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This issue of *Papers on Parliament* brings together in published form six lectures given during the period from February to July 1993 in the Senate Department's *Occasional Lecture* series.

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Safeguarding Integrity in Government

Ian Temby

In case anybody has momentarily forgotten the fact, Australia is in the middle of a federal election campaign.¹ That means that attention is presently concentrated upon politics, a human pursuit which is important, intriguing, messy, competitive; think of your own adjectives. While there are, of course, honourable politicians, I suggest that the political process would rarely be described as either principled or seemly. Indeed, my dictionary provides the following meanings of politician. First, one who is active in party politics. Secondly, one skilled in political government or administration. Thirdly, one who holds a political office. Fourthly, a seeker or holder of public office who is more concerned to win favour or to retain power than to maintain principles. Fifthly, one who seeks power or advancement within an organisation by unscrupulous or dishonest means. Lastly, and this is said to be a rare use, an expert in politics or political government.

If that sounds cynically despondent, consider this. I have worked from the Macquarie Dictionary — the second revised edition indeed — which provides current common usage of the Australian language. It tells us what those who speak our language think of politics and its practitioners.

The Commission I head is of necessity apolitical but, taking a broader view than that, what must be remembered and stressed is that politics and elections are a means to an end, namely democratic government. It is government that matters, not politics, and it is an important aspect of government that I wish to discuss today. That aspect is integrity and how it may be effectively protected.

Corruption is, of course, the antonym of integrity. How much government corruption is there in Australia? In the nature of things precise figures cannot be provided, but two things can be said. One is that our government institutions are far more virtuous and dependable than is the case in most other parts of the world. Secondly, standards of rectitude are not as good as the people demand, and their will must prevail.

As to the first aspect, let me provide one area by way of example. This country has a grave problem with political donations, large sums of money given to political parties in such circumstances as to engender an expectation of benefits from government. That was most recently and spectacularly documented in the West. Five individuals gave the party in power nearly \$5 million in total within a five year period. Each dealt with government and each prospered. Not everybody would see the elements just related as being unconnected. Like instances could be given for other States. But the Australian situation is paltry and insignificant compared to like problems elsewhere.

In France, high officials seriously talk about the need for a general amnesty against prosecution for the making of illegal political donations. They say that otherwise almost no practised politician will be left standing, and democracy will falter. In Italy, the scandals have been of stupendous dimensions leading to the political demise of the powerful head of the Socialist Party within the last few weeks. Others have fallen and more will follow. The news this morning spoke of three Ministers likely to resign as a direct result of this scandalous state of affairs. Putting the matter simply, expenditure on the Milan underground system approached double what it should have been through featherbedding, kickbacks and donations by contractors which were secretly but formally shared between all significant political parties. The Italians, on this occasion, showed a genius for administration and formalised the process so that everyone took a cut. And that is only two European countries. If time permitted we could visit Japan where the problem is almost certainly worse again, and the United States where few who are neither wealthy nor bought can today enter Congress.

I take the opportunity to urge, yet again, that an effective disclosure regime for all but nominal political donations must be put in place in relation to all three levels of government throughout Australia. Much remains to be done at State and local government level. In relation to the Federal level, new and stricter political donation laws are receiving their first test of strength in the current election. Their

1. House of Representatives and half-Senate elections were held on 13 March 1993.

effectiveness will need to be monitored closely. The public will no longer tolerate attempts by the main political parties to wash money through companies in foreign jurisdictions and thereby circumvent their duty of disclosure. There must be better laws across the board and they must be enforced. Otherwise there is precisely no reason why Australia cannot sink to the depths which have been experienced in so many other parts of the world. Anything less than effective laws effectively enforced is bound to reduce confidence in government and its institutions, and that confidence is something that we all wish to see strengthened.

The demand of the people for integrity in government is manifested in Royal Commissions and other inquiries in every Australian State within the last five years. It is reinforced by the shocking revelations which have emerged from, at least, Queensland and Western Australia. That demand of the people explains the existence of bodies such as the Criminal Justice Commission in Queensland and the Independent Commission Against Corruption (the ICAC) in New South Wales.

The latter body came into existence nearly four years ago, in March 1989. It is a statutory Commission, independent from Government but accountable to Parliament, which exists to minimise corruption in the public sector of Australia's most populous and most prosperous State.

The Commission seeks to achieve its objective by using a three-pronged approach. The first prong is investigations and reports which expose and measure problem areas. The second is corruption prevention by which administrative and other systems are improved so as to reduce corruption opportunities to a practicable minimum. And the third is public education through which people are taught that each of us can contribute, that each of us can make a difference.

Often the three approaches are used in combination, each with the other. Let me give you an example which goes back now a couple of years. It was commonly asserted in Sydney for many years past that if you needed a driver's licence, did not have one and could not drive then, if you were prepared to pay and could make contact with the right people, the licence was yours for the asking. That matter was investigated by the then Deputy Chief Magistrate of New South Wales about twelve years ago. At that time, the going price was ten shillings which was supposedly paid to the driving examiner to look after the instructor's car during the course of the test. It was, of course, a bribe. And the Lewer report, as it was called, demonstrated that this was a widespread practice. Unfortunately, the then Department of Motor Transport, which was responsible for the issue of licences, persuaded the then Minister that the whole thing was a storm in a teacup. They made some changes and pretended to make a few others. After a short respite, the old habits resumed.

By the time we did our work, the price had gone up to \$30 but otherwise the practices were very much the same. The matter was important in a couple of respects. First, it was a well known practice which led to widespread cynicism amongst the populace and, secondly, it was enormously dangerous. The rule of thumb so far as corrupt examiners were concerned was that if somebody had paid and did not actually crash the vehicle beyond repair during the course of the test, they got a licence. If however the vehicle was wiped out, then the deal was off, and no refund was paid.

The ICAC conducted a major hearing and issued a report in which the practices were documented. The problem area was precisely defined and suggestions were made as to the sorts of changes that were necessary to fix up the situation. In parallel with that, commencing about half way through the hearing process and before the report was published, our corruption prevention people started working with the Roads and Traffic Authority (the RTA) in order to implement the sorts of changes that were necessary at a level of fine detail. That was a major and parallel exercise. Fortunately, the RTA (unlike its predecessor) was determined to fix the problem. To their great credit, RTA management tackled the demonstrated deficiencies in the system with extraordinary vigour, such that it can now be said with confidence that apart from occasional individual aberrations against which nobody can safely provide a guarantee, the systemic difficulties of the past, the institutionalised corruption, is entirely behind us.

The ICAC also did a lot of educational work. This was done in the particular case with various ethnic minority groups because we found they were being preyed upon in a very large way. Newcomers to this country, in effect whatever their qualifications, tend to start off fairly low in the employment heap and very often in jobs where they need a licence. In some of those communities there were so-called leaders, godfather figures, who could 'arrange' matters. Frequently they put the individual in touch with corrupt instructors and told these newly arrived migrants that the way the thing was done in this country was to pay and you would get a licence. The test would be conducted by a friendly (and corrupt) examiner and the natural consequences would flow.

It was necessary to put a lot of effort into educating these minority groups. We did that by devising a positive message which was, 'exercise your rights'. If you can drive, the licence is a right in this country and there is no need to go through any back doors. We did not, you will note, go for negative messages

like, 'if you pay a bribe you'll get imprisoned', for two reasons. One is that negative messages do not work. People want to be empowered, want to have their own position reinforced. Secondly, it is probably not true anyway. So in that case we used each of the three techniques — investigation and report, corruption prevention, and education — with very great success.

The most visible work the Commission does is that related to investigations, although you will have gathered from what has been said that, in my view, corruption prevention and education are at least as important because they tackle problems in a long term way. But so far as investigations are concerned, which is where from time to time the flak tends to fly, the methods used are inquisitorial, using that word of course without its pejorative overtones. An inquiry is conducted pursuant to stated terms of reference with a view to ascertaining and reporting the true facts and making remedial recommendations. There are no parties, as before the courts, nobody is charged, there is no onus of proof upon anybody, and the normal rules of evidence do not apply. The process must be undertaken rationally and fairly and all irrelevant considerations must be put to one side. But the object is to ascertain, to record and to recommend. It is only through witnesses that this can be done. Not all find that to be a pleasant experience. Accordingly, the power should only be exercised where necessary.

I ask you to consider the following which is taken from an English Royal Commission on Tribunals of Inquiry conducted by Lord Salmon who reported in 1966:

The history of inquiries to which reference has been made shows that from time to time cases arise concerning rumoured instances of lapses and accepted standards of public administration and other matters causing public concern which cannot be dealt with by ordinary civil or criminal processes but which require investigation in order to allay public anxiety. These cases vary in importance, urgency and complexity and may relate to matters of local or national concern.

The key phrase I think is, 'to allay public anxiety'. To do that is of course to restore faith or, if you like, to safeguard. That may be done by an authoritative report that finds and states that everything is in order. Some Commission reports have been to that effect and they are most useful. Another way of restoring faith, and that which is the more frequent outcome of our investigations, is by identifying what has gone wrong and saying how the problem can be fixed. Now that cannot be done in secret. If the point is to allay public anxiety, the public must know what is being done and have faith in the process.

So the approach must be open and visible. A second requirement is that a remedial approach be adopted. There is precisely no point in simply saying what went wrong. It is essential to fix the system. Finally, and most importantly, independence is paramount. There will be no public faith in decisions made by a body investigating government if that body is perceived to be biased as it must be if it is seen as a creature of government.

Great benefits flow from having a standing body such as the ICAC. Some of them are practical in nature; for example, cost-effectiveness. The Commission's most expensive investigation, which was into the sale of supposedly confidential government information, cost a little less than \$3 million. The report was, and is, of great importance. It has aroused international interest. It disclosed an enormous trade in information which we as citizens had provided to various government agencies, which government promised to keep secret, but failed to do so. Over one hundred public officials were identified as having been corrupt. That is in one state, and there is no reason to believe that that represents the entirety. Nor is there any reason to believe that the same sort of thing is not going on throughout this country at both Federal and State level. The amounts of money involved were very large. A number of these public officials were making more in illicit payments than they were being paid through their wages. Some made as much as \$100,000 in illicit payments over three years. Of course, they were not paying tax on that money. The Tax Office has issued over \$2 million worth of assessments, and the process is continuing. I could go on giving this sort of detail but perhaps to little effect. What it comes down to is that the Australia Card debate of several years ago was simply theoretical. The fact is that the trade in our secrets was privatised long ago.

Australian governments, having been put on notice that these personal details are being bartered and sold, must now solve the problem. It has been identified and measured and it is for them to now fix it. The report contains various recommendations in that respect.

Now that provides an idea of the results that were achieved for about a little less than \$3 million. You will have gathered from press reports that the other Royal Commissions I have mentioned cost between five and ten times as much, in some cases for insignificant return. The reason is quite simple. It is that if you have a standing body, then expertise is developed such that when a problem arises it can be quickly and effectively tackled. Any ad hoc solution is always expensive and every Royal Commission is ad hoc.

Another practical reason why a standing body is useful is that such a body can pursue matters so that reports do not just lie on shelves. A Royal Commission becomes *functus officio* when its report is tendered. The ICAC does not, and the maintenance of a continuing reform program manifestly brings results. Indeed, to have a body which has an education charter enables its head to speak on occasions such as this in a manner that a Royal Commissioner may think to be inappropriate.

And there is yet another reason which has squarely to do with good government. Experience shows that if a corruption scandal erupts, whether or not the concern expressed is justified, and whether it has to do with a sports boss and the criminal justice system or the collapse of a State Bank, and if the head of government is said to be involved in any way, the effect upon the business of government is crippling. We have seen that in various parts of this country over the past few years. When there is a body such as the ICAC to which such matters can be referred, much of the drama goes out of the issue, at least unless and until a hearing is held and a report provided. By furnishing an impartial arbiter which can investigate what it will, Parliament has taken the corruption issue largely off the political agenda. The proof of this is that the last election in Sydney was the first for many decades in which corruption issues were largely lacking. That is surely a good thing. Take those issues away because they are being effectively dealt with and the people can concentrate on issues which are fundamentally more important.

The ICAC is not best considered as an alternative to Royal Commissions which are appointed by government, work to government, according to terms of reference dictated by government, and government decides what to do with reports received, there not being any obligation even to make them public. The ICAC reports direct to the Parliament, not through a Minister but direct to the presiding officers. Its reports must be made public and they are based upon terms of reference which the Commission works out for itself. We are required by statute, and naturally inclined, to do all of our work in the public interest. We do not, in any sense, work for the government of the day.

The Commission is perhaps best considered alongside the Auditor-General and the Ombudsman. The first of these has responsibility for integrity in government finances. The second seeks to achieve integrity in administrative decision making. The new body which creates a triumvirate improves integrity in government generally by fighting corruption in particular.

Any body which is funded by and close to government but required by statute to be independent from government, is bound to cause displeasure from time to time. That is the case with Auditors-General, with Ombudsmen and with the ICAC. It is also true of other independent bodies; for example, the various Directors of Public Prosecutions, the Australian Broadcasting Authority, the Administrative Appeals Tribunal and, indeed, even the courts of the land. If independence is not just a matter of theory but is exercised in practice, then there will be from time to time awkwardness caused because an important function of government, whatever it may be, is disclosed as being inadequately performed. It is the need for that demonstration to occur which imposes the requirement of independence. Only a non-partisan body can be authoritative and will enjoy public confidence. Periods of disharmony between government and independent officers are, accordingly, inevitable. If they were never encountered, the only available conclusion would be that the independent officer was not doing his or her job properly.

The fact of that disharmony, the inevitability of it occurring from time to time, of course brings one to Parliament. It is Parliament that creates all of these bodies and it is Parliament which must look after them. When relations between a particular government and an independent officer, say an Ombudsman, become strained, then protection and support must be vouchsafed by Parliament. Why is this so? First, because parenthood brings responsibilities. Secondly, because those not directly affected can appreciate that the proper performance of functions, simply doing the job laid down by legislation, can involve the making of inconvenient decisions. Thirdly, because the Parliament directly distils and reflects the will of the people in a way that government and the bureaucracy never can and never will and, as has been mentioned, a body such as the ICAC is an outgrowth of a particular demand of the people, that demand being, of course, for improved integrity in government.

Can I conclude on a personal note. For nearly five years, from March 1984, I was an independent statutory officer of the Commonwealth as Director of Public Prosecutions. History shows that government did not applaud everything that my office did, but I always knew that Parliament was available and its members would take the long view. That makes it a special pleasure for me to be back here today talking about the independent office in Sydney which I now head, and the important work that it is doing.

Questioner — I am a visiting fellow at the Australian National University. I was fascinated by your talk. It raised an interesting question for me. Why is the Public Service of New South Wales so corrupt?

Where do people learn to act in the way that they do? What is really being done within the public sector organisations to change those patterns of behaviour so that we do not have to have an independent investigative arm looking at government forever? In the long run, I think the integrity of the Public Service really rises from inside the Public Service and integrity will never really reach the levels that you want if you still have to sit and watch government from the outside.

Mr Temby — As to the first part of that question, there was a perception that New South Wales, and, in particular, Sydney, was a corrupt place and that perception was certainly abroad fifteen, ten or even five years ago. There was some justification for it. Most members of the audience will remember that the Chief Magistrate in Sydney went to prison for perverting the course of justice, that a Prisons Minister was sent to prison for letting prisoners out of prison for money, that a deputy police commissioner was forced into early retirement after some unhappy dealings between himself and gambling interests, and other examples, which are less well known to all, are certainly known to me.

I come from Perth and I would have said that things in Perth were so much better than in Sydney, but that now has to be doubted. I think the people of Brisbane would have said five years ago that things there were so much better than in Sydney, but that now has to be doubted — and so we can go on. There is no reason to think that Sydney is worse than other parts of the country. Indeed, partly because of the work we have done, it may now be better. The problem is one that will always be encountered as long as you have got fallible human beings, which means forever. That is why we consciously talk about minimisation rather than expungement, because you will never achieve perfection in these areas.

Having said those things, I do not want to sound as if I am knocking the country that I belong to because on everything I know it is not just better than our neighbours, but better than almost anywhere else you can look. The corruption problem in Australia is bigger than we would wish and the public are demanding change, but you are better off here than in most other places. I do not know about Canada.

As to the second part of your question, I agree that the best solutions are those that people find for themselves with assistance from others. That is why we place such stress upon both education and corruption prevention. The educational work aims at changing attitudes and it is directed not just at the public generally but also at the public sector. We do all sorts of things — seminars, surveys and so on. It is the sort of hard, unexciting work that does bring results.

The corruption prevention function is highly important. It is a helping hand function which says to departments and agencies: 'If you have got a problem which is of unique proportions, if you want to come to us, we can provide you with a device as to how you might get over it'. That is always advisory work; we never impose solutions on anybody. In all of our reports we make suggestions but we do not impose solutions for the very reasons the professor alluded to. The solution you impose upon somebody does not belong to them and it will not work. You have to work with people and help them find solutions. We are doing that all the time.

Finally, I agree with what I think was implicit in the question which was that, ultimately, a body such as the ICAC should be working to put itself out of a job, just as dentists ought to be doing through fluoride. Unhappily, they are not, because what dentists are doing is giving us flasher orthodontic treatment all the time. What you need to do with an ICAC is to make sure that it does not keep on expanding its areas of responsibility; it does not keep on finding new flash areas of minor corruption. The point should be reached where enough has been done to render a body such as the ICAC unnecessary. That point will be reached when the public make the judgment the body is no longer needed. That point will not be reached for a few years yet.

Questioner — Would you comment on two aspects of the fight against corruption? In your lecture, you tended to concentrate on the formal institutions of government. Firstly, have you got any observations to make on the role which the media plays in the exposure or the identification of corruption or, indeed, in the business of creating a climate which makes it difficult for corruption to flourish, or, if it flourishes, ensures that it is denounced with suitably florid language? Secondly, have you any observations on the place of whistleblowing in the fight against corruption? Is it a valuable element in the armoury or is it a bit of a distraction?

Mr Temby — As to the media, one needs to be careful about nostalgia, but I think that more and better investigative journalism of an accomplished sort was being done in this country ten or five years ago than is the case today. The Commission enjoys good relations with the media and we strive hard to have a professional course of dealings with journalists. We make it an article of faith to do this all in an open, up-front way. We do not work through backdoor revelations. We do not leak, and we never have.

The media are very important to us in getting the message across. The only criticism I have is that, for reasons that are understandable but still unfortunate, there is often a tendency to deal with individuals rather than issues, which is to say, to sensationalise. Our stress is always upon issues, although you have to tell the stories by relating what individuals have done.

As to the other question, again I cannot give you a simple, enthusiastic response to that. These things can be said: the New South Wales Parliament has had introduced a whistleblower protection bill. I think it is fair to say that we have contributed significantly to its introduction. Certainly, we have made submissions to government, both before and after the bill was introduced, as to its improvement.

We rely upon complaints from the public. A very high proportion of the complaints we get from the public are sincere. The complainants may often have reached a mood of malevolence. Nonetheless, their sincerity in bringing the complaint forward is, in a very high proportion of cases, undoubted. Many of the complaints are also, it has to be said, entirely unjustified.

A typical complaint is against the local council. It is based upon the contention that the neighbour has been allowed to construct a building or change a zoning in a manner which is perceived as being unorthodox. The complainant says that that is such an absurd, flagrant, irrational reaction that the only possible explanation is that the 'fix' is in — that somebody has paid a bribe. The fact is that, once you understand how government works, you find that so often such decisions are made, and perfectly properly made. So, to us, the typical complainant is misguided, or even completely wrong, but sincere.

I have absolutely no doubt that people such as that must be protected. I have no doubt that the test must be that of good faith, not good faith coupled with justification, because if you add that second element you are going to be punishing people for bringing forward something and seeking assistance where their sincerity is undoubted. That is the sort of approach that needs to be taken in relation to whistleblowers. I think that, in a general sense, legislation should encourage them and legislative and other measures should be taken to protect them, but they are never going to be the most important sources of information for any law enforcement or similar body.

A great deal of our work comes from the provision that says that, if corruption is suspected, the head of agency must tell us about it. When they tell us about it — which they do not want to do but they have to because they think we are about to find out about it — we pull in the files and we then find out what has gone wrong, if anything has. It is the top insiders who really know what has been going on.

Questioner — I was interested in your comments early in the piece about disclosure legislation. Is it going to be enough for political parties and political entities actually to go through a disclosure process, or will we need to go further? Even when we are aware that somebody has donated \$1 million or whatever to a party, there is still a connection that is made there — a dependency of a type. Will disclosure be enough, or do we need to go further?

Mr Temby — For my part, I would consider an effective disclosure regime to be an enormous step forward. I suspect it would suffice, because in this country the dissemination of information is widespread and the people are not inclined to be devoid of scepticism. It is the case that in some places more is done. In California, for example, as well as disclosure legislation there is compulsory registration of lobbyists. The nature of the interests that the donor represents also has to be disclosed. You can then, by using simple data handling techniques, run programs to work out who has got money from what interests and how they have voted. But that is probably of greater importance in parliaments where you do not have high levels of party discipline. Where you do have high levels of party discipline, I am not sure that such sophisticated approaches are necessary. So I think that effective disclosure should suffice. One has to keep looking. I may be wrong, in which case you have to do something more.

Questioner — I would be interested in your comments on the effect of administrative law on your job. We find in the Australian Public Service — it is possibly the same in a number of other public services — that even if you catch somebody with his hand in the till, so to speak, it is very difficult to then sack that person. It is a very complicated process. I would be interested in your comments on the effect of administrative law on that. You mentioned that there were one hundred public officials found guilty of corruption in the selling of government information. How many of those people are still public servants?

Mr Temby — As to the second part of that question, I do not have precise figures but I can say that disciplinary action has been taken — in almost every case, a sacking; in some cases, where no money changed hands but the rules were broken, something less. Disciplinary action has been taken in a very large number of cases — I do not know exactly how many cases — but in a very large number of cases

and certainly in the majority of those cases. A number of those who were sacked have appealed and to date all the appeals have been unsuccessful. That is heartening.

Having said that, let me say that we are frustrated by what we see as being a weak-kneed attitude on the part of some industrial and like tribunals which do not appear always to understand the critical importance of the public being able to have confidence in the integrity of the individuals with whom they are dealing. If there has been a lapse of standards, coupled with, as we often find, a lack of an appreciation that the standards have been departed from — which amounts to moral blindness — it is very hard to see how such a person can continue as a public servant with whom members of the public can reliably and safely have dealings. So there is frustration there.

The additional frustration is that, when somebody who is sacked appeals successfully, then inevitably it is seen as a failure on the part of the ICAC, which is ludicrous. Our power is limited to recommending that consideration be given to disciplinary action. We do not take the disciplinary action. Once again, it is always left to the department or the agency concerned. It is their staff. They must make the decision. We do not make them do it. They do not always follow our advice. All we say is: 'You should think about it'. But, if there is a successful appeal against a sacking and the individual is reinstated, then inevitably the outcry is that it is a failure of the Commission. That is very frustrating indeed.

Questioner — I was interested in the subject of integrity. Recently, in the Commonwealth bookshop, I saw a publication on selection procedures in the Public Service. It indicated that people on committees who are selecting people for promotion are not allowed to take into account integrity in the criteria for selection. I was wondering how we define integrity.

Mr Temby — I do not find that easy to understand. As a general proposition, it is possible for any job to define the selection criteria that are appropriate. We certainly take integrity as being of high importance; we obviously must. If there are doubts cast on integrity, even if absolute proof is unavailable, then we reserve the right to terminate employment. So I do not understand why it is that integrity should not be taken into account.

The way in which you do it is more difficult. That gives rise to a real dilemma. You will understand that in and around this area there are all sorts of dilemmas, both legal and ethical, that arise. It is difficult territory. People have to stop and think through problem areas. For example, if you say that it is important that public servants should enjoy integrity — and that is a proposition with which we would all agree — then how do you measure it? Do you say that anyone who has not actually been convicted is deemed to be a person of good integrity? That is an available approach — apart from the fact that it is simply stupid. We all know people who are devoid of integrity who have never been to prison and who have never been convicted of anything. Indeed, some of them go to church. But, when you know them, you know that they are people who do not have integrity.

It is hard to get referees to talk about such matters. I do not think you can do much more than talk in terms of reputation. It seems to me that people who enjoy good integrity are very likely to have a reputation for that. Although the other side of the coin does not have exactly the same shape, where people have a reputation for poor integrity, typically, there will be justification for that reputation. It has to be said that that is not always the case. It can be the case that rumours — salacious or otherwise — well up around somebody, and that procedure can be a bit less than fair. But I do not know of a better way of doing it and I think it is something that has to be done.

I am mindful of that, in particular, so far as police are concerned. The effective police officer who goes out, does a job, gets arrests and all the rest of it will not be liked by the criminals with whom he deals. They can easily, by making unjustified complaints against that police officer, cause question marks to be put against the reputation for integrity. So it is a quite difficult area. But, police apart, it is perhaps not terribly hard.

Constitutional Change in the 1990s: Moves for Direct Democracy

Geoffrey de Q Walker

The 1990s show signs of being a time of constitutional debate and possible change unparalleled since the 1890s.

A number of actual changes have come through the High Court of Australia, and more are likely. The *Australian Capital Television* case establishes that the Australian people enjoy a right of political communication and discourse that parliaments are powerless to take away. The case identifies what amounts to a constitutional right of free speech in political matters, and some of the judgments in the case suggest that other rights, such as movement and association, may be similarly protected. The *Dietrich* case appears to be developing a general right in an accused person to a fair trial. The *Mabo* decision calls in question the whole legal basis for the European settlement of the Australian continent. In the *Nationwide News* case, Chief Justice Mason proposed a principle of proportionality to be used in determining whether a purported law of the Commonwealth validly comes within a head of law-making power under the Constitution. Few commentators seem to have appreciated the implications of this principle which, if adopted by a majority of members of the court, would give the High Court a role somewhat similar to that exercised by the United States Supreme Court in substantive due process cases.

Justice Toohey of the High Court has proposed that the courts might identify a wide range of protected civil rights; that is, rights that could not be taken away by ordinary legislation. In a paper delivered in Darwin last year, His Honour suggested that 'the courts would over time articulate the content of the limits on power arising from fundamental common law liberties and it would then be a matter for the Australian people whether they wished to amend their Constitution to modify those limits. In that sense, an implied bill of rights might be constructed'.

A wide range of other possible changes to the constitutional order are being canvassed by such bodies as the Centenary Constitutional Conference, its successor the Constitutional Centenary Foundation, and its rival the Samuel Griffith Society. Part II of the report of the Western Australian Royal Commission on the Commercial Activities of Government is likely to recommend a number of changes that would give a more Jeffersonian flavour to constitutional structures in that state, and perhaps in others as well.

In addition, the movement for an Australian federal republic is gathering support with remarkable speed. Already the prospect of abandoning the monarchical symbolism in government is giving rise to debate about the arrangements that would replace it. Should a president be appointed by the executive government, as the Governor-General is today, or elected by the Parliament, or directly elected by the people? Should we abandon the Westminster model, with its extreme concentration of power in premier or prime minister, and replace it with the direct election of an executive president?

When so many competing ideas are vying for public attention and support, there is much to be said for returning to first principles. The first principle of constitutional doctrine is that the true constitution of a nation is to be found in the temper of its people. Any meaningful debate about constitutional issues in Australia must start by acknowledging that nowhere has the democratic spirit flowed more strongly than in this country. We were among the first to introduce universal manhood suffrage, well before Great Britain and the United States. We were among the first countries to introduce the vote for women. We pioneered the secret ballot, and indeed in America it is so strongly associated with this country that Americans still call it the 'Australian ballot'. Our Senate was from the outset directly elected by the people, whereas its American equivalent at that time was not, and the Canadian Senate still is not. The British upper house, of course, is entirely unelected. Our federal constitution was among the first national constitutions to be adopted by a direct referendum of the people. The American constitution was adopted by a constitutional convention, and the Canadian, New Zealand and British constitutions have never been submitted to the people at all. Last year when Canadians were for the first time given the opportunity of expressing their views at a referendum on a package of sixty-nine different amendments to their constitution, they sent a resounding message to Ottawa that they were dissatisfied with the current process of constitutional change by political elites.

As the Clerk of the Senate, Mr Harry Evans, in an earlier lecture in this series pointed out, most of the radical constitutional reforms being sought in Canada, Great Britain and New Zealand are already in place in Australia. One Canadian commentator recently described Australia's federal constitution as a 'people's constitution', as opposed to the 'governments' constitution' that exists in his country. The formula for amending the constitution (in our case s.128) answers, he argues, the fundamental question of where sovereignty lies.

Australians have much to be proud of in this connection, and indeed, in the early part of the century, political science textbooks the world over treated the Australians as being second only to the Swiss as innovators of practical democratic reforms. Democracy is natural in this country. Just as in some other countries there is an instinctive habit of deference, in Australia there was seen to be an instinctive habit of democracy.

Yet that central characteristic is almost unrecognised in Australian constitutional debate today. One even hears prominent people such as Mr Hawke declaring that our democratic institutions were inherited from Britain. From Britain we certainly did inherit the traditions of liberty and the rule of law, and they are priceless indeed. But the Westminster constitution, which took its basic form in 1689, was designed mainly as a check on royal power. It was never intended to be a democratic system of government. It later became one, but only grudgingly, incompletely, and well after Australia and other countries had led the way.

Although that Australian democratic spirit is still there, and at least as strong as in 1901, it has since then almost ceased to find any outlet in proposals for reform of Australian constitutional structures. The state of war and near-war that prevailed between 1914 and 1989, the rise of iron party discipline and the transformation of political life into a lifetime career have led to a great concentration of power in the hands of the premier or prime minister, the reduction of the significance of parliament almost to vanishing-point and the insulation of expert policy-making and the law-making process from popular pressure. These developments have become accepted in governmental circles and are even regarded as desirable by some. It is probably no coincidence that all the democratic advances mentioned above occurred before the rigid party system took hold, and before politics became a career.

All this has engendered in the public an alienation from the political system so profound that it is causing concern even among governments. In the last New South Wales elections, sixteen percent of the electors voted for independents. A number of candidates were elected who were initially able to force the government to cease treating parliament as a mere instrument of the executive. As the government could no longer rely on a guaranteed majority to pass its legislation, new laws have to be genuinely debated; the need for them has to be explained and their operation justified. Nor is the premier able to call a snap election at his own convenience.

This may be a sign that the old democratic spirit is at last breaking free again, but it is not enough. One cannot rely on independents alone, for it is always possible for a government to change the electoral laws so as to make it difficult for the people to elect them, as recently happened in the Australian Capital Territory, or to use house rules to prevent debate on bills introduced by independent members.

