Constitutional change in the 1990s

Edited by Rick Gray, David Lea and Sally Roberts

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CONSTITUTIONAL CHANGE IN THE 1990s

Proceedings of the 1992 Constitutional Conference held in Darwin

Edited by

Rick Gray, David Lea & Sally Roberts

North Australia Research Unit, Australian National University and the Sessional Committee on Constitutional Development, Legislative Assembly of the Northern Territory

Darwin, 1994
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EDITORS’ INTRODUCTION

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ACKNOWLEDGMENTS

These papers were delivered at the conference, Constitutional Change in the 1990s organised by the Northern Territory Legislative Assembly’s Sessional Committee on Constitutional Development from 4–6 October 1992 in Darwin. The editors have made only minor alterations, not affecting – we believe – the substance of the original papers. We have corrected typographical errors, deleted repetitions and rhetorical excursions appropriate to a conference paper but not to a proceedings, and attempted to obtain as much consistency of style and styling as possible.

Most papers were written by the speakers and distributed at the conference. A few have been edited from typescripts. All papers have been shown to contributors before and after the final editing and final versions approved by them.

Obviously these papers reflect a wide range of opinions and positions. Content and conclusions are not those of either the Sessional Committee, the North Australia Research Unit or the editors. Naturally, however, we are grateful to the authors for writing these papers, for the Sessional Committee for initiating the conference, the sponsors and supporters of the conference\(^1\) and the Working Committee who planned the conference and the Conference Secretariat who ran the conference. In particular we would like to thank Graham Nicholson, Peter Jull, Yoga Harichandran, Nicole White and the staff of the Legislative Assembly who provided logistical support to the conference. Thanks are also due to Janet Sincock for the final wordprocessing and to Ann Webb for coordinating production.

Rick Gray
David Lea
Sally Roberts

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FOREWORD

The Hon J H Muirhead, AC, QC
(formerly Administrator of the NT)

During this conference you will hear something of the Territory’s ‘statehood’. When that day dawns it will preface an era when no longer will you be required to read to the words of a Commonwealth appointed Administrator. The national flag which flies at the masthead of our old Government House will be replaced by the emblem of the State of the Northern Territory and the house will perhaps be occupied by the Territory governor. Will the Territory flag then be flanked, perhaps, on the halyard leading to the yardarm, by the flag of our Aboriginal people, originally designed by my friend Harold Thomas, which today symbolises, at least to many, concepts of sovereignty or self-determination, call it what you will? Who knows what lies ahead? To many here today these developments are unthinkable.

In 1911, upon the transfer of powers from South Australia to the Commonwealth, the hopes of those early Territorians were raised. They looked forward to a political voice in their destinies, they had visions of a brave new enfranchised Territory. But it all failed. Their expectations of employment and their ambitions for mineral and pastoral wealth were simply dashed on rocks of disillusionment. The Great War of 1914–1918, the withdrawal of Vestey’s, the great depression, repeated commercial failures, union militancy, crabby Administrators, Commonwealth neglect and lack of interest, combined to nullify progress.

And then 50 years ago along came World War II and the destruction of much of Port Darwin. It was, in my eyes, a commemoration, if I may say so, as much of Australian Government neglect of the north, including its defences, as of the tragedies then experienced. But with World War II behind us new concepts of the future developed, not perhaps heralded by Committees of Constitutional Development, but stirring in the minds of politically motivated men like the late Harold Nelson, Dick Ward and Gough Letts, and other passionate Territorians. And eventually great changes came, heralded perhaps by the natural disaster of Cyclone Tracy, as a result whereof the people of the Territory were, for the first time, able to elect their own government. So we entered this new phase of self-government despite the powers of the Territory Government being limited in a few areas which some contend still constitute a major obstacle not only to state-like legislative freedom but to development. Be that as it may, the changes have been dramatic. Nothing is easy these days, but I think those of you who knew pre-cyclone Darwin and the Territory would agree that the Northern Territory Self-Government Act, the early Commonwealth funding policies and the enthusiasm and energies of many, promoted the most extraordinary changes — not just constitutional or structural changes — but social changes.
With that past in mind, I find it interesting to open a conference of this nature in a city which now lacks few amenities, inhabited by people who have great social, artistic and recreational facilities with access to institutions such as courts, museums and libraries which are second to none. It certainly looks as though the new Parliament House will maintain a high standard, at least in the bricks and mortar stakes.

