

1423

THE UNIVERSITY OF NEWCASTLE

UNIVERSITY CONSERVATORIUM HALL

NEWCASTLE, THURSDAY 20 MARCH 1997

THE FOURTH SIR NINIAN STEPHEN LECTURE

**CONSTITUTIONAL CENTENARY & THE COUNTING OF
BLESSINGS**

The Hon Justice Michael Kirby AC CMG

THE UNIVERSITY OF NEWCASTLE

UNIVERSITY CONSERVATORIUM HALL

NEWCASTLE, THURSDAY 20 MARCH 1997

THE FOURTH SIR NINIAN STEPHEN LECTURE

**CONSTITUTIONAL CENTENARY & THE COUNTING OF
BLESSINGS***

The Hon Justice Michael Kirby AC CMG**

SIR NINIAN STEPHEN & THE CONSTITUTIONAL CENTENARY

Has any Australian lawyer had a more glittering public career than Sir Ninian Stephen? There are few offices or honours that have eluded him. Knight of the Garter. Knight of the Order of Australia. Knight Grand Cross of the Order of St

* Adapted and updated after an address to the South Australian Chapter of the Constitutional Centenary Foundation, Bonython Hall, the University of Adelaide, August 1996.

** Justice of the High Court of Australia. President of the International Commission of Jurists. One-time Deputy Chancellor of the University of Newcastle.

Michael and St George. Knight Grand Cross of the Royal Victorian Order. Knight Commander of the Order of the British Empire. One-time Governor-General of Australia, Member of the Privy Council, Justice of the High Court of Australia, Justice of the Supreme Court of Victoria, Australian Ambassador for the Environment. And still at work for his country and the wider world: President of the Constitutional Centenary Foundation at home. Judge of the International Criminal Tribunal for the former Yugoslavia abroad.

Despite all these honours, sir Ninian remains a basically shy, modest and exquisitely polite human being: sensitive to his fellows, warm in praise and encouragement, devoid of pomposity or small mindedness. An expeller of duty and loved by his family and wise circle of friends.

Mind you, during his service at Government House, Canberra, his new guests were often astonished to feel a warm, unexpected moist and muzzling presence under the table - the Stephen family dog who lay in wait there for the unsuspecting. My slightly adverse greeting to this astonishing presence, when first encountered, was remarked upon when Sir Ninian, as Governor-General, inaugurated me, with many dubious expressions, into the office of Patron of the RSPCA Australia. I think he saw me as the Scrooge of the animal kingdom instead of its protector. In January 1997 at 5 a.m. he telephoned me in Bangalore, India to seek a reference on a past staff member of

mine - gladly and successfully given as I woke out of my dreaming. But save for these minor infractions I can think of not a single criticism of this distinguished fellow citizen after which this lecture series is named. I am honoured to be invited to deliver the fourth lecture in succession to my friends and colleagues, Justice McHugh, Chief Justice Gleeson and Justice O'Connor. I am specially glad to return to the University of Newcastle on whose Council I served twenty years ago and which has garlanded me with the honorary degree of Doctor of Letters that I am so proud to have. I am proud to be associated with its Law School, so long in gestation and with the *Newcastle Law Review* which is carving for itself an enviable reputation.

I have taken as my theme the Blessings of the Australian Constitution. I have done this in tribute to the work that Sir Ninian and his colleagues have performed and are performing in the Constitutional Centenary Foundation - striving to lift the national reflection the simplistic single issues that tend to delight the media and those who quest for simple themes as if in fear that the people of Australia are capable of nothing else.

Every day of my working life - and he did earlier - I now live with the text and spirit of the Australian Constitution. I was struck recently by a comment made by Sir Ninian in his capacity in the Centenary Foundation. It was a call to balance and proportion in our debates about our Constitution as we approach its centenary in less than four years time. It is right that, as a

free people, we should be considering the Constitution's faults and weaknesses - and the ways in which we can improve it and review it for the coming century. But it is also proper that we should consider its strengths as one of the six oldest written Constitutions still governing a nation and a people in a world of remarkable changes: so different from that which saw its birth in 1901. My call is not one to complacency or self-satisfaction. It is a call to honesty and balance and proportion - three characteristics which Sir Ninian Stephen has honoured throughout his long life of service to the people of Australia. They are characteristics we should all strive to emulate.

THE SUGGESTED DEFECTS

Let me start first with a few suggested defects - just to put what follows in context and to demonstrate that these are not words of pious self-satisfaction and complacency.

It would be unsurprising if there were not a catalogue of faults in the Australian Constitution. Just compare the different age in which it was drafted and the world of today. The year 1901 was one in which the British Empire was reaching its apogee. The penal settlements in Australia had changed themselves into rustic settler societies. Men of affairs controlled the colonial governments of Australia. For the most part, women's suffrage but was a distant dream. It was a time of White Australia, in which most of the immigrant settlers who

came to this land derived from the United Kingdom of Great Britain and Ireland. The Aboriginal and other indigenous peoples of the continent were generally regarded as uncivilised nomads. Their land was taken without compensation. Their culture was ignored or belittled. If they were not killed, they were all too often marginalised or promised complete assimilation. The fear of hordes invading from the north was ever-present in the colonial mind. Imperial preference in peace and the Royal Navy in war were the foundations of Australia's national security. Yet, in an astonishingly short time these settler societies had won for themselves self-government. They had busy, elected parliaments earnestly debating the statutes and issues of the day. They had established independent courts which reflected the legal traditions of "home". They had introduced innovations in industrial relations and in other spheres and had developed economic activity which had already won for the settlers one of the highest standard of living in the world.