There is widespread agreement that the present state of affairs cannot be allowed to continue. But two conflicting sets of solutions are offered. On the one hand, there are elitist solutions; and on the other there are democratic solutions.

Elitist Solutions

The elitist solutions rest on the premise that the problems of representative democracy stem from the restraints imposed by constitutional checks and balances and by the pressures of almost constant electioneering. One of the main elitist solutions offered is therefore to lengthen the parliamentary term. This has been promoted on the basis that governments will adopt more responsible policies if they are not preoccupied with the next election. The now-defunct Constitutional Commission strongly advocated this solution in its 1988 report. Little evidence has been adduced in support of this proposal, and it is strongly disputed by some constitutional writers. Some critics assert that it will in fact tend to the opposite result. As John Gava of Macquarie law school argues:

Offer a politician the incentive of a longer term and you have a gilt-edged certainty that creative adaptations of the truth will proliferate. Politicians and political parties fight to win elections: the longer the term on offer, the higher the stakes and the bigger the temptation Shorten the term, and the temptation is correspondingly reduced, while the chances of real debate and honest policies emerging would increase.

Gava joins with Lord Hailsham in describing the present state of affairs as 'elective dictatorship' and believes that the political class is 'finding the participation every three years by the citizenry is disturbing to their rule. The further away the citizens can be kept from power the better'.

Another common elitist solution is to propose removing the few remaining checks and balances on the near-absolute power of the premier or prime minister; for example, by curtailing the powers of upper houses. The Constitutional Commission advocated that expedient too. Other proposals of this kind rest on the argument that the solution is to give incentives that will induce better people to enter parliament: higher salaries, increased resources, larger support staffs and the like.

These ideas are not necessarily bad, but they do form part of a broad elitist approach to constitutional development which, overall, is supported by virtually the whole political-media establishment.

In the past few years, however, a competing movement has developed which follows in a straight line from the great democratic tradition I have referred to. This movement argues that the remedy for the failings of our representative democracy is not less democracy, but more.

Democratic Solutions

The democratic proposed solutions to our problems broadly envisage wider use of the ballot box. For example, Mr Brown, Federal Minister for Land Transport, has proposed that High Court justices should be popularly elected, so as to guard against a repetition of the free speech case, to which he takes strong exception. Justice Toohey envisages the constitutional referendum process as a final court of appeal whereby the people could overrule unacceptable High Court developments in what he sees as a common law implied bill of rights. The problem with that view is that currently only the parliament can initiate a constitutional referendum.

This brings me to the main focus of the movement for democratic solutions, which is the campaign for the adoption of direct legislation by the people using the citizen-initiated referendum system ('CIR'). This mechanism was first introduced at the national level in Switzerland in 1874 and was later adopted in twenty-six of the American states. Since the 1970s it has also been used with great success in Italy. In Canada it is widely employed at the local government level.

Direct democracy through the initiative and referendum system has been publicly advocated in Australia since the 1890s. It was one of the main objectives of the Australian Labor Party and remained so, at least nominally, until 1963. Between 1914 and 1919 a number of bills for the introduction of the system were introduced by the Queensland ALP government, but were delayed in the then upper house and eventually abandoned.

After World War I, the ALP lost interest in the idea and it remained forgotten until the late 1970s, when the Democrats in the Senate began introducing a series of bills for a constitutional amendment to provide for the system. In 1988 the Queensland government prepared a comprehensive CIR bill, but it was dropped only days before it was due to be introduced.

There are two main forms of direct legislation. The first is the *legislative petition referendum*, or '*people's veto*'. This allows a specified number of voters (usually between two and five percent) to petition for a referendum on a bill that has passed through parliament in the normal way but has not yet taken effect. When a petition signed by the prescribed number of voters is presented to the government, the statute's operation is suspended until the voters have had the opportunity to approve or reject it in a binding referendum. In Switzerland this mechanism also extends to the ratification of treaties. This type of voters' veto has not been seriously advocated in Australia because of the political resistance to the idea of suspending the effective date of legislation.

The other form is the *legislative initiative*, which permits a prescribed number of voters to compel in the same way the holding of a binding poll on whether a proposed law of their own choosing should be adopted, or whether a particular law already in force should be repealed. This terminology is slightly confusing because the initiative obviously involves the holding of a referendum in the ordinary sense of the word, while the legislative petition referendum incorporates an element of citizen initiative, in the sense that the petition is launched by voters of their own motion. In Australia the term 'CIR' is widely used to denote both forms.

The initiative may also be used to propose amendments to the constitution; in this case it is called the '*constitutional initiative*'. This was the particular form of CIR supported by the Centenary Constitutional Conference.

Whatever form it may take, a true CIR system can be recognised by *two essential characteristics*: (1) the people have the power to initiate a referendum on a particular law or treaty and (2) the result of the referendum is binding on government and parliament.

The arguments for and against CIR I have canvassed in my 1987 book *Initiative and Referendum - The People's Law* (Centre for Independent Studies, Sydney). As public dissatisfaction with the political scene has certainly not decreased, support for CIR has quietly followed. The result is that in every state and territory of the Commonwealth except Victoria there are, or have recently been, draft CIR bills in existence or in preparation.

Another factor that may add intellectual impetus to moves for direct democracy is the growing understanding of public opinion and the way in which people reach judgments on public affairs. A recent influential book by Daniel Yankelovich, *Coming to Public Judgment* (Syracuse University Press 1991), noting a growing gulf, indeed an adversary relation, between expert policy making and public opinion, has identified a basic misunderstanding of public opinion and of the way in which it develops and becomes public judgment. Public opinion, he argues, improves in quality as it moves from snap opinion to public judgment, as people hear the other side of the argument and become aware of the consequences of their preliminary opinions. Views arrived at in this way are stable and responsible, though not always in harmony with elite views.

That public opinion should follow this path from initial impression to considered judgment should not surprise us - such a progression underlies the jury system, and indeed the whole of the system of justice in courts. Indeed, it is the assumption that underlies the process of parliamentary debate. Nevertheless, the failure to distinguish between the stages through which opinion develops, and the preoccupation of the media with quick polls that identify mainly snap opinions, has led to a view that public opinion is fickle and irresponsible. Studies such as Yankelovich's are challenging that view and thereby strengthening the case for direct democracy.

Most of the current CIR bills are private members' bills with uncertain prospects of passage in the short term, though they could become harder to ignore as time goes on. Among them is the set of two bills introduced in the House of Representatives by Mr Ted Mack, MHR, independent member for North Sydney, and seconded by the ALP's Mr Frank Walker MHR, a former New South Wales cabinet minister.

The support of at least one major party will be needed before the system can become law in any Australian jurisdiction. In 1988 the Western Australian Liberals became the first mainstream party for many years to introduce a general CIR bill of their own. In 1991 the Queensland National Party again started seriously considering the idea as party policy. The state's Liberal Party adopted CIR as part of its policy at the last state elections, but did not campaign on the issue. The New South Wales Labor opposition is displaying interest in the idea.

It is Tasmania, however, that currently presents the most interesting picture. The Hon. Neil M Robson MHA in 1990 introduced a private member's bill for a voters' veto system. His Liberal colleagues endorsed the proposal (subject to some quite significant qualifications), and the bill needed the support of only one of the Green Independents to pass the lower house. For two years the Greens assured Mr Robson of this support, but withdrew it just a week before the crucial second reading vote. The Liberals have now apparently decided not to proceed with the bill for the time being, but several ministers are enthusiastic about it, and the debate continues.

Main Current Proposals

In Federal Parliament

Since 1990 the Democrats in the Senate have been promoting two CIR bills and they were part of its platform in the recent elections. One, the *Constitutional Alteration (Electors' Initiative) Bill*, would provide for a binding constitutional initiative. They consider that this makes sense because the people decide the issue now. Five percent of the electors who voted at the last federal election could petition for a federal referendum on a proposal to alter the Constitution. As some 9.2 million people voted formally at the last election, the required number of signatures on the petition would be 462,000. This large number of signatures would need to be collected within six months, a task that would be difficult if not impossible for groups that did not have substantial means.

If the petition qualified, it would be presented to the voters at the next federal election and would be required to satisfy the same majority requirements as those provided by Section 128 of the Constitution. The constitutional initiative was recommended by one of the committees of the Constitutional

Commission (but not by the full Commission) and the Centenary Constitutional Conference supported the idea strongly.

The other bill the Democrats have presented, the *Legislative Initiative Bill*, provides for a general legislative initiative to be triggered by a number of voters equivalent to 2.5 percent of those who voted at the last election. A six-month time limit is again provided. The bill lays down stringent requirements for the validity and checking of signatures, but if the petition qualified, it would be placed on the ballot paper at the next federal election. The central feature of the bill, however, is that the result would in no way be binding on parliament. It could not be otherwise, as the Democrats propose the introduction of the system by means of an ordinary Act of parliament without the constitutional amendment that is essential if the manner of exercise of the legislative power is to be altered. Consequently, this bill fails one of the tests for a genuine CIR system and is really on a par with the non-binding initiative system promised by the New Zealand National Party before the last election in that country. However, the Democrats see the proposal as a way in which the CIR could become accepted and could be shown not to be a threat.

The independent member, Mr Ted Mack MHR, who was responsible for introducing a referendum system when he was Mayor of North Sydney, prepared a constitutional initiative bill not unlike that introduced by the Democrats.

The federal parliamentary Liberal party has expressed some interest in CIR, but so far has gone no further than issuing a green paper on the subject. It proposes a trigger requirement of 460,000 signatures (five percent of the votes at the last election), and petitions that qualify would be submitted to the voters on the same day as the next election. The measure would be a general legislative initiative, but the Liberal proposal requires a special majority consisting of a majority of voters in a majority of states, together with an overall majority. Special requirements of this nature are justifiable in the context of constitutional alteration, where something closer to consensus is required, but for ordinary legislation it is unacceptable, enshrining as it does the possibility of minority rule.

Western Australia

The *Referendums (Repeal of Acts and Regulations) Bill* proposed by the Western Australian Liberal Opposition which was introduced into the lower house on a number of occasions is a restricted, but binding, form of voters' veto system. It would permit the voters to petition for the repeal of any legislation in force at the time the Act takes effect for a period of three years, and in the case of future legislation, for a period of three years after enactment. This is one of a number of limitations that reflect party-room compromise. The bill would require a petition to be signed by not less than eight percent of the electors qualified to vote, and each signature would need to be accompanied by the legislative assembly electoral number of the signatory.

The referendum would be held in conjunction with the next election if it were certified no more than twelve months before the due date of the next election, or in any other case within three months. If a majority of those voting at the election favoured repeal of the challenged legislation, the repeal would be automatic. It is expected that the Bill will soon be reintroduced by Mr Reg Davies MLC.

New South Wales

The Call to Australia group in the New South Wales Legislative Council in 1989 introduced a comprehensive initiative and referendum system partly based on the abortive Queensland bill. Under the *Constitution (Citizen-Initiated Referendum) Bill* 1989, a referendum could be triggered by the petition signatures of three percent of the numbers who voted at the last preceding general election for the Legislative Assembly and could propose either the enactment of a new law or the repeal of an existing one. Signatures could be checked by a process of sampling, without the need to check the entire petition. The draft of any proposed new law would be submitted to the chief parliamentary counsel, who would be required to satisfy himself that the form of the proposed law was clear, logical and comprehensible and included all the necessary transitional, machinery and ancillary provisions. This bill, like the Queensland bill on which it is based, includes all its own machinery provisions. The bill was reintroduced in 1992 with new provisions for a special majority of electorates. It is currently 'on hold' and is being reworked. Given the rather uncertain influence of the CTA group at present, this bill should perhaps not detain us for long, but it is worth noting that the state's Labor shadow cabinet has expressed support for the idea.

Queensland

Similarly, the 1988 Queensland *Constitution (Direct Democracy) Bill* was a comprehensive initiative and referendum bill triggered by a number of signatures equal to five percent of the number of electors

who voted in the last Legislative Assembly election. The intention was to make the referendum binding, but this was not possible because of a 1934 constitutional amendment entrenching the abolition of the upper house, which prohibited the establishment of any legislative body other than the Legislative Assembly. A constitutional referendum would have been required to alter that state of affairs, so in the meantime the bill provided for a restricted power in the legislative assembly to overrule the result of the referendum (clause 40). This bill was abandoned shortly before the day of its intended introduction into the Assembly, but the Queensland Nationals are reportedly considering adopting CIR as policy at their state council in July.

Australian Capital Territory

There, a Liberal in the Australian Capital Territory introduced a CIR bill in the territory's Legislative Assembly, partly in order to pre-empt a private member's bill which an independent member had apparently been planning to table. In general terms it was similar to the Tasmanian measure, to which we now turn. The private member's bill is expected to be re-introduced in April.

Tasmania

The Tasmanian bill is perhaps the most interesting, not because it is particularly comprehensive, but because in present conditions it has the best chance of being enacted. The subject of CIR is a matter of steady political debate in Tasmania, and the local media, especially the press, take it seriously and are generally supportive. The movement gained a substantial boost when Burnie Municipal Council adopted its own CIR system, which requires a petition bearing 500 ratepayers signatures and a deposit of \$500. The mechanism is not provided for in the *Local Government Act*, and therefore has no legally binding force, but the council treats the results of the referendum as conclusive. Two referendums have already been held, one on the subject of saving a small park in the municipality, and another concerning the establishment of a pulp mill. Polling takes place over a period of a week, and the council sent a mobile polling booth into the more remote parts of the quite large municipality.

The Citizen-Initiated Referendums (Elector-Initiated Repeals) Bill 1991 was sponsored by a private member, the Hon. Neil Robson, but had the support of his colleagues in the Liberal Party and required only one more vote to pass through the lower house, after which upper house approval would have followed as a matter of course. For two years, while the bill was in preparation, the Green independents indicated that they would support it, but withdrew their support at the eleventh hour even though the bill incorporated substantial concessions requested by them. The bill was to be re-introduced, minus the concessions previously made to the Greens, but the Liberals have decided not to proceed with it at present. However, it is still a live issue and is gathering wider support.

As the name implies, the bill provides for essentially a voters' veto system under which citizens could seek the repeal of any legislation except appropriation or tax acts. The trigger is 18,000 electors (about five percent of the enrolled voters), of whom twenty percent or more must be enrolled in each of three House of Assembly electorates. Petitioners have twelve months to collect the signatures, and the chief electoral officer is under an obligation to make reasonable inquiry as to the genuineness and validity of signatures. Sampling techniques may be used for this purpose. The petition may seek the repeal of more than one enactment. The referendum is to be held on the same day as the next election, if such election is due within twelve months, otherwise a special date may be set.

The chief electoral officer is required to circulate a summary of the arguments for and against, rather like that which we saw in Queensland in the recent referendum on the four-year term proposal. But, in an appalling provision inserted at the insistence of the Greens, all other citizens were originally to be prohibited from publishing or circulating any arguments for or against once the date of the referendum was notified. This clause was removed from the new version of the bill to be presented at a future session and would in any event now be unconstitutional in light of the High Court's decision in the *Australian Capital Broadcasting case*.

The bill then proceeds in clause 33 to state the effect of the referendum results. Again at the insistence of the Greens, the bill required a double majority - a majority of voters and a majority of voters in a majority of electorates, a provision unknown in any other country where CIR is in use for ordinary legislation. This requirement is indefensible as it clearly enshrines the possibility of minority rule in relation to ordinary (as opposed to constitutional) legislation. The use of separate electorates as subdivisions of a state or territory is usually a necessary concomitant of representative democracy, which rests on the premise (somewhat questionable in modern conditions) that members of parliament seek to represent the views of their constituents in legislative debate. In direct democracy, however, electoral boundaries are irrelevant, and indeed improper, as all people are bound equally by the same laws, no matter where they may happen to live in the state. It is notable that in all other Australian states, even constitutional referendums are determined by a simple majority of voters in the state.

Further, as electoral boundaries are the plaything of governing parties, the proposal would reintroduce some of the evils that direct legislation is meant to obviate. Mr Robson removed this provision from the later version of the bill and returned to a simple majority requirement.

Modest though the Tasmanian bill is, it is difficult to exaggerate the legal and constitutional consequences that would flow from its enactment. It would change the entire constitutional order of the country by showing that it is possible in Australia to move away from the servile constitutional doctrines that have swamped our democratic tradition and helped to distance the parliaments from the people. The old Diceyan theory of parliamentary omnipotence, for which there is not, and never has been, a shred of binding authority, would be finally discredited. Similarly, the old theory of the British constitution according to which all power flowed from the crown. The Westminster constitution was never intended as a democratic system of government, but as a method of restraining royal power. Subject only to those restraints, it was the duty of the citizens (or rather 'subjects') to submit to the crown, and not vice versa. With the advent of *de facto* republicanism under the *Australia Acts* 1986 and the clear possibility of *de jure* republicanism within the decade, that would be a dangerous theory, in that it would tend to give an additional element of spurious legitimacy to the already extreme concentration of power in the hands of premier or prime minister.

With the enactment of any CIR legislation in Australia, however, we would begin to move towards the democratic doctrine of delegation, under which the institutions of government are conceptualised as agents or delegates of the people. This would constitute nothing less, on the theoretical plane, than a democratic revolution.

Questioner — You mentioned that the Tasmanian bills would exclude tax and appropriation measures. Can you think of any other areas that ought to be excluded?

Professor Walker — Whether you are using direct legislation or parliamentary legislation, I think people should have some rights that cannot be taken away. The High Court has recently said that that is the case already. It should certainly be the case that if we had a federal CIR system it could not be used to abridge people's right to political free speech. Similarly, at the federal level, the Parliament has no power to take property from people except on just terms. I think you would have to have that sort of safeguard. Personally, I would quite like to see that at the state level too.

Whatever safeguards you need against legislative encroachment, I think they are the same whether you are using parliamentary legislation or direct legislation. There may be some other areas also where the system might not operate. We have mentioned Appropriation Bills. Perhaps you should not be allowed to use the system to block supply. Tax should not be accepted, I think, because historically taxation is the central issue in the whole problem of government. The English, French and American revolutions all revolved around tax questions. The nearest we came in Australia to a violent rebellion was the Eureka Stockade, which was a tax revolt. Surely the people should have a direct say in relation to tax laws.

There is one area in which I would argue that a federal CIR system should not apply, and that is in foreign affairs. I do not mean treaties necessarily. I think that perhaps treaties should be subject to people's veto, but not foreign affairs generally. First of all, it is the primary function of government to protect the nation from external threats. Secondly — and I think this is more conceptually important — in foreign affairs the Government often has to act on information that is not generally available. It has to act on secret intelligence information and various pieces of information it gets from diplomatic posts which cannot be made public because it could sour relations with other countries and create international tension. Ordinarily, foreign affairs is probably not an area suitable for this because the public are not in a position to make an informed judgment. In all other areas I do not see why they are not in a position to make an informed judgment.

Questioner — I have two points, one of which concerns voting systems. It is possible for the federal parliament to change the methods of voting. For instance, it could introduce certain forms of so-called proportional representation into the House of Representatives, although that would be extremely difficult with the Constitution. It could mess around with the voting system and deprive the citizens of a power that they do not realise they have — the power of getting rid of a member of parliament by putting him or her last on the preferential voting ballot.

In the last two elections, the sitting member could have been put last and the other major parties' candidates second last. Under those circumstances, except in the Northern Territory at the latest election, there would not have been an ALP representative, a Liberal or a National Party representative in the House. This is a power which is very much neglected because it has not been taught in schools.

Do you think that there should be further constitutional restrictions other than those in the Constitution at the moment about electoral powers?

My second point is more of an assertion than a question, but I would like you to comment on it. The move for a republic — there is to be a referendum after a great deal of propaganda in favour of it — is, in the view of many people throughout Australia, part of the process of constitutional referenda that we have seen in the last ten or fifteen years in which the aim is fundamentally to concentrate power in Canberra, particularly power in the hands of the Prime Minister. The introduction of a republic in many forms would leave the Prime Minister as virtually a three-year dictator and that effect is one of the reasons for opposing it.

I think it is also important that, in 1988, the various referenda which had the effect of concentrating power and decision-making in Canberra were defeated throughout Australia, except in the Australian Capital Territory. Do you think that is a danger of misuse of the constitutional referendum procedures?

Professor Walker — The tendency of Australian voters to reject referendum proposals that have or may have the effect of concentrating more power in Canberra is deplored by some constitutional writers. They feel that there ought to be more power in Canberra, that States are an anachronism and so on. They further go on from that proposition, which one can agree or disagree with, to say that it also shows that people are stupid.

You can be for or against having more power vested in parliament, the executive and the judiciary in Canberra, but it is not the same thing as saying that people are stupid, that people always vote no at referendums, or whatever the case may be. If you look at the history of referendum proposals at the Federal level that do not have that effect, you would see that about half of them have passed. A lot of debate about the CIR system consists of criticism about Australia's alleged tendency to vote no. You can approve or disapprove of the tendency, but what I am trying to say is that it is not a general tendency. It is a tendency in relation to certain types of proposals.

One possible form of republican government might well increase the powers of the Prime Minister. I would certainly think that the Prime Minister and Premiers have enough power as it is. But we do not have to follow that model. I noticed that in one opinion poll recently something like twenty per cent of the people said that they were in favour of an American system of a directly elected executive president. That is very interesting because that has never even been debated in Australia, to my knowledge. Yet twenty per cent of the people are already in favour of it. It may be just a snap opinion, but it is interesting that a proposition that has never really been ventilated is seen as promising by quite a large proportion of the population. I presume the reason it is seen as promising is that it would move away from this tendency of Premiers and Prime Ministers having so much power, bearing in mind that they are not necessarily directly elected at all. They are not directly elected and people may have voted for a different candidate for that office.

Questioner — I was not criticising the CIR proposal.

Professor Walker — I understand that. But if we are to have a referendum on whether Australia should become a republic in the near future, we do have to look very closely at what type of alternative arrangements are proposed. At the moment, the most popular arrangement, at least in the sense that you hear it most often, is that a president would be elected by the Parliament — not directly elected and not appointed by the Prime Minister. That would be a sort of halfway stage between a directly elected president, as in Ireland, or an appointed one. Your other question related to electoral matters. I am not an expert on electoral systems and I would get into deep water if I tried to answer that question.

Questioner — The phrase you used which disturbed me most was 'both sides of the argument'. It seems to me that one of the problems with democracy is that we take the view that most things can be reduced to two simplistic views one way or the other, whereas in fact most matters are complex. Would the sort of proposition you have been putting forward be strengthened or weakened if such referenda as you have been referring to contained a series of propositions wherein people voted preferentially so that the complexities of the matter could be more fairly explored?

Professor Walker — I think that is a very constructive idea and it is available. I have not been able to go into the complexities of various types of CIR arrangements. In California, if a petition for a new law qualifies — a proposition qualifies — and is going onto the ballot paper, the legislature can put a competing proposal on the ballot paper. So people can choose between two different approaches to the same problem. Of course, they can also urge people to vote no to the original proposal and not put forward an alternative. The problem with the Californian approach is that people cannot vote preferentially. They have to choose one or the other.

Our practice of preferential voting in Australia is very much admired in the United States. I was there last year during the presidential election campaign. When it became apparent that there would be three candidates, I told them about our system of numbering one, two or three and they thought that was a brilliant idea. Normally, they have not had more than two candidates so the question has not arisen much. A preferential system is a very desirable arrangement. It gives the legislature the power to put forward a compromise proposal or perhaps a proposal in which something has been thought of that was not thought of previously.

In the broader sense, I am not so sure that all problems are, at bottom, so complicated. Acts of parliament are complicated when you look at them because there is so much machinery, so much need for definitions and so many consequential matters to deal with. But the basic principle behind most acts of parliament is simple; for example: 'Do you want income tax or don't you?' 'Do you want a Goods and Services Tax or don't you?'. The basic principle does lend itself to voting yes or no and, in fact, that is what the Parliament does; it votes yes or no once the proposal is formulated. That is what the High Court does when a matter comes before it in which there may be merits and equities on both sides. At the end of the day the court still has to decide yes or no. Although in one sense matters are complicated, life would become impossible if ultimately all problems of government were complicated. At bottom, I think they basically have a certain simplicity.

Questioner — Firstly, when some people first hear about CIR, they are concerned that we will be having a lot of referendums on a lot of issues. Secondly — and this goes to the point that was brought up earlier — some people who are in favour of the legislative veto are very concerned about the initiative of new legislation because of the power of the media. Do you have comments on those two issues?

Professor Walker — The power of the media argument comes up when the result turns out the same way as the media want it to. You can point to many examples where people have totally disregarded media opinion. For example, one study was done on the CIR system in the city of Los Angeles. It involved twelve million people, which is nearly as big as Australia in population terms. They examined samples of a couple of thousand ballot papers; to be exact it was 1,500. Not one of those ballot papers had been marked in accordance with the recommendation of the *Los Angeles Times* or the local dominant television station. That referendum had been the subject of a saturation campaign by the media.

Proposition thirteen, which put a cap on property taxes in California — and it has since been reaffirmed a number of times — got a two-thirds majority, despite almost unanimous media opposition, except from one evening paper in Los Angeles. I cannot remember the name of it. All the other media — television, radio and press — were against it, yet people decided that they had just had enough. Their property taxes had trebled in a period of five years and they thought that was enough. I think that although the influence of the media certainly cannot be discounted — if I were involved in a public debate, I would much rather have the media on my side than against me — it is not insuperable either. Once people have made up their minds, once public opinion has gone through the three stages that Yankelovich mentions, it does not matter what the media say.

Your other point was about people having more reservations about the initiative system than the veto system. It is true that a lot of people who are very favourable to the voters' veto system are much more wary of the initiative system. In fact, as far as the voters' veto system goes, it is almost impossible to develop an argument against it that is not also against democracy.

In relation to the initiative system, it is easier to develop arguments against it. I do not think they are supported by the evidence. Because of the ordinary human experience that it is easier to strike down something that is bad than to build something that is good, you can understand that people would have reservations, that they might fear excessive numbers of propositions, and so on. But it does not seem to have worked out that way.

You hear in the media reports about Californian voters having to vote on thirty-seven referendum propositions, and it is true; they do. But what you do not hear is that thirty or thirty-one of those propositions are not citizen measures; they are government measures for minor amendments to the Constitution; bond issues, which in America for historic reasons have to be approved by the voters; and a variety of other sorts of relatively minor housekeeping matters. There is only an average of two citizen measures per ballot, even in California, which is a very big user of the system per election. It has an election every two years. So that fear does not seem to have been borne out.

Occasionally, a period of intense ferment and controversy will occur in some state or country as there will be up to ten citizen measures on the ballot paper. I would rather see those get onto the ballot paper and be resolved by the people than have them seized upon by pressure groups, extremist groups and all sorts of people over whom you and I have no control. I would much rather have a say in it myself than let other people decide for me.

Questioner — I have two propositions on which I would be interested in hearing your comments. Firstly, is the apparently needless republican push that we are enduring at the moment really to take away certain rights that may not yet be articulated; for example, things that the High Court has not even identified? Secondly, how much rejuvenation of the electorate do you envisage that CIR in operation would cause? Will the voting public get to realise that it is not faced with having to choose between Heckle and Jeckle or terrible and much worse, as we had to perhaps last Saturday? If it realised that there were alternatives, that it could exercise a democratic right, do you think the Australian apathy would, to a large extent, evaporate?

Professor Walker — Yes. If I may say so, you have put your finger on one of the central advantages of the system. It enables the voters to separate issues from personalities. Most people seem to think that the election last Saturday turned into a referendum on Goods and Services Tax (GST). You can be for or against a GST, but that is not really what it was about. It was about the government of the country for the next three years. In the absence of CIR, we are constantly having to decide these mixed issues. It may be that you think both issues went the same way, and that is fine. But there might have been a lot of people who did not, but they are forced to accept one party or another because they disapprove of one of the policies of one of the groups. Under CIR you could vote for the party and the people that you prefer and just reject one or more of their policies.

The other aspect you have put into the spotlight is the effect that it has on the general citizenship of the country. I do not think Australians are, in any general sense, apathetic. But it is true that on particular questions you might find that people are apathetic. I would suggest that is because their opinion does not really make any difference, except on one Saturday every three years. Basically the individual's opinion is completely irrelevant. So why should you become well-informed about some current issue? Why should you knock yourself out? It will not make any difference. All you get is the same bundle of issues and personalities once every three years. If people know that they have the ultimate power to decide the laws under which they and their children are going to live, they think about these things more.

Any lawyer who has ever had a jury trial knows that jurors who are just taken off the streets, metaphorically, take their duties very seriously. Lawyers will tell you — and I have seldom met a lawyer with criminal law experience who would disagree — that although they have often had verdicts that they did not like, they have never had a verdict which they regarded as irrational, vindictive, malicious or anything like that. People, once you give them responsibility, do take their duties seriously.

I think it would elevate the whole tone of the life of this nation, it would make people into real citizens; whereas at the moment we are sort of subjects in a way, subjects with a right to vote. We are basically just a walk-on crowd that walks on once every three years and applauds one or other of the groups of people who are put before us.

Questioner — From what you have been saying, CIR has stalled basically around the nation. It seems like a rather exciting idea. Can you see any government in Australia actually deciding to give itself less power, to give away some of its power to the people?

Professor Walker — Yes, because it is not just about giving yourself less power. They are not actually reducing their own powers in an ultimate sense. They are creating a check on their powers, that is true. What they should realise from overseas experience is that it gives them greater security of tenure. If people do not have to throw out a government that they basically like just because they disagree with one of the things that it is doing, they will leave them in for longer. You can see this in Switzerland, where members of parliament — as long as they are satisfactory in other respects — tend to get re-elected much more reliably than they do in Australia because all that is at stake is that person's competency to represent you. It is not the policies that that person and a group of others are advocating.

Questioner — I was interested in your idea that foreign affairs is one of the areas that should be excluded from CIR because it requires specialist knowledge. I think one of the ways we have understood democracies to date is that they have geographic limits and the decisions taken within those democracies should not be seen as having effect outside of them. But we seem to live in an era where the internationalisation of finance increasingly compromises that idea of state sovereignty and perhaps begins to render the idea of the nation state and state sovereignty as obsolete. Given the ability of

international finance markets to have influence on domestic political outcomes, why should people not have some chance to use the CIR to restate their wishes in regard to international finance?

