly a people's movement because *Recognise* is part of Reconciliation Australia which, despite being a charitable institution, is heavily funded by the Australian Government. In February 2013, Reconciliation Australia was promised $14.4 million for the next four years to assist in its task of, among other things, changing the Constitution.[3]

Those thinking of supporting the cultural "Yes" case should also be very careful because, as is likely, when the new Constitution fails to change Aboriginal lives for the better, the intended consequences, such as continued litigation to "close the gap", may be costly and ineffective and the unintended consequences, such as delayed recovery

by blaming others for behavioural problems, may be serious.

It will be the job of those arguing for the history "Yes" case (or, if forced to, a "No" case) to remind voters that Aboriginal despair will not be banished by constitutional change. The nation is not in need of healing, as advocates would have it. Rather, some people within the nation are in need of help. Constitutional change may well increase the chances that help will be in the form of separate rules and institutions, which are sure to isolate further the neediest Aborigines.

Few Australians would be unaware of the gap that exists between the prospects of some Aborigines and the rest of Australia across a host of measures. Data on crime and violence, however, seem to be most illustrative for our purposes. Constitutional change, for example, is unlikely to alter the fact that, in 2012, Aborigines constituted 60 percent of defendants in the Northern Territory higher court (excluding traffic offences), 69 percent of defendants in the magistrate's court and 76 percent of defendants in the Children's Court. Aborigines constitute 30 percent of the population of the Northern Territory.

The percentages in NSW for the three courts respectively were 12 percent, 13 percent, and 31 percent. The percentages in Queensland for the three courts respectively were 16 percent, 21 percent, and 40 percent.[4] Aborigines constituted between two to three percent of the NSW and Queensland populations.

Allowing for the facts that children aged less than 15 years comprised 38 percent of the total Aboriginal population compared with 19 percent in the non-Aboriginal population and that people aged 15-24 years comprised 19 percent of the Aboriginal population compared with 14 percent,[5] the number of Aborigines in the Children's Courts is shocking.

Furthermore, Aboriginal women are between nine and 16 times more likely to offend than their non-Aboriginal counterparts and Aboriginal men are between eight and 10 times more likely to offend than their non-Aboriginal counterparts.[6] These numbers may be under-reported because it is likely that a high proportion of violent victimisation among Aborigines is not disclosed to police. It also appears that around 90 percent of violence against Aboriginal women is not disclosed, nor most cases of sexual abuse of Aboriginal children.[7]

New Zealand and Canadian experiments in recognition

The proponents of Aboriginal recognition will use these statistics to press their case. They will find no joy in doing so, as both New Zealand and Canadian indigenous people have found no joy in recognition, at least in so far as escape from crime and violence is concerned.

In New Zealand, the Treaty of Waitangi of 1840, which, although not a powerful instrument, has nevertheless in recent years been given great effect. Through the *Treaty of Waitangi Act* 1975, the Waitangi Tribunal was set up to look at Maori grievances under the Treaty and a host of other legal measures.[8] Recent statistics indicate that Maori are more likely to be victims of violent crime than any other New Zealanders.

The rate of violence prevalent in New Zealand as measured by two surveys shows that Maori are more likely to be victims of violent crime that any other ethnic group in New Zealand. As a proportion of total violent victimisation, Maori suffered at between 160 and 180 percent and European and Asian around 90 percent. Pacific peoples were

around 100 percent.