Contrast that world with the world we live in, a century later. The composition of Australia's population is radically changed and rapidly changing. "White Australia" has been officially abandoned. An attempt, often faltering, to achieve a new accommodation with the indigenous people of Australia and

a correction of past injustices is reflected in the law¹ and in the policies of successive governments. The British Empire has completely faded away. Symbolically, its last substantial vestige, Hong Kong, is to be surrendered in little more than three months time. Imperial preference in trade has been replaced by strong trading links with the countries of the region and a commitment to global liberalisation of trading restrictions. A great network of international and regional institutions has sprung up to respond to the many problems which defy national solution and to the opportunities which demand global cooperation. Nuclear fission and information technology have revolutionised war. Our species has walked on the moon and now explores the outer reaches of space. Computers are linked across the world, integrating a million minds and defying national borders. Genomic research promises even the possibility of a redefinition of the human species. Cloning of human beings is seriously debated.

We should not, therefore, be surprised that many of our fellow citizens point to defects and call for change. Ten areas, in particular, may be singled out as the subject of the most

¹ *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1.

persistent and oft-repeated criticisms needing constitutional consideration:

1. **Aboriginals:** A number of commentators assert that the Constitution should be amended to reflect the special place in our nation of its indigenous peoples. As originally enacted, the Constitution even omitted people of the Aboriginal race from the powers of the Federal Parliament to make special laws with respect to the people of any race². That exclusion was repealed with the passage of the *Constitution Alteration (Aboriginals) 1967*³. However there is still no recital about the special position in Australia of the Aboriginal and Torres Strait Islander people who are descendants of the people who inhabited this land before the settlers arrived. Some advocates propose the inclusion of recitals which acknowledge the special position of the indigenous peoples. Others call for a constitutional "Treaty

² Australian Constitution, s 51(xxvi) as originally enacted.

³ Altering s 51(xxvi) of the Constitution. At the same time, s 127 of the Constitution was repealed which precluded the counting of "aboriginal natives" in reckoning the numbers of the people of the Commonwealth. See also *Commonwealth v Tasmania* (1983) 158 CLR 1; *Western Australia v Commonwealth (Native Title Case)* (1995) 183 CLR 373. On the topic of Aboriginal reconciliation, see W P Deane, Vincent Lingiari Lecture, reported *Canberra Times*, 23 August 1996 at 11.

of Reconciliation". Still others suggest the need for substantive provisions affording larger rights and constitutional compensation for past wrongs. These are controversial questions. They continue to trouble many Australians.

2. *The Crown:* The suggestion that all references to the Crown should be removed from the Constitution and that Australia should adopt a republican form of government is not entirely new. Indeed, there were advocates (a small minority) who suggested that approach to the Conventions which drafted the Constitution in the 1890s. There have always been a number of Australians who favoured the severance of links with the Crown of the United Kingdom. Only in the past decade or so have they commanded much popular support. Some of the recent advocacy for an Australian republic seems curiously outdated: at least when expressed in the form of appeals to nationalism: more in keeping with the 19th than the 21st century. But other, more rational, voices suggest that a change in this feature of the Constitution is but a natural next step in an historical evolution. For them, the process began with the surrender of all legislative and executive powers belonging to the United Kingdom in respect of Australia, now finally terminated by the *Australia Acts* of 1986. It progressed through the gradual termination of judicial powers with the end of Privy Council appeals from the High Court and

Federal courts⁴ and, finally, State courts⁵. Now the only avenue of appeal to the Queen in Council is that vestigial remnant in s 74 of the Constitution which is contingent on a certificate from the High Court, which the Court has said it will never again give⁶. These constitutional developments, allied with the evolution of the Crown's new role in the Commonwealth of Nations and the changing composition and full independence of the Australian nation and people, lead a number of the more thoughtful advocates of a republic to call for the final termination of the last formal link with Australia's colonial past, in the person of the Sovereign as Queen of Australia. Obviously, this is a subject for serious debate. The appeal of the simple proposition often appears to founder on the disagreements about the alternative arrangements to be put in its place; the untroublesome nature of the present system; and the established reluctance of Australians to

4 *Privy Council (Limitation of Appeals) Act 1968 (Cth)*; *Privy Council (Appeals from the High Court) Act 1975 (Cth)*; *Ex parte Attorney-General for Queensland* (1985) 159 CLR 461.

5 *Australia Act 1986 (Cth)*, s 11.

6 *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 159 CLR 461 at 465. See also *Attorney-General of the Commonwealth v T & G Mutual Life Society Ltd* (1978) 144 CLR 161.

alter their Constitution by referendum⁷. Perhaps we will all be wiser after the Convention which the Federal Government has promised to commence later this year.

The Crown is mentioned repeatedly in the Constitution. The form and structure of the document, as well as the history of its operation, are profoundly monarchical. This would not change by the mere erasure of references to "the Queen". It would then simply be a constitution providing for a constitutional monarchy without a monarch. Indeed, there is a tension in the Constitution, for a federation is inescapably republican in character. Once the Crown is divided in many parts and the people are included with the Crown in Parliament for the referendum procedure

7 Only eight alterations have been effected by the Constitution Alteration Measures on Senate Elections (1906); State Debts (1909); State Debts (1928); Social Services (1946); Aborigines (1967); Senate Casual Vacancies (1977); Retirement of Judges (1977); and Referendums (1977). On the topic of republicanism see A Abbott, *The Minimal Monarchy and Why it Still Makes Sense for Australia*, 1994; A Atkinson, *the Muddle Headed Republic*, OUP, 1993; M L Brabazon, "Mabo, the Constitution and the Republic" (1994) 11 *Aust Bar Rev* 229; Z Cowen, "The Legal Implications of Australia's Becoming a Republic" (1994) 68 *ALJ* 587; B Galligan, *A Federal Republic - Australia's Constitutional System of Government*, Cambr UP, 1996; Republic Advisory Committee (M Turnbull, Chairman), *An Australian Republic*, 1993; G Winterton, *Monarchy to Republic: Australian Republican Government*, OUP, 1994.

under s 128 of the Constitution, the ultimate foundation of the legitimacy of the Australian constitutional settlement may appear to be the people of Australia who approved the Constitution and whose concurrence is exceptionally required for any formal alteration⁸. Yet so powerful in the mind of the Australian people at the time the Constitution was established was the idea of monarchy, with its centralising forces coming together in a personal Sovereign, that the early federal notions, evinced in the original decisions of the High Court, soon gave way. The tendency to centralisation of power - a general feature of monarchy - continued to gather apace, at the cost of the federal elements in the Constitution. Centralisation of power is still a dominant characteristic of the Australian Constitution and it is monarchical and not federal or republican in its essential character. That could not be changed with a few verbal erasures.