Professor Walker — I can see the force of your argument. I have not thought along those lines but, if anything, there is a slight trend in that direction. There is a new book that has just come out. It has just reached our library so I have not read it yet; I have just leafed through it. I cannot even remember the exact title, but if you give me your address I will send you a copy of the title page. It is about the greater use of direct democracy in international affairs and looks at a lot of recent developments, such as the referenda in Russia, or in the former Soviet Union, over the break-up of the Soviet empire, if you want to call it that. If anything, the trend is in the direction that you are suggesting. I still have reservations because of the need to use information that is not generally available. But there is a movement in that direction.

Aboriginal Self-Government In Canada

Thomas J Courchene

In this International Year of Indigenous Peoples, it is a special honour and privilege to be invited to speak to Australians about aspects of aboriginal self-government in Canada. At the outset, I must note that I am not an expert on aboriginal self-government in Canada. Few people probably are, given the complexity and the dimensions of the issue, particularly when one realises that aboriginal self-government will eventually entail hundreds of separate negotiations. What I will offer are a few broad perspectives and then some more-detailed analysis of what I think is the most significant development, namely the set of negotiations relating to self-government for the fourteen First Nations in the Yukon.

There is a second introductory point that merits airing. On the surface at least, our two nations appear quite similar. We are both parliamentary federations. We are both constitutional monarchies. (While the recent enthusiasm in Australia for becoming a republic does not have its counterpart in Canada, we have already gone through the emotional exercise of replacing the Union Jack with the Maple Leaf.) We are among the largest nations in the world; we are both resource-rich and we both have generous social contracts sustained by comprehensive equalisation programs. Actually, Canada followed Australia's lead here, basing our equalisation program on the principles enshrined in the Commonwealth Grants Commission. Of particular relevance for this paper, we both share the land with indigenous peoples, or First Nations as they prefer to be called in Canada. And neither nation can be proud of the manner in which historically or culturally we have dealt with these first peoples.

In spite of these similarities, our respective histories and culture and our geo-economic and geo-political environments are so different that policies appropriate to Canada are not likely to make much sense for Australia and vice versa. Thus, while you may find some insights and indeed some potential policy options in what I have to say about aboriginal self-government in Canada, I want to emphasise from the outset that my comments are intended to present information about aboriginal self-government in Canada and *not* to make recommendations about what may be appropriate for Australia.

This paper is divided into three sections. The first part will consist of a brief profile of Canada's aboriginal peoples. Part II will then focus on an analytical or theoretical model for self-government — one that proposes a First Nations province (or a small number of such provinces) within Canada. This model may have very little to do with reality. Its role is to present a conceptual framework for thinking about aboriginal self-government. The third and most important part outlines the recent agreements with the Yukon First Nations which will grant them quasi-provincial or territorial status (not in the political sense, but rather in terms of their range of powers) within the Canadian federation. A short conclusion completes the paper.

A Brief Profile Of Canada's First Peoples

Table 1 presents an overview of the population and geographical distribution of Canada's aboriginal peoples. As the Table indicates, there are four aboriginal groupings:

- registered or status Indians (inset 1);
- the Inuit (inset 2) who mostly inhabit the north and who may be more familiar to you in terms of their former name, Eskimos;
- non-status Indians (inset 3) — persons who have Indian ancestry but who for some reason have lost or have been denied their status as registered Indians; and
- the Métis Nation (also inset 3) composed of persons who are part aboriginal and (generally) part European.

Each of these four aboriginal groupings were effectively granted full participation (along with the provincial premiers and the Prime Minister or his designate) in our recent round of constitutional discussions. Each also has the equivalent of a national organisation and their leaders (frequently women) are, to a person, highly articulate and effective politicians.

From Table 1, the total aboriginal population is just under one million persons, or four per cent of Canada's total population. However, for some provinces like Saskatchewan, where the Table 1 totals exceed 100,000 persons, they represent more than ten per cent of the provincial population. Moreover, these figures are only guesstimates — some estimates run closer to a million and a half persons, with the additional numbers coming in the Métis and non-status Indian categories.

I want to focus in somewhat more detail on the registered or status Indians. Along with the Inuit, these are the aboriginal groupings that, constitutionally, Canada has a fiduciary responsibility toward. (Many of the registered Indians are also covered by Treaties with Canada or the Crown which are still in force. In this sense, the parallel is probably closer with New Zealand than it is with Australia.) As the side panel to inset 1 indicates, Canada has about 2300 reserves for the roughly 600 Indian bands. In general, each of these bands is an independent and autonomous First Nation. Travellers along the highways and byways of Canada are by now quite familiar with the road signs that read, for example, 'Siksika Nation — 60 km' or 'you are now entering the territory of the Serpent River First Nation'. That these reserves literally dot the entire Canadian landscape is evident from Chart 1, which indicates the geographical dispersion of Indian lands (or 'reserves'). The two large 'white' areas in the Chart, namely Northern Quebec and the eastern and northern part of the Northwest Territories are, as inset 2 of Table 1 indicates, the home of the Inuit and few other persons. Only the island of Newfoundland has no reserves, although the remainder of the province of Newfoundland, namely Labrador, is also peopled by the Inuit.

Because, among other reasons, these reserves are frequently little more than 'muskeg, rock and sand'¹ and living conditions on reserves are often deplorable, very substantial numbers of First Nation citizens live off-reserve, typically in the larger urban centres. From inset 1 of Table 1, about 200,000 of the 500,000 registered Indians live off-reserve. This poses substantial problems because, while the federal government recognises its fiduciary responsibility for Indians on reserves, it assumes that once First Nations persons leave the reserves the respective provinces should look after their socio-economic needs. And if the status Indians fall into these jurisdictional cracks, the situation is even worse for the non-status Indians and Métis who suffer the discrimination meted out to aboriginals without any rights to fall back on. Recently, however, several provinces have instituted preferential hiring policies for visible minorities and disadvantaged groups in the hope that this may ameliorate their situation somewhat.

Still focusing on status Indians, Table 2 contains data relating to an especially tragic episode in Canadian and Indian history. Under the Indian Act (introduced shortly after Canadian nationhood), if an Indian woman married a white man, not only was she typically forced to live off-reserve but she and all her offspring lost their Indian status. As a result, probably hundreds of thousands of First Nations people lost their birthright. In 1985, the Indian Act was amended (via Bill C-31) to allow for the restoration of status. The federal government was overwhelmed by the response. As Table 2 indicates, nearly 100,000 Indians regained their status. To my knowledge, data are not available on the countless thousands of others who, for whatever reason, could not substantiate their claim. Intriguingly, Ovide Mercredi, the current Grand Chief of the Assembly of First Nations (essentially the Assembly of the Chiefs of the roughly 600 Indian bands), regained his status through the C-31 route.

In terms of socio-economic status, the registered Indian population is largely transfer- or welfare-dependent. From Table 3, 45.6 per cent of all Indians fifteen years of age and over have government transfer payments as their primary source of income. This compares with 19.4 per cent of the general population. But even this is an underestimate of the Indians' economic plight because the figures in Table 3 include the elderly receiving social assistance and only four per cent of first Nations persons were older than sixty-five years in 1981 compared, for example, to nine per cent for the general population. Projections indicate that, by 2001, nineteen per cent of Canadians will be under fourteen years of age and fourteen per cent will be over sixty-five. Comparable projections for status Indians suggest that these percentages will be thirty-one per cent and five per cent respectively. Thus, the Indian population is dramatically younger (on average eleven years younger) than the Canadian population and this poses corresponding policy challenges.

1. Courchene, Chief Dave, 'Commemoration Address', Address by the President of the Manitoba Indian Brotherhood at the Treaty Centennial Commemorations, Lower Fort Garry, Manitoba, 2 August, 1971. (Available from the School of Policy Studies, Queen's University.)

There is one bright light on the horizon: the numbers of status Indians pursuing post-secondary education has increased markedly. Thanks to the availability of post-secondary-education allowances, there are now over 20,000 Indians at universities and colleges, compared with less than one hundred twenty years ago.

To close off this brief profile of Canada's first peoples, Table 4 presents estimates of the federal government's per capita spending on Indians resident on reserves in 1989-90. The total is roughly \$10,000 per person. While this may appear to be a large amount of money, it should be noted that the per capita spending on the average Canadian by all levels of government (including an allocation for the current deficits) is, if anything, somewhat larger.² However, the bases for these two estimates are quite different so that strict comparisons can be misleading. But the essential point is that something must be very wrong at the policy level when spending of this magnitude does not achieve meaningful results. This obvious poverty of existing policy approaches is a major reason why Canada and Canadians are sympathetic to the increasing demands on the part of the First Nations for self-government. Relatedly, while self-government will likely be expensive, most of the needed funds are already being spent — they just have to be re-channelled.

With this backdrop, I now turn to an analytical approach to aboriginal self-government.

An Indian-Lands or First Nations Province

Included as an integral part of the 1992 Constitutional Accord that was agreed to by all first ministers and the leadership of the four aboriginal groups was the recognition of the *inherent right* of aboriginal peoples of self-government *within Canada*. The term 'inherent right' implies that the right always existed: hence, the right is recognised, not 'created'. And the term 'within Canada' implies that aboriginal governments would be one of the three recognised orders of government in Canada: aboriginal governments would not be sovereign in the international sense.

Other aspects of this Constitutional Accord relating to aboriginals included:

- the entrenchment of the inherent right to self-government would not create new rights to land. The existing and on-going land claims would proceed in the normal way;
- there would be a five-year delay in the justifiability of the right of self-government. This would allow for political rather than judicial solutions to self-government;
- aboriginal and treaty rights would continue to be guaranteed equally to men and women. This was intended, in part at least, to ensure that the tragic episode discussed in the context of Table 2 could never be repeated;
- treaty rights were to be interpreted in a just, broad and liberal manner taking into account the spirit and intent of the treaties and the context in which they were negotiated; and
- all future constitutional amendments that directly refer to the aboriginal peoples would require aboriginal consent.

This Accord, which included amendments and provisions in many other areas (including a proposal for an elected, equal and effective Senate; 'distinct society' status for Quebec; a guarantee to Quebec of twenty-five per cent of the seats in the House of Commons; and a transfer of several powers from the federal government to the provinces), went down to resounding defeat in the national referendum on 26 October 1992. I think that it is fair to say that this defeat had much more to do with the non-aboriginal provisions of the Accord: Canadians were generally in favour of aboriginal constitutional aspirations. In any event, many of the provisions, including aboriginal self-government, will now have to be pursued through the political process, where they probably belonged in the first place.

However, while Canadians are generally sympathetic to aboriginal rights, I think that it is also fair to say that during these recent constitutional discussions there was (and still is) considerable anxiety in terms of precisely what aboriginal self-government might mean. Beyond the concern that it might involve aspects of international sovereignty (which a few of the First Nations clearly desire), three general questions arise:

2. Courchene, Thomas J & Powell Lisa M., *A First Nations Province*, Institute for Intergovernmental Relations, Queen's University, Ontario, 1992, Table 12.

- What would be the powers of these governments?
- How would these governments relate to the existing governments? and
- How would aboriginal self-government be financed?

In order to address these issues head-on, as it were, I proposed³ that the most obvious approach, and one that Canadians are totally familiar with, would be to grant full provincial status to an 'Indian Lands Province' or a 'First Nations Province' (henceforth FNP). Prior to focusing on the FNP and how it would address these three issues, a few details are in order.

First, this would be a land-based province — essentially the province would incorporate all the Indian lands in Chart 1. Thus, while land-based, these lands would not be contiguous, which is not as daunting in our progressively telecomputational age as it may have been a decade ago. Second, the land and population base of the existing reserves would make the FNP a relatively small province in the Canadian context — about half the size of Nova Scotia in terms both of population and land mass. However, this is likely to be a substantial underestimate of what an FNP might eventually look like. Apart from the land claims in the northern territories (dealt with later), as of 1989, 519 specific land claims had been filed and this excludes the 'comprehensive' claims which are not related to treaties. Once these claims come to some conclusion or other, the likelihood is that an FNP could be, geographically, one of the larger provinces.

Third, since this is an Indian-lands-based province, it does not address the important issue of aboriginals living in urban areas. Thus, an FNP cannot be a complete approach to aboriginal self-government. (As we shall see, however, the Yukon First Nation Agreements do address this issue.) Fourth, as already noted, there could be more than one FNP — although not too many because part of the rationale is to reap some economies of scale. The final preliminary point is that even if the Indians were to opt for some variant of this model, it is highly unlikely that they would ever use the term 'province'. They want to be one of the three orders of government, quite distinct from the other two. Nonetheless, I shall continue to use the term 'province' because of the information and substance that this brings to the analysis. Indeed, it provides immediate answers to the three earlier questions, to which I now turn.

Powers

In terms of powers, the answer is straightforward: FNP would have the same powers as Ontario or Quebec, or any other province. In the Australian context, the rough equivalent would be the powers of, say, New South Wales, except that, unlike the Australian states, the Canadian provinces have control over welfare (unemployment benefits in your terms) and have the right to levy (and do levy) income and sales taxes.⁴ The FNP would probably use its powers to implement some version (or different versions in different parts of FNP) of a native justice system. This would not be that anomalous in the Canadian context because Quebec already uses 'civil law' while the rest of the provinces have a common-law system.

Were such an FNP implemented, down the line a bit one would likely find First Nations development corporations, a First Nations university (part of the 'peace dividend' is that Canada no longer needs two English-language military colleges — one would be sold or turned over to FNP) and perhaps First Nations financial institutions. Readers are probably as good as I am in terms of forecasting what other FNP institutions might emerge.

Relations Among Governments

Like other provinces, FNP would have its appropriate number of Senate seats and would elect the appropriate number of members of Parliament from its province (based, obviously, on multi-reserve constituencies).

The internal structure of FNP would be up to the First Nations themselves. My guess is that it would be highly decentralised and confederal, because the ultimate autonomous unit would still be the individual

3. Courchene, Thomas J, 'How About Giving Natives a Province of Their Own?' *Globe and Mail*, 18 October 1990, editorial pages; and Courchene, Thomas J & Powell Lisa M., *A First Nations Province*, Institute for Intergovernmental Relations, Queen's University, Ontario, 1992.

4. In the Canadian context, levying provincial income tax is not difficult because Ottawa collects the tax for the provinces. Levying sales taxes would be more complicated. The FNP could mount its own bureaucracy or the various constituent First Nations could tie themselves into the sales-tax regimes of their contiguous province.

First Nation. For example, the FNP assembly might be composed of Chiefs with an upper house composed of elders. The internal constituent units might be along regional or linguistic groupings of individual First Nations. In other words, the end result could well be the opposite of the Germany-EC relationship. Germany is a federal nation embedded in a confederal Europe. FNP might well be a confederal province embedded in a federal Canada. The essential point, however, is that the internal design of FNP would be left to the First Nations in the same way as the internal design of Ontario is left to Ontarians.

This conception of an FNP which I propose is not as revolutionary as it might at first appear. Indeed, the 600 or so First Nations are essentially currently administered as if they were one big province, run out of the federal Indian Affairs bureaucracy. Areas like welfare, health, education and other 'provincial' powers are currently being provided to these First Nations. What would happen under FNP is that this bureaucracy would fall under the control of FNP. Some of the functions could be coordinated from the centre, some would clearly be decentralised and some would likely end up being contracted out to the adjacent province or city, just as they are now. Thus, this is really more evolutionary than revolutionary. There is, however, one critical difference: henceforth the monies and the control would come from FNP.

There is another advantage to this sort of arrangement. Different First Nations find themselves in different stages of readiness and have different sorts of aspirations in terms of self-government. Some want only municipal-type powers. Others want powers that may exceed provincial powers in certain areas. Rather than having each band negotiate with Ottawa every time it wants an increase in its powers, full provincial powers would be transferred to FNP and then individual First Nations could negotiate with themselves, as it were, in terms of drawing down additional powers.

Finally, entry and exit from FNP would be free and open. If a Canadian citizen (aboriginal or otherwise) resides on FNP land, he or she would be subject to FNP laws. Similarly, if a status Indian lives outside FNP territory (say, for example, in Winnipeg) he or she would be subject to Manitoba, not FNP, laws. And so on, with respect to the full range of areas where provinces interact among themselves and with the federal government.

Financing

Canada's equalisation program would also apply to FNP. Thus, in addition to its own revenues, the equalisation program would ensure that FNP had, as the Canadian Constitution stipulates, 'sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.' Given that the socio-economic condition of the First Nations would, initially at least, be so far below that of other provinces, it may well be the case that a special form of equalisation would be required for some interim period. The obvious example here is the formula financing model currently used for Canada's territories. Specifically, one would define some thing akin to a 'gross expenditure base'; that is, the amount needed to deliver public goods and services of comparable Canadian quality to the First Nations. From this total one would subtract the amount of revenues raised by the FNP as well as any other monies it would receive from Ottawa, and the difference would be the formula financing or equalisation payment due to the First Nation. Readers will recognise that this corresponds in spirit, if not in detail, to the operations of the Commonwealth Grants Commission in Australia.

This equalisation would presumably be transferred to FNP which, in turn, would engage in a 'second tier' or internal equalisation program to achieve some equity across various First Nations.

Summary

I have glossed over a good many of the details and, indeed, some of the complexities and complications related to an FNP.⁵ However, the general approach should by now be quite familiar to an Australian audience, since it essentially applies the principles inherent in the operations of state governments to the aboriginal peoples.

I emphasise again that the FNP is an *analytical exercise*. The likelihood is that it will never be fully implemented in practice (although as the rest of the paper indicates, it has been largely implemented in

5. Many of these are addressed in Courchene, Thomas J & Powell, Lisa M., *A First Nations Province*, Institute for Intergovernmental Relations, Queen's University, Ontario, 1992, 13. One major complication is that section 87 of the Indian Act exempts First Nations from taxation by other governments for income earned on Indian lands. One possible way around this is to have *both* the FNP proportion as well as the federal portion of income taxes returned to the First Nations as their 'own revenues'. This would then be an offset under the equalisation program and would (or could) be fiscally neutral.

the Yukon). However, even if the FNP turns out to be unacceptable constitutionally or impractical operationally, it should nonetheless provide a valuable benchmark against which other approaches can be assessed or addressed. Given that aboriginal self-government essentially involves integrating another order of government into a federal system, whatever approach or approaches are chosen will almost inevitably draw upon aspects and/or principles of the FNP model because this is the way that Canadians practice federalism.

I now turn from theory to practice and shall focus on the path-breaking Yukon First Nations self-government agreements. I should warn the reader in advance that I was privileged to be a consultant to the Yukon First Nations in these negotiations. Thus, the natural tendency on my part may be to heap too much praise on these self-government arrangements. Accordingly, I shall provide (hopefully) adequate documentation so that readers can make up their own minds on this issue. Finally, it would be nice to be able to claim that the reason why these arrangements resemble the FNP model in places has to do with my input. Reality is different, however: the Yukon First Nations had been negotiating these agreements for over two decades before I appeared on the scene.

Self-Government in Action: The Yukon First Nations Agreements

When Australians and even Canadians hear of major recent breakthroughs in aboriginal self-government in Canada, what they typically have in mind is the creation of Nunavut ('our land' in the Inuit language). Nunavut is indeed a breakthrough. The Inuit are to be paid \$580 million (in 1989 dollars) over fourteen years. These are 'compensation dollars', quite apart from equalisation-type funding to finance Nunavut on a year-by-year basis. The deal gives the 17,500 Inuit absolute ownership of selected parcels of land carved out of the former Northwest Territories that add up to roughly 350,000 square kilometres, with subsurface rights to 36,257 square kilometres. Nunavut as a whole will contain 200 million square kilometres, more than a fifth of Canada's land mass (see Figure 1). The Nunavut government will be a 'public government' and thus will operate as part of the Canadian parliamentary system, not as a version of aboriginal self-government. However, Nunavut will be Inuit-controlled by virtue of demographics. Inuit now make up eight-five per cent of the population and will likely remain the overwhelming majority. Nunavut will not come on stream until 1 April 1999, the lead time deemed necessary, in part at least, to ensure that programs are put in place so that the Inuit themselves, not 'southern whites', will run the bureaucracy.

To be sure, Nunavut is a major victory for the Inuit and a giant move forward in terms of realising aboriginal self-government in Canada. Essentially, it creates a new territory within Canada and, in a sense, is in line with the dictates of the FNP model. However, in another sense, Nunavut is unlikely to be a model for the rest of the First Nations. Much more difficult conceptually, operationally and negotiation-wise is to grant self-government to a group of First Nations that occupy pockets of land that are non-contiguous. This is precisely what the Yukon First Nations self-government agreements accomplish and why they, rather than Nunavut, are more likely to be a model agreement for the rest of the First Nations.

There are fourteen First Nations in the Yukon Territory. In terms of Chart 1, the Yukon is the triangular formation in the upper-north-west of Canada. While Chart 1 is a stylised depiction of Indian lands, there are actually fourteen dots in the Yukon, corresponding to the fourteen Yukon First Nations. The population of the Yukon is just under 30,000, twenty-five per cent of whom are First Nation peoples. Because the various fourteen First Nations are in different stages of readiness in terms of embracing self-government (and because there is a limit to the number of negotiations that can be ongoing at one time), the negotiation process has proceeded on a First Nation by First Nation basis. To date, self-government agreements have been signed with four First Nations. The remaining agreements will come on stream over the next few years. These are tripartite agreements, negotiated among the First Nation and the governments of the Yukon Territory and Canada. The Yukon Territorial Government has already ratified the agreements. Ratification by the First Nations is in mid-stream. The expectation is that the Government of Canada will give its imprimatur fairly soon, perhaps as early as next month.

This bit of administrative detail out of the way, I now focus on the substance of the agreements. There are two key negotiated documents — the 'Umbrella Final Agreement' (which becomes modified slightly for each First Nation and is then referred to as the First Nation Final Agreement) and the 'Self-Government Agreement' (which is also First Nation specific, but again quite uniform). For convenience, these documents will be referred to as the UFA and the SGA respectively. There are also negotiated 'implementation plans' related to the UFA and the SGA. Finally, there is a Financial Transfer Agreement or FTA (essentially an equalisation program) negotiated pursuant to the SGA.

The UFA

The UFA is the master document, as it were. In effect, it is a land claims settlement which, pursuant to sections 35(1) and (3) of the *Constitution Act (1982)*, as amended by the *Constitution Act Proclamation, 1983*, may well become a formal part of the Canadian Constitution.⁶ Included as an integral part of the UFA is a transfer of 16,000 square miles of land to the Yukon First Nations (YFN) as well as over \$200 million (in 1989 dollars) financial compensation, a significant portion of which will go to repay monies borrowed to sustain the more-than-two-decade negotiation process. As an aside, on a per capita basis, this compensation is larger than the Nunavut compensation. The UFA is an overview document in another sense as well: it establishes some of the basic parameters and principles under which the SGA, and to a lesser extent the Financial Transfer Agreement, were to be negotiated. Most importantly, perhaps, the UFA sets out the relationship between the YFN and the land, both for lands set aside for the YFN and for other lands in the Yukon.

Because the UFA is roughly 300 pages long, it is impossible in this present paper to attempt even a summary. By way of compromise, Table 5 contains the UFA's chapter headings. Some brief comments are in order. Chapter 3, dealing with eligibility and enrolment issues, breaks new ground in the Canadian context. Way back in the negotiation process, the YFN abandoned the distinction between status and non-status Indians and, instead, adopted the concept of a YFN 'citizen'. While citizenship is based largely on ancestry, it also incorporates citizenship arising from marriage, adoption and even, for lack of a better phrase, cultural and spiritual affinity.

It is evident from Table 5 that most of the UFA provisions relate in one way or another to stewardship over the land and the environment — land use, land management, forest, fish and wildlife management, water management, surface rights, boundary issues, non-renewable resources, heritage (which includes parks, burial sites and the naming of places), etc. In some of these areas, the YFN will be assuming what elsewhere in the country would be 'federal powers' (for example, with respect to fishing) and in all cases they will be full participants in the husbanding/stewarding of the environment. The YFN are peoples of the land and now they have the power to ensure that the land will always be there for them and, indeed, will be there in a way that they, not the rest of Canada, deem appropriate.

Other chapters deal with issues that are elaborated in the SGA — self-government itself, the financial transfer agreement, taxation and accessing royalties from resources on YFN lands and provisions in some cases for sharing royalties on crown lands. Finally, but hardly exhaustively, there is an important chapter on dispute resolution which allows for mediation and, if the parties agree, arbitration as well as judicial review.

The SGA

In order to facilitate the description and analysis of YFN self-government, the Appendix contains selected provisions of the Champagne and Aishihik First Nations SGA. (The Champagne and Aishihik First Nations are one of the fourteen YFN.) As with the UFA, the SGA is a tripartite agreement among Canada, the Yukon Territory and, in this case, the Champagne and Aishihik First Nation. The first point to make is that all parties recognise that this will be a special sort of government. As the 'whereas' clauses and the 'principles' in the Appendix indicate, YFN self-government will be a co-mingling of the traditional and the modern. From 2.1: 'The Champagne and Aishihik First Nations has traditional decision-making structures and desires to maintain these traditional structures integrated with contemporary forms of government'. While meaningful self-government for the YFN could not be otherwise, it is nonetheless a significant achievement to have formal recognition of these institutions. And for anyone who is familiar with traditional 'consensus' decision-making, it is especially gratifying to have this recognised as the democratic institution that it really is.

On the day the SGA comes into force, the Indian Act as it pertains to the Champagne and Aishihik First Nations shall cease to exist and the associated rights, title, interests, assets, obligations and liabilities shall vest in the Champagne and Aishihik First Nations. Section 9.2 in the Appendix lists the new legal status and powers of the First Nation.

6. The relevant section of the Constitution Act 1982 read:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed...

35(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.

For what its worth, my non-legal opinion is that these First Nation Final Agreements will qualify under section 35(3) to be enshrined in the Constitution.

The SGA also spells out the requisite nature of the First Nation constitutions. Section 10 in the Appendix contains some of the relevant provisions. Others include providing for adequate financial reporting, for amendment procedures, for procedures that allow citizens to challenge the validity of First Nation laws, and more generally for ensuring that the First Nation can be held accountable to its citizens. As an intriguing aside, while the Australian states have their own constitutions, the Canadian provinces do not.

Legislative Powers

Turning now to the legislative powers of the First Nation under the SGA, section 13.1 presents one of the exclusive powers — internal management and administration. Obviously, this has to be part and parcel of meaningful self-government.

Section 13.3 of the SGA relates to the legislative powers of the First Nation that apply only on its own territory. Again the Appendix presents only selected clauses. One that should have been included is the licensing and regulation of any person carrying on any business, trade, profession, or other occupation. Determining the extent of some of these powers — in particular q), the power over the administration of justice — will require future negotiations among the parties. As a final comment on the section 13.3 powers, I draw your attention to section w) which reads: 'other matters coming within the good government of Citizens on Settlement Land' — which is in the nature of a catch-all or even a residual power.

Note that the powers enumerated under section 13.2 (that is, powers to enact laws in the Yukon) also apply to First Nation territory (settlement land) because these settlement lands are by definition in the Yukon.

These are rather sweeping powers. Whether they are greater or lesser than those of the existing provinces is really beside the point (although one might note in passing that the powerful provincial clause 'property and civil rights' is absent from section 13, although parts of it are covered elsewhere). What is relevant is that, barring some unforeseen circumstance, these powers appear wholly adequate for the YFN to secure their future as a self-governing and self-determining culture, society and nation within Canada.

What is unique about the SGA, certainly in comparison with the FNP model elaborated earlier, is that the YFN will be able to provide programs and services to their citizens beyond Settlement Lands, but still in the Yukon. By and large, these powers (reproduced in section 13.2) relate to the social envelope — education, health, welfare, marriage, adoption. Thus, the SGA is really a combination of a 'territorial model' (powers depend on *where* you are) and a 'citizenship model' (powers depend on *who* you are). This citizenship model operates in a few areas in the rest of Canada. For example, school taxes in Ontario can be directed either to the public or Catholic school systems and therefore depend on who you are, not where you are. This approach makes considerable sense in the Yukon since roughly half the population resides in Whitehorse. Whether this concept can be carried over in terms of aboriginal self-government negotiations in southern Canada is far from clear. At the very least, it poses a challenge to negotiators.

Taxation

Section 14 relates to taxation powers. These too are broad powers, but there are some further provisions (not reproduced in the Appendix) that indicate that some of these powers are concurrent. In turn, this implies further negotiations. The ability to exercise direct taxation powers is, under section 14.3, subject to a time delay so that Canada can put together a coherent approach to Indian taxation. Nonetheless, these must appear as sweeping powers to Australians since they exceed, in *de facto* terms at least, what the Australian states can do.

A slight detour is warranted here. Part of the rationale for the extent of these tax powers is that the Canadian government has become convinced that the right to tax is an integral component of meaningful self-government. From an Autumn 1991 speech by the Minister of Finance, Don Mazankowski, to a conference on Indian taxation:

Up until now, the legislative regime has recognised only one type of tax power for Indian governments — municipal-like property taxes. But the status quo is unacceptable. For strong self-government to be a reality, Indian communities must have access to a wider range of tax powers — not just the right to levy property taxes....

In many Indian communities, there may well be sufficient economic activity to form a tax base. We are willing to work with you to design tax systems that can ensure that Indian governments

have the ability to tax this economic activity on Indian lands. Cooperation between the federal government and Indian governments can do more than simply define the parameters for the exercise of Indian government taxation. There are ways that the federal tax system can be used to facilitate taxation by Indian governments....

We are willing to examine how the administrative experience and capability of the federal government can be potentially harnessed to help in making Indian government taxation feasible even in relatively small communities.⁷

However, while Ottawa appears (and is) very generous when it comes to extending significant taxing powers to the First Nations, there is an important underlying rationale for this generosity. My reading of the situation is that the federal and provincial governments are concerned that aboriginal self-government will become synonymous with tax havens. The Finance Minister admitted as much (albeit obliquely) in the same speech:

Uncoordinated tax systems — with the potential for overlapping application — cause problems for everyone, including taxpayers, administrators and governments. Potential problems caused by overlapping tax jurisdictions, such as double taxation and tax avoidance, are dealt with through agreements and conventions between taxing authorities. We are willing to work with Indian governments to establish this type of relationship between Indian and other tax systems.⁸

In any event, what matters for purposes of this paper is that the YFN have access to broad taxing powers. Moreover, the Yukon First Nations have, for compensation, renounced section 87 of the Indian Act which had exempted them from taxation. However, self-government requires adequate revenues not just the right to levy taxes. Enter the equalisation program or the Financial Transfer Agreement.