Maori are also more likely to commit a crime than other New Zealanders. Relative to their numbers in the general population, Maori are over-represented at every stage of the criminal justice process. Though forming just 12.5 percent of the general population aged 15 and over, 42 percent of all criminal apprehensions involve a person identifying as Maori, as do 50 percent of all people in prison. For Maori women, the picture is even more acute: they comprise around 60 percent of the female prison population.[9]

The true scale of Maori over-representation is greater than a superficial reading of such figures tends to convey. For example, with respect to the prison population, the rate of imprisonment for New Zealand's non-Maori population is around 100 per 100,000. If that rate applied to Maori also, the number of Maori in prison at any one time would be no more than 650. There are, however, currently 4 000 Maori in prison – *six times* the number one might otherwise expect.[10]

Neither does Canada bring much joy to the recognition camp. The Canadian Constitution was amended in 1982 and 1983 to recognise "aboriginal rights". The *Constitution Act* 1982 recognised and affirmed the Aboriginal and treaty rights of Canada's Aboriginal people, who were defined as including Indians, Inuit and Métis (those of mixed ancestry). In 1983, the Act was amended to include rights that exist or might be acquired through land claims agreements and to state explicitly that Aboriginal rights are guaranteed equally for both men and women.[11]

Concentrating again on crime statistics, and only on the Inuit, the data on police-reported crime in a 2010 survey, almost thirty years after constitutional recognition, indicate that crime is, in the best-understated bureaucratese, "a significant challenge" in Inuit Nunangat, the Inuit autonomous region. Compared with the rest of the country, Inuit Nunangat has an overall crime rate that is six times higher and a violent crime rate that is nine times higher.

In Inuit Nunangat, rates of accused persons are very high for men aged 15 to 29, with more than four accused of every five young men. Women in Inuit Nunangat are more likely than women elsewhere in Canada to be accused of a criminal offence. The victimisation rate for women was 12 times higher in Inuit Nunangat than in the rest of Canada.[12]

Recognition in Canada appears to have failed the Inuit. I doubt the Indian and Métis have fared much better. The Queensland, NSW and Victorian State constitutions recognise characteristics of Aboriginal and Torres Strait Islander peoples. The culture "Yes" case has to prove that the changes it promotes would change Aboriginal lives for the better. The data for Queensland and NSW presented above suggests that, as with New Zealand and Canada, recognition appears to do no good.

Culture trap and group think

The cultural "Yes" case suffers from the assumption that there is a cultural solution and a group solution to the problems that befall Aborigines. Both assumptions are flawed.

Aboriginal culture was formed as a result of isolation from centres of innovation and civilisation. Indeed, it had a genius for survival in isolation.[13] Anymore complimentary description than that, however, is, with great respect, gilding the lily. Hunter-gatherer societies were among the most violent societies in human history.[14] Australian Aborigines were no exception to the rule.[15] To preserve a violent culture would seem

wholly unsavoury. Of course, culture cannot be preserved once isolation has been removed. Although Aborigines living in remote communities on their own land are the most "disadvantaged" of all Aborigines, isolation from the mainstream, especially with access that Aborigines have to modern communications, is no longer possible. More than 98 percent of 12 to 14-year olds access the Internet (the difference in participation rates between children living in major cities and remote and very remote areas of Australia was not statistically significant)[16] and there are more than 17 million subscribers with Internet access connections via a mobile handset in Australia.[17]

It may be possible to preserve a culture in stagnant or hermit societies, but it is not possible unless it thrives in an open society, as, for example, the Jewish culture and beliefs, which are consistent with commerce and learning. The pattern of behaviour often exhibited by Aborigines, mostly living in remote Australia, does not seem consistent with commerce and learning. If anything, the adaptation has been for the worse. It is also apparent, as my colleague, Ron Brunton, has pointed out, that at particular times Aborigines were not interested in passing on traditional practices and beliefs, nor were younger Aborigines keen to receive them.

In her book, *Race, Wrongs and Remedies: Group Justice in the 21st Century*, Amy Wax argues that while racial inequalities suffered by blacks in the US are the result of historical oppression, the remedies that follow from identifying the sources of racial injustice are unlikely to be found in group solidarity. American blacks as a group have continued to lag in educational and occupational achievement and have been plagued by the same problems as those that plague Australian Aborigines – high rates of criminality, drug addiction, family fragmentation and economic dependence.