3. **Parliament:** It is probably fair to say that there is less respect today for the institution of Parliament than existed at the time of Federation. In part, this is because of

⁸ Cf *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106 at 138 per Mason CJ; *McGinty v Western Australia* (1996) 69 ALJR at 239 per McHugh J.

disillusionment with the public performances of some Parliamentarians. But, in part, it is also a reflection of the loss of power from Parliament to the bureaucracy, to the judiciary and, particularly, to the Executive Government. Whilst the formal system of government in every Australian jurisdiction remains parliamentary, the realities have everywhere enhanced the power of cabinet, and especially of the head of government. This feature of modern realities is every day given emphasis by media coverage of political affairs. There is a widespread feeling that problems are now too complex for a representative Parliament of lay-people who often appear to concentrate their attention upon simple, symbolic issues associated with the race for office rather than the hard business of government when office is won.

4. *No Bill of Rights:* Then there is the absence of a general Bill of Rights. True it is there are particular rights guaranteed by the terms of the Australian Constitution. But Justice Dawson was clearly correct when he pointed out that the Founders of the Australian Constitution deliberately rejected the proposal to include a Bill of Rights, believing that the better safeguard for the liberties of

Australians would be found in a democratic Parliament⁹. Such guarantees as existed in the Constitution, save for that found in s 92¹⁰ have often attracted a rather narrow construction from a High Court respectful of parliamentary democracy and, until lately, unaccustomed to the jurisprudence of basic rights¹¹. Australia is now one of the few nations of the world without a constitutional charter of rights. Even the United Kingdom has a kind of charter in the *European Convention on Human Rights and Fundamental Freedoms*. Although not incorporated into domestic law, that Convention can afford an avenue of redress by citizens of the United Kingdom through proceedings in the European Court of Human Rights¹². It

⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 186. See also 133-134 (per Mason CJ) and *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 193. Note *Cunliffe v Commonwealth* (1994) 182 CLR 272, 361; *McGinty v Western Australia* (1996) 70 ALJR 200 at 215.

¹⁰ Guaranteeing freedom of trade, commerce and intercourse among the States. See now *Cole v Whitfield* (1988) 165 CLR 360.

¹¹ See eg *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 581-582; *Kingswell v The Queen* (1985) 159 CLR 264. Cf *Cheatle v The Queen* (1993) 177 CLR 541 and P Hanks, "Constitutional Guarantees" in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives*, Law Book Co, 1992 92 at 98-100.

¹² See N Lyall, "Whither Strasbourg - Why Britain should think long and hard before incorporating the European

can also affect local judicial decisions¹³. In Australia, the High Court has found implied constitutional rights, which are derived from the democratic character of the polity established by the provisions of the Constitution¹⁴. International human rights treaties to which Australia is a party have come "inevitably"¹⁵ to affect the content of Australia's domestic law. In these circumstances, proponents of constitutional change urge that a more modern, democratic and honest way to enshrine basic rights is now to adopt a constitutional Bill of Rights given legitimacy by the approval of the people. Proponents fear that such a proposal would founder on the rock of constitutional conservatism. Opponents fear the politicisation and excessive empowerment of the judiciary at the expense of the other, more accountable, branches of government.

Convention on Human Rights into domestic law" (1996) 18 *Liverpool Law Review* 115.

- 13 See eg *Derbyshire County Council v Times Newspapers Ltd* [1992] 1 QB 770.
- 14 See eg *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v The Herald and Weekly Times Limited & Anor* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211. But see J Miles, "The end of Freedom, Method in *Theophanous*" (1996) 1 *Newcastle LR* 41.
- 15 *Mabo v Commonwealth [No 2]* (1992) 175 CLR 1 at 42.

5. ***Federal weaknesses:*** Within a federation, it is inevitable that there will be debates about the distribution of powers between the national and the sub-national areas of government. These debates accompany political life in every federation. Critics take to task both the heads of power settled in 1901 and the interpretation of the approach to the constitutional grant of power to the Federal Parliament which was established in the *Engineers' Case* in 1921¹⁶. As a result of this constitutional approach, the federal character of the Constitution was weakened significantly. No implication, derived from federation itself, could stand against a clear grant of power to the Commonwealth. Advocates of federalism urge a reassignment of powers to enhance those of the outlying governments. They are specially concerned about the diminishing avenues of State revenue which have a potential to erode the viability of the surviving functions of State governments. The failure of the Constitution to provide clearly for the democratic character of State governments¹⁷ is also said to be a weakness which

¹⁶ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1921) 28 CLR 129 affd (1921) 29 CLR 406 (PC).

¹⁷ Cf *McGinty v Western Australia* (1996) 70 ALJR 200 (HC).

requires attention before any redistribution of powers from the centre can be contemplated.

6. ***Local government:*** Local government is not mentioned in the Constitution although it long preceded the establishment of the Commonwealth of Australia. There are some advocates of change who contend that a proper redeployment of power within Australia should be between the federal Parliament and government and local government, bypassing the States. If this seems too adventurous for a nation which has been described as "constitutionally speaking, a frozen continent"¹⁸, the recognition and protection of the democratic character of local government could be an appropriate reform which would have many supporters.