The Financial Transfer Agreement

Section 16 of the SGA provides for the negotiation of a Financial Transfer Agreement (FTA). Unlike the UFA and the SGA, the FTA is a bilateral agreement between the First Nation and the federal government. The principles underpinning the FTA appear in sections 16.1 and 16.2 of the Appendix and these more or less track the equalisation principles contained in the Canadian Constitution. The nature of the FTA is along the lines of the Yukon Territorial Government formula financing approach outlined earlier. Basically, a gross expenditure base (that is, the amounts of money needed to deliver the comparable level of goods and services) is negotiated and from this is subtracted First Nation revenues and other federal transfers to arrive at the financial transfer. As is the case with equalisation in Canada and Australia, the revenues that are subtracted are not actual revenues, but rather standardised revenues — the revenues that would exist if comparable tax rates were levied. The First Nation need not levy taxes, but the financial transfer will be calculated on the assumption that taxes at rates comparable to those elsewhere are being levied. Moreover, the offset rate for tax revenues against the gross expenditure base is less than dollar for dollar. Both of these provisions encourage the First Nation to engage in taxation. But again, this will be their decision.

As section 16.6 of the Appendix indicates, the financial transfer is, in general, to be provided on an unconditional (no-strings-attached) basis. This follows Canadian practice in terms of equalisation transfers to the provinces.

Prior to some summary comments on these agreements, there are two other issues that need to be addressed. The first of these relates to the time-frame for the implementation of self-government and the second relates to the potential for reaping economies of scale.

Implementation Time-Frame

While the First Nations will have all the SGA powers on the day that the agreements are ratified, it is highly unlikely that they will access these powers immediately. There are at least three reasons for this. The first is that it is very difficult to build up the necessary personnel and expertise from a standing start, as it were. Many of these programs and services require a degree of financial, legal and administrative backup that can only be developed over time. Second, for some programs it may be optimal for all fourteen First Nations to access them at the same time. But, as already noted, it may be a couple of years before all fourteen First Nations complete their negotiation and ratification process.

7. Mazankowski, the Honourable Don, 'Notes for an address to the Indian Government and Tax Conference' (Whistler D.C.), 12 November, 1991.

8. Ibid.

Third, the First Nations may be quite satisfied with how some programs are currently delivered. The SGA provides for First Nation legislation in areas that they are not occupying: if the current provider (for example, the federal government or the Yukon Territorial government) accepts these legislated conditions then there is less need for the YFN to deliver the programs themselves.

Indeed, the SGA and the FTA anticipate that not all programs will be accessed immediately. Section 17 of the SGA (not reproduced in the Appendix) details the process by which additional programs can be taken down after the agreements come into force and it also contains provisions relating to the associated funding. The FTA was also designed explicitly to accommodate future program and services takedowns.

What this means is that the First Nations have flexibility to exercise their powers as their priorities, aspirations and expertise dictate.

Internal Structure of the YFN

While the individual First Nations are the signatories of these agreements, they may decide to provide some of the public goods and services in concert. Indeed, the incentives are all in this direction, since any savings achieved by this would accrue to the First Nations. For example, it probably would not make much sense for each First Nation to hire a professional to oversee the operations of the FTA when one for all fourteen would likely suffice, given the likely similarities in the FTAs. Moreover, in this fiscal climate it is highly unlikely that Ottawa will be overly generous in terms of the FTA, so that the only way to deliver all programs and services adequately may be to seek out economies in delivery whenever and wherever they exist.

Once again, the SGA allows for this possibility. This is clear from section 12 (in the Appendix) which deals with the delegation of powers. Of particular interest here is the Council for Yukon Indians (section 12.1.6). This Council has, in various forms, existed for many years and it played a lead role in the negotiation of all of these agreements. In political science terms, it is a sort of confederal superstructure which is responsible to the YFN leadership. Once the agreements are ratified, the YFN may wish to reconstitute this body in more formal terms and to grant it various powers. For example, the role of liaison with other governments — federal, provincial, territorial — may well be best done through some such federal or confederal institution. Likewise, as in the FNP discussion above, the Council for Yukon Indians could initially assume responsibility for all programs and services and then devolve them to the individual First Nations as soon as they are able and willing to take them down.

What is clear from the very structure of the agreements, however, is that power rests with the individual First Nations and that delegation of any administrative, legislative or delivery powers to a YFN superstructure will be their decision.

Summary

This, then, is an overview of the Yukon Indians' self-government agreements. I have attempted to focus briefly on a rather broad range of areas. Were the audience composed largely of lawyers and political scientists, for example, I would have placed more emphasis on issues relating to concurrency and paramountcy as they relate to First Nation legislative powers. I might add in passing that there cannot be a legislative void because laws of general application (whether federal or Yukon Territory laws) will apply until the First Nations enter the field.

No doubt some problems will crop up. These agreements are unprecedented: there is no existing experience to model them after. Hence, it is virtually inevitable that some events will not have been anticipated.

Finally, there is, of course, no guarantee that these or any self-government agreements will be successful. I think that it has to be this way. If there is not the possibility for failure, it is also the case that there is little likelihood for success. This is the essence of meaningful self-government and self-determination. However, I would add that the Yukon Indians have been preparing for self-government for a long time and they are determined and confident of their future as self-governing First Nations.

One final point. Thus far, the emphasis on the financial side, both in this paper and in Canada generally, has been in terms of the costs of self-government. But there is the distinct possibility for self-government to be a very significant positive-sum financial game. To the extent that self-government will lead to a decrease in the welfare dependency of First Nations and, more generally, to economic development on Indian lands, not only will the First Nations be better off financially but so will the federal treasury.

Conclusion

It may not be accidental that the two high-profile self-government agreements — Nunavut and the YFN agreements — are located in that part of Canada where there are territories rather than provinces. Crown land in these territories generally rests with the federal government, so that it may be easier to negotiate land claims. South of the 60th parallel, most Crown land rests with the provinces so that they have to do the transferring of land, even if some of the compensation comes from Ottawa. Nonetheless, there have also been breakthroughs south of 60. The James Bay Agreement among Quebec, the federal government and the James Bay Cree is a case in point. Recently, the province of Saskatchewan turned over substantial sums of money to the First Nations in order for them to buy additional land in the province. And, as I noted in the introduction, there are probably hundreds of on-going negotiations throughout the country.

In terms of these negotiations, it seems clear the Yukon Indians' settlements are likely to be precedent-setting, not only in terms of the principles and substance of the agreements but as well because they involve a group of First Nations who occupy non-contiguous parcels of Indian land — exactly the situation of the remaining 600 or so First Nations with reserves located inside the boundaries of the existing provinces.

While the YFN agreements are likely to be precedent-setting for the rest of Canada, I have not attempted to speculate in terms of the implications that these models might have for addressing Aboriginal self-government in Australia. Intriguingly, however, the 1993 Report of the Commonwealth Grants Commission (the CGC)⁹ devotes Chapter 6 to issues relating to the funding for Aboriginals and Torres Strait Islanders. Among the proposals that the CGC appears willing to entertain is the following: 'that the Commission establish an inquiry to investigate (principally) how fiscal equalisation could be applied to Aboriginal communities and how relative needs of the communities could be assessed'.¹⁰ Should the CGC receive a mandate to undertake this inquiry, it is inconceivable that the Yukon First Nations agreements and, in particular, the Financial Transfer Agreement (that is, the YFN equalisation program) would not figure prominently in terms of the range of alternatives that the CGC canvasses.

This slight detour aside, in terms of the broader Canadian perspective, it is important to recognise that the Yukon First Nations self-government agreements have implications that transcend aboriginal self-government. Without putting too fine a point on it, when we Canadians are addressing aboriginal self-government we are, at the same time, re-constituting Canada.

I want to end on a personal note. If all goes as expected, these agreements could be proclaimed in the near future. Indeed, the proclamation could well be one of the first official actions of Brian Mulroney's government. This would be fitting because the federal government could have abandoned the negotiations after the defeat of the Referendum. Instead, Canada stayed the course. So did the Yukon government. On this day I will be especially proud to be a Canadian.

But the day will belong to the Yukon First Nations. Words cannot describe the roller-coaster of emotions involved in a lengthy and complex negotiation of this sort. Nor can words describe the courage and determination of the leadership and the citizens of the Yukon First Nations and, beyond this, their unswerving belief in their mission and their commitment to future generations. However, it will also be a day filled with anxiety, for while they will celebrate the successful termination of negotiations, they will also be fully aware that this is also the beginning of the new challenge of self-government. In the midst of all this emotion, however, I suspect that most of them will also see their way to say, 'Good on you, Canada'.

At long last, this could be the start of something grand. Thank you. I am willing to entertain questions, if there are any.

[Editor's Note: The official signing ceremony took place in the Yukon on 29 May 1993.]

Questioner — Firstly, are the Inuits of the northern Yukon part of the self-government agreement? Secondly, you referred to the concept of consensus being adopted as a democratic notion. Is there any provision for elections within the self-government move?

9. Commonwealth Grants Commission, *Report on the General Revenue Grant Relativities, 1993, Volume One, Main Report*, AGPS, Canberra.

10. *Ibid.*, 67.

Professor Courchene — To answer the first part of your question, the northernmost First Nation in the Yukon is the Old Crow. Remember that the Yukon shares a border with Alaska, so that some of the people go freely between these borders. There are some Dene in the lower part of the Yukon and that is creating a bit of a transboundary problem. I do not think there are any Inuits in the north of the Yukon; I could be wrong. The north of the Yukon is a point. It does not include the Mackenzie Delta and that is where the Dene are.

The second question concerned elections. I presume you mean election of chiefs?

Questioner — No, elections for the government body, however that is going to be done.

Professor Courchene — If the governing body is confederal — by definition, a confederal system would be the government. The leaders of the government would elect the chief of, say, the Council of the Yukon Indians. That would be a confederal model. In terms of elections, some chiefs are elected; some are not elected.

There are some highly interesting examples in the rest of Canada. For example, among the Mohawks only males can be chiefs, but only women can elect them. Women can impeach them. The impeachment provision in the United States Constitution is taken from the Six Nations approach to impeachment. The word 'caucus' is an Algonquian term for consensus, so a lot of the things that we take for granted, like the whole notion of American Federation — even the Australian Federation — come initially from this concept of the confederacy of the Iroquois. Some of the constitutions require elections. There are hereditary chiefs in some parts of the country, but a lot of them now are elected. So it just depends on which part of the country you are talking about. As I mentioned earlier, a lot of them are women.

Questioner — I think you said that self-government depends on self-sufficiency. Could you explain how that might be?

Professor Courchene — I will give you an example from regional development. Canada has tried hundreds of different ways and spent millions and millions of dollars to try to make the maritime provinces more self-sufficient. We tried to make them like little Ontarios. We put all sorts of money into these provinces, but we never asked them what might be best for them and let it work from the bottom up. As a result our regional policy in Canada is not very viable, even to this day. I think it is the same with the Yukon First Nations, and with any nation. If our approach is always to put a safety net under them, so that if they slip we are going to catch them, then they have very little incentive to make sure they do what they know they have to do. I think that getting rid of welfare dependency means that, from day one, they will know that it is up to them to make sure this works. The agreements are there; they have the money to do it; they have to manage themselves and be responsive to their own citizens. So I think that when they get the ability to integrate all their social programs in ways that they want and not the ways we thought were good for them, we will see a remarkable change.

In particular, there will never be a situation, as occurs in the rest of Canada, where somebody who is collecting welfare is not doing anything. The Yukon Indians are a collective society. The group is as important as the individual, so if some people in the First Nation have to be on welfare, they are going to have to do something for the First Nation in return, even if it is only chopping wood for the elders. They will have to do something to be part of the community. I think that what they are trying to do is build up their faith in themselves and their spirit as a community. We cannot do that for them; they have got to do it on their own. I think that, finally, at long last, we are turning to the right approach and that is 'Let them do it'. It may not work, but I think that it will.

Questioner — What thought has been given to dispute resolution between the nations? I can see that disputes might come about because the nations have management of resources and may like to develop resources differently. Where rivers or perhaps mining or other resources cross boundaries, what happens if disputes arise?

Professor Courchene — The Yukon First Nations will have control of the resources in their area. They are not anti-development, but the development that will occur on the Yukon First Nations lands will be according to the Yukon First Nations priorities and their standards, whatever they are, for the environment or whatever else. So disputes will occur, but if there is some sort of transboundary issue, they will be no different from the disputes that occurred between British Columbia and Alberta. Within the First Nations I think those disputes will be relatively easily solved, because the umbrella final agreement will look after that.

I should have mentioned that, when you look at all these areas, there are about a dozen boards where both Ottawa or representatives of the Yukon territorial government and the First Nations will sit to resolve any disputes but, more basically than that, to do the planning, whether it is for water resources, for forest habitat, or for efficient game management. These are cooperative exercises. They are managing the land, not only in their territory, but generally to protect it. A particularly troublesome area is fishing. The salmon go all the way up the river and it is important that the First Nation right near the mouth does not take all the salmon. So within the Yukon First Nations they are having allocation limits for salmon. What happens if the salmon are short this season? This will impact in some ways on fishing in the whole Yukon area. These things have to be worked out.

Questioner — I was thinking particularly in the case of somebody deciding to dam a river to generate electricity or something such as that. I was just thinking forward to that and wondering about the federal government; I think between the states there would be some sort of overriding view or it may be possible to come to some agreement with them. I was just interested in what you have conceived in terms of a mediating process.

Professor Courchene — There are provisions set out for mediation and arbitration, but they relate basically to the contents of the agreement. You are talking about something that might develop outside of the agreements. Given that the First Nations are sovereign in terms of some of these areas and on their own land, this would be resolved in the same way as a dispute between Saskatchewan and Alberta would be resolved — it would probably have to go to the courts.

Questioner — Because of Lester Pearson, I have a tremendous admiration still for what can come in the way of commonsense and social conscience from Canada. I would like to ask you about problems that I see very much in human nature at the moment. There is a tendency for people, when one gives them quick so-called university education, to forget to be public servants and to become government servants. In these cases, where they are in charge of people, it is very tempting for them to think they are superior to them and the danger becomes acute. There is also the danger, when one has well recognised separate areas of self-government, of there being an awful temptation for people in the urban areas of other provinces to say, 'Get back to where you belong'. Those are painful challenges within the situation, and I wondered if you feel that Canada is certainly well able to say that that cannot happen?

Professor Courchene — In terms of the last issue, one of the criticisms of my model — not the Yukon Indians model but the one I gave earlier — is that this is like the South African homelands. I want to address that. That is partly what you are saying by 'Get back to where you belong'. The best answer I have heard about that is from your own Justice Brennan. In response to some issue related to the northern territories, he said, 'There is an awful lot of difference between a home and a prison'. But it goes beyond that. These are going to be open societies. There will be a lot of white or non-aboriginal people living in these aboriginal communities. Once they are taxed, they are going to have to have some say in the city governments. Beyond that, Nunavut, for example, is a fully open government. It may initially have an aboriginal-type constitution, but beyond that it will be run like any public government in Canada.

One of the things that happen, and one of the things that may relate partly to what you said, is that quite often these look like they are closed governments because the provincial governments, not the Indians, want them that way. They want to make sure that if any citizens of their province move into these territories that province is still providing their citizens with services. Some of these areas may appear as if the Indians are trying to build lands that nobody else can get into. It is quite the opposite. Quite often they are forced, if they want to get self-determination, to move into that mould.

In terms of your more general issue, about going back to your land, one of the real changes that has made a big impact in Canada is the Canadian Charter of Rights and Freedoms, where for the first time we tried to marry a charter with a parliamentary system of government. It does not always fit very well because the charter constrains the supremacy of Parliament. Because we recognised a whole bunch of new groups such as the aboriginals, and we give language rights to certain areas; we give rights to the disabled, I think Canada has become more tolerant of all of those things. It has quite a profound impact on our society. I do not think you are going to find this. I do think that some of these aboriginals living in the urban areas will go back — maybe not for long periods of time, but they will go back because the reserves will now be a place where they can get strength from if they are actually fully self-governing. In any event, the Indians are quite open, and appropriately so, to having full education of their citizens. So what you say may happen — one cannot rule it out — but we have become a lot more tolerant than we were a decade ago. When the degree of agreement is such that the Yukon territorial government can sign something with the Yukon Indians knowing that they have to live together forever because

they occupy the same basic land, I would hope that that sort of approach is going to carry over into other parts of the country, too.

Questioner — Is there a strong separatism movement at all among the First Nations? Do you think that the formation of a province of First Nations may ultimately be a stepping stone to full separation from Canada? Speaking personally, as you say, as much as we Canadians very much appreciate and support these reforms, I for one would be somewhat sad to see a province of First Nations not part of Canada.

Professor Courchene — To get to the nub of what you are saying, both you and I know that there is a series of First Nations, namely the Mohawks, who have aspirations to more than just national powers. This comes for several reasons. First, they are in a peculiar piece of land. They are part in Quebec, part in Ontario and part in the state of New York, so they are international in any event. They have a quasi-office at the United Nations. I talked to one of the local chiefs at one point. He showed me his passport. They have Mohawk passports. It turns out that if you give the British about eighteen days lead time they will accept these passports. His had a British stamp in it.

There are some areas within Canada or some First Nations that, because of their historical relationship, would still want to maintain the internationalisation that they have. I do not think that is true of most other First Nations. Some of them want to be on a government to government level. Because they have treaties with the Crown, they feel that they are every bit as important as the federal government. But they do not really want to be outside of Canada. I think the best example I can give you comes from the province of Quebec, which also has aspirations to separate. The way I tend to view the Quebecois situation within Canada is that the reason why an English-speaking person — although I have French ancestry — has trouble understanding the Quebecois is that for Quebecois Quebec will always be their nation and Canada will always be their country. They separate nation from country. The rest of us do not. I imagine Australians in general associate your nation and country with Australia. But the aboriginals are exactly like the Quebecois: their nation is going to be their First Nation, but their country is also going to be Canada and they will not give up either.

Appendix

Selective Aspects of the Champagne and Aishihik First Nations Self-Government Agreement

The "Whereas" Clauses

1. the Champagne and Aishihik First Nations has traditional decision making structures based on a moiety system and are desirous of maintaining these structures;...
2. the Champagne and Aishihik First Nations asserts, subject to Settlement Agreements, continuing aboriginal rights, titles and interests with respect to its Settlement Land;...
3. the Parties recognise and wish to protect a way of life that is based on an economic and spiritual relationship between Champagne and Aishihik citizens and the land;...

Principles

- 2.1 The Champagne and Aishihik First Nations has traditional decision-making structures and desires to maintain these traditional structures integrated with contemporary forms of government.
- 2.2 The Parties are committed to promoting opportunities for the well-being of Citizens equal to those of other Canadians and to providing essential public services of reasonable quality to all Citizens.

Legal Status of the First Nation

- 9.2 The Champagne and Aishihik First Nations is a legal entity and has the capacity, rights, powers and privileges of a natural person and without restricting the generality of the foregoing may:
 - 9.2.1 enter into contracts or agreements;
 - 9.2.2 acquire and hold property or any interest therein, sell or otherwise dispose of property or any interest therein;
 - 9.2.3 raise, invest, expand and borrow money;
 - 9.2.4 sue or be sued;
 - 9.2.5 form a corporation or other legal entities; and
 - 9.2.6 do such other things that are conducive to the exercise of its rights, powers and privileges.

Constitution

- 10.1 The Champagne and Aishihik First Nations Constitution shall:
 - 10.1.1 contain the Champagne and Aishihik First Nations citizenship code;
 - 10.1.2 establish governing bodies and provide for their powers, duties, composition, membership and procedures;...
 - 10.1.3 recognise and protect the rights and freedoms of Citizens;

Delegation

- 12.1 The Champagne and Aishihik First Nations may delegate any of its powers, including legislative powers, to:
 - 12.1.1 a public body of official established by a law of the Champagne and Aishihik First Nations;
 - 12.1.2 Government, including a department, agency or official of Government;
 - 12.1.3 a public body performing a function of government in Canada, including another Yukon First Nation;
 - 12.1.4 a municipality, school board, local body, or legal entity established by Yukon Law;
 - 12.1.5 a tribal council;
 - 12.1.6 the Council for Yukon Indians; or
 - 12.1.7 any other legal entity in Canada.

Legislative Powers

- 13.1 The Champagne and Aishihik First Nations shall have the *exclusive* power to enact laws in relation to the following matters:
- (a) administration of Champagne and Aishihik First Nations affairs and operation and internal management of the Champagne and Aishihik First Nations;...
- 13.2 the Champagne and Aishihik First Nations shall have the power to enact laws in relation to following matters in the Yukon (both on and off Settlement land):
- a) provisions of programs and services for Citizens in relation to their spiritual and cultural beliefs and practices;...
 - c) provisions of health care and services to Citizens, except licensing and regulation of facility-based services off Settlement Land;
 - d) provision of social and welfare services to Citizens, except licensing and regulation of facility-based services off Settlement Land;
 - e) provision of training programs for Citizens, subject to Government certification requirements where applicable;
 - f) adoption by and of Citizens;
 - h) provision of education programs and services for Citizens choosing to participate, except licensing and regulation of facility-based services off Settlement Land;...
 - l) solemnisation of marriage of Citizens;
- 13.3 The Champagne and Aishihik First Nations shall have the power to enact laws of a local or private nature *on Settlement Land* in relation to the following matters:
- a) use, management, administration, control and protection of Settlement Land;
 - c) use, management, administration and protection of natural resources under the ownership control or jurisdiction of the Champagne and Aishihik First Nations;
 - d) gathering, hunting, trapping or fishing and the protection of fish, wildlife and habitat;
 - k) planning, zoning and land development;
 - q) administration of justice;
 - t) control or prevention of pollution and protection of the environment;
 - w) other matters coming within the good government of Citizens on Settlement Land.

Taxation

- 14.1 The Champagne and Aishihik First Nations shall have the power to make laws in relation to:
- 14.1.1 taxation, for local purposes, of interests in Settlement Land, of occupants and tenants of Settlement Land in respect of their interests in those lands, including assessment, collection and enforcement procedures and appeals relation thereto;
 - 14.1.2 other modes of direct taxation of Citizens (and, if agreed under 14.5.2, other persons and entities) within Settlement Land to raise revenue for Champagne and Aishihik First nations' purposes; and...
- 14.3 The Champagne and Aishihik First Nations shall not exercise its power to make laws pursuant to 14.1.1 until the expiration of three years following the effective date of Self-Government Legislation, or until such earlier time as may be agreed between the Champagne and Aishihik First Nations and the Yukon.

Self-Government Financial Transfer Agreement

- 16.1 The Government of Canada and the Champagne and Aishihik First Nations Shall negotiate a self-government financial transfer agreement in accordance with 16.3, with the objective of providing the Champagne and Aishihik First Nations with resources to enable the Champagne and Aishihik First Nations to provide public services at levels reasonably comparable to those generally prevailing in Yukon, at reasonably comparable levels of taxation.
- 16.2 Subject to such terms and conditions as may be agreed, the self-government financial transfer agreement shall set out:

- 16.2.1 the amounts of funding to be provided by the Government of Canada towards the cost of public services, where the Champagne and Aishihik First nations has assumed responsibility;
 - 16.2.2 the amounts of funding to be provided by the Government of Canada towards the cost of operation of Champagne and Aishihik First Nations government institutions;
and
 - 16.2.3 such other matters as the Government of Canada and the Champagne and Aishihik First Nations may agree...
- 16.6 Payments pursuant to the self-government financial transfer agreement shall be provided on an unconditional basis except where criteria or conditions are attached to the provision of funding for similar programs or services in other jurisdictions in Canada.

TABLE TWO

TABLE THREE

TABLE FOUR

TABLE FIVE

CHART ONE

FIGURE ONE

Corporatised Bodies Old and New: Is Parliament Missing Out?

Roger Wettenhall

I have two main purposes in this paper. First, I want to offer some thoughts, by way of a comparison across time, about the earlier corporate bodies created by Australian governments to operate public enterprises and related non-departmental activities and about our more recent exercises in 'corporatisation'. And second, I want to consider particularly how parliament has related to these corporate bodies old and new. At the outset, however, I offer a comment on the current debates about the process of accountability: this comment will take me into the main argument.

The Several Faces of Accountability

Accountability is a subject that has been much before our attention in recent times. As Elizabeth Harman of Murdoch University observed to the 1992 Australasian Political Studies Association (APSA) Conference:

- 'concerns about accountability have been at the centre of fallout from dubious government-business dealings, especially within some States', and these concerns 'have been the subject of Royal Commissions and other inquiries';
- a 'decade of managerialism has rendered accountability frameworks in government both complex and opaque'; and
- the leading Canadian public administration academics Kernaghan and Langford have diagnosed 'a confusion about accountability relationships' as one of the causes of 'a collapse in the ethical basis of behaviour by public officials'.¹

Drawing attention to a larger study of government accountability under way at Murdoch University, Dr Harman sought to identify ten causes of confusion about accountability in this country. Her ten causes are:

1. A straightforward definition of accountability has not been agreed and given wide circulation by Australian governments.
2. There is agreement by many that we can no longer rely on the conventions of Westminster, but there is also a reluctance by some to accept this.
3. A new accountability regime is emerging, but is comprised of several different systems, with the result that there are multiple reporting lines, or paths of accountability, now in operation.
4. Accountability regimes for government are now being represented not just as a vertical chain, but as a matrix of relationships.
5. There are inconsistencies between the several accountability systems which make the system, as a whole, opaque.
6. Some of the most important relationships are being redefined, most notably that between minister and public servant.

1. Harman, Elizabeth, 'Public Sector Reform and Challenges for Accountability', paper for 1992 Australasian Political Studies Association Conference, Canberra, 1; reporting Kernaghan, K & Langford, J.W., *The Responsible Public Servant*, Institute of Public Administration of Canada, Halifax, 1990.

7. Another major relationship which is being redefined is that between the public agency and citizens as clients.
8. Politicians, and some courts and commissions, may lag behind senior public servants in understanding the implications of the changes which are occurring.
9. The legal and institutional machinery for defining and monitoring government accountability has grown substantially in recent years, but is not evenly developed, nor well tested, nor necessarily effective.
10. The ethical basis of public behaviour has collapsed and with it our understanding of reasonable standards of behaviour.²

This sort of discussion can be linked to some other significant debates which reveal the existence of contrasting views about the nature of accountability. On the one hand, it is argued that accountability is only meaningful when structured into vertical, hierarchical arrangements. On the other, it is argued that accountability has to be conceived as a much more open and multidimensional process, with sideways and downwards as well as upwards components.

That accountability has several faces became very apparent in the debates that followed the release of the report of the Commonwealth's Management Advisory Board and its Management Improvement Advisory Committee a couple of years ago. The report presented a very traditional hierarchical view of accountability as something 'existing where there is a direct authority relationship within which one party accounts to a person or body for the performance of tasks or functions conferred, or able to be conferred, by that person or body.'³ In other words, it requires an 'effective management hierarchy', in which public servants 'are responsible to the next formal superior up, who is responsible to the next up, and so on, on to the secretary, who is responsible to the minister, who is responsible to parliament'.⁴ On this view, as some influential critics noted, public servants were not to think of themselves as being accountable to clients, to the public at large, to the law, to external agencies such as the ombudsman or the auditor-general or, in any direct sense, to parliament itself. Those of this important list which were noted in the MAB-MIAC report were regarded simply as 'adjuncts to accountability'. Some of the 'adjuncts', of course, did not appreciate being written down so lightly. As The Canberra Times's Jack Waterford observed of the MAB-MIAC prescription: 'If only it were all so simple'.⁵

At least in academic circles, this recent Australian controversy has rekindled interest in the famous Friedrich-Finer debate of the early 1940s. Coming from the German and American governmental traditions, Carl Friedrich was always sceptical of claims from Britain that the system of ministerial and parliamentary responsibility 'effectively insures responsible conduct of public affairs by officials, high and low'.⁶

- First, that 'responsibility in a democracy will remain fragmentary because of the indistinct voice of the principal whose agents the officials are supposed to be — the vast heterogeneous masses composing the people'.
- Second, that the 'ways ... by which a measure of genuine responsibility can be secured under modern conditions appear to be manifold, and they must all be utilised for achieving the best effect'.
- And third, that much reliance needs to be placed upon the sense of responsibility of individual officers which is 'largely unsanctioned, except by deference or loyalty to professional [or 'objective', 'functional' or 'technical'] standards'.⁷

2. Harman, Elizabeth, 'Public Sector Reform and Challenges for Accountability', paper for 1992 Australasian Political Studies Association Conference, Canberra, 3-6.

3. Management Advisory Board-Management Improvement Advisory Committee, *Accountability in the Commonwealth Public Sector: An Exposure Draft*, AGPS, Canberra, 1991, 1.

4. Waterford, Jack, 'A Bottom Line on Public Service Accountability', (1991) *Australian Journal of Public Administration* 50 (3), 414.

5. *Ibid.*

6. Friedrich, Carl J., 'The Nature of Administrative Responsibility', *Public Policy*, Yearbook of Harvard Graduate School of Public Policy, Cambridge, Mass., 1940, 221. Reprinted in Peter Woll (ed.), *Public Administration and Policy: Selected Essays*, Harper Torchbooks, New York, 1966.

7. *Ibid.*, 224,245,256.

British Professor Herman Finer's response was to endorse the accountability values built into the Westminster system. For him, responsibility (or accountability) was a matter of instituting arrangements to ensure 'political control of public officials through exercise of the sovereign authority of the public': these arrangements would provide for 'correction and punishment even up to dismissal both of politicians and officials'. For such a system to operate, ministerial and parliamentary responsibility, representing a clear hierarchy of accountability, were vital forces; and Friedrich's 'professional standards, duty to the public and pursuit of technological efficiency' were mere ancillary 'ingredients' themselves requiring clear political control and direction.⁸

It is certain that we will go on arguing about all this. I want here to offer another observation about accountability, one that received some attention when Dr Harman presented her paper to the APSA Conference.

This is that there is an ambivalence in the current Australian discussions about whether there is necessarily a single approach to accountability to be discovered and applied throughout the public sector, or whether different parts of the public sector require different treatments appropriate to their purposes. If the latter represents the 'better path', then all attempts to apply a single general approach — however uncertain that approach might be — are likely to be inimical to the quest for improved functioning over the whole apparatus of government. Indeed, sorting out what are the appropriate forms of accountability for particular parts of the public sector, and then applying those forms clearly and consistently within those matched parts, might lead to better performance not only of the parts but of the whole.

Dr Harman's causes 3 and 5, which recognise that the 'new accountability regime' which is emerging contains 'several different systems', or 'multiple reporting paths', go some way to acknowledging this. But I submit that we are very far from reaching either clarity or agreement here.