The inability or unwillingness of black Americans and Aboriginal Australians to take advantage of changed societal attitudes hobbles progress towards racial equality. Those programs that focus on everything but the person fail, in Australian terminology, to close the gap.

As Wax argues:

> No one knows how to ensure that others make good choices or engage in constructive behaviour. Nor do we know how to make someone obey the law, study hard, develop useful skills, be courteous, speak and write well, work steadily, marry and stay married, be a devoted husband and father, and refrain from bearing children they cannot or will not support.[18]

Thinking in Australia has begun to shift toward behavioural management, especially following the imposition of income management as part of the Northern Territory intervention. A successful strategy for Aborigines who want to escape their poor lives is to escape the group. There are, for example, Aboriginal "traditional owners" in the Pilbara and Kimberley who have left "country" for town and fly in and fly out to regional mines. There may be solace in the group, but there is unlikely to be a success. It seems apparent that dysfunctional behaviour and the inadequate development of the person, not discrimination, are now the most important factors holding back Aborigines. There are different pathways to success, but few rely on change to the law, and none relies on constitutional change.

The ambit claim

The Labor Government hand-picked an "Expert Panel" to advise on changes to the Constitution to recognise Aborigines. The report of the panel to the Prime Minister in January 2012 recommended that Australians should vote in a referendum as follows:

1. That section 25 be repealed.
2. That section 51(xxvi) be repealed.
3. That a new section 51A be inserted, along the following lines:
   Section 51A *Recognition of Aboriginal and Torres Strait Islander peoples*
   > Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;
   >
   > Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;
   >
   > Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;
   >
   > Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;
   >
   > The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.
4. That a new section 116A be inserted, along the following lines:
   Section 116A *Prohibition of racial discrimination*
   (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
   (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.
5. That a new section 127A be inserted, along the following lines:
   Section 127A *Recognition of languages*
   (1) The national language of the Commonwealth of Australia is English.
   (2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.[19]

Rebuttal

There are three distinct elements in the panel's log of claims that require rebuttal: recognition of prior occupation; respect for culture, language and heritage; and the power to make laws for Aborigines.

Recognition of prior occupation is a reasonable aspiration, but it should not be placed in the Constitution. It would be difficult to predict the consequences, and the risk of future adverse interpretations is unacceptable. Rather, the aspiration should be accommodated by words being placed in a preamble to the Constitution. The substance of the suggested words, "Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples" is acceptable.

Future jurists would be hard pressed to imply any rights from these words, especially as they appear in a preamble and are expressly not part of the Constitution.

The option should be withdrawn if legal opinion judges that it is not possible to accommodate historical recognition in such a manner. It is important, however, to consider the matter and not to dismiss the possibility on the basis of any perceived risk.

Demonstrating "respect" by "acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters" and "respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples" are not acceptable.

Respect is a much greater leap into the idea of the character of a people than is recognition. "To respect" implies not only recognition, but also a deference. In deference to what, one may ask? Another culture, language, or heritage, and, if so, whose and what weight is to be attached? What degree of deference should be afforded? This is a journey of exploration on which no responsible person would embark.

It is not true to suggest that all people who claim Aboriginal heritage have "a continuing relationship with their traditional lands". As most Aborigines live in cities, it is not credible to assert that they have a continuing relationship to traditional lands. A tiny minority of Aborigines, perhaps as few as 5 000 though no more than 50 000 of the 500 000 who claim Aboriginal heritage, has successfully claimed native title.[20]

Australia has seen a recent example of the stultifying effect on free speech that occurs when a culture is given respect. *Herald Sun* journalist Andrew Bolt and his 2009 articles on light-skinned Aborigines have offended the gods of identity. The Federal Court found that Bolt and the *Herald and Weekly Times* contravened the *Racial Discrimination Act* 1975 (RDA) because the comments were not made reasonably or in good faith. They offended the sensitivities of those about whom the articles were written.