7. ***International treaties and external affairs:*** One area of acute concern in several quarters has been the effective expansion of the power of the Federal Parliament by the making of laws with respect to external affairs¹⁹. Fears

¹⁸ G Sawyer, *Australian Federalism in the Courts*, Melbourne, Melbourne University Press, 1967 at 208.

¹⁹ s 51(xxix). See *Victoria & Ors v The Commonwealth*, (1996) 70 ALJR 680 (HC).

are often expressed that this head of power, allied with international treaties dealing with topics hitherto the subject of State law, may be used to undermine the federal compact and to redistribute power to the Commonwealth's advantage without the "irksome" necessity to secure the approval of the people. Concern about the direction of international treaties, ratified for Australia by the federal executive, came to a head after the decision of the High Court in *Teoh v Minister for Immigration and Ethnic Affairs*²⁰. The decision produced State legislation purporting to afford relief from some of its implications²¹. A Bill introduced into the Federal Parliament designed to overcome the effect of the decision lapsed with the prorogation and dissolution for the 1996 general election²². The new Federal Government announced proposals which will afford the Federal Parliament a greater role in the scrutiny of international conventions, with their now clearly revealed scope for affecting Australian domestic law²³.

20 (1995) 183 CLR 273.

21 *Administrative Decisions (Effect of International Instruments) Act* 1995 (SA).

22 *Administrative Decisions (Effect of International Instruments) Bill* 1995 (Cth).

23 Australia, Department of Foreign Affairs, *Treaty Making Reforms*, May 1996.

Critics of the Constitution urge the adoption of a clear break on the power of the Federal Executive to ratify international treaties without the concurrence of the States or at least of the Senate established to reflect State diversity. Some even urge the need to secure the approval of the Parliament as a whole. This is one area where the growing influence of globalisation and regionalisation are not reflected in a constitution drafted in a different age. Yet its adaptation by court decisions has sometimes, in effect, altered the distribution of powers, reducing not merely the powers of the States under the Constitution but also the prerogative of the Australian people to approve or disapprove such changes.

8. *The judiciary:* The growing appreciation of the importance of the High Court of Australia in determining the federal balance, and in the general development of the law, has led to demands, strident of late, for constitutional controls upon the appointment of Justices of the High Court and of other Australian courts. Whilst the spectacle of congressional hearings, such as attended the nomination to the United States Supreme Court of Judges Bork and Thomas seem out of place and even undesirable in Australia, some public scrutiny of the opinions and attitudes of judicial appointees is said to be appropriate, given the great power which Justices of the High Court, in particular, enjoy, once appointed. By their decisions they

may affect the very nature of the society we live in. So long as the rhetoric of the declaratory theory of the judicial function was accepted, such democratic scrutiny was considered inappropriate. Alternatively, it was sufficiently satisfied by the appointing function of the Executive, answerable to Parliament. But once it became plain, and generally acknowledged, that judges in deciding cases have choices and are not engaged in a purely mechanical function (least of all in constitutional controversies) appointments to the judiciary - and especially the High Court - become more arguably a matter of legitimate political interest. Moreover, the qualities appropriate to appointment become more debatable. The notion that lawyers skilled in the traditional areas are necessarily the most suitable to have a seat on the High Court becomes rather more controversial.

9. *Outside power:* There is a growing recognition that changes in the realities of the world in which the Constitution operates affect the capacity of the Australian political system it establishes to afford good government to the Australian people. Transnational corporations, the international market in capital and global media operate, to a large extent, beyond the power of the governments of any but the most significant nations. What can be done about this increasingly important feature of the world we live in is unclear. Perhaps it merely underlines the

diminishing significance of the nation state, and the constitutions by which they live. As governmental and regulatory powers increasingly pass to international agencies, it becomes imperative that a national constitution, such as Australia's, should reflect the realities of the regional and global environment to which Australian institutions must respond and which they must try to influence.

10. ***Difficulty of change:*** There is finally the obstacle of the mechanism for change of the Constitution. Very few amendments have secured the majorities required by s 128 for a valid alteration. This number is even smaller when it is remembered that three of the eight proposals approved by the necessary majorities were adopted on the same occasion in 1977. Critics suggest that the requirements for formal change are too burdensome and that this is part of the reason for the pressure to adopt an expansive interpretation of the Constitution, out of recognition of the fact that formal amendment is next to impossible. A simpler procedure, combined with community education in the merits of regular constitutional change, are said to be the path proper to a people who take their own responsibility for modernising and reforming their basic law. It is to the people, rather than judges, that we should look in the future as we adjust the centenary Constitution

to the rather different nation and circumstances it must serve in the century to come.

I trust that I have done justice to some of the major demands for constitutional change in Australia. Others exist. They include the position of the States, the system of responsible government envisaged by the Constitution (claimed to be the "big mistake" of the Constitution²⁴) and the demand for a more appropriate and realistic reference to the public service than exists in the antique fiction that they are merely part of the Executive power vested in the Governor-General as the Queen's representative²⁵. Some of the language²⁶ of the Constitution is assailed as outdated, inappropriate and misleading. Some of the bright ideas enshrined in the Constitution are now, effectively a dead letter²⁷. Some transitional provisions are clearly spent. They could be tidied up without offence to anyone²⁸. But these are trifles. The basic system of government established by the Constitution endures. It is this achievement which deserves

24 H Evans, "Reflections on the Founders", Australian Parliament, *The House Magazine*, 1 March 1995 4 at 8.

25 Australian Constitution, s 61.

26 See eg *ibid*, 58, 59, 60.

27 See eg s 101 (Inter-State Commission).

28 See eg ss 69, 70, 95.

recognition. In my view it merits celebration at the very time that, as a free people, Australians contemplate the changes that might be needed to adapt the Constitution to the future.

INSTITUTIONAL ADAPTATION

Given the great changes which have occurred since the establishment of the Commonwealth, it has been imperative that the institutions created by the Constitution should adapt. And adapt they have.