Consider the case of the police. The issue of police accountability got serious attention in a conference in May 1993 organised by the Royal Institute of Public Administration Australia and the New South Wales Ombudsman's Office. The Queensland Public Sector Management Commission had just reported:

1. that 'the Police Service is a Government department, a part of the executive arm of Government and as such, the police are answerable and accountable to the Minister'; and
2. that 'the Minister is responsible for the Police Service in the same way other Ministers are responsible for other areas of public administration'.

But then it immediately asserted:

3. that 'there are legal and constitutional constraints on ministerial authority over the Police Service';
4. that 'there is an area of the [Police] Commissioner's responsibilities, the duty to enforce the law, which, by convention and at common law, is not subject to Ministerial direction'; and
5. that 'The Police Commissioner has significantly wider powers than other CEOs in a number of areas related to Human Resource Management'.⁹

Is the police service, then, an ordinary department of government subject to the normal accountability arrangements understood to operate in the departmental public service? Or is it not?

Dr Rudolf Plehwe and I argued in our paper to the conference that it was not possible to have it both ways, that there were significant elements in the Anglo-Saxon police tradition which required that police should *not* be regarded as just another government department, and that the need for special processes of accountability should be recognised. These elements included the common law responsibility of the individual police officer, the kin police tradition within which the police organisation is seen as being responsible to the law rather than to the government-of-the-day, and the long acceptance of devolution in the management of police operations. We argued further that current problems of policing might be better 'treated' if those tackling them were prepared to bring some of the

8. Finer, Herman, 'Administrative Responsibility in Democratic Government', (1941) *Public Administration Review*, 1(4), 248, 275. Reprinted in Peter Woll (ed.), *Public Administration and Policy: Selected Essays*, Harper Torchbooks, New York, 1966.

9. Public Sector Management Commission, Queensland, *Review of the Queensland Police Service*, Government Printer, Brisbane, 1993, 37-41.

precepts now applying widely to the statutory authority group of public authorities to bear on questions of police-government relations.¹⁰ But our efforts were blunted by two law academics who argued that old distinguishing features had vanished, that today the 'same legal and administrative means of accountability' applied to all public sector employees.¹¹

If everything else is standard, why should the police expect to be treated differently? But is everything else standard?

The differential aspect was made abundantly clear in the February lecture in this series by Ian Temby, Commissioner of the New South Wales Independent Commission Against Corruption (ICAC) and a former Commonwealth Director of Public Prosecutions (DPP). He spoke of the creation of public bodies 'independent from government but accountable to parliament' — bodies like ICAC, DPPs, auditors-general and ombudsmen, administrative appeals tribunals, broadcasting tribunals and courts, which are non-partisan (because they are not headed by ministers), which report directly to the parliament which created them, and which 'do not in any sense work through the government of the day'.¹² To a considerable degree, his descriptions apply also to the corporate bodies running, for example, the public broadcasting services and public universities: to some degree, they apply to the corporate bodies running the so-called government business (Canberra) or trading (Sydney) enterprises.

The non-differential aspect is apparent when old distinctions are blurred (as they are particularly in some Australian states today):

- distinctions between secretaries of departments and general managers of statutory corporations, who are now all chief executives;
- distinctions between the Public Service staffed under a Public Service Board or Commission, and non-departmental bodies within the public sector — now we have some undifferentiated Public Sector Management Commissions;
- distinctions between departments and statutory authorities/corporations — the generic, indiscriminating term 'agency' becomes increasingly popular.

My proposition here is that there is, in our machinery of government today, a great deal of ambivalence as to whether we have (or should have) a single overriding system of accountability, with only minor variations within; or whether there are major sub-sectors within the public sector requiring, for their efficient performance, distinctive accountability regimes. So often we seem to want to have it both ways, and I suspect few of us who make up the profession of public administration — either the many practitioner politicians and administrators, or the smaller band of teachers, researchers and reporters — are blameless.

When we talk about the imperatives of accountability, we use broad-sweep language, invoking a force of general application which harms the cause of devising appropriate treatments for particular cases. But then we — and particularly the drafters and passers of legislation — invoke older traditions and take care to be discriminating in the detail we write into our statutes. These statutes are very often clear: they vest functions in ministers and their departments, or they create non-departmental organisations operating in specified relationships with ministers. The intention that there is to be a difference is quite explicit. But then we come back to the broad-sweep (and usually non-statutory) propositions about accountability, and they influence behaviour away from the statutory intent.

And, of course, if governments opt for the form of the state-owned company, as they now do ever more frequently, we can virtually write parliament out of the equation. Again, however, choosing the company form, rather than that of a department or a statutory corporation, surely asserts an intention that behaviours in and around it should be different, and accountability will again be one of the central issues at stake.

Corporate Bodies in the Public Sector: Phase 1

10. Plehwe, Rudolf & Wettenhall, Roger, 'Policing in Australia: An Historical Perspective', paper to Conference on Keeping the Peace: Police Accountability and Oversight, Sydney, May 1993.

11. Goldring, John & Blazey, Patricia, 'Constitutional and Legal Mechanisms of Police Accountability in Australia', paper to Conference on Keeping the Peace: Police Accountability and Oversight, Sydney, May 1993.

12. Temby, Ian, 'Safeguarding Integrity in Government', (1993) 21 *Papers on Parliament* 1.

A little administrative history helps to locate the place of corporate bodies in the public sector. Small statutory authorities were commonplace in British (and British colonial) public administration in the eighteenth and early nineteenth centuries. Mostly, in the middle and later nineteenth century, they gave way to the ministerial department, that great organisational invention of the British, Canadian and Australian Westminster reformers.¹³ The vertical accountability chain — through the ranks of the now merit-recruited departmental hierarchy to the permanent secretary, minister, cabinet and parliament to the electorate-at-large — was now the guiding principle of public administration within a system of responsible parliamentary government. These Westminster reforms are widely regarded as having constituted an administrative revolution.

Then, in the Australian states, came the great challenge of state railway management. Ministerial and public service management of the rapidly expanding rail networks was found to be wanting, a finding which soon extended to the management of other public enterprises here and abroad. The ensuing counter-revolution (counter to the Westminster revolution), which began with the reform of the Victorian railway management system in 1883, produced the organisational form of the modern statutory corporation: this was a revival of the older, more primitive form of statutory authority, which at the same time imported into public administration some features of the joint-stock company form now increasingly familiar in private enterprise.¹⁴

The designers of this new form sought to provide opportunities for entrepreneurial public managers to operate expanding commercial and technologically complex enterprises within the framework of organisations which were both legally incorporated and clearly separated from the central state apparatus. Anyone doubting that this was the objective should read Eggleston's classic text, *State Socialism in Victoria*.¹⁵ Of course, the designers were also very clear that the statutory corporations they were creating remained part of the public sector, and therefore needed to be held accountable to their ultimate owners, the public. Accordingly, they made strenuous efforts to devise new methods of accountability different from those applying to the central departments and suited to government business enterprises.

In trying to find reasonable balances between control and autonomy, the Victorian and New South Wales legislators, in 1883 and 1888 respectively, produced rival models of statutory corporation accountability. In Victoria, the railways

were, as it was called, removed from political influence and placed under the control of a board of three commissioners, who were rendered independent of the Government of the day, and responsible only to Parliament.¹⁶

The essence of this model is the assumed direct responsibility to parliament through annual reports and the like.

When Sir Henry Parkes designed the New South Wales railway corporation, he rejected this Victorian model, which he regarded as incompatible with the 'genius' of responsible government. After a visit to Victoria, he claimed to have found a great deal of muddled thinking underlying the Victorian statute. His conclusions were these:

- Once the railways were operational, their management should be kept 'distinctly separate from the policy of the government' and free from political pressures. It should be conducted according to 'principles of commercial probity and intelligence'.

13. For my argument, partly based on some very respectable Canadian administrative history, that the Westminster system evolved spontaneously in Canada, Britain and Australia, and is not therefore just a British imposition, see Wettenhall, Roger, *Organising Government: The Uses of Ministries and Departments*, Croon Helm, Sydney, 1986, 26-8.

14. See, for example, Wettenhall, Roger, *Railway Management and Politics in Victoria 1856-1906*, RIPA (ACT Division) Canberra, 1961; Wettenhall, Roger, *Public Enterprise and National Development: Selected Essays*, RAIPA (ACT Division), Canberra, 1987; Wettenhall, Roger, 'Australia's Daring Experiment with Public Enterprise', in Alexander Kouzmin & Nicholas Scott (eds), *Dynamics in Australian Public Management: Selected Essays*, Macmillan, Melbourne, 1990.

15. Eggleston, F.W., *State Socialism in Victoria*, King, London, 1932.

16. Reid, J., 'State Railways', *Sydney Quarterly Magazine*, June 1887, 138-44. The argument in the next few paragraphs follows that in Wettenhall, Roger, 'Quangos, Quagos and the Problems of Non-Ministerial Organisation', in G.R.Curnow & C.A. Saunders (eds), *Quangos: The Australian Experience*, Hale and Iremonger, Sydney, 1983.

- The creating statute would lay down the broad principles which the commissioners would follow. The government would have the responsibility of ensuring that the commissioners carried out the provisions of the statute and, if parliament were not satisfied with the conduct of the administration, it could turn out the government or alter the underlying principles by amendment of the statute. But that was all it could do.
- For so long as the commissioners complied with the statute, their autonomy must be defended.

Parkes saw the government's role as holding a watching brief to be exercised in a 'continuous, constant and searching manner', but it was a 'dormant authority' in contradistinction to any active authority — simply enabling the government to intervene in any emergency or the last resort'.

For a while, succeeding New South Wales governments endorsed Parkes's approach. The operating autonomy of the enterprise was to be defended against political pressures seeking to bend it away from its commercial objectives. The New South Wales railways were, at the time, regarded as achieving high standards in efficiency and service. By contrast, the Victorian railways, which had never achieved effective protection from the clamorous interest groups, staggered from crisis to crisis. Amendments to the statute were passed in 1891 and 1896. The 1891 changes significantly increased ministerial control. Those of 1896 recognised that the earlier changes had gone too far, and introduced the 'recoup' system which supposedly obliged the commissioners to receive compensation for the cost of things done for political or social rather than commercial reasons — for which we now use the term 'community service obligations'.¹⁷

Most other traditional formulations of the relationship of statutory corporations to parliament and the executive appear to build on one or other of these two models: that of New South Wales, emphasising remoteness of control, and that of Victoria, emphasising direct answerability to (and, therefore, control by) parliament. Reporting in 1937, the Royal Commission on the Monetary and Banking Systems (RCMBS) came close to the New South Wales model in considering the desirable relationship between the Commonwealth government and the Commonwealth Bank in the aftermath of the Bank's refusal to follow the monetary policies of the Scullin government a few years earlier. RCMBS found that the bank was an entity independent of the government; its powers were delegated by parliament, and it was fully entitled to determine how they could be exercised in what it took to be the national interest, even though its view differed from that of the government. RCMBS suggested that serious differences should be raised in 'full and frank discussion'. If the differences remained unresolved, the government (as 'the executive of parliament') should give the bank

an assurance that it accepts full responsibility for the proposed policy, and is in a position to take, and will take, any action necessary to implement it. It is then the duty of the Bank to accept this assurance and to carry out the policy of the Government.¹⁸

In 1945, the Chifley government wrote this formulation into the Banking Act. This was an important milestone in the evolution of the statutory corporation in Australia. A subsequent Menzies government insisted that all such directions, together with the bank's views, should be reported to parliament, thus ensuring that, in theory, the legislature should make the final judgment on the facts.

During the 1930s, the two pioneering scholars of public enterprise in Australia also emphasised the theoretical separateness of statutory corporations from the general state apparatus, and their corporateness and commerciality. Sir Frederic Eggleston, like Parkes, found that,

if a business service be undertaken by the State, it must be isolated from the State system; definite functions must be allotted to it and responsible managers should be left to carry them out as they think proper; policy should be determined on general lines by the State, and embodied in legislation, but its detailed interpretation and execution should be left to the managers.¹⁹

17. Full citations and further detail may be found in Wettenhall, Roger 'Early Railway Management Legislation in New South Wales', (1960) *Tasmanian University Law Review* 1(3); Wettenhall, Roger, *Railway Management and Politics in Victoria 1856-1906*, RIPA (ACT Division), Canberra, 1961. The Australian state railways drifted far over the succeeding decades from their intended position as autonomous statutory corporations and by the mid 1900s were often mistakenly regarded as (and therefore treated as if they were) departments: see discussion in Wettenhall, Roger, 'Organisations with Two Faces', (1967) *Australian Transport* 12(1). This misuse of them so confused Sir Richard Boyer as ABC Chairman that he suggested that the solution to the problems of the railways lay in their conversion to the statutory corporation form: Boyer, Sir Richard, 'The Statutory Corporation as a Democratic Device', (1957) *Public Administration* (Sydney), 36.

18. Royal Commission on the Monetary and Banking Systems, *Report*, Government Printer, Canberra, 1937, 206.

19. Eggleston, F.W., *State Socialism in Victoria*, King, London, 1932, vii, 45.

As Minister for Railways in Victoria in the 1920s, Eggleston has seen his main role as defending the railways from the 'interests', though he recognised that he had been only partly successful in this and believed that his approach had contributed to his defeat at the 1927 elections. Professor F.A. Bland so despaired of achieving the necessary restraints in political supervision of statutory corporations that he proposed the creation of a Supreme Administrative Council, an administrative tribunal to determine questions about their performance within the terms of guiding legislation, about fees charged by them, and so on.²⁰

As Chairman of the Australian Broadcasting Corporation, Sir Richard Boyer made a significant reformulation in suggesting that the basic principle governing the operation of statutory corporations was that they were responsible, not *to* their ministers like departments, but *through* their ministers to parliament. 'In other words, Parliament requires of a Statutory Corporation the same degree of accountability as it requires of its Ministers.'²¹ W.J. Campbell, then New South Wales Auditor-General, put forward a similar view a few years earlier when he wrote of corporations as paralleling ministers in the executive branch of government, working through them only for 'liaison' purposes:

just as is the Ministerial executive, so also is the corporation answerable to Parliament, which having created the corporation can restrict or enlarge its powers or terminate it at will.²²

Many observers seek to draw a distinction between policy matters for which governments and ministers should retain control and therefore be responsible, and matters of day-to-day administration for which the boards should remain autonomous operators. But policy is notoriously difficult to define, and there is also insistence that statutory corporations must be allowed to exercise important policy discretions.²³

In 1959, the High Court ruled, in *City of Launceston v. The Hydro-Electric Commission*,²⁴ that this Tasmanian corporation was independent of the state apparatus, in the sense of not being a 'servant of the Crown', and that the few statutory powers given to the minister were merely 'a limitation upon what is otherwise a completely independent discretion'. As late as 1959, then, the High Court was emphasising the separateness and independence of these corporations, thus associating itself with a tradition which had held sway in Australia since the 1880s — tradition which, on the world front, had produced the British Broadcasting Corporation in 1926 to serve (in the grand phrase of the Crawford Committee) as 'a trustee for the national interest', the Tennessee Valley Authority in 1933 (in President Roosevelt's words) as 'a corporation clothed with the power of government but possessed of the flexibility and initiative of a private enterprise', numerous 'crown corporations' to manage a variety of Canadian public commercial and developmental enterprises and, after 1945, the 'public corporations' set up by the Attlee government to manage Britain's nationalised industries. A massive literature was generated, reporting and analysing the achievements and problems of these public sector corporations.

Corporate Bodies in the Public Sector: Phase 2

That remarkable management clairvoyant, Peter Drucker, predicted in 1969 that the Western world was about to enter an 'age of discontinuity'.²⁵ For several generations, major currents of political and economic thought had shared a confidence in the ability of government to tackle social problems meaningfully, to lead towards more affluent and more equitable societies. When the era of decolonisation began, this confidence spread to the new nations of the Third World. But, said Drucker in 1969, all that was about to change. And so we saw, developing slowly through the 1970s and much more rapidly in the eighties, a loss of confidence in governments along with a deepening sense of economic and social crisis.

20. Bland, F.A. 'Some Implications of the Statutory Corporation', (1937) *Australian Quarterly*, 9(2), 37-49; Bland, F.A., *Planning the Modern State*, 2nd edn, Angus & Robertson, Sydney, 1945.

21. Boyer, Sir Richard, 'The Statutory Corporation as a Democratic Device', (1957) *Public Administration* (Sydney) 16(1), 31.

22. Campbell, W.J., *Australia State Public Finance*, Law Book Co., Sydney, 1954, 186-7.

23. For example, Dimock, M.E., 'Government Corporation: A Focus of Policy and Administration', (1949) *American Political Science Review*, 43(5&6).

24. (1959) 100 CLR 654.

25. Drucker, Peter, *The Age of Discontinuity*, Heinmann, London, 1969.

Ignoring all the evidence that civilised man has always made much use of public enterprise and that the public/private frontiers have existed and been shifting throughout recorded history, a new ideology spread the word that government had no business in business. It found allies in many of the more pragmatically inclined, who simply feared that government had grown too big to be manageable and so looked for a slimming down in the activities of the state. It is not appropriate to go into the details of the 'small government' movement here. What is relevant is to note that it has produced *not only* a demand to 'privatise' many of the activities of the state *but also* a quest for greater efficiency, better performance, in those functions which remain in the public sector.

For the last ten years or so, we have been hearing insistent demands that government business enterprises should adopt commercial methods of operation and be organised, following the model of the private company, as corporations. Thousands of reforming minds have applied themselves to the task of achieving these reforms, and many of the pronouncements they make suggest a belief that they are blazing a new trail. Those terms 'commercialisation' and 'corporatisation' are invoked — along with 'privatisation' — with an almost religious fervour to indicate the newness of what is going on.

From what I have already said, you will appreciate that I don't believe it is all so new, or so original. I believe that the annals of our administrative history show that previous generations of administrative reformers — men like Service and Gillies, who created that first Victorian railway corporation; Parkes, who followed suit in New South Wales; Eggleston and Bland, who studied, analysed and recommended improvements; the countless others involved over the last one hundred years in the design of corporate bodies to run our public electricity, transport, communications, marketing, banking and development enterprises; and great public sector corporate leader-managers like Sir John Monash and Sir William Hudson — have had many of the same objectives in view. Did not their creations also represent 'commercialising' and 'corporatising' activity?

As I have suggested elsewhere, they:

sought to establish organisational conditions that would facilitate entrepreneurial business management within the context of public ownership. The contrast was with the system of *political* management that necessarily operated in departments close to the centres of government. Thus 'managerialism' was brought to an important part of the public sector generations ago, and far more than a few state-owned corporations have been exemplars of sound entrepreneurial management, sometimes in competition with private firms. Successive waves of political action have seen these organisational conditions weakened, strengthened, weakened, strengthened ... Of course, the waves have come at different times in different jurisdictions, and there is room for considerable argument about how many really novel reforms are contained in each new wave.²⁶

Through the 1980s, it often seemed that we had overlooked our own rich history in this field, forgotten that there were previous waves of relevant reformative action. To an extent, I believe, we were misled by Lange and Douglas in New Zealand. Their changes appeared to have revolutionary force, and many Australian 'moderns' believed they furnished the model we should follow. They *were* revolutionary for New Zealand, for New Zealand was still mostly operating its public enterprises as government departments.²⁷ Now New Zealand saw the light and, in moving to adopt the corporate form of organisation, *it was following us!* For a while, we just seemed to forget we had been there before.

There were certainly Australian continuities. Thus, the Coombs Royal Commission of the mid-seventies reviewed Australia's past experience with statutory corporations and other forms of non-departmental organisation and, on the basis of this review, recommended strongly that the Commonwealth should prepare guidelines to regulate the future use of such devices. The important work of the Senate Standing Committee on Finance and Public Administration (originally Finance and Government Operations) has carried on directly from the Coombs prescriptions. And this work has led in turn to the equally important series of late eighties policy papers from the Finance, Primary Industry and Transport and Communication portfolios.²⁸ Most of the current reforms can be traced to this pedigree.

26. Wettenhall, Roger, 'Public Enterprise in an Age of Privatisation', (1993) *Current Affairs Bulletin*, 69(9), 7.

27. See, for example, Mascarenhas, R.C., *Public Enterprise in New Zealand*, NZ Institute of Public Administration, Wellington, 1982; Duncan, Ian & Bollard, Alan, *Corporatization and Privatization: Lessons from New Zealand*, Oxford University Press, Auckland, 1992.

28. Walsh, Senator Peter, (Minister for Finance), *Policy Guidelines for Commonwealth Statutory Authorities and Government Business Enterprises*, AGPS, Canberra, 1987; Kerin, John (Minister for Primary Industry) *Reform of Commonwealth Primary Industry Statutory Marketing Authorities*, AGPS, Canberra, 1986; Evans, Senator Gareth (Minister for Transport and Communications), *Reshaping the Transport and Communications Government Business Enterprises*, AGPS, Canberra, 1988.

I am reminded of Professor W.J.M. Mackenzie's quip about the newness of cost-benefit analysis, when economists were claiming this as a great intellectual breakthrough a generation ago. The basic framework was all there in the ideas of the Utilitarians one hundred years before, he asserted. What the 'moderns' had contributed — certainly a highly important contribution — was the refinement of measuring techniques. Perhaps, then, it is thus also with the new wave of advances in the organisation and management of government business enterprises.

All the waves have contained calls for ministers to concentrate on strategic (or broad policy) issues, and avoid trivial interventions — so that is not new. But the focus on negotiated corporate plans as the preferred means of ensuring that strategic relationship is new and, once that was accepted, we had a mechanism within which we could develop in a systematic way other needed refinements as in the setting of performance targets and performance indicators, the better identification and treatment of those community service obligations, and so on. I am not seeking to devalue these contributions, which I believe are of major importance: my point is rather that we should not ignore the continuities.

In organisational terms, we continue to make much of the device of the statutory corporation — fairly recent Commonwealth additions to this group are the Defence Housing Authority, the Maritime Safety Authority, the Fisheries Management Authority, the Civil Aviation Authority and the Federal Airports Corporation. These creations have been said by some to represent instalments of 'corporatisation'. But there has also been a noticeable trend towards greater use of the alternative form of corporate organisation within the public sector, the government-owned company, and others seem to insist that this style-change is necessary for 'corporatisation' to occur. Studying world trends in this area of public administration from the University of Hong Kong, my former colleague Ian Thynne suggests that our understanding might be helped if we regarded statutory corporations as representing 'stage 1 corporatisation' and the government-owned companies as representing 'stage 2 corporatisation'.²⁹

From the time the Chifley government acquired the shares previously owned by private interests and the British government, Qantas has been a public enterprise in this form. So too was the Menzies government's Commonwealth Hostels Ltd, and a few others — notably between the 1920s and the 1950s in Australia, mixed public-private corporations in which government held a majority shareholding: Commonwealth Oil Refineries and Amalgamated Wireless.³⁰ But it was a deviant, not the dominant form. In the recent period, however, the Commonwealth has converted several major statutory corporations to this form; for example, the old Australian Airlines and OTC, the Commonwealth Bank, the new Telecom, the Snowy-Mountains Engineering Corporation and the Serum Laboratories Commission. Such conversion is now set to play a leading part also in the reform of the New South Wales public enterprise system. It is claimed that the converted corporations are more readily able to respond to market imperatives and so behave in a fully commercial manner.

More controversially, because little or no legislative action was required, the Commonwealth has also excised large sections of the Defence Department and registered them directly as companies under government ownership: Australian Defence Industries Pty Ltd and Aerospace Technologies of Australia Pty Ltd. This brings me to the final section of my paper, for it provokes a number of questions about the role of parliament in the design of the public enterprise system and about the accountability to parliament of the component parts of that system.

The Role of Parliament

As we have seen, the great Australian railway reformers of the 1880s produced two quite different conceptions of the relationship of parliament to corporations within the public sector. In the first conception, the statutory corporation was to be independent of government and responsible only to parliament. In the second, the influence to be avoided was that of parliament itself; the executive government was given a watching brief and generally expected to defend corporate autonomy, and was itself responsible to parliament for how that brief was exercised. Notwithstanding this difference, however, the very exercise of creating these corporate, non-departmental bodies produced a new geometry of government. Orthodox Westminster principle had produced a linear (two-way) relationship between the parliament and the government of the day, which was made up of ministers unambiguously heading departments. Now the new statutory corporation sector furnished a triangular (three-way) relationship between parliament, government and corporations. This was what was so

29. Thynne, Ian, 'Public Enterprise Transformation: Changing Patterns of Ownership, Accountability and Control', in C.Y. Ng & N. Wagner (eds.), *Marketisation in ASEAN*, Institute of Southeast Asian Studies, Singapore, 1990.

30. These followed, of course, the great British example of this form of organisation, Anglo-Persian which became Anglo-Iranian which became British Petroleum (BP).

clear in those formulations of New South Wales Auditor-General Campbell and Australian Broadcasting Corporation Chairman Boyer: statutory corporations were not responsible to their ministers as departments were; rather they were responsible *through* their ministers to parliament. It was equally clear when the Royal Commission on the Monetary and Banking Systems in the 1930s asserted a corporation's right to have its own independent view of how it might best serve the public interest and, from this position of independence, to negotiate with government if policy conflicts emerged, with reports to parliament on both positions.

I have already indicated that the movement to Thynne's Stage 1 corporations produced a massive literature. The parliamentary connection is a major strand running through this literature, and it earned some specialised treatments. For the purposes of this paper, I picked from my own bookshelf Hanson's *Parliament and Public Ownership*,³¹ Ramanadham and Ghai's *Parliament and Public Enterprise*,³² Coombes's book-length study of the British Parliament's Select Committee on the Nationalised Industries,³³ and the *Report of Proceedings* of the 1959 Conference of the Commonwealth Parliamentary Association held in the Old Parliament House here in Canberra, which contained a substantial discussion on 'Parliamentary Control of Statutory Bodies'.³⁴

In introducing the discussion at the Parliamentary Association Conference, the Deputy Chairman of the Upper House of the Indian Parliament endorsed the dictum of a leading British authority of the middle 1900s, Ernest Davies, that parliament was 'the final arbiter between the public corporation, the Minister, and the community'. Through its democratically elected representatives, this dictum continued, 'the community reserves final control over the public corporation'. The collective role of parliament was, however, to defend the arm's length management relationship — there must be ultimate control 'over broad matters of general policy', along with protection of the corporations against 'close treasury control, bureaucratic management' and the detailed interference of individual Members of Parliament.³⁵ Ramanadham and Ghai similarly saw parliament as 'the custodian of society's expectations from public enterprises', observing also that the 'central concern of parliament ... relates to the ensuring of aggregate accountability of public enterprise to society or the public', but also defending the managerial autonomy of the corporations.³⁶

Of course, no one has suggested that the operationalising of these prescriptions is easy. I focus here on a few themes given further development in these works.

One emphasises the importance of the creating statute, which:

- serves as the operating charter for the corporation,
- makes parliament's intentions clear,
- has force of sanction, in that major changes in the environment of the corporation will require the full force of legislative amendment.

Here some observations of the Indian-New Zealand scholar Mascarenhas are pertinent. He asserts with great persuasiveness that there are two relevant efficiencies: policy efficiency (establishing the legal and contextual framework within which public enterprises must operate) and operational efficiency (sound management within that framework); that politicians and their advisers are fully responsible for policy efficiency; and that it is unfair to blame enterprise managements — though it happens too often for shortfalls in performance which result from failures in policy efficiency.³⁷ Getting the statutory provisions right is, of course, a major consideration in the ensuring of policy efficiency.

31. Hanson, A.H., *Parliament and Public Ownership*, Cassell for the Hansard Society, London, 1961.

32. Ramanadham, V.V. & Ghai, Yash, *Parliament and Public Enterprise*, International Centre for Public Enterprises in Developing Countries, Ljubljana, 1981.

33. Coombes, David, *The Member of Parliament and the Administration: The Case of the Select Committee on Nationalised Industries*, Allen & Unwin, London, 1966.

34. Commonwealth Parliamentary Association, *Report of Proceedings*, Conference, Canberra, November 1959.

35. *Ibid*, 163.

36. Ramanadham, V.V. & Ghai, Yash, *Parliament and Public Enterprise*, International Centre for Public Enterprises in Developing Countries, Ljubljana, 1981, 9,52.

37. For example, Mascarenhas, R.C., *Public Enterprise in New Zealand*, NZ Institute of Public Administration, Wellington, 1982.

A second theme derives from the always complex relationship between parliament and government. In Westminster systems, parliament always looks to the ministerial executive as its governing agent, and so ministers act for parliament in exercising their statutory responsibilities. Equally, however, since statutory corporations are not themselves represented in parliament, they use ministers as *their agents* in the legislature. Yet ministers will, if not checked, seek to exert extra-statutory powers over corporations through informal interventions, and so enhance the degree of executive power beyond that which parliament has intended: ideally, parliament will seek to hold ministers responsible for *all* their interventions in the affairs of corporations.³⁸ It is for this reason that so many inquiry bodies, and so many statutes today, require transparency in ministerial-corporate relations, with all ministerial directions to be in writing and reported back to the parliament. This could never happen in ministerial-departmental relations.

An extension of the last, a third theme relates to reporting about corporate operations.³⁹ There are now elaborate guidelines governing what should be included in these reports, but there is uncertainty as to whether the corporation is reporting primarily to the minister, or primarily to parliament. If the former, it will be very aware of ministerial sensitivities and report in the manner of a captive department rather than a self-respecting corporation. If the latter, it will report fearlessly on the nature of its relations with the minister, including problems in those relations, as the theory of the autonomous corporation clearly requires, and without which parliament cannot properly discharge its intended role. Statutory corporations are entitled to expect that parliament will rebuke ministers who have exceeded their powers or otherwise behaved improperly towards them. As a rider to this comment, there is room for concern today about the negotiating processes which produce the corporate plans. How transparent are they? Is parliament adequately informed about them?

Other themes seek to make explicit the techniques through which parliament involves itself in the statutory corporation sector. Importantly, they testify to the value of specialised parliamentary committees which develop expert knowledge and wisdom to be applied to issues of corporate accountability. Notable cases, where excellent reputations for this sort of service have been established, are Britain's Select Committee on Nationalised Industries (SCNI)⁴⁰ and India's Committee on Public Undertakings. Amongst other things, these committees have helped make more transparent the nature of minister-corporation relations. Though not quite as specialised, our own Senate Standing Committee on Finance and Public Administration has earned similar respect for its major concentration on the public corporate sector. Notoriously, Mrs Thatcher collapsed Britain's SCNI soon after assuming the prime ministership.