I recall very different days when we were subject to Commonwealth bureaucracy in all things. I remember when the Territory had but one parole officer and I remember the days when prisoners were discharged, having served their full sentences, whilst recommendations for their earlier parole release had sat upon desks in Canberra, neglected for months. In those days on circuit in Alice Springs we slept on a return verandah in the dear old bungalow court-house; the dew in the morning, as the sun rose, dripping from the underside of the corrugated iron roof on to our little steel framed beds. By modern standards the facilities were then challenging for all, but it was different, it was fun. Annexed to that old court-house was a small asbestos jury room. It was like an oven in summer. This tended to ensure that Alice Springs juries not only gave the benefit of the tiniest doubt to a high percentage of accused persons, but in summer they did it by reaching their verdicts in a flash. And it is of some interest to comment that for many years those Alice Springs juries apparently made it clear that they did not think themselves qualified to judge Aboriginal accused whose alleged crimes were very much Aboriginal business.

Today, it has all been upgraded or replaced by ‘progress’ and the Territory has developed a basic infrastructure, including courts, medical, hospital and educational services, which are of increasingly high standard and which pave the way for future developments. When I arrived in 1974 as the second permanent resident judge, Sir William Forster had previously done the job alone, with some help from commonwealth judges. Today, Government House is dwarfed by the fortlike splendour of a Supreme Court complex designed for many judges, staff and practitioners to serve the community throughout the next century. Of greater importance has been the foundation of our Northern Territory University which today has an enrolment of about 7,500 students and a staff of over 700.

But, we must always remember that whilst fine buildings and institutions may reflect comparative affluence, it is in many vital areas the hearts, minds and understanding of men and women, which must change if the search for a secure, happy and integrated society is to be successful, and this perhaps applies particularly in this Territory.

When we look back at one hundred years of social, cultural and economic development, we find we are a stable society; we are certainly free – no knocks on the door in the middle of the night. We are progressive, and mindful of past injustices and defects, we utilise much of our national resources to ameliorate the lot of those who are underprivileged, unemployed or physically or mentally disadvantaged. Australian governments have over decades attempted to keep the balance in funding national needs. It seems to me that by reason of the successive policies of elected governments under our federal system, we have developed a caring society. The main negative
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factor today is the number of young Australians who need work to do, who need opportunity and perhaps renewal of self-esteem. And I wonder in my ignorance why it is, at times like these, we cannot further develop our national infrastructures and resources, railway lines, water resources — those basics we will require in a competitive world. Hopefully this may provide work and opportunity to some and enrich the potential of many lonely and barren parts of our country.

Why then the need to change? Will we be a happier, wealthier or safer society as a republic? How will it be achieved? What will be the economic and social cost? Admittedly, we are, as a nation, much over-governed — will republic Australia sweep away the inefficiencies which result from seven levels of government? How then will government be more efficient, more cost effective, more decisive? Will dedication to the true national good of the republic then override the present situation of adherence, by our political masters, to preconceived political policies and dogma? Will the new republican constitution be more likely than the present, to steer us safely through the years ahead especially now that as a nation we can no longer afford to sit with a full bread basket, on a rather lazy island and thumb our noses at the world — a world in which our true neighbours to the north have assumed and pursue energetic development and growth — a world in which from Australia’s point of view, much of the action and economic development will be right here in the north? We will no doubt be told in time why it must all be different in the next century, and governments and committees such as yours will be able to explain to the people of Australia why the changes mooted will not be divisive, but to the contrary, will be to the national benefit. On the other hand, if we are merely giving our essential institutions a face-lift and changing a few names, will it all be worth it and can it be done without bitter schisms between states, territories and the national government? So these are the things that puzzle me and I ask from where comes the true impetus for change. And lastly, I wonder whether if our principle political parties do not see eye to eye on the need for change, is it really responsible, ie in the national interest, to proceed?

I would like to congratulate those of you who have put the program together. Of particular interest to this Territory and to me will be the discussions under the theme ‘Indigenous Peoples and Constitutionalism’ and ‘Reconciling Diversity’.

May I talk but briefly about a matter which much concerns me; the aftermath of the Royal Commission into Aboriginal Deaths in Custody. The National Report is clearly an historic document. I would like to think that it will prove a watershed; or will it, after brief flurries of political enthusiasm, gather dust in parliamentary and academic libraries? Commissioner Elliott Johnston’s final recommendation was in these terms:

That all political leaders and their parties recognize that reconciliation between the Aboriginal and non-Aboriginal communities in Australia must be achieved if community division, discord and injustice to Aboriginal people are to be avoided. To this end the Commission recommends that political leaders use their best endeavours to ensure bipartisan public support for the process of reconciliation and that the urgency and necessity of the process be acknowledged (Johnston 1991, v.5 146).
This recommendation and indeed almost all the Commission’s recommendations appear to have found acceptance with all governments. I am a little surprised. I hope they have been truly evaluated. Whether apparent approval will be accompanied by truly fresh initiatives remains to be seen. There is so much to do.