1. ***The Crown:*** At the time of federation, it was the decision of the people to whom the Constitution was twice submitted for a vote, to federate "under the Crown of the United Kingdom of Great Britain and Ireland"²⁹. Recent research has shown that the Founders, who participated in the debates of the Convention, were by no means rabid imperialists. They rather liked old Queen Victoria, who had been on the throne for most of the century.

Over the century, the Crown in Australia, as in England, has normally performed its duties as the people's

29 Preamble to the covering clauses of the Constitution.

representatives advised. So it was when Governor Strickland, under Royal instruction, extended the duration of the New South Wales Parliament in 1916. He was then relieved by the King for his initial hesitation³⁰. So it was when King George V accepted, reluctantly it is true, the insistent advice of Prime Minister Scullin that Sir Isaac Isaacs, an Australian, should be appointed as his representative and Governor-General³¹.

King George V gave his assent to the Statute of Westminster enacted by the United Kingdom Parliament to confirm the complete legislative independence of the self-governing dominions of the Crown. King George VI assented to the *Statute of Westminster Adoption Act* 1942 (Cth) by which it was enacted that no Act of the Parliament of the United Kingdom, passed after the commencement of the Act, should extend or be deemed to extend to a dominion unless expressly declared in that Act that the dominion has requested and consented to such enactment³².

30 H V Evatt, *the King and His Dominion Governors*, London, OUP, 1936 at 146-152.

31 See P Hanks, *Constitutional Law in Australia*, 1991 at 140.

32 *Statute of Westminster*, 1931 (UK), s 4.

It is in the reign of the present Queen that the most significant changes affecting the Crown in Australia have occurred. Soon after her accession, she approved her separate designation as Queen of Australia³³. A separate Australian Crown was clearly established. In 1984, the Queen revoked the Letters Patent issued by Queen Victoria in October 1900 relating to the office of the Governor-General of the Commonwealth of Australia. She issued new Letters Patent, more modern in form and more appropriate in content, doing so on the advice of her Australian ministers³⁴. In 1986, in Canberra, the Queen gave the Royal Assent to the *Australia Act* 1986 (Cth). She assented to an Act of the same title enacted in substantially identical terms by the United Kingdom Parliament³⁵. Amongst other things, these statutes finally terminated the remaining appeals to the Privy Council, save for the vestigial residue in s 74 of the Constitution already

33 *Royal Style and Titles Act* 1953 (Cth). See R D Lumb and G A Moens, *The Constitution of the Commonwealth of Australia*, 5th ed at 10-11.

34 Letters Patent relating to the office of Governor-General of the Commonwealth of Australia. 21 August 1984 in Australia, *The Constitution*, Canberra, AGPS 1986, 42-45.

35 1986 c 2. See discussion Lumb and Moens, above n 32 at 13-14.

mentioned³⁶. They repeated the termination of the power of the Parliament of the United Kingdom to legislate for Australia. They restated³⁷ the requirement that the Parliaments of the States must act in the manner and form required by law³⁸. They entrenched and clarified the role of State Governors as representatives of the Queen³⁹.

Although the Crown and its representatives retain the traditional privileges of a constitutional monarchy (to be consulted, to advise and to warn) the convention has been that they invariably act in accordance with the advice of their Ministers. It is perhaps ironic that the reason often advanced as to why the events of November 1975 damaged the position of the Crown in the Australian Constitution is precisely because what happened contrasted so strongly to the usual reticence of Crown representatives and departed from the traditions of candour and transparency which have otherwise marked the modern relations in Australia between representatives of

36 *Australia Act 1986 (Cth)*, s 11.

37 *Ibid*, s 1.

38 *Id*, s 6.

39 *Id*, ss 7, 8.

the Crown and the elected government. There are rational arguments for the system of government which constitutional monarchy establishes - barring ex-politicians (or for that matter ex-judges) from the position of Head of State. In some ways the very absence of the Head of State from Australia creates a system which appeals to some. At the least the system, as such, has overwhelmingly performed as duty - not personal ambition or self-interest - required. We may change it. But we should at least make ourselves aware of its paradoxical strengths before we do.

2. ***Parliament:*** The Parliaments of Australia have also adapted to changing times. Under the Constitution, the Australian Parliament contained two features which were unique when they were adopted. The first was the provision for direct election of the members of the Senate. This is still not the case in Canada. Only later was it adopted in the United States. The second is the provision for the resolution of conflict between the Chambers found in the provisions in s 57 of the Constitution⁴⁰.

40 See *Cope v Cormack* (1974) 131 CLR 432.

Attempts have been made to win back popular confidence in the Houses of Parliament, notwithstanding the modern ascendancy of the Executive. House and particularly Senate Committees, by diligent work avoiding the worst excesses of partisan politics, have won, especially for the Senate, a respected and important role in federal government in Australia. The Senate is a deliberate break on majoritarianism which only the naive now believe constitutes the definition of a modern democracy. Although the Senate has not become, as such, a House of Parliament representing the States, it has ensured that the diversity of viewpoints reflected in all parts of this very large nation may provide a balance to the force of numbers reflected in the House of Representatives. Moreover, the Senate has become a Chamber in which political viewpoints, which do not always embrace the two major political groupings in the nation, can have their say. This is doubtless viewed by some as a an irksome check on firm government and democratic mandates. However, because the Senate is itself elected, it is seen by others as the protector of diverse points of view. It has helped to ensure that our national Parliament is so much more effective in preserving and reflecting the diversity of the federation than, say the Canadian Parliament in Ottawa.