They emphasise also the vital role of the Auditor-General in reporting to parliament on the financial operations of the corporate sector. We have been uncertain about this recently in Australia, and John Taylor as Auditor-General has been outspoken in urging the need for parliament to retain this direct reporting service:⁴¹ the alternative is, of course, that the corporations engage *their own* corporate (private) auditors in which case the independence of the audit is in some doubt. Ghai reports that the Indian parliament 'force(d) the government to accept [the] important ... principle that the Auditor-General should have jurisdiction over the auditing of the accounts of government corporations and companies'.⁴²

More generally, this literature explores other ways in which the legislature can be encouraged to develop a broad and sympathetic awareness of the needs of corporate public sector managers serving

38. Ramanadham, V.V. & Ghai, Yash, *Parliament and Public Enterprise*, International Centre for Public Enterprises in Developing Countries, Ljubljana, 1981, 14-15, 29, 53 etc.

39. It is worth remembering that annual reporting was developed as part of the *different* (special) accountability regime for corporate and other non-departmental bodies in the public sector. The presence of departmental heads (ministers) in parliament, and the consequent ability of MPs to question them constantly on the work of their departments, was long seen as a centrepiece of the orthodox accountability system. Annual reporting by ministerial departments has come much more recently. See discussion in Wattenhall, Roger, 'Spotlight on Annual Reports', (1986) *The House Magazine* 5 (18&19).

40. Hanson, A.H., *Parliament and Public Ownership*, Cassell for the Hansard Society, London, Chap.6; Coombes, David, *The Member of Parliament and the Administration: The Case of the Select Committee on Nationalised Industries*, Allen & Unwin, London, 1966.

41. For example, Taylor, J.C. (Auditor General), *Accountability off the Rails: National Rail Corporation Limited - Erosion of Accountability to the Parliament*, AGPS, Canberra, 1991.

42. Ramanadham, V.V. & Ghai, Yash, *Parliament and Public Enterprise*, International Centre for Public Enterprises in Developing Countries, Ljubljana, 1981, 25.

the public interest, at the same time respecting those 'ordinances of self-denial' that require abstinence in matters of operational detail.

The issue of parliamentary questions has always been controversial. For Hanson, indeed, reporting on the situation in the British parliament in the 1960s, this was *the* most controversial issue: should Members of Parliament have the same right to question ministers about the affairs of the corporate bodies within their portfolios as they enjoyed in relation to the departments headed by the ministers?⁴³ Mostly, it would seem, we distance ourselves somewhat from the corporations, but manage to get the information we want except where it involves information about business dealings which would be useful to the competitors of our commercial undertakings. Occasionally, however, Members of Parliament do not get the information they believe they are entitled to and vigorous complaints follow — as in a series of interactions over the years between Senate Estimates Committees and secretive corporations such as the Australian Broadcasting Corporation.⁴⁴

I have, of course, been reflecting here on parliamentary interactions with the statutory (or stage 1) corporations. I now come to a final question: what about the stage 2 corporations, the government-owned companies?

As long ago as 1981, Ghai noted that parliament was unlikely to get as much information about the companies as about the statutory corporations, since they were bound by the provisions of the relevant companies legislation rather than being created by and governed by special parliamentary enactments.⁴⁵ Though he was drawing mainly on Indian evidence, the message seems to have wide application. In noting the recent New Zealand movement to the government-owned company form, Mascarenhas speculates on who are the winners and who the losers. He has no doubt that 'the role of parliament has been down-graded and its place has been taken over by the executive — in this case the shareholding ministers'.⁴⁶

For the Australian Commonwealth, the issue is nicely digested in the Senate Standing Committee on Finance and Public Administration 1989 report on *Government Companies and their Reporting Requirements*.⁴⁷ Much of the report is taken up with tracking the growth of these Commonwealth companies: though the Committee was by no means certain it had located them all, it was able to identify at mid-1989:

- 208 government controlled companies,
- 55 associated companies,
- Commonwealth involvement in 58 companies limited by guarantee, and
- 67 incorporated associations.

One major recommendation sought the establishment of a central register of these companies; others related to a specification of the kinds of activities for which the company structure is appropriate, and to reporting and audit requirements. Of particular importance here, the report traversed the procedures creating these companies, noting that an earlier provision for the minister to notify parliament was replaced in one major portfolio in 1988 and ignored in other portfolios.⁴⁸ It noted further that, while legislative action was required in those cases where previously existing statutory corporations were converted, in cases such as Australian Defence Industries (ADI) 'major enterprises were taken out of the sphere of direct parliamentary scrutiny without any reference to Parliament'.

43. Hanson, A.H., *Parliament and Public Ownership*, Cassell for the Hansard Society, London, 1961, p.216 etc.

44. See discussion and references in Wettenhall, Roger, 'Statutory Authorities', in J.R. Nethercote, Alexander Kouzimin & Roger Wettenhall (eds), *Australian Commonwealth Administration 1984: Essays in Review*, Canberra College of Advanced Education, Canberra, 1986, 109.

45. Ramanadham, V.V. & Ghai, Yash, *Parliament and Public Enterprise*, International Centre for Public Enterprises in Developing Countries, Ljubljana, 1981, 38.

46. Mascarenhas, R.C., 'New Zealand', in Roger Wettenhall & Colm O Nuallain (eds.), *Public Enterprise Performance Evaluation: Seven Country Studies*, International Institute of Administrative Sciences, Brussels, 1991, 142.

47. Senate Standing Committee on Finance and Public Administration, *Government Companies and their Reporting Requirements*, AGPS, Canberra, 1989.

48. *Ibid*, 15.

Moreover, for exempt propriety companies such as ADI, 'formal reporting requirements under the Companies Code are negligible'; and, 'unless specifically included by regulation', such companies 'are exempt from the provisions of the Freedom of Information Act'. The Standing Committee noted also that the Department of Employment, Education and Training had established thirty-seven companies limited by guarantee and sixty-seven incorporated associations 'without specific parliamentary approval'; 'the reporting of these companies to Parliament has been derisory', it said, 'and there is no way to be sure that the reporting by the Department to the Government is any better'. One involved minister had agreed to ask the companies in his portfolio to produce full annual reports which he would table in parliament. But that was by ministerial grace and favour, not legal requirement — which, not surprisingly, the Standing Committee did not regard as satisfactory.⁴⁹

The Standing Committee's answer to all this was to propose a Government Companies Act to contain general provisions for the formation, reporting, audit and disposal of such companies and so establish a degree of order in what has become a very unruly area of public administration.⁵⁰ It would be pointless to lament the rapid increase in the use of these bodies, for they are obviously proving, like the statutory authorities and corporations before them, a very useful aid to the delivery of public policies. But it is proper to investigate how they are operating, and to provide — again, as for the statutory corporations — for ultimate parliamentary oversight.

As the Senate Committee report has digested the experience of stage 2 corporatisation in the Australian Commonwealth, a recent study by Thynne, whom I have already quoted, digests the scholarly attention such corporatisation around the world in now receiving.⁵¹ This small but growing body of literature is replete with terms such as 'government by moonlight' and 'the hybrid parts of the state'.⁵² It is argued that these parts are more 'private' than private enterprise, that their activities largely go unchecked and unaccounted for through the established mechanisms of review within government.⁵³ Thynne concludes:

- 'From being of marginal interest by reason of their location on the periphery of government, companies are now assuming importance along with, and sometimes in place of, those organisations which traditionally have featured on centre stage within government'.
- 'Those changes, whether novel or otherwise, are yet to be comprehended and so ought to be the subject of considerable attention'.⁵⁴

This finding, at the cutting edge of modern administrative scholarship, directs attention also to a sliding together of the concepts of corporatisation and privatisation, in a way presumably not intended by those whose purpose was to create conditions under which public bodies could behave more commercially, be more market-sensitive, or simply be better performers. There is already some Australian evidence that the government companies are seeking to deny their publicness. I am told that Australian Defence Industries is encouraging its staff to think of themselves as belonging to the private sector, notwithstanding the public ownership. And an Australian Council of Professions report notes that the Industry Training Bodies within the Department of Employment, Education and Training portfolio are insisting that they are 'not "government" companies' but 'private companies', leaving major questions about accountability unresolved.⁵⁵

49. *Ibid.*, 16.

50. *Ibid.*, 18-19.

51. Thynne, Ian, 'The Incorporated Company as an Instrument of Government: Fundamentals in Comparative Perspective', unpublished paper, University of Hong Kong, 1992.

52. Birkinshaw, Patrick, Harden, Ian & Lewis, Norman, *Government by Moonlight: The Hybrid Parts of the State*, Unwin Hyman, London, 1990.

53. Sin, Boon Ann, 'Statutory Board Privatisation: Some Issues in Accountability and Control', *Malayan Law Journal*, June & July 1990; Taggart, Michael, *Corporatisation, Privatisation and Public Law*, Inaugural Lecture, University of Auckland, 1990; Taggart, Michael, 'The Impact of Corporatisation and Privatisation on Administrative Law', (1992) *Australian Journal of Public Administration* 51(3). In the works digested by Thynne, these verdicts were related to another about privatised or part-privatised enterprises: that the retention by governments in some such cases of 'golden shares' or 'kiwi shares' represents policy-making 'by stealth', for the exercise of the powers inherent in those shares is, it seems, beyond the power of either judicial or parliamentary review (Graham, C. & Prosser, T. 'Golden Shares: Industrial Policy by Stealth', *Public Law*, Autumn 1988).

54. Thynne, Ian, 'The Incorporated Company as an Instrument of Government: Fundamentals in Comparative Perspective', unpublished paper, University of Hong Kong, 1992, 18.

55. Australian Council of Professions, *Re: Administrative Arrangements of the ITABS [Industry Training Bodies]: The Impact on the*

Another sort of hybridisation arises when part-public, part-private companies are formed. Mrs Thatcher claimed much credit for privatising British Telecom, but at the time she had sold off only about half the shares. In the general belief that privatisation had in fact taken place, who worried much about public accountability in respect of the retained state investment? The classic illustration of this problem was provided by the exemplar of this sort of public-private mix, British Petroleum. How was it held accountable when, at a time when the British state held a lucrative majority shareholding, it succeeded in 'running' the Royal Navy blockade of East African ports to get oil to the illegal Smith regime in Rhodesia?⁵⁶

It was, of course, pursuing its commercial mission. But is it sufficient to argue that we should now focus single-mindedly on the test of commercial success; that all else is secondary? That answer leaves me, as a political and administrative scientist, feeling extremely uncomfortable.

Summary and Conclusion

And so I come to a pretty inadequate summary. I make a confession here: I am unable to offer a firm blueprint indicating how parliament might act to improve *both* the performance *and* the accountability of publicly owned corporations that would have any hope of gaining general acceptance. It is, ultimately, a matter of balances and I believe that only evolving wisdom can achieve such balances. That requires vigilance and the courage to be outspoken in defence of principle, qualities which I don't believe can be set in any rule-book.

What I have argued is that, while all parts of the public sector, departmental and non-departmental, must be accountable, we should be careful to ensure that *appropriate* accountability regimes are created, and to acknowledge that the regimes suited to non-departmental corporate bodies will be different from those suited to other parts of the public sector. Through an excursion into administrative history, I have described some of the attributes of the corporate bodies widely used in Australian public administration before the wave of late twentieth century reforms, and have suggested that the managerialist imperative was alive and well in the early creations. My brief comparison with the corporate bodies of the modern 'corporatising' period has suggested that there is a strong continuity in our corporate experience, and that what the modern period has contributed most is a development of techniques needed to ensure high levels of performance and so give renewed force to the intentions of the founders.

The parliamentary role in relation to public sector corporations has been briefly traced by dipping into the ideas of the pioneers and an extensive literature generated by the statutory corporation movement. The vitally important analytical and tracking work of some specialist parliamentary committees has been acknowledged: reports from committees such as the Senate Standing Committee on Finance and Public Administration have become required reading for numerous cohorts of public administration students today.

The comparison between the old and the new phases has, however, noted an increasing tendency to use the device of the government-owned company as an alternative to the statutory corporation form, and shown that this has had significant implications for the parliamentary relationship. This challenge has been identified both by the Senate Standing Committee and by the new literature digested by Thynne. I think that our parliaments have been less than vigilant in too easily allowing it to emerge, and I want to conclude by stressing the need for a parliament to be well-informed about such developments in the machinery of government.

It is, I believe, vital that parliamentary monitoring should continue in relation to the statutory corporations, always informed by an awareness of the needed arm's-length relationship between politicians and corporations. In relation to the state-owned companies, I do not think parliament should let itself be frozen out of the equation, and I urge that it should seek to develop a better understanding of this newly significant phenomenon in government. That, of course, is a challenge for academic public administrationists as well: we need to work together!

I believe, to this end, that there is an investigative and educational role of vital importance to be played by specialist cross-functional committees such as the Senate Standing Committee on Finance and Public Administration. Functional committees are, of course, important too, but they are more susceptible to

Professions, Report, 22 March, 1993, 2.

56. Bailey, Martin, *Oilgate: The Sanctions Scandal*, Coronet Books, London, 1979.

being influenced by portfolio ministers. The cross-functional committee has greater detachment: it needs all the cherishing support the main body of parliament is able to give it, for it should remain one of our major sources of information about public organisations, and thereby also one of the major focal points of our accountability system.

Questioner — At one point you made comparisons between historical reforms to government statutory corporations and the things that have happened in the last twenty years, and you said that many things perhaps had historical antecedents. The private sector sometimes claims that government bodies, in being free to do more commercial things, are not subject to the same commercial disciplines to which the private sector is subjected. To what extent do you think that is an important factor in questions such as accountability? To what extent do you think government organisations will become increasingly state-owned companies? Are they subject to commercial practice?

Professor Wettenhall — The emphasis that we place today on the level playing field is relevant to your question. Clearly, there is an attempt to make sure that, where public and private bodies are in competition, the conditions for competition are level. There are all sorts of arguments about whether that is really possible and whether it happens between two private companies. To the extent that it is possible we are quite strenuously trying to achieve those conditions.

In regard to the earlier period, I would like to say that it worked both ways. I can quote many occasions when public enterprises were restrained in their competition against private enterprises. A very good example of this is found in the early history of Trans-Australia Airlines (TAA). The Menzies Government, which was so embarrassed that a public enterprise was performing so well in competition against a private enterprise, set about — first of all, it tried to sell TAA, but public opinion would not allow that to happen — putting barriers in the way of TAA's continuing successful competition. It survived, but it was restrained. Of course, people could give me examples the other way. That issue did work both ways. The modern attempt to establish a level playing field is a very useful thing to do.

Questioner — This is a very difficult subject, because I see it in a very big sphere in which we are losing even the incentive to try to be accountable. In a way your talk very often seems to be directed as though all the accountability has to be between people behind closed doors up on the top of the sphere. It is nine years now since Queen Elizabeth reminded us, as we were going into 1984, that we are lacking human communication. We are getting bad at communicating and we need to pay more attention to it.

Professor Wettenhall — I will make two comments that probably will not cover your question adequately. In relation to accountability, the one side — the side that thinks it is all vertical — argues that it is a process that just works up line through the levels of an organisation, to a Minister, to parliament, to the electorate, with Cabinet somewhere in the middle. That is a very closed view of it. The other view — the much more open one — is quite prepared to consider the accountability of public organisations, particularly the corporations that I am talking about, to their clients. In the case of the police, they are accountable to the law rather than to an in-group of politicians and senior administrators. There is an interest in fashioning ways in which public organisations can be seen to be accountable in various directions.

Within the Commonwealth Government — I certainly did not mention this in my remarks — some remarkable reforms have taken place in the primary industries portfolio, where accountability is now seen as a dual process. Not only is accountability up to the government; it is up to the producers of the commodities that have been marketed and so on. So there is real interest in opening up accountability and expanding it like that.

Questioner — I think one area of parliamentary concern about governments moving to the states with regard to corporate bodies, as you have described — that is, bodies incorporated under state corporations law — is the whole question of limited liability and the position that the government and the parliament may be placed in if an organisation was financially unsuccessful. Many years ago I had some experience of a statutory corporation — the Australian Industry Development Corporation. In a number of those sorts of bodies, great reliance was placed upon the fact that the body was owned by the government. If one moves to a corporation, where does the parliament stand if the body should become financially unsuccessful and the creditors look to the government as the shareholder to make up the difference?

Professor Wettenhall — I think that is a very good question, but I do not have a ready answer to it. Again, I insist that it is not new. In cases such as Qantas, this practice goes back a long time, but the great volume of activity today introduces an element of newness in the use of this company form. I still

think of it in that way because I need to distinguish it terminologically from the statutory corporations. This company form proposes great challenges, and the one you mentioned is one of them.

You will find people on the one hand saying that accountability is taken care of because they are subject to what is now called the general Corporations Law, which affects private companies. It would seem that they are still in some ways subject to accountability requirements within government, although not so much to those that lead to parliament. The question of an excess of accountability requirements on these bodies because they are aimed in two directions is open. However, the Senate standing committee, in speaking about Australian defence industries, did not believe that the private accountability requirements were anywhere near as stringent as the old public accountability requirements.

These questions are very much in need of research today. I do not have easy answers to them. I would like to think that the Senate standing committee would undertake further inquiry into this matter to try to provide answers. You have pointed to a very important research question today for which I do not know the answer.

Questioner — Assuming that you can actually put in place all the accountability you are talking about — I assume you mean reporting to parliament — how does parliament then deal with all the information that comes to it? What is parliament's role or the role of the committee in actually monitoring it, particularly if you are talking about companies that might have a more direct link straight back to the parliament? At the moment, the Department of Finance is doing a whole range of things, and there is some internal monitoring. So you might have a statutory corporation, but it is backed up by a policy section within a department that is actually closely monitoring it. There might still be an element of that but, assuming you are throwing much more responsibility onto parliament, is parliament's role simply to take the information as it is made public, thereby implying that it will have done its job, or do the parliament and its committees have a bigger role than the one they might have at the moment?

Professor Wettenhall — I am fairly despairing of parliament as a collectivity, but I am not despairing of the committees, particularly cross-sectional committees, such as the Senate Standing Committee on Finance and Public Administration. Not only the members of the committee but also the staff who support it have developed an ability to do useful investigative work, and that is very important. There is an expertise there that is very useful. Reports such as this one are very useful documents; they provide information. I believe that the very provision of information is an important part of the accountability process. It means that people such as me or journalists as well as other members of parliament can get information. We can teach from this. Accountability processes are enhanced by the work of parliamentary committees in all sorts of ways. I simply hope that other members of parliament also take this information seriously so that parliament itself becomes a significant voice in the accountability process.

Its dependence on the power relationship between the executive government and the parliament is an important part of the equation. I thank God for being in a system that has a Senate, which is a house of review, possessing some independence. Accountability is much healthier because we have a Senate and because the Senate has a well-developed committee system. My faith goes in that direction. I am afraid that I would not have much faith if there were just the general body of parliament. But there are elements within it which give us much reason for hope, if not satisfaction, at the moment.

You mentioned accountability. Government departments have sections which monitor the work of corporate bodies. But to the extent that that goes on in a closed-shop atmosphere it means that it is a very limited sort of accountability. You then have to ask yourself to what extent departments themselves report to the Parliament on what is going on. It is very important that parliament has independent means of vetting what is going on.

How Popular was the Popular Federation Movement?

Brian de Garis

The phrase, 'the popular movement', to describe a phase in the series of events which led up to the federation of Australia on 1 January 1901, seems to have been coined by John Quick and Robert Garran in their historical introduction to *The Annotated Constitution of the Australian Commonwealth*, published in 1901. It was the sub-title they used for the ninth of the eighteen segments into which they divided their account of the federation movement and, like other aspects of that account, it has shaped the way later historians have perceived the lead up to federation.

This is an appropriate time to review the 'popular movement' because its landmarks included the foundation of the Australasian Federation League in Sydney on 3 July 1893 and the Corowa Conference held a few weeks later on 31 July and 1 August. It is to be hoped that the centenaries of both events will attract some media attention for they each played their part in the making of the Australian Commonwealth. The People's Federal Convention held at Bathurst in November 1896 was another landmark in the 'popular movement', which is generally reckoned to have ended with the first session of the Australasian Federal Convention held in Adelaide in March 1897.

The concept of Australian union was as old as the reality of disunion, federation having been talked of since the time of the Australian Colonies Government Act of 1851, which paved the way for the separation of Victoria, Tasmania and Queensland from New South Wales. But for most of the nineteenth century federation was little more than a subject for after-dinner rhetoric at intercolonial meetings. In the 1880s it became a more pressing issue for a time, largely in the context of unwelcome German and French activities in the Pacific region and the unwillingness of the British Government to intervene as many colonists wished. The idea was canvassed that Britain would be obliged to take more notice of Australian views if there was a single government able to speak with a united voice; and Britain itself encouraged that attitude.

The outcome was the Federal Council of Australasia, formed in 1883, but which proved an ineffective body with hopelessly limited powers which seldom met and was further handicapped by the refusal of NSW to become a member. The failure of the Federal Council did not seem to worry anyone too much, however, for the heat went out of the foreign policy issues which had called it into being. In 1889 Sir Henry Parkes attempted to breathe new life into the federation movement, his pretext being a report prepared by a British officer, Major-General Bevan Edwards, which suggested that the continent was vulnerable to Chinese attack and that the colonies ought to federate for defence reasons. After a good deal of skirmishing between political leaders from the various colonies, this initiative led eventually to the National Australasian Convention held in Sydney in 1891, at which a constitution bill was drafted of which the present Australian constitution is a direct descendant. The immediate aftermath of the Convention was disappointing for federalists, however. Parkes confirmed the suspicions of the cynics by delaying the presentation of the draft constitution for approval by the New South Wales Parliament and before long all colonies became preoccupied with depression, unemployment, the bank crashes and local political problems. Quick and Garran concluded their account of this part of the story with the words, 'In short, the Parliamentary process of dealing with the Commonwealth Bill had broken down hopelessly',¹ and it is difficult to quarrel with this conclusion. It was at this time that the 'popular movement' is said to have taken up the running.

In using the word 'popular', Quick and Garran seem to have meant, among other things, that enthusiasm for federation increased markedly around 1892-3 and that the initiative was taken by the people as opposed to politicians. Their account of this period began;

1. Sir J. Quick and R. R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney, 1901, 150.

Sir John Robertson's boast that 'Federation is as dead as Julius Caesar' was coming to be a favourite saying of anti-federalists; but as a matter of fact the federal spirit was only just beginning to awaken. The Commonwealth Bill, though neglected by the Parliaments, had helped to educate the people. Since 1891, public interest in the question of federation had been steadily gaining ground; from 1892 onwards it began to advance rapidly...²

When he returned to this subject more than half a century later in his autobiography, *Prosper the Commonwealth*, published in 1958, Garran echoed the same theme even more vigorously, writing, 'And the ghost walked! Left for dead by the politicians, federation was brought to life by the people'.³

This emphasis on the people as opposed to the politicians is, as Allan Martin noted many years ago, rather misleading.⁴ The formation of federation leagues, the organisation of conferences, and the dissemination of pro-federal ideas through the newspapers, was in most cases initiated by politicians, though they often worked deliberately from behind the scenes. What was new was the strategy of seeking to develop grass-roots support and to keep federation at arm's length from party politics. As William McMillan wrote to Sir Henry Parkes in June 1893;

I have seen Mr Barton and I have urged the necessity of making this movement a citizens' movement. With an executive from which members of Parliament are to be excluded. It seems to be quite impossible to construct it on any other lines during the present period of our political struggles.⁵

Barton had already, seven months earlier in December 1892, made what has been described as a 'missionary visit' to the New South Wales-Victoria border region along the Murray river, the result of which was the establishment of some fifteen pro-federal leagues in the first few months of 1893.⁶ Barton's role was explicitly acknowledged by Edward Wilson, the moving spirit behind the first of these leagues, when he wrote to Barton some months later saying, 'Mr Piggin and I were the first to adopt your suggestion to form a League in the Riverina'.⁷

Moreover, Wilson continued to look to Barton for guidance, writing in June 1893 that

all we want is Organisation and a Program. At present we are running about looking for an enemy, like a lot of new recruits, and tumbling over each other: we want a General to map out a plan of campaign.

A fortnight later he re-iterated, 'tell us *what we are to do* in order to bring about the desired result'.⁸

The meeting held on 3 July 1893 in the Sydney Town Hall to form the Australasian Federation League, which came to act as co-ordinating body for a growing network of metropolitan and country branches, was not so very different. The first resolution carried by the meeting was that the League should be 'an organisation of citizens owning no class distinction or party influences' and a later resolution decreed that no member of parliament could be elected to the Executive Committee.⁹ But the resolutions had all been carefully prepared in advance by a group in which politicians such as Barton and McMillan took the lead. Later, Barton advised Edward Dowling, the League's secretary:

I hope to have your hearty help in organising a strong program of Federation meetings. We should form Branch Leagues now at all these meetings and to do so we must have things settled

2. Ibid.

3. Sir Robert Randolph Garran, *Prosper the Commonwealth*, Sydney, 1958, 101.

4. A.W. Martin, 'Economic Influences in the New Federation Movement', *Historical Studies Australia and New Zealand: Selected Articles*, Melbourne, 1964, 215-25.

5. McMillan to Parkes, 21 June 1893, Parkes Correspondence, Vol. 14, Mitchell Library, A884.

6. J. L. Whitaker, *Corowa for the Commonwealth. The History of the Border Movement*, National Library, MS.891.

7. Wilson to Barton, 30 June 1893, National Library, MS 47/2710.

8. Wilson to Barton, 13 June and 30 June 1893, National Library, MS 47/2705, 2710.

9. *Sydney Morning Herald*, 4 July 1893.

with the strong local men beforehand. I will set apart at least one night a week to speak for Federation ...¹⁰

It is said that Barton attended over three hundred meetings and made over a thousand speeches during the three years which followed,¹¹ both his health and his legal practice suffering in the process, though he was sometimes able to combine federalist activities in country areas with circuit court work. The network of League branches which grew up throughout New South Wales and in other colonies during these years certainly gave the cause a 'popular' face but the initiative came more from above than from below.

In Victoria, the Australian Natives' Association (the ANA) and its branches played a role similar to that of the federation leagues in New South Wales. Founded in the 1870s as a mutual benefit society, the ANA had in the 1880s become a political training ground for Australian-born males and was committed to the federal cause even before the 1891 Convention. In the period of the 'popular movement' its branches and its annual conferences regularly affirmed the importance of federation and it was represented at the Corowa and Bathurst gatherings. Like the Federation League, it kept party politics at arm's length; but also like the League, it was closely linked with leading politicians. Alfred Deakin, in particular, played much the same role in Victoria as Barton did north of the Murray. When the Australasian Federation League of Victoria was eventually constituted in July 1894, Sir John Madden, the Chief Justice, was elected President, Deakin declining this honour 'on the ground that his political connection rendered it inadvisable... for the good of the cause'.¹² Deakin did, however, become a Vice-President and, in due course, chairman of the executive, so the veneer of non-politicity was rather thin.

In describing the federal movement of the mid-1890s as 'popular', Quick and Garran probably also had in mind the procedure for advancing the cause which was first suggested at the Corowa Conference, in which both had played an active part. This conference was convened on the initiative of the Berrigan branch of the Federation League, though held at the Corowa courthouse, and was attended by seventy-four delegates, forty-three from League branches in the border region, ten from the ANA and the balance from various municipalities and organisations which included the Melbourne Chamber of Manufactures and the Imperial Federation League.¹³ Garran attended on behalf of the Sydney League; Quick on behalf of the Bendigo ANA. Conferences and conventions were common in the late nineteenth century but this one attracted attention because the Victorian Premier and Leader of the Opposition decided to pay a visit, coming up by special train from Melbourne to Wahgunyah from which they crossed the Murray to Corowa for an evening. The proceedings were, nevertheless, dull and uneventful apart from an episode late on the second day, after the Melbourne VIPs had returned home, when Herbert Barrett, a member of the Melbourne ANA Board of Directors, complained that the Conference had been all talk and no action. Although the official record does not record this, it seems that a number of young turks loudly agreed with him and that John Quick then moved for a brief adjournment during which he and a few others, including Garran, quickly drafted a resolution which had not appeared on the Agenda, which was carried unanimously.¹⁴ It read:

That in the opinion of this Conference the legislature of each Australasian colony should pass an act providing for the election of representatives to attend a statutory convention or congress to consider and adopt a bill to establish a federal constitution for Australia, and upon the adoption of such bill or measure it be submitted by some process of referendum to the verdict of each colony.¹⁵

Few seem to have attached any great importance to this resolution at the time. Indeed the Corowa Conference as a whole was laughed at by many observers, J C Neild describing it in *Cosmos* as a 'distressingly funny Federation-cum-protection function, at which Australian unity and long beers were

10. Barton to Dowling, 29 July 1894, National Library, MS 47/266.

11. John Reynolds, *Edmund Barton*, Sydney, 1948, 98.

12. *The Age*, 21 July 1894.

13. L.E. Fredman, 'A Note on the Corowa Conference of 1893', (1969) *Journal of the Royal Australian Historical Society*, Vol. 49, Pt 4, 301-4.

14. Sir Robert Randolph Garran, *Prosper the Commonwealth*, Sydney, 1958, 103-4.

15. *Official Report of the Federation Conference Held in the Court-House, Corowa, on Monday 31st July, and Tuesday, 1st August, 1893, Corowa, 1893*, 27.

discussed in one of the Murray hamlets'.¹⁶ The federation leagues in both Sydney and Melbourne had their reservations about the resolution which Quick had sponsored and twelve months elapsed before they were persuaded to endorse it. However, on a visit to Sydney, Quick saw the NSW Premier, George Reid, who had been excluded from the 1891 Convention and was generally disliked and distrusted by the leading federalists, and persuaded him to take an interest in his scheme.

The Corowa, or Quick, proposal was 'popular' in the sense that it envisaged a constitutional convention which unlike that of 1891, was directly elected by the people — or, at any rate, those of them who were male — rather than being nominated by governments. Furthermore, the draft constitution devised by the convention was to be voted upon by the people rather than simply being accepted or rejected by the colonial parliaments. The other attraction of this scheme was that it established a framework for continuing action once each colony had passed a single enabling act; further legislation would not necessarily be required so that the progress of the federal movement would be less dependent on the exigencies of day-to-day parliamentary politics.