Cultural identity is arguable and should be discussed in a free and open manner. If not, then Australia is entering a world where Aboriginal people, especially those of light colour and claiming discrimination (or favours) based on their race, become a laughing-stock. All that happens under constitutional change is that Australians will get into trouble for laughing.

The expert panel was aware of the risk to the race powers by removing 51(xxvi). It advised new words both to forbid racial discrimination and preserve the Commonwealth's powers to make laws for Aborigines.

The new words are intended to entrench anti-racial discrimination in the Constitution, which is an altogether different matter to the recognition of Aboriginal culture and prior occupation. My advice to the cultural proponents is to keep the matters of recognition and anti-discrimination separate, as it is easy prey, given its bill of rights overtones, to a "No" case.

Conclusion

There is a real possibility that a consensus will form around a case to recognise Aborigines in the Constitution. It is essential to formulate a "Yes" case based on history, in order to forestall one based on culture.

The history "Yes" case is the most likely strategy to –

Forestall costly and ineffective as well as unintended and damaging consequences of the cultural "Yes" case

Provide historical accuracy
Assuage a sense of wrong among some, and
Do no harm.

A "Yes" case based on culture would be a retrograde step for Australian Aborigines, Australians, and the Constitution.

Endnotes

1. *Munda v Western Australia* [2013] HCA 38 (2 October 2013).

2. The term Aboriginal will be used to represent Aboriginal and Torres Strait Islanders.

3. Australian Government, "Continued funding for Reconciliation Australia", http://www.formerministers.dss.gov.au/13216/continued-funding-for-reconciliation-australia/ accessed 20 September 2013.

4. Australian Bureau of Statistics, *Criminal Courts, Australia, 2011–12*, Indigenous Status Data.

5. Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006*, 2010.

6. Lorana Bartels, *Indigenous Women's Offending Patterns: a literature review.* Australian Institute of Criminology, Research and Public Policy Series, 107. 2010, ix.

7. Australian Institute of Criminology, "Non-disclosure of Violence in Australian Indigenous Communities". *Trends and Issues in Crime and Criminal Justice, No. 405 January 2011*, 1.

8. Rt Hon. Sir Geoffrey Palmer QC, "Maori, the Treaty and the Constitution," *Maori Law Review*, June 2013.

9. Statistics New Zealand 2010, *Crime Victimisation Patterns in New Zealand: New Zealand General Social Survey 2008 and New Zealand Crime and Safety Survey 2006 compared*, 25.

10. Department of Corrections New Zealand 2007, "Over-representation of Maori in the Criminal Justice System: An Exploratory Report." *Policy, Strategy and Research Group*, 6.

11. Government of Canada, *Justice Laws.* http://laws-lois.justice.gc.ca/eng/const/page-16.html#docCont accessed 21 September 2013.

12. Mathieu Charron, Christopher Penney and Sacha Senécal, *Police-reported Crime in Inuit Nunangat*, Canadian Centre for Justice Statistics, 2010, 13.

13. Quoting Jared Diamond in Gary Johns, *Aboriginal Self-determination: The Whiteman's Dream*, Ballarat, Connor Court, 2011, 24.

14. Steven Pinker, *The Better Angels of Our Nature: A History of Violence and Humanity*, London, Penguin Books, 2011, 59.

15. Stephanie Jarrett, *Liberating Aborigines from Violence*. Ballarat: Connor Court, 2013.

16. Australian Bureau of Statistics, *Children's Participation in Cultural and Leisure Activities, Australia*, April 2012.

17. Australian Bureau of Statistics, *Internet Activity, Australia*, December 2012.

18. Amy Wax, *Race, Wrongs and Remedies: Group Justice in the 21st Century*, Maryland, Rowman and Littlefield, 2009, 37.

19. Report of the Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 2012, xviii.

20. See my paper on Native Title, presented at the 2012 Samuel Griffith conference.

Contributors

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