In addition to specialist committees, the parliamentary innovations for the scrutiny of Bills and of subordinate

legislation have been pioneered by the Australian Parliament. Parliament has also established statutory guardians to help it in the performance of its own functions. The traditional office of Auditor-General, is now supplemented by the Ombudsman, the Australian Law Reform Commission, the Human Rights and Equal Opportunity Commission and other bodies which assist and stimulate the work of the legislators. They, in turn, have promoted administrative reforms for the assurance of lawfulness, fairness and general reasonableness in the activities of the bureaucracy⁴¹. To observe how far the Federal Parliament, under the same Constitution, has developed in the course of the century, one need only compare the size, subject matter and variety of the federal legislation in the early years of the Commonwealth with the enormous output of lawmaking which exists today. It is difficult to conceive how an effective response could have been offered to the acute challenges of war and peace that have occurred in the century, without a national Parliament enjoying large powers.

41 M D Kirby, "The AAT - Twenty Years Forward", unpublished paper, Australian National University, July 1996.

3. ***The judiciary:*** In 1902, introducing the Bill which became the *Judiciary Act*, Alfred Deakin declared that:

"The Constitution is the supreme law. The High Court determines how far and between what boundaries it operates. It is the Court which decides the orbit and boundary of every power".

There is no provision in the Constitution which reserves to the High Court the power of judicial review which it has exercised since its establishment. As in *Marbury v Madison*⁴², this has just been a constitutional power accepted as inherent in a federal system of government itself. It is necessary to have an umpire. From the first, the High Court of Australia established its independence and authority as the guardian and expositor of the Constitution. It recognised from the earliest days that constitutional interpretation required techniques which were different from those developed for other judicial tasks of interpretation⁴³. Justice Isaacs in *The Commonwealth v Kreglinger*⁴⁴ pointed out that the Constitution was "made

42 (1803) 1 Cranch 137. See K Booker, A Glass and R Watt, *Federal Constitutional Law - An Introduction*, Butterworths, 1994, 324-337.

43 *Jumbunna Coal Mine v Victorian Coal Miners' Association* (1908) 6 CLR 309, 367-8. See K Booker, A Glass and R Watt, *ibid*, 54.

44 (1926) 37 CLR 373.

not for a single occasion but for the continued life and progress of the community". He stated that its meaning was to be derived from the "silent operation of constitutional principles". Similarly, Justice Windeyer in *Victoria v The Commonwealth*⁴⁵ explained that because the Constitution was the fundamental law of the land its "interpretation ... may vary and develop in response to changing circumstances".

As the century progressed, and the formal inflexibility of the Constitution became clearer with each defeated referendum proposal, it became obvious to every Australian, including the Justices of the High Court, that a broad construction of the Constitution was necessary if its words were to have any hope of adapting to the complex commercial, economic, social and political changes which were occurring in the nation⁴⁶.

The examples of the adaptation by the Court of the constitutional powers devised in an earlier age for later needs, are legion. The best known involve the expansion

45 (1970) 122 CLR 353.

46 *Tasmania v Commonwealth* (1985) 158 CLR 1, 221 (per Brennan J).

of the power with respect to industrial conciliation and arbitration⁴⁷; external affairs⁴⁸; corporations⁴⁹; and the large expansion of the postal powers to embrace successively broadcasting⁵⁰ and television⁵¹. In time of war, the defence power was given a larger ambit to meet the vital need to ensure the very survival of the nation⁵². As the power and responsibilities of the Federal Parliament and Government expanded, so did the powers of federal taxation⁵³.

-
- 47 See eg *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297.
- 48 See eg *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; cf *Victoria v Commonwealth*, High Court, unreported, 4 September 1996.
- 49 *Strickland v Concrete Industries (Monier) Ltd* (1971) 124 CLR 468. Cf *New South Wales v Commonwealth* (1990) 169 CLR 482.
- 50 *R v Brislan; Ex parte Williams* (1935) 54 CLR 262.
- 51 *Jones v Commonwealth* (1965) 112 CLR 206.
- 52 *Farey v Burvett* (1916) 21 CLR 433. Cf *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43, 83.
- 53 See esp *First Uniform Tax Case* (1942) 65 CLR 373; *Second Uniform Tax Case* (1957) 99 CLR 575; *Commonwealth v Sigamatic Pty Limited* (1962) 108 CLR 372.

Yet for all this, it is sometimes more important to study the cases involving the denial of power and the assertion of authority to appreciate the impact of the High Court's decisions on the character of government in Australia.

The decision of the Court in the *Communist Party Case*⁵⁴ was certainly one of its most noble moments. By a majority of six Justices to one⁵⁵, the Court struck down as unconstitutional the *Communist Party Dissolution Act* 1951 (Cth). The decision came in the midst of what can now be seen as hysterical public and media concern about communists in Australia. The decision saved Australia from the legal excesses which manifested themselves at the same time in the United States of America, South Africa and other countries.

The Court has also vigilantly defended its authority whenever it was seriously challenged. Anyone in doubt should read the transcript of the exchanges with counsel recorded in *Tait v The Queen*⁵⁶.

54 *Australian Communist Party v Commonwealth* (1951) 81 CLR 1.

55 Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ; Latham CJ dissenting.

56 (1962) 108 CLR 620 at 623-627.

The Constitution creates, or envisages, at the one time, the stable, unelected elements of government (the Crown, the civil service, the military and the judiciary) and the impermanent but elected elements (the two Houses of Parliament; the Ministers of State who are to be Members of the Parliament⁵⁷ and, in the exceptional case of a referendum under s 128 of the Constitution, the whole body of the electors, representing the people of Australia). This is a complex mixture of authority and democracy, of permanency and impermanency, of paradoxes, fictions, conventions, practices and law. By the world's standards, it works remarkably well.

BLESSINGS REMEMBERED

So what can we say are the chief blessings of the Constitution as its centenary approaches? Just to survive and endure a hundred years - even so turbulent a century as that past - is not enough. That our country is still governed under a Constitution devised in a different time could theoretically be as much a commentary on lethargy and indifference to the needs

57 Australian Constitution, s 64.

for reform as on the value of the system of government which the Constitution puts in place. As to the missing ingredient of excitement as the centenary approaches, perhaps this is because the imperial power which formally granted the Constitution was, by that time, no tyrant. The evolution of the Constitution owed more to the work of earnest, middle-aged, male settlers and their descendants than to the revolutionary patriots who called forth the Constitution of the United States⁵⁸.