In August 1894, Reid announced through the Governor's speech at the opening of the New South Wales Parliament that federation would 'speedily be placed upon a popular basis'¹⁷ and wrote to each of the other premiers inviting their attention to the position of the federal movement. Some of the others were wary but in November Reid followed up with telegrams suggesting a 'meeting of Premiers at Hobart in January upon questions of Federal Union intercolonial Free Trade Federal Defence and such other subjects as may be thought worthy of discussion'.¹⁸

This proposal was eventually accepted and the Premiers gathered in Hobart in January 1895 for a meeting which, in my opinion, was the pivotal event of the federation movement in the 1890s and far more significant than any of the 'popular' gatherings. In the space of a single evening Reid moved a succession of resolutions which received the support of Kingston from South Australia, Braddon from Tasmania, and Turner from Victoria and which committed their governments to; first, a new constitutional convention consisting of ten representatives from each colony, directly chosen by the electors; secondly, to the submission of the constitution so framed to a direct vote of electors; and, finally, to the enactment of the new constitution if it were to be accepted by the electors of three or more colonies. Hugh Nelson of Queensland accepted these resolutions whilst indicating dissatisfaction with the concept of approving a constitution by referendum. John Forrest of Western Australia endorsed the importance of federation but demurred from every aspect of the proposed procedure. Nevertheless, Turner and Kingston were commissioned to draft a model enabling bill which might be submitted to the parliament of each colony to give effect to the Conference resolutions and this document was endorsed later in the week.

It was to be a further two years before these decisions were implemented and the Convention elections held; and in the meantime a number of colonies had varied the provisions of the model enabling bill. But five of the six premiers who took part in the Hobart conference remained in office until 1899, by which time federation was assured, an unusual degree of political stability for those or perhaps any times. Though there were great personal and political differences between them, some level of trust or at least familiarity had been created which certainly contributed to the ultimate outcome. The procedure agreed to by the premiers was, of course, that which the Corowa Conference had recommended, a tribute to Quick's persistence as well as to the merit of his proposal. But it was their adoption of it which lent retrospective significance to Corowa.

I have not yet directly addressed the question of just how popular the federal ideal was in this mid-nineties period in the straight-forward sense of the level of support and enthusiasm. This is, of course, more difficult to assess with certainty. Edmund Barton expressed the opinion in December 1894 that:

Public feeling on this question is, to my mind, greatly underestimated by politicians, and they know not yet with how much danger to themselves. I am certain that as soon as the public of this colony have an opportunity, they will declare themselves strongly on this question...¹⁹

16. J.C. Neild, 'Obstacles To Federation', *Cosmos*, Vol. 1, No. 4, December 29, 1894, 215.

17. R.A. Pringle, 'The Workings of the Federation Movement in New South Wales 1891 — 1899; the roles of Parliament and Public Opinion', M.A. thesis Macquarie University, 1969, 114. This thesis is very helpful on aspects of the popular movement.

18. Reid to Braddon, 12 November 1894, Tasmania State Archives, P.O. 236/95, P.D. 1/69.

19. Minutes of Proceedings of Conference of Premiers, Hobart. South Australian Parliamentary Papers, 1895, Vol. 3, No. 38.

And the referenda of 1898-9 may be said to have proved him right, not only about New South Wales but all the colonies; for notwithstanding the hiccup in New South Wales in 1898 when the majority in favour of the Commonwealth Bill failed to reach the level required by parliament, the electors recorded an affirmative majority in every colony and on every occasion that they were given the opportunity to do so.

There is nevertheless a great deal of contemporary evidence of apathy in the 1894-6 period. Marian Aveling's history of the Australian Natives' Association certainly gives the impression that the sense of urgency had waned in Victoria and she cites *The Age* as commenting in 1893 that federation was 'not yet within the range of practical politics' and that 'all this windy talk about a United Australia is so much hysteria...'²⁰ In New South Wales, the emergence of the Labor Party, which tended to see federation as a distraction from the real issues, deflected a lot of political energy in other directions. Even Edward Wilson, the Federation League's indefatigable representative in the border region, reported in July 1895 that:

*The Federal flame burns somewhat dimly here just now. The freetrade government of New South Wales is engaged in erecting a species of fortress on the Murray River, in the shape of an elaborate Customs House, at a cost of more than L1000, as a perpetual menace to the hostile inhabitants of the adjacent colony of Victoria... The Building is known amongst us as 'Federation Villa'*²¹

From remote Western Australia, Winthrop Hackett had lamented to Barton in 1891 that the public feeling against federation 'amounts to absolute frenzy', and six years later a former Federation League secretary from South Australia who had moved further West reported that people there were interested in nothing but making money.²² In Queensland, the lack of enthusiasm was just as great for these two colonies did not feel ready for equal partnership with the others and had internal separatist movements to deal with. In South Australia, there seems to have been latent feeling in favour of federation but a belief that there was little point in pushing the issue until New South Wales and Victoria took the lead. In those colonies, many who professed to support federation were all too willing to squabble amongst themselves over the kind of federation that was desired. Even at the carefully orchestrated meetings which established the Sydney and Melbourne Federation Leagues, proceedings were in each case almost brought unstuck by the intervention of radicals who wanted a republican Australia or a guarantee that the future constitution would enshrine the principle of one man one vote.

When all this has been said, however, it remains true that a number of people devoted their lives through the 1890s to the attainment of federation and that, although the grass roots they cultivated were in large measure planted rather than a spontaneous growth, the ultimate harvest was an impressive one. Just how impressive is perhaps more apparent to us than it was to them because the notorious reluctance of the electorate since 1901 to countenance even the smallest change to the constitution makes the nation-wide vote in 1899 of 2.5 to 1 in favour of federating under the Commonwealth Bill seem even more striking. Why then did the enthusiasts labour so hard and why did the people respond, in the long run, so positively?

Clearly the state of the economy was a factor for, in the nineteenth century as in the twentieth, Australia entered the '90s in a depressed condition. For half a century, the six colonies had administered their affairs not merely separately but in competition with each other. Laws governing business and banking practice, weights and measures, and all the gamut of policies and practices which affect trade and commerce, including rail gauges, differed from one part of Australia to another. This was tolerable if irksome during the boom but the need for what would now be called microeconomic reform became overwhelming in the face of depression. Handing such issues over to a single federal government seemed the obvious, perhaps the only, way of achieving change. In particular, the differing tariff policies of the colonies, and especially of NSW and Victoria, could no longer be tolerated. Inter-colonial trade, by then as important to each colony as trade with Britain, had to be freed from barriers and restraints. Of course, this issue mainly concerned the business community which was not always able to convince the population at large of its importance. Those in the border regions faced the problems of border barriers in their day-to-day lives, however, which is why the Murray valley seemed a logical starting point for federal activity.

20. 'The Immediate Prospects of Federation', *Liberty*, 17 December 1894, 10.

21. M. Aveling, 'A History of the Australian Natives Association 1871-1900', PhD. thesis, Monash University, 1970, 286.

22. Wilson to Dowling, 9 July 1895, National Library, MS 47/2725.

The need for a unified economy has thus been seen as the launching pad for the popular federation movement; but it is clear that the real impetus came from the cities rather than the borders and mostly from lawyers and other professionals rather than from businessmen. For those whose primary goal was intercolonial free trade, federation was a means rather than an end; and, crucial though it is, microeconomic reform makes a poor rallying cry for nation-builders.

It is an inconvenient fact for historians, though, as it no doubt also was for the federalists, that other issues which are generally considered to have promoted interest in federation were at a lower ebb in the nineties than they had been in the eighties. Concern about the future of the Pacific had receded into the background; there was no credible threat to Australian security; and Chinese immigration was not a live issue — although fear of the yellow peril and general insecurity about Australia's isolated position at the bottom of the world were never far below the surface. These topics were all staple fare in federalist speechmaking and pamphleteering. It is hard to see why they were more potent than they had been a decade earlier when the reverse should have been true. But it is also hard to see how the debate on economic issues moved many hearts. Rival experts published long columns of statistical projections which I find difficult to make much sense of and I am not convinced that the average voter in the 1890s did any better. Rival speakers and rival newspapers flatly contradicted each other, day in day out. Most people must have been confused and I believe their attitudes towards federation owed more to instinct than to reason. That instinct seems to have been increasingly tinged with national sentiment.

Though it was not their exclusive preserve, the Australian-born were consistently to the fore in the federation movement and, by the 1890s, they were heavily in the majority and increasingly in control of the colonies. Strong though attachment to their own colony was for many, and pervasive though residual pride in Britishness also was, most colonists thought of themselves as Australians and were proud of it. There were, however, no compelling reasons why pride in Australia should be translated into the creation of an Australian nation-state in this period rather than earlier or later.

Federation was thus not the product of a popular movement in the sense of an irresistible tide of nationalism welling up from below and carrying the Commonwealth Constitution Bill of the conventions to an inevitable triumph. But the climate of opinion was such that the strong federal leadership of individuals such as Barton, Deakin, Kingston, Braddon and, in their own way, Reid and Forrest, drew a positive response. Even the anti-billites knew which way the tide was running and were at pains to argue that they too were federalists at heart — but, alas, the draft constitution was unsatisfactory or the time was not ripe.

This slow and, to some extent, subterranean groundswell was, I believe, more than a little teleological in character. Rather than being pushed forward towards federation by their history, the Australian colonists were drawn forward towards it by dreams of their destiny. 'Nothing but some appalling cataclysm of nature can prevent the progress of Australia towards a position of power and prominence in the world's history', opined Henry Gyles Turner of Victoria; whilst the Tasmanian federalist John Henry knew Australia to be 'inevitably destined to grow into a great nation, a power that will dominate the Southern Seas and take its part in the great family of nations'. Federation was seen as a step towards this destiny — as it had been for the great exemplar and role model, the United States of America.

The current talk of major constitutional change, coming as it does exactly one hundred years after the last round and in the same context of a depressed *fin de siècle* economy, irresistibly invites parallels, though I am more confident of the ability of the present to illuminate the past than of the past to illuminate the future.

One major difference between the 1890s and the 1990s is that federation could plausibly be presented as a cure for economic woes, as opening the door to microeconomic reform, whereas the present republican movement is vulnerable to the charge that it would do nothing for our economic woes and may be depicted as a deliberate distraction from them.

There may well be broad latent support in the community now for a republic, as there was then for a federal union, but it will be even more difficult to identify a compelling reason why the trauma associated with change should be undergone now rather later.

This makes it the more necessary, I suspect, for the republicans, if they are to have any hope of success, to emulate the federalists by creating a grassroots 'popular movement' at arm's length from party politics, and to do that they perhaps need to find some Bartons and Deakins; men, or perhaps this time women, who are of the political world but who are prepared to put constitutional change ahead of their careers, for a time.

Questioner — Would you like to comment on the recent press coverage of the secessionist movement in Western Australia and do you think that the costs and benefits have really been studied by such people?

Professor de Garis — I am not sure that I am fully cognisant of the press coverage because being isolated in Perth I do not see the full national spectrum of the press. It certainly has been fairly dismissive of the possibility of secession, and in my view rightly so. I am a born and bred Western Australian and like all Western Australians I believe that nobody over this side of the continent understands us properly and that we do not get a fair deal.

In my youth I used to toy with the idea that maybe secession had some merit but the late Henry Mayer, early in my academic career, argued this subject around with me for several hours on one occasion and left me totally persuaded that the costs and benefits really go the other way. Although you can make an economic case for Western Australia propping up the rest of the economy through its mineral exports, I believe that a rational balance sheet would show that there is really no benefit to Western Australia to secede and I do not believe that anybody who is voicing that at the moment is serious. So in that sense I think if the press has dismissed this fairly briskly, it is entirely justified in doing so.

Questioner — What was the percentage of people in individual colonies who actually bothered to vote in each of those referendums?

Professor de Garis — I have not got all that detail in front of me at the moment. We are talking in the days of optional voting and the percentage of people who voted in 1899, which is probably the best one to take because all the colonies were voting at the same time on the same basis then, was lower than at preceding general elections in each colony. However, in a number of colonies, plural voting still existed for ordinary parliamentary elections and it did not apply for the federation referendum. One elector had one vote on that occasion.

The exact extent to which that explains the discrepancy is something nobody has ever done the work on to be able to tell us. I am not sure that it would be possible to determine it. Although it has sometimes been argued by people who have looked at this that the turnout was low and that this does not prove immense popular enthusiasm, I think the figures nevertheless are pretty impressive. Even in the colonies where there was resistance to federation, it is broadly true that almost every constituency did actually have a majority in favour. It was not a matter of dissident minorities in one seat being coerced by large majorities in another.

Some parts of Australia were less enthusiastic than others, but the broad level of support was there. As I say, this result seems really more impressive in hindsight because of the reluctance of the electorate to change even details in the Constitution since then.

It has hard for us to appreciate just what a revolutionary change federation was because we have been accustomed to it for a long time now and there do not seem to have been any major barriers to federation. But it did involve half a dozen communities giving up their autonomy. They were totally self-governing communities. They had full sovereignty in their own hands. They really had nothing to do with each other constitutionally before 1901. They were all parts of the same British Empire but New South Wales and Victoria did not constitutionally have any greater relationship with each other than either of them did with the West Indies or South Africa.

It really was a very big change, even though it may seem to many of us to have been the logical one to endorse. In the end, I find the evidence that there was broad popular support for federation pretty persuasive, even though I do not believe that it was the outcome of what one might call a spontaneous popular movement.

Questioner — I heard that only Victoria had a majority of voters who were eligible that actually turned out. Is that not so?

Professor de Garis — That may be right. Participation rates in elections were always low. You have to look at the percentage of votes at the referendum in the context of the percentage of votes normally cast at an election. Although, as I say, they were a little lower, they were not spectacularly lower. Incidentally, the Victorian federalists did not bother to campaign much in 1899; they had had a thumping majority in 1898 and they found it hard to get the troops to turn out and do it all again when they knew their colony was going to get a vote in favour. So all the leaders of the federation movement in Victoria predicted that the actual vote would be down in 1899 and they were rather surprised that it

was substantially up despite the weaker efforts on their part. They felt that proved that there was even deeper support than they had previously understood there to be.

Questioner — In the discussions going on at the moment about change in a whole lot of areas, whether it is Aboriginal people, republicanism or whatever, the year 2000 has been focused on as an artificial target and a way of focusing attention. During the 1890s, was the turn of the century actually used as a time to aim for to bring change, or is this something that has happened in this particular decade?

Professor de Garis — I do not think it was. The federalists wanted to get it as soon as they could and they intended and expected for a long time that they were going to get it before 1 January 1901. Even at the time that the final referendum had been carried, further delay was forced on them by the reluctance of the British Government to enact the Constitution in precisely the form that the Australian colonists had approved it. So they had to send a delegation off to London and waste some months arguing with Joe Chamberlain, the Secretary of State for colonies, about one or two details concerning the High Court. I think if they had been able to get through all those formalities more rapidly they might have proclaimed the Commonwealth earlier. It was really only towards the end that the symbolic logic of beginning the new century began to get a grip on people's minds.

Questioner — Why have not the differences between the states been resolved — for example, the railway gauges — in all that time since Federation?

Professor de Garis — You need to ask the historians of the twentieth century, not the historians of the nineteenth century. It is interesting, because people argued in the 1890s that the need to clean up the rail gauges was an urgent reason for federating. J.C. Neild, the politician whom I quoted laughing at the Corowa conference, was particularly scathing in the same article on this subject. He said that people do not federate for the sake of railway gauges; it might be a nuisance but it is not that important. I suppose he was borne out by the long delay before governments finally got their act together on that.

A lot of the problems which seemed to loom large before Federation dropped into the background afterwards. I suppose it is really just a matter of the sheer expense of cleaning up railway gauges, together with the residual life that does remain in local politics and local communities in Australia. There was never any serious thought in the 1890s that the country might be totally unified, that you would have a single government which ran the whole country and no intervening government above the level of shire councils. It was always assumed that there had to be a role for state parliaments as well as federal parliament. In fact, the Constitution gave much greater and, as they saw it at the time, more important responsibilities to state parliaments than to the federal parliament.

Although a lot of the best talent went off to the federal sphere as soon as federation was achieved, there were still state politicians who were not going to be pushed around by people in the other states or by the federal government and who thought that narrow gauges or broad gauges had been perfectly good enough for their fathers and were going to be good enough for their children. It is really a part of the whole federal character of Australia which, although it has been eroded somewhat in the twentieth century — from a Perth perspective at any rate — still seems to be fairly strong.

Questioner — After Federation, the popular enthusiasm did subside. To what degree was it maintained? I think I read somewhere that Deakin, for example, felt that if there had been a vote a couple of years later it might not have done so well.

Professor de Garis — Yes, it did fall away. Part of the problem is that Australians are an undemonstrative people. There were no events which required them to give expressions of national fervour. Politics became much more complicated after Federation in many ways, and it took ten or fifteen years to sort out the relationship of the State parliaments to the Federal Parliament and to get the whole political party system realigned, because party politics had revolved so much around the tariff question in the nineteenth century. Free-traders versus protectionists was probably the most important dividing line between political parties, and that ceased to be a relevant issue at Federation. One reason why the free-traders had always dragged their heels on federation was that they could see that it was going to cut the ground from under them. So all that change and readjustment made the early federal period a businesslike one where lots of things were happening. But there were no big symbolic events to draw the community together in any way. This is why it has often been argued, though not entirely correctly, I think, that Gallipoli was more the birthplace of the Australian nation than Federation was.

As to whether it would have happened if the vote had been a few years later, I really do not know. Despite twenty-five or thirty years of studying this subject, I still do not feel entirely confident that I

really know why things happened when they did, and how they did. I can recount it, and I can give the best speculations that I can, but such a fundamental change involved so many people that it has to remain a bit mysterious. If you are studying an event where a few politicians have the decision in their hands, then you may begin to feel confident that at the end of the day you know what was going on in their minds. But federation required, not only the leadership of politicians, but it also required this mass turnout. It is much harder to explain why a whole community voted the way it did when there had been no really clear signs that that was what was going to happen. It was all a matter of gut feeling before, as well as gut feeling afterwards. I suppose what I am saying in a roundabout way is I do not have the faintest idea what would have happened if they had taken a federation vote a few years later.

Questioner — I am interested in why there was a move for federation at that time and not a republic. Can you give any thoughts on why there was interest in a federation and not a republic.

Professor de Garis — As I indicated in passing, there were individuals who believed that it ought to be a federal republic. The United States as a role model was, I think, a powerful influence. When it comes down to it I believe that the theory that if we went down the same path as America and federated we might end up like America — a great and powerful nation — was the kind of thing which people had in the back of their minds, and made them lean towards a federal union. For the same reason, some people argued that it ought to be a republican federal union. But they were a tiny minority on the left wing of politics. They were sometimes allied with the Labor Party but it was not an official Labor perspective. In the nineteenth century, Labor had other things much more on its mind than republicanism. So it really did not ever get to first base at that time. This is because the majority of Australians really were still devoted to Britain. It became fashionable in the late nineteenth century to laugh a bit at the monarchy, and the same sorts of scandals were being published about members of the royal family then, as now, which discredited some aspects of the British ties. But there were aspects of Britishness, the long cultural heritage going back to Shakespeare, which Australians wanted to claim just as much as people in England. The perceived genius of the British for parliamentary politics and democracy, the pride in the fact that British communities everywhere ran their affairs more efficiently and with less fuss than other communities — all these sorts of British values were still widely held in Australia. Most Australians in the 1890s had multiple loyalties, as I have written in other places. I believe that most Australians had a loyalty to their own colony. The rivalries between the New South Welshmen and the Victorians, between the South Australians and the West Australians, which now survive only really in football matches and the like were much stronger in the nineteenth century. People did identify with their own colonial community. They did identify themselves as British, and in some kind of growing way they also identified themselves as Australian. That is one of the reasons it was hard to get any kind of clear-cut outcome about political union. It meant giving up some of the loyalties or subordinating them to others, and in that equation the disenchantment with Britain or the desire for autonomy still was not strong enough.

Questioner — Could I ask you to go a little further along that line concerning the perception of the electorate when it faced the final plebiscite. Do you think the people understood anything of what did eventually happen — the chariot wheels of the Commonwealth, that sort of thing — or, on the contrary, did they have symbolic expectations which were vague and really saw the colonies as proceeding much as before with no great downside? Could they then have perceived anything of the way the nation would grow and the power that would move to the Commonwealth? If they had, how would they have voted?

Professor de Garis — We have got fairly clear evidence that Deakin, for example, not only expected something like the development of a powerful Commonwealth but wanted it and did not say so. He thought the first step was to get federation, take things quietly and not alarm people by talking about where this might all end up. On the other hand, the anti-federalists' strongest line was really the belief that the Commonwealth would become too powerful and subordinate the States to its chariot wheels. That line of thought was powerfully and repeatedly expressed over and over again.

I think, however, that the politicians who were saying those kinds of things were mainly concerned about the power of their State governments. The general leadership role of the Commonwealth in a broader community sense was something which was not really understood at all. They were simply saying, 'The New South Wales Parliament won't have enough money to do the things it ought to do because all the money will be with the Commonwealth'. They appeared to be fairly self-interested in the kinds of critique of possible growth of Commonwealth power which they were suggesting. Hints could easily be depicted as parochial and narrow minded.

Had people perceived where federation might have ended up, I guess probably some of them who voted yes would have voted no. It is rather like saying, if we could all understand in advance exactly what

married life was going to be like, probably not so many of us would get married, but at the end of the day many of us are glad that we did.

Questioner — You mentioned that there was relative political stability at the end of the 1890s. Do you think that was a result of apathy or a result of popular support? In turn, do you think the reason that the Constitution has been so hard to amend is a result of popular support for it or because of political apathy?

Professor de Garis — I do not think there was political apathy in the 1890s. I think it is partly a matter of coincidence that there was stability in a number of colonies at the same time. I think it is also in some way related to the growth of political parties. Pre-party politics in the earlier nineteenth century had been notoriously unstable because you need party discipline to keep your majority together. Back then, all you needed was a bit of a cabal over a drink in the bar one night and suddenly next day you find you do not have a majority any more.

Although party politics as we know it had not fully evolved at the end of the century, it was well on the way. I think a more disciplined mode of politics had been evolving for some time and that contributed to the stability. There had also been a fairly brisk turnover of governments at the beginning of the 1890s, as there always is in the face of depression, and as the economy began to improve a bit in the mid-1890s people decided to stick with the governments they had for another term. I think there were a variety of reasons for that political stability, and certainly not apathy. In fact, I suppose I would be of the view that the population at large were far more interested in politics in the nineteenth century than they are now. Certainly, if the attendance at political meetings and the number of individuals who were prepared to do things themselves of a political character is any guide, I think one would have to come to that conclusion.

As to whether it is apathy that is responsible for the difficulty in changing the Constitution, I do not think there are any real grounds for supposing that. Populations are naturally and perhaps rightly conservative about constitutional change. Unless they fully understand how it will affect them and they are convinced there is a strong case, then, provided the status quo seems reasonable, they prefer to stay with it. I think it is part of the 'if it isn't broken, let's not fix it' approach to life, which is a perfectly pragmatic and rational one. The fact that some politicians sometimes get themselves convinced that something is broken and needs fixing does not necessarily move the wider community, unless all the politicians agree to this, unless there is a broad basis for going to the community and saying, 'Look, we really do need your support. This change has to happen'.

On one or two occasions there has been that consensus and constitutional changes have been approved, but it is fairly rare. Normally when the Federal Government says, 'We want to change', the State Governments say, 'No, not on your life'; if the Liberals say they want a change, Labor says, 'Not on your life', and so referenda get drawn into the normal party politicking and/or the normal Federal-State politicking. I think that is one of the reasons why any profound change such as some people are seeking at the moment has to draw on some kind of non-party basis.

The Founding Fathers: Constitutional Kings or Colonial Knaves?

Greg Craven

Introduction

I feel that I should begin by indicating why I chose the Founders as the subject for a lecture. The Founders have always been a matter of special interest to me. To begin with, I vividly recall that, in an in-cautious moment that lasted two years, I devoted most of my time to preparing an index and a guide to the printed debates of the Founders. I have always remembered, in this connection, the comment of a colleague at the University of Melbourne Law School, who said he thought that, from an academic point of view, this was like trying to discover who wrote Shakespeare's plays by playing the recorded speeches of Billy McMahon backwards. I have no reason to think that the comparison was inapt. A second reason for lecturing on the subject of the Founders is that I am presently meant to be writing a book, of which the only chapter that I have so far managed to complete has been one concerning Australia's constitutional progenitors. The publishing company tells me that it is meant to be a popular book on the Australian Constitution; a notion which sets up one of those great contradictions, such as a Serbian cease-fire or a Queensland intellectual: but I am trying.

The third reason that I have chosen the Founders is that I am currently away from academia for two years, and am working for the Victorian Government as Crown Counsel. Crown Counsel are not meant to say anything controversial, and these days about the only thing that is not controversial about the Australian Constitution is the existence of the group of men who wrote it, and who have been dead for fifty years. It used to be that from the point of view of the public, the Australian Constitution had all the excitement of wet mud. Now it seems that constitutional discussion is about the most brutal sport since the banning of badger baiting.

Nevertheless, what I wish to attempt here is three things. First, I want briefly to explore the position of the Founders in what one might call the 'current collective Australian psyche'. Second, I would like to see whether that contemporary perception matches what I would suggest is the reality — by which I mean my own reality — of the Founders. Third, I would like to offer some form of tentative reassessment of the general place of the Founders in Australian history.

The Position of the Founders

In terms of the present position of the Founders in the public mind, one would have to say that they are prominent only in the degree of their obscurity. There is arguably no more neglected group of people in Australian history than those who produced the Australian Constitution. It is, in fact, well worth considering why they are collectively the 'third gravediggers' in Australia's national *Hamlet*. Here, it must be remembered that most Australians would be hard pressed to name more than the smallest handful of the Founders. It is true that people can, with varying degrees of confidence, come up with names like Barton, Deakin and Isaacs. If you really push them, they will then go on to other names like Griffith (or Griffiths or even Griffin). But if you press them any further, they will simply say, 'We do not know'. The Founders, in terms of their popular legacy, very nearly do not exist.

To the extent that they do exist, to the extent that there is a 'race-memory' of the Founders, they tend to be remembered more for their political achievements after Federation than for their roles at the great conventions. Deakin is remembered because he was a prime minister; Barton is remembered because he was the first Prime Minister; and Griffith is remembered because he was the first Chief Justice. Very few of them are remembered because of what they did at the great federal conventions. This historical obscurity is particularly noticeable when you compare Barton and company to the American founders. In America, the names of people such as Madison and Jefferson still ring through that country's constitutional history, and their names are cited daily. Whether as objects of utter contempt or of complete subservience, their memories exist. They have the immortality of prominence.

This, the Australian Founders decidedly do not have. There is even a difference in terminology. I have constantly referred to the convention delegates as 'the Founders'. In America, of course, the literature is replete with references to 'the Founders' and the 'Founding Fathers', which references are completely unselfconscious. No-one is surprised when Madison is talked of as a 'Founding Father'. Yet there is always something faintly embarrassing about referring to the Australian delegates as 'Founders' or as 'Founding Fathers'. A certain Blakeian, God the Father image is evoked, and there seems to be difficulty in us imagining someone as utterly human as George Reid clothed in diaphanous cloud, engendering potency in a constitution. The Americans have no such inhibitions, and I feel that our embarrassment is symbolic of our historical contempt for the Founders. In this connection, I cannot help but recall that there was a Minister in this place who, not so long ago, said that he really thought the paintings of the Founders in Parliament House should be taken down, because they did not match the decor. There is a certain great truth in that view, in terms of the Founders' contemporary place in history.

Of course, it cannot be denied that there is some recognition of the Founders. They appear, though with diminishing frequency, in school history books, playing bit parts. In what would be to many Australians a somewhat dubious honour, there are suburbs of Canberra named after the Founders. But as to their place in contemporary Australian consciousness, it would be fairest to say of these people that they are dead, and that we are more than happy for it to be that way.

Why the Founders Have Ceased to Exist

It is worthwhile trying to understand why the Founders are so enmeshed in their own obscurity. I believe that one of the most important reasons is based in the view that we take as to inevitably of Federation itself. We survey the fact of Australian union from the hindsight of almost a century of that very fact, and see anything other than Australian unity as utterly inconceivable. The sovereign State of Queensland, or the People's Republic of Tasmania, have essentially risible connotations to us. We therefore tend to think of the Founders as handmaidens to the inevitable: they really did not do anything: it was going to happen anyway, so they cannot be terribly important people. I will return to this issue presently, but I think that this is one of the reasons we dismiss the Founders so readily.

Another reason we dismiss them so quickly and profoundly is because of the nature of Australian Federation in 1900, when I think we suffered from the dreadful lack of a tyrant. I know that it is not terribly fashionable now to say anything nice about perfidious Albion, and I will restrain myself as someone whose surname is correctly spelt 'O'Creavan'. But Britain was a depressingly benevolent despot, at least to white middle-class male Australians of the late nineteenth century. There were no haughty imperial armies quartered around the colonies, grinding the noses of the population into the mud. There was no need for an exciting revolution from the point of view of people such as Barton and Deakin. If someone such as Barton had started prancing about the place screaming that, 'We, the people, hold these truths to be self-evident', and so forth, the general reaction would be, 'Yes, so what else is new?' If you had tried to write a constitution in terms of ringing declaration of rights and assertions of independence, you would quite rightly have been laughed at. There simply was no need for revolutionary rhetoric, because there was no need for a revolution.

The result is that, whereas the United States Founders were midwives to a revolution, the Australian Founders were notaries to a nineteenth century deed. There is a clear difference in perception of, and there is a difference in the degree of excitement aroused by, these two things. Of course, the plain truth is that nothing more was needed, and anything else would have been ridiculous. But it seems to me that we have never been able to forgive the Founders for their own good luck in not having had to foment a revolution or a rebellion.

This has had a further consequence. No one could claim that the language of the Australian Constitution is particularly exciting. The reason for this is that the Constitution is really a detailed blueprint for the next stage in a peaceful development of governmental structures. Having said this, I note that the Australian preamble is not quite as bad as some people would have one think. It begins quite resoundingly, 'Whereas the people of X, humbly relying on the blessing of Almighty God, have agreed to unite', and so on and so forth. There are such moments of attempted lyricism in the Australian Constitution, but I concede that it is not exactly *King Lear*.