Few Australians can name the Founders of our federal Constitution. Once they get past Parkes, Barton, Deakin, Griffith and perhaps Kingston and Isaacs, most Australians are stumped. There are few memorials to the Founders. Selected suburbs of Canberra record some of their names. A University in Queensland is named after Griffith. But little else records the people whose efforts secured the Australian Constitution, save for that instrument itself and the fact that it is still the basis of Australia's government.

58 G Craven, "The Founding Fathers: Constitutional Kings or Colonial Knaves?" in *Australian Parliament, Parliament and the Constitution - Some Issues of Interest*, Papers on Parliament No 21, December 1993, 119, 121. See also B de Garis, "How Popular Was the Popular Federation Movement?", *loc cit*, 101. As to the Founders, see R R Garran, *Prosper the Commonwealth*, Angus & Robertson, 1958 at 112.

Objectively considered, many of the Founders were people of remarkable talent. They numbered three Prime Ministers (Barton, Deakin and Reid), one of whom, Deakin, is undoubtedly one of the greatest of our national leaders. There were 33 participants in the Conventions who were, had been, or later became Premiers of the States. There were two Chief Justices of Australia (Griffith and Isaacs). There were several Justices of the High Court and of the State Supreme Courts. They were fine drafters. If the language of the Australian Constitution is not considered inspiring, it at least has the merit of brevity. Surveys show that, as a document, its content is completely unknown to most citizens. Yet its principles work silently and rarely impinge upon the consciousness of the people governed under it. Many are the peoples of the world who would value such a tranquil constitution.

What are the features of the Australian Constitution which we should chiefly celebrate? There are, I suggest, ten at least which deserve our consideration:

1. ***Securing a nation:*** By the Constitution, Australians established a nation. They established a federation in a continental country which has survived a century of unstable national borders. If we look around the world today, we see the breakup of nations, particularly of federal states. The Union of Soviet Socialist Republic, Yugoslavia and Czechoslovakia have split asunder.

Australia has done better than Canada and the United Kingdom because its Constitution recognised from the start the need, in a large and diverse country, to share the central and the outlying power. Our federal arrangements have their weaknesses. But no-one seriously suggests that the solution is the dissolution of the nation.

2. ***Stability and change:*** We share with other stable democracies, the United Kingdom, the United States, Sweden, Switzerland and Canada constitutional arrangements within which change, reflecting the popular will, can be readily accommodated. Stability in itself may be no boast. The laws of the Meeds and Persians were inflexibly resistant to change. But the secret of the success of the Australian Constitution has been its adaptability. Other lands, with longer histories, have seen their constitutions changed by war and revolution. Our stable constitution, and the strong institutions which it establishes, has provided Australia with the foundation upon which political, business, legal and social affairs can be ordered with the assurance that the fundamental features of society will not be changed by political whim or by the unstable exercise of power.

3. ***Rule of Law:*** The Constitution enshrines the rule of law throughout Australia. It is upheld by all the courts and supervised by the one national and federal supreme court:

the High Court of Australia⁵⁹. The independence of the judiciary, protected in the High Court and in the federal judiciary by constitutional control over removal⁶⁰ ensure that judges will act, with neutrality and courage, separately from the other branches of government. Far from the rule of law becoming weakened with the complacency of a century of our constitutional government, recent decades have seen an enlargement in the facility of judicial review, both by the common law⁶¹ and by statutes enacted by the Federal and State Parliaments⁶². No-one is above or outside the law in Australia. In practice it may often be inaccessible to citizens. When found, the law may sometimes be in need of reform. But, in the end, high and low are subject to its rule which is enforced by independent courts which are uncorrupted and highly trained. Cases are not decided in Australia by telephone

59 Australian Constitution, s 71. Cf N M Stephen, Remarks on receiving an Honorary Degree (1986) 15 *Melb Uni L Rev* 746 at 747.

60 *Ibid*, s 72. See now as to State Supreme Courts *Kable v Director of Public Prosecutions (NSW)*, (1996) 70 ALJR 814 (HC).

61 K Booker, A Glass and R Watt, *Federal Constitutional Law - An Introduction* (above) 324ff. But cf *Craig v South Australia* (1995) 69 ALJR 84.

62 *Administrative Decisions (Judicial Review) Act 1977* (Cth).

calls to judicial officers on the part of powerful people. Yet this is the reality of the exercise of power in the wider world in which most people live.

4. ***Democracy:*** The Constitution enshrines the features of our representative democracy. Governments are peacefully changed by the vote of the people in elections conducted with integrity. It is a blessing we mostly take for granted to be a citizen of a free country and to live through a peaceful change of government. All the trappings of power change. The conventions are not challenged. Moreover, the fact that leadership of the nation *can* change means that ideas constantly compete for the acceptance of the people. In turn, this means that our society is faced at all times with new ideas competing for the people's support. Autocracy tends to be closed to new ideas. Our Constitution provides the governmental, legal and social environment in which ideas may flourish.
5. ***Federal government:*** The elected Senate ensures a break on unbridled majoritarian rule by ensuring that a different balance may be present in the Parliament. Senators are elected by the people in the scattered communities over the face of the continent. Minority viewpoints can be, and are, represented. The essence of a modern democracy - a reflection of majority will tempered by respect for minority

interests - is better achieved in our federal arrangements than in most others.

6. ***The civil service:*** Our country has been well served by a talented, well trained and uncorrupted civil service. We are still a nation that is shocked by corruption in office when it is revealed. We have not embraced the notion that corruption is a way of life or a mollification of rigidity of laws or administration. The tradition that the civil service faithfully and loyally works within the law to serve whichever government the people elect is deeply embedded in our constitutional traditions.