The other problem for the Founders is that they are undeniably ideologically unsound. This is particularly unfortunate for them, because they are dead, and there is not much that they can do to reform. Consequently, they are not in the mainstream of attempts by those such as Manning Clark to write, or to rewrite, depending upon one's point of view, Australian history as an heroic epic. Thus, if you take

Australian history, and say that its great theme has been a glorious battle by forward-thinking Australians, led by organised and unorganised labour, to seize a united national destiny from backward thinking Anglo-Saxon imperialists, the Founders are a huge problem. They are, in short, spectacularly inconvenient. Why? Because they were Anglo-Saxon imperialists to a man. Unfortunately, wicked people that they were, they wrecked the plot of those such as Manning Clark and Fin Crisp by achieving the first step in national unity. It is not bad enough that they were evil Anglo-Saxon imperialists. They also actually managed to do something that should have been done by the scripted heroes — enter, stage left, Henry Lawson and a large band of singing shearers. Worse still, the Founders achieved Federation at a time when organised labour was, for a variety of complicated historical, social and economic reasons, steadfastly opposed to it, and fought the coalescing national epic tooth and nail, fortunately for them, unsuccessfully.

But this is disastrous for correct-line historians. One can hardly have as the heroes in the first verse of the national saga a group of social brontosauri. What do you do with them? The best thing you can probably attempt is try to write them out, pooh-pooh them, and generally exclude them from the story. If you read the relevant part of Manning Clark's history, you will see that he does a very good job of it.

The other problem that the Founders have is that they do not fit in with modern perceptions as to what a good group of Founders would be. The difficulty with the Founders is that they were, as any sane person would expect, directly reflective of the social paradigm of their time. Thus, they were (by and large) Anglo Celts. They were exclusively male. There were no ethnic minorities as such represented among them. Clearly, there were no Aborigines. In saying all of those things, one is saying nothing about the Founding Fathers except that they were living in the 1890s rather than the 1990s, but there is no doubt that they are, by present standards, ideologically lower-class.

The fact that it is quite unreasonable to judge the Founders by the standards of the 1990s has not stopped us. We are a little bit like people who criticise Leonardo da Vinci for not having applied Freudian theory when he painted the *Mona Lisa*. The fact is, as a matter of objective aesthetics, he should have. A Freudian analysis would have been a wonderful thing to bring to bear on the subject. The fact that it was not available to da Vinci does not matter. Of course, this is not to say that the Founders were the beakers of distilled wisdom that some people believe them to have been. Anyone who has read the convention debates will know the full limitations of the Founders. But, equally, anyone who reads the convention debates with any understanding should realise that it is not appropriate to dismiss the Founders simply by reference to our own, equally period-specific ideas of the 1990s.

I also believe that the Founders have suffered as a result of an endemic enmity felt towards them by constitutional academics. Constitutional academics are pretty pointless people as long as you have a constitution with which you are broadly happy. In short, if no one wants to rewrite the Constitution, it is a depressing business being a constitutional academic. I speak from experience here. It is bitterly unfair that Sir Samuel Griffith and the boys got so successfully into the act in the 1890s, and that consequently no one is ever going to come to you and say, 'Re-do the Constitution', so that you get your turn. Thus, my only chance of re-writing the Constitution is to make sure that you all think the Founders were complete fools, and that their Constitution is absolutely atrocious. Down the years, I think that there has been a real tendency for constitutional academics — Geoffrey Sawer and all the rest of us — to go to a considerable amount of trouble to stress the very real human frailties of the Founders, in the hope that our very unreal human frailties, and indeed prodigious strengths, will be brought to bear on the Constitution.

Finally, and only half flippantly, I would like to suggest that there exists a serious public relations problem in terms of the looks of the Founders. This was something suggested to me by an American constitutional colleague. He said, 'The problem with your Founding Fathers is that you have photographs of them. We have only oil paintings of our Founding Fathers and they look really impressive. Your Founding Fathers look like a group of beached walruses in a second-rate gentleman's club. They are all hopelessly overweight'. I checked this, and in fact the Founders had an average weight of thirteen stone thirteen pounds, so there is no serious doubt about the matter. If one thinks about it, in terms of Australia's national self image, and the genre of visions concerning young shearers wandering off into the sun, there is nothing terribly attractive about the Founders as physical objects. It is an odd physical truth, that matches our general intellectual perception of their work.

So I feel that in many ways what is wrong with the Founders is what is wrong generally with Australian history — from the point of view of a ten year old school boy. Nothing exciting happened until the 1850s, when you had Eureka and a few people were killed. Then there was another blank period until Gallipoli, when a lot of other people were killed, and nothing much has happened since then. The

Founders are not exciting; they are not dramatic. We really think that their one great achievement, Federation, would have happened anyway. Consequently, we pay them little attention.

The Real Character of the Founders

However, I would suggest that there are some qualities of the Founders which we should indeed accept as laudable, and perhaps even outstanding. I begin here by observing that present day politicians are particularly inclined to dismiss the Founders of the Australian Constitution. In keeping with the general position of the Founders in Australian history, I do not think that this is a particularly vehement dismissal, largely because the Founders do not warrant that intense degree of emotion. It is more of a condescending rejection, 'Well, poor old chaps, they really didn't know terribly much. They weren't awfully bright'. What I would like to do here is to assess the quality of the Founders from three aspects: From the point of view of politics, which is indeed the same perspective from which they are themselves assessed by modern leaders; from the point of view of what I would call non-political intellectualism; and from an entirely general aspect.

I have said that modern leaders are fond of suggesting that the Founders were not exactly first-class. The common suggestion of contemporary politicians is that they were naive, did not understand the realities of government the way 'we' do, and wrote a constitution that was sadly deficient from the point of view of the practical realities of government that 'we' understand. Yet one thing that should be stressed at the outset is that the constitutional conventions which met in the 1890s were probably the most politically accomplished assemblies ever to convene in Australian history. The delegates between them comprised a collation of sheer rat cunning that would make Senator Richardson look like St Francis of Assisi. Thus, if you do a political head count of the Founding Fathers, there are some impressive statistics. There is little point counting the ministers or members of parliament — which almost all of them were or had been — because there simply are too many of them. There were, however, three future Prime Ministers, which is undeniably impressive. The statistic that struck me, however, is that there were thirty-three past, present or future Premiers. Even in contemporary politics, Premiers are serious beasts, and when one says that there were thirty-three of them among the Founders, one is saying that you could not describe such an assembly as politically naive. You would not, in short, lightly expect it to produce a constitution that did not bear some connection with the realities of government.

If you go through these politicians that were the Founders, just about every type of political skill is displayed. There were practical number-crunchers with a capital 'C', such as George Reid, who was so professionally inscrutable that ninety years later we are still not sure whether he was in favour of Federation, or just hedging his bets. There were the extraordinary, wheedling, parliamentary debaters like Henry Parkes. He would try habitually to orate his way to victory, and if that failed, he was prepared to sulk his colleagues into submission. There were the classic systematic planners such as Andrew Inglis Clark; hugely imaginative policy makers such as Henry Higgins and Isaac Isaacs; brilliant political orators, such as Alfred Deakin, who could convince everybody but himself that he was right; and altruistic visionaries such as John Quick. As a gamut of political talent, these people are difficult to dismiss.

In terms of intellect, it would not be unfair to say that the quality of the Founders was such as to be potentially embarrassing to modern-day Australians. Griffith was a brilliant lawyer; a brilliant legislator, which is not the same thing; a brilliant judge, which is a third and different thing; and finally, a brilliant administrator. In the case of Deakin, it was only a question of whether he was a better lawyer, orator, politician or journalist. The story is well known that, as Prime Minister, Deakin anonymously wrote a column for the London *Morning Post* on Australian politics, and no one could ever work out from where the unknown journalist was getting his information. It gives an entirely new dimension to the word 'leak'.

Isaac Isaacs had one of the most penetrating legal minds in Australian history. If he had been any cleverer, he would have been almost as clever as he thought he was. In 1901, John Quick produced what is probably still, embarrassingly, the best book on the Australian Constitution. John Forrest was an explorer of real renown. Even relatively obscure Founders, such as John Hackett, had talents as quite exceptional journalists and newspaper proprietors. The essential point to grasp about the Founders is that these people were, in general terms, outstanding — and they were outstanding long before they ever got into the conventions. Our Constitution, for better or for worse, was not written by a dowdy group of dead politicians, but by people who could not, in any age in which they lived, ever have failed to be anything other than exceptional and impressive.

That brings me to the general intellectual quality of the Founders. Possibly the most surprising thing about the Founders is that they were really very interesting people, and not the sorts of chaps that one would chew one's arm off rather than be seated next to at a dinner party. People usually react to the Founders by saying, 'Oh, yeah, I suppose they wrote the Constitution. That is fair enough, but, gosh, they look dull'. But they were not, by and large, even remotely dull.

Take a man such as Henry Parkes, who came to Australia as an ivory turner, which is reasonably unusual to start with. Yet apart from being a politician, he was a baroque poet of the most outstanding awfulness. I recommend Sir Henry Parkes' poetry to anyone with a taste for the appalling; it is unspeakable. He had an ego like a bull elephant; a sex life that was more ornate than his poetry; was married yet again at seventy-three years of age, to universal concern in the Sydney newspapers that his health would not be up to it; and lived for another eight years. He was a truly extraordinary man. Equally remarkable was John Quick, who came from Cornwall, and whose first job was as a miner's boy. He rose to be the country's pre-eminent constitutional lawyer, and did more to reactivate the federal movement between 1891 and 1897 than any other person. If ever there was an Australian Dick Wittington whose life is waiting to be made either into a nursery rhyme or a novel, it would be Sir John Quick. Consider also someone like Charles Kingston, who raised the dynamics of political abuse to an art form when, after being horse-whipped by an opponent, he grabbed the whip and turned it back on his tormentor.

Yet to be popularly appreciated are virtually unremembered Founders such as Sir George Grey — who was born in the baggage train of Wellington's Peninsular Army in 1812 — and who became the Governor of the infant colony of South Australia in 1841, coming back to Australia in 1891 as the most radical delegate to the convention for, of all places, New Zealand. He was a world-recognised bore, and to read Sir George Grey's contribution one hundred years later is to find oneself becoming irritated, and saying, 'For God's sake, get to the point'. Yet Sir George Grey is a potential constitutional hero, because he is the only Founder I have discerned to have been more or less definitely a republican at the conventions. It could be that his big chance has come around at last.

Perhaps the most depressing thing of all is that even the really dour, straight-laced Founders had an appealing side. Thus, Sir Samuel Griffith, who was what would today be called a high achiever — first Chief Justice of Australia, a terribly good lawyer and so forth — had a hobby, the nature of which surpasses all belief. That hobby was, of all things, translating the poetry of Dante into prose. Griffith would sit by the light of the lamp translating it and, as one person observed, rendering the divine poetry of Dante into the language of a parliamentary enactment. I also recall seeing recently in the press the story of how he offered a copy of the fruits of his labours to a friend. The friend accepted his offer on the condition that Griffith inscribed it, to the effect that it had been given voluntarily, because the friend did not want anyone to think that he had actually bought a copy or, even worse, that he had asked for one. Another great story about Griffith, which I have always liked, is that when Barton was thinking of drafting a particular constitutional provision about voting in elections — whether there should be penalties if the wrong thing were done, what the penalty should be and whether it should be included in the Constitution as such — Griffith, in a terribly polite manner, wrote back that the great constituent document of a new continental federation seemed an odd location for an addition to the statutory criminal law. This would have to be one of the great legal put-downs of Australian history.

Another thing about the Founders is that, while no one would suggest that they collectively comprised Smith Street, Collingwood, they were a far more diverse body than is commonly accepted. It is true that absolutely all of them were male, and that they were not particularly varied ethnically. It is true also that a lot of them were lawyers, and many were professional politicians, though it should be noted in relation to most of those Founders who were lawyers, that they were lawyers who were at the peak of their powers when they sat at the convention, rather than people who were lawyers, and who also happened to become successful politicians.

The point is that there was a real diversity among the Founders, which reflected the general diversity of what in Victorian times properly could have been called the 'successful class'. Within that class, as represented by the Founders, was a wide variety of backgrounds. There were doctors, lawyers, miners, soldiers, engineers, bootmakers, market gardeners, artesian well diggers, civil servants and shopkeepers. There was only one member of organised labour, William Trenwith, about whom almost nothing is remembered, but who was — in his own way — an extremely impressive man. As I said before, the reason that labour was not in the conventions was because labour largely had chosen, either tactically or substantively, to keep itself out. Thus, the Founders were not culturally diverse, but nor were they socially monolithic.

The Achievement of the Founders

It is far from trite to say that the great achievement of the Founders was Federation itself. This is something that I believe is downplayed, on the basis that Federation was inevitable, and that there is no credit due to those such as the Founders, who are perceived to have floated jellyfish-like upon the inevitable tide of history. Yet this perception of the flow of events surrounding Federation is absolutely inaccurate. Federation, although it did happen, was not inevitable, and it is in reality ninety years of continuing and successful unity that gives that false impression. It is a little like when a team wins a football premiership, and every journalist in every paper in the country can tell you how it was always inevitable that this was going to happen even though they had consistently presented an alternative 'premier' throughout the year.

In fact, of course, Federation was far from inevitable. It is quite conceivable that Australia could have broken into separate national units, and in one sense it did: the Australian colony of New Zealand is still out there masquerading as a sovereign state, and there is no reason why you could not have had such similar sovereign entities as Western Australia, Queensland, or Victoria. Western Australia was intensely hostile to Federation, and it was only brought in by a series of political confidence tricks that were grubby even by the undemanding standards of the Colonial Office in the 1890s.

There were a number of very real factors conspiring against Federation. There was, firstly, the powerful force of inertia. It is always easier (and always has been easier) in terms of constitutional politics to stay with that to which one is accustomed. There was inter-colonial rivalry, with the only real question being whether Victoria hated New South Wales more than the collective small States hated Victoria and New South Wales together. Ready proof of this state of affairs is to be found in the convention debates, where a hopeful New South Wales regularly would raise the question of Sydney as the prospective capital of Australia. Everyone would look forward to the occasion immensely, and while some poor New South Welshman would try to argue for Sydney, other members of the convention would be screaming out, 'St Kilda — no, Mudgee — no, Warracknabeal', frantically advocating the most obscure place that they could imagine. One must also take account of the vested interest of politicians, who had happy colonial political careers which they were reluctant to place in jeopardy. Most importantly, the Founders faced a huge number of profoundly complex issues, all of which would have to be resolved if Federation was to occur. The balance of power between the Commonwealth and the States had to be arrived at, as did the basis of representation in both Houses of the Federal Parliament. A decision was required on the question of whether there was to be responsible government, or some modification thereof. There was the appallingly vexed question of freedom of interstate trade, and the equally daunting prospect of attempting to create a financial settlement between the States and the Commonwealth. It is worth noting that every one of those issues is more complicated in its own right than any constitutional issue that has ever been solved by any group of Australians since 1900. Collectively, they dwarf such current issues of profound importance as Mabo and the republic. Yet to all of these issues, the Founders gave some sort of answer, and that answer was accepted by the Australian people.

It is well worth remembering how close the Federal cause came to disaster. In 1891, we saw the first draft of the Constitution. It was laid over for six years before any further progress was made, and the Paul Lynehams of 1891 were predicting that it was never going to come back onto the agenda. In Adelaide, in 1897, there emerged the key issue of States rights — the issue that was always to be at the heart of the conventions — and it emerged in its most acute form: how the Senate was to be composed. Was it to be composed on the basis of population — the large States obviously wanted that — or was it to be composed on the basis of equality of representation among the States, which was the dream of the smaller colonies? In 1891, the Senate question had been resolved by a compromise, under which the basis of representation in the Senate would be equal numbers for the colonies, but with the Senate's powers with regard to money being severely constrained. The small States were happy to get equal representation; the larger States were prepared to concede that, so long as the Senate had limited money powers.

However, on 13 April 1897, that compromise began to unravel, when the representatives of the small States, in an unusually acute display of arithmetic, realised that there were three of them at the convention, and only two sets of representatives of the large States. The mathematically gifted among them worked out that South Australia, Tasmania and Western Australia — even in the absence of Queensland, which had not bothered to turn up — could outnumber New South Wales and Victoria, and they proposed to go back on the compromise of 1891.

If you read the debates of 13 April, you can almost smell the sour hopelessness. You can almost see these people thinking that it was 1891 all over again. There then occurred — and it is brilliantly described in

La Nauze's book, 'The Making of the Australian Constitution' — what I have always referred to as 'the night of the long drinks'. This was a typically Australian version of how you would solve a massive constitutional impasse, with coaches lumbering around the streets of Adelaide and the sounds of corks popping, as the arms of South Australian and other delegates were wrenched from their sockets. On the following day, when the vote was taken, the compromise of 1891 was affirmed because two South Australians and three Tasmanians voted with the large colonies, resulting in a majority of two votes for the compromise. There is little doubt that, had the vote gone the other way, Federation would have been put off for as long as it had been in 1891; and it might not have occurred at all, at least with the States that we have today. So when one talks of inevitability in the context of Federation, one is talking of the votes of two South Australians and three Tasmanians.

The achievement of the Founders in this context is one not to be underestimated. Obviously there were many profound factors impelling us towards Federation: defence, economics, nationalism — all of those wonderful, inevitable things that produce solutions so readily in places like Bosnia and Serbia. Certainly, Federation was a thing that clearly should have happened, but — in the infinity of possibility — conceivably may not have occurred. It was the achievement of the Founders to ensure that it did.

For the purpose of this lecture, I tried to think of what qualities the Founders had that enabled them to achieve Federation. There are obviously a lot of factors that played their part here: political, intellectual, and just plain good luck. But it struck me that there was one thing in particular that allowed the Founders to achieve something the like of which has not been achieved since, and this was the fact that and I would describe the Founders as 'pragmatists of vision'. They were, in the Victorian phrase, 'highly practical men of affairs' — people with the capacity to understand political reality, and to wheel and deal in the gutter with the best of them, and win. But, in addition, they were not blinded by this practicality to the value of ideals and ideas, or to the value of aiming high to achieve distant objectives. Again, I think Parkes is not a bad personification of that quality: an incredibly grubby politician, with a genuine, if schizophrenic, belief in the idea of Federation as a concept. It was that combination of pragmatism and vision, of an acceptance of the two things as being of equal worth, that stood best to the Founders' credit in achieving Federation. In this sense, I think they are very different from many modern leaders, who try to draw a clear distinction between those who are practical and those who are idealists. The practical despise those with ideals as unrealistic and pathetic, while those idealists among us despise those who can actually work out how to catch a tram as morally bankrupt. The difference between the Founders and their political descendants, at least in this context, was that they were able to achieve some sort of creative tension between those two genuine values.

Aside from Federation, the other great achievement of the Founders is the Constitution itself. The adequacy of the Constitution at the moment is very much a political issue, so I am determined not to go into that in any detail, but I will make a few comparatively uncontroversial points. The first is that the Constitution was drafted, as I have said before, by excellent lawyers and superb politicians; whatever one thinks of the Constitution in today's circumstances, that is worth remembering. The second is that it is an objective fact that very few constitutions last one hundred years without collapse. This is an undemanding test, in one sense, but a real one. There are not many constitutions around the world that have lasted that long, but the Australian Constitution undeniably is one.

Another thing that is important to grasp is that the Founders were not mindless followers of British precedent. There is an idea about that they were a group of imperial hijackers who somehow managed to gain the constitutional ascendancy briefly in the 1890s, and attempted to follow a guide marked 'Imperial Constitutions: for the making of'. That is not true. If you look at the Australian Constitution, there are many international influences. Obviously, the imperial English precedent but — equally obviously — the United States example, with the added and extraordinary difficulty of combining the two: not to mention our quite amazing section 128, with its referendum requirement imported directly from Switzerland for the occasion.

All of those things suggest, I think, a wider grasp of constitutional and political reality and thought than that with which the Founders are generally credited. Moreover, I believe that there is a tremendous misconception about some things that the Founders did. For example, one of the ideas that most amuses me is that federalism is a colonial relic. This is often put forward by those who wish to abolish the States, and to wipe out federalism itself. The true colonial relic is, of course, an absolute hatred for federalism derived directly from Dicey, and the one central proposition of British constitutional politics, which is that at all times you must crush the Scots, the Irish and the Welsh, and make sure you have an omni-competent parliament in Westminster. It is this centralism gone mad that is the true constitutional descendent of the British imperial colonial legacy in Australia.

The other thing I would say about the Constitution is this: one of the criticisms that had not been raised until quite recently, but is being cited frequently in a number of contexts today, is that the Constitution is a bad constitution because it does not spell out the true system of government, and does not mention the holy words 'Prime Minister', for example. All I would say about that is that there is no constitution in the world — bar none — which is fully explicit. There is no such thing as a fully written constitution, as indeed the French and the Americans will tell you. Of course, in England you have a constitution which is largely unwritten, so that this sort of criticism does nothing less than betray a misunderstanding of constitutionalism as such.

Conclusion

The final thing I would say for the Founders is that they have a real constitutional authority in Australia. This is a concept that is more familiar, I would have thought, to an American audience than to an Australian one. But we must remember that the Founders were not, as I have said, imperial terrorists who invaded the colonial parliaments and held a Gatling gun at people's heads until they let them write a constitution. The Founders from all States, except Western Australia, were directly elected in popular elections, with massive voting in favour of the selected candidates. Their Constitution was put to a referendum on two separate occasions, and passed with massive majorities. If you take that Anglo-Celtic democratic club of Australia, Canada, the United States and New Zealand, the Australian Constitution is, in fact, the only one that has ever been put to direct popular vote. That occurred in the 1890s. So when one looks at the old fogies sitting in their colonial armchairs writing a constitution, one must recall that, in the absence of a referendum carried in a majority of States by a majority of Australians, one is looking at the authors of the last authentic expression of the will of the Australian people upon their constitutional depositions. Here, it matters not how good the Founders were, whether they were perfect, or whether they represented an absolute democratic ideal. The real question is whether they are better on these scores than any of the available or putatively available alternatives. I think the answer is that, in the absence of a referendum, one must have a very considerable respect for the achievement of the Founders as embodied in the Constitution.

So what I would say by way of conclusion on this subject is this: the Founders decidedly were not heroes; they were ordinary people. But they do not need to be heroes for their true position in history to be secure. I prefer to think of them as what I said before: pragmatic men of vision, practical enough to achieve something, and idealistic enough to achieve something worth having. In terms of the title of this lecture, I would say this: if the Founders were not constitutional kings, they very certainly were not colonial knaves.

Questioner — I would point out that an original copy of the document we have been listening to you talking about, and which of course is the foundation of the magnificent building that we are in, resides at this moment — although practically no-one who enters this building is ever aware of it — in a very drab nondescript box which you can see on the right hand side as you exit this committee room. That is totally out of keeping, one would think, with the importance of a document which is the total foundation of our country.

That state of affairs does not exist in the United States of America. When you were analysing at the start of your speech why Australians are so unaware of their Constitution and their founding fathers, I thought you missed the vital point. In the United States of America, the constitutional history of the country is a core part of the educational curriculum. That is the reason why all Americans know about John Hancock and all the rest of the founding fathers.

In this country I went to what I think was quite a good school and was never told, at any stage, that this country even had a constitution, let alone the process by which it had been drafted. As far as I am aware, basic constitutional history is still not a core part, that is a compulsory part, of the school curriculum anywhere in Australia. So huge numbers of people are still leaving school in this country unaware that this country has a constitution. That seems to me to be the real reason. That is not something for which the broad mass of Australians can be blamed; they do not set the school curriculum.

So I think all the points about the photographs of the founding fathers not revealing terribly handsome visages or ethnic minorities not being represented or all the things about despots being lacking are really beside the point. Australians do not even know that there are founding fathers. How could they therefore know what their photographs look like? We must change the educational system. Part of that process

could be that when children come to this House in very large numbers we could make sure that they are aware that they are walking right past one of the original copies of the Constitution of their country.

Dr Craven — I quite agree with you that there is a really lamentable lack of teaching about our Founders and indeed the whole process of Federation in schools. I completely agree with that. I think that perhaps there is not quite the dichotomy between the two things that you are suggesting. To some extent one of the reasons it is not talked about, and certainly why it will not be taught from now on, is some of the factors I mentioned. If one is to judge the history one is going to teach, one brings to it certain presuppositions and judgments.

Some of the things I have talked about reinforce what you are saying. That is why it is not taught. I would much rather people be taught the history of the Constitution. There is a much sadder story than that of people walking past that box. I remember a colleague of mine who worked in the Premier's Department in Victoria for a time. Because she was doing intergovernmental agreements, she eventually asked whether they could bring the file up. They did so, and she rifled through it in my presence. She looked under C for Constitution. She found the original copy of the Constitution as agreed to in 1898 in Melbourne, signed by the president and the other members of the convention.

People talk about bringing back the Constitution from the United Kingdom. However, I think that is not the real Constitution — it is just the Constitution with the elephant stamp on it. But the real Constitution is, as far as I know, still in a manilla folder under C for Constitution. I know the Victorian Government of the time did not want to display it. We tried to have it displayed in Queen's Hall. I think that document did not even get as far as the box.

Questioner — Could we not make constitutional education a compulsory part of the Victorian curriculum?

Dr Craven — That sounds like a great idea to me.

Questioner — I was most impressed when you mentioned the democratic experience of the founding fathers. You also mentioned that section 128 came from Switzerland. It seems to me to be the essential section of the Constitution — a quite remarkable one. It means that the Constitution cannot be changed except by the will of the people. The Clerk of the Senate, Mr Harry Evans, recently said that he takes this to indicate that the people of Australia are sovereign because they are the only people who can change their own rules about democracy.

Another point I wish to touch on is the fact that in the 1890s and early 1900s, particularly in the 1880s and 1890s, Tasmania, Victoria and South Australia were pioneers in voting systems — particularly, our quite extraordinary and, in my view, perfect single member electorate system with the full preferential vote. This is the only system I know of in which it is possible to put a member out of parliament by having half the voters plus one put him last.

I have only read a few of the convention debates. I wonder what the reaction of the founding fathers would have been to the proposal that, where the governing party had a majority of more than five seats in the lower House, there should be no by-elections for casual vacancies.

Dr Craven — I honestly do not know. I appreciate that is a proposal in Victoria at the moment. Without a crystal ball or a ouija board, I would not try to answer it.

Questioner — I was wondering whether you would elaborate on a part of your discussion. It seems to me that in the 1890s one of the ambivalences about the continent was that it was governed by colonies. But fifty years earlier, as a result of a long campaign, they were granted the status of independent sovereign beings. So you had this entity called a colony, but it won independence in the 1850s. Why was it that the founding fathers fifty years later chose to perpetuate the colony part of their inheritance rather than the sovereign independent state? It is one of the documents being circulated by the Turnbull committee — a lot of us have read it again after all these years. But it reads so much like a colonial document.

This is the Keating problem, is it not: if it was not a colonial document, you would not have to change about one hundred things to get rid of the Queen? In other words, why did the founding fathers perpetuate the colonial part of their inheritance and forget the independent sovereign state part?

Dr Craven — There are a number of reasons. One reason is, like all good lawyers, they were working from precedents. A lot of what they had came from the original colonial constitutions. Some of it did not, obviously. It makes no sense to argue about the colonial bits that are direct lifts from the United States Constitution. There are quite a few of those. British governments, and therefore the Australian Government derivatively, have always been somewhat euphemistic. I know that Malcolm Turnbull gets terribly upset about this. Things are never quite as they seem. I think to a large extent the founding fathers would have said, 'Well, as long as everyone knows things are not the way they seem, it really doesn't matter'. A lot of the colonial part of the Constitution that you are referring to is in simple form. It is a bit like the white part in the French flag which stands for the Bourbon monarchy. No-one seriously believes that it represents a commitment to monarchism. I think the central part of what you are saying is correct, of course. The colonies were, subject to very limited exceptions, fully independent at least by the 1870-80s and certainly by 1900.

It is true that the founding fathers — and this is probably the ultimate answer — saw everything as a gradual development. In a sense, the year of 1900 was the creation of a bigger colony, not full independence, though many of them would have seen independence as coming. I think the fundamental answer is that the founding fathers were great gradualists and great realists. They cared much more about the substance of something than they cared about its form.

Questioner — I would really like to know if there is such a breed as founding mothers. I feel that behind every good man there must be a good woman. You might be able to enlighten us. In regard to the influences of other constitutions, you touched briefly on the constitution of Switzerland. I wonder whether, in the debate, the American model had been looked at seriously. I am also wondering whether constitutional discussion is a *fin-de-siecle* issue and whether it is always inevitably going to be linked to economic depression.

Dr Craven — There were no founding mothers in the sense that there were no women delegates to the convention. I think in five of the six colonies, the vote was still a manhood suffrage. It did not apply to women. That was not true in South Australia where women voted in the convention, and, I think, one woman stood for election to the convention. There were no women delegates. In that sense, the Founders were very much the creatures of their social paradigm.

In regard to the United States document, the answer is yes. Much consideration was given to the United States document. In 1891, Sir Samuel Griffith railroaded a form of words through parliament which would not have left Australia necessarily tied to responsible government. Sir Samuel Griffith firmly believed that Australia should be left in a position where it could develop either into a responsible government type situation or into a United States model — not a presidential model — but where there was a strict separation between the executive and the legislature. Some would say that as a result it has developed into neither. It sits stranded somewhere in the middle. It was very seriously considered in that sense.

I do not know if it is a *fin-de-siecle* issue. I suppose the French Revolution is running for you in the century before. I think that good constitutions always go through periods of renewal. I do not think that a change of a constitution or a reaffirmation of a substantially intact document is a bad thing. I think you have to hope that the quality of the debate is sufficient to isolate the issues and to allow good, sound intellectual judgments to be made.

Questioner — Mr Craven, you have represented to us that the delegates at the convention were people of perspicacity, vigour and energy, but nowadays we are used to all of policy coming rather more from departments and from advisers and from staff and things such as that. In your reading of the constitutional debates, is there any evidence that there was a second line of people advanced in policy, ideas and, in fact, they were what we would nowadays see as public servants?

Dr Craven — Yes, there were some very prominent type people like that. The answer is yes and no. Yes, there were some very prominent people behind the Founders. To mention two — the most obvious is probably the person who became Sir Robert Garran who was the secretary to the drafting committee. He was the man with the bottle of glue and the scissors who did the drafts — which would have been the most appalling job. He would have been the classic. The other one was Blackmore who was the Clerk to the South Australian Parliament and also the Clerk to the whole of the second convention. He was very, very influential.

The striking difference between the Founders and modern day politicians — and it is probably no more than a difference of the way governments are organised — is that the Founders, at least the best of them and the central ones of them, were utterly capable of drafting a constitution themselves. There was never any question of who was doing the drafting out of people such as Griffith and O'Connor. It was them and while they were supported they were the people in charge.