7. ***The armed forces:*** Similarly, our armed forces are small in number, non-political in tradition and subordinate to the civil power. The command of them is vested in the Governor-General as the Queen's representative⁶³. This fact symbolises their loyalty to the people of the nation, rather than to transient government. True, the Governor-General will act on the advice of Ministers. But the armed forces are not, in their self-concept or in law, the servants of any political power. Australia's strong tradition of a

63 Australian Constitution, s 68.

professional defence force which keeps out of politics is enshrined in the Constitution. It is also derived from the English constitutional tradition which preceded it. The notion of our defence forces being involved in a military *coup d'état* is completely unthinkable.

8. ***Free expression:*** Without an express constitutional guarantee, free expression has been nurtured and has flourished in Australia for the whole history of the federation. Even the old legal inhibitions of sedition⁶⁴ and obscenity⁶⁵ have declined in the context of new media of communications and modern notions of the right of people to enjoy free expression. The High Court has found implied guarantees of free speech in the democratic and representative nature of the system of government established by the Constitution⁶⁶. We live in a community which enjoys one of the highest levels of communication in the world. This is, in turn, an assurance of the free flow of ideas which is essential to sustain a modern society and a

64 *Byrnes v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121; *Cooper v The Queen* (1961) 105 CLR 177.

65 *Crowe v Graham* (1968) 121 CLR 375.

66 *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106. Cf *McGinty v Western Australia* (1996) 70 ALJR 200 (HC).

progressive economy. Some jurists contend that the right of free expression is the most important of civil freedoms. Long before the implied constitutional freedom was found by the High Court, Australians enjoyed a high measure of freedom to express their ideas and opinions. They did so because of the political system which the Constitution reflected and protected.

9. ***Adaptation:*** Our constitutional text has adapted with remarkable success to changing needs and times. This is the more remarkable when it is remembered that the text was actually conceived by the Founders as long ago as the 1870s. It is a text which has greater popular legitimacy than the constitutions either of the United States or Canada. The draft of our Constitution was twice accepted by the electors, with overwhelming majorities of those voting. There is no right conferred in it such as the "right to bear arms" which appears in the United States Constitution to embarrass later generations. Its language may not be inspiring. Many of its central provisions work only by the operation of fictions and conventions. But some measure of popular satisfaction with the way it operates is the general disinclination of the Australian population to change its provisions. Such disinclination has sometimes proved to be fully justified.

10. ***Freedom preserved:*** When great challenges have come to the tolerant and democratic character of the Australian Constitution, the institutions which it establishes have normally, in the end, provided the right answers. The Constitution has usually proved a noble protector of tolerance and diversity. No clearer illustration of this assertion can be seen than in the *Australian Communist Party v Commonwealth*⁶⁷.

Permit me to conclude these reflections with a personal recollection. It concerns my own first consciousness of the Constitution and of the Court on which I now have the honour to serve.

In the late 1940s, my grandmother remarried. Her new husband, Jack Simpson, had been born in New Zealand. He fought at Gallipoli. He was gassed on the Somme. For his military prowess he was honoured with medals. But he was disillusioned with war and with the Depression which followed. He threw away his medals. He became a communist.

67 (1981) 83 CLR 1.

As a child of nine, I recall accompanying him on his rounds in Tempe, an inner Sydney suburb, as he fixed electoral posters to lamp-posts. They were red of course. "Vote 1, L L Sharkey, Communist".

His electoral efforts were completely fruitless. The Menzies Government was returned in the election . It had a clear mandate to ban the Australian Communist Party and to proscribe communists. The newspapers were full of frenzied condemnation of communists. Communists were demonised, as many minorities before and since have been. But for me, the only communist I knew was a kind and idealistic man who was now a member of my family.

I recall that anxious time as the challenge to the *Communist Party Dissolution Act* was before the High Court. Had the Act been upheld, my new "uncle" would surely have been "declared" under its terms⁶⁸. In childhood days I knew little of the law; only that the happiness, and possibly the liberty, of my new uncle was somehow at stake.

68 *Communist Party Dissolution Act* 1950 (Cth), s 10(1) noted 83 CLR at 6.

When the news came that a court had removed the danger, I knew nothing at the age of 11 of the notion of *ultra vires*. Still less did I appreciate the blessings of the Constitution or the strength of purpose of the Justices of the High Court who had upheld it. I did not know then of the courage of the opponents of the legislation, in all political parties, who objected to a law which would penalise Australians for what they believed or thought, rather than for what they did. All I knew was that a great cloud had lifted.

Only later did this first, personal encounter with the High Court of Australia and the Constitution come to assume its true significance for me. The Court reached its opinion against the clamour of popular opinion at the time. It upheld the essential character of the Australian Constitution as one emanating from a free, confident and just people for the good government of all who lived under its protection. In time, I have come to realise how courageous, but foolishly naive, my "uncle's" political views were. But I have also come to appreciate the courage and wisdom, the foresight and good judgment which the High Court of Australia displayed at that testing moment in its exposition of the requirements of Australian law. The same is now generally

said of the Court's decision in *Mabo*. Perhaps, in time, it will be aid of *Wik*⁶⁹.

When, therefore, I reflect on the defects of the Australian Constitution, as many there doubtless are, I balance these thoughts with a remembrance of that anxious time in 1951 and other times since. Of the continuity and change we have seen. Of the rule of law secured by independent judges. Of the peaceful shifts of power secured by free elections accepted by all combatants. Of the civil service and armed forces who submit dutifully to the civil power. Of the ways in which the Constitution has served the people. Like every product of fallible human beings, it may be improved, as no doubt it will.

The coming centenary of the Constitution is a time once again to consider our Constitution's oft-catalogued defects. But let us also remember the freedoms which the Constitution has helped to secure to us, the Australian people, who are now the ultimate foundation for its legitimacy and the guardians of its future.

⁶⁹ *The Wik Peoples v Queensland* (1996) 71 ALJR 173 (HC).