An Aboriginal field officer, who assisted me in Western Australia, who had served overseas in the Australian forces and who had experienced it all, taught me much. As a small boy he had seen his Aboriginal father arrested for being out and about after curfew time, sunset. After his discharge from the armed forces he was not permitted into hotels. Whilst he was with us in the north-west, he was refused admission to a dining room. My wife and I were waiting for him to join us inside. He was sober, well clothed, but he was black. We found it almost unbelievable and offensive. Be that as it may, one morning he said to me ‘Judge, this is the saddest job I have ever had.’ His task at the time was to prepare Commission files for hearing. Australia must understand this background as a starting point.

The evidence taken in the course of the Commission, carefully received and all recorded, spelled out a history of treatment of Aborigines in our institutions and of their lives in this our lucky country which all right thinking Australians must today deplore. In his report Commissioner Elliott Johnston referred to some words of Sally Morgan, the respected Western Australian artist and writer:

In the telling we assert the validity of our own experiences and we call the silence of two hundred years a lie. And it is important for you, the listener, because like it or not, we are part of you. We have to find a way of living together in this country, and that will only come when our hearts, minds and wills are set towards reconciliation. It will only come when thousands of stories have been spoken and listened to with understanding. (Johnston 199, v.2 44).

Well, the Royal Commission reports indelibly record these matters for our country and the world to heed. The important thing is that the truth has been told and recorded; there can be no going back. As a result all governments have a responsibility to ensure that custodial methods and practices will be different. But it goes beyond that; the vital goal is that all of us, whatever the colour of our skins, should lift the blinkers off our eyes, be they blinkers of shame or blinkers of anger.

We live in a country and a world of rapid change. The advent of land rights legislation; the review of common law property rights by the High Court in Mabo are important contemporary developments. It is perhaps too early to say that the advent of ATSIC and seeming acceptance by bureaucracy that the Aboriginal people should play a dominant role in the choice and disposal of grants designed for Aboriginal progress and welfare, augurs well for the future, but at least it evidences recognition of the need for change.

The work and efforts of Aboriginal artists, young and old in the fields of music, dancing and painting have perhaps, beyond all other initiatives, put Aboriginal culture on the map in the last two or three decades. The greatest thing the Aboriginal people, who were overwhelmed by European culture, lost, was their self-esteem – the ability we all need to hold our heads high, to look to the future and to plan our own destinies.
That is, I believe, being restored but we still have a long journey to travel. What Australia so desperately needs is a change of attitudes. It is a corollary of this that the needs of the Aboriginal people, and the action to be taken to fulfill those needs and aspirations for development of resources on Aboriginal land, should be discussed by governments, councils and other interested parties and debated in a reasoned and calm manner. A great difficulty for us all has been the politicisation of so many issues particularly those relating to Aboriginal land including national parks, sacred sites and the mining of resources. True issues tend to be lost by point scoring, at times aided and abetted by the media and by the strange tendency we have in modern society to send messages to those with whom we may be in debate by press release and comment rather than by ordinary dialogue – by having a chat together. We must learn and never forget that Aboriginal talk around the campfire is almost as old as history. Surely discussion and mediation are profitable methods of dispute and resolution – certainly much quicker, more predictable and generally more equitable than litigation type processes.

You will gather from the above that I support the processes of reconciliation and the establishment of the Councils and Committees of Reconciliation. How they will go about their task, I do not know and I know nothing of their work. They have great responsibilities. They work in areas of confusion; neither Aboriginal spokesmen nor State or Territory governments espouse the same philosophies, let alone talk with a single voice. Much of our population is confused as to current Aboriginal aspirations, as to the meaning of concepts such as ‘self-determination’. So those who will lead the way to reconciliation may perhaps have to define the paths we will take and the political objectives or destinations so that national support can be fostered. In the meantime, it seems to me our country must concentrate our efforts in the areas of Aboriginal education where, I am convinced, lies the principal key to progress. The availability of Aboriginal professional, trade and other workers will be one of the great stepping stones to self-determination.

May I in conclusion briefly mention the law. When one is busy in the profession there is perhaps not enough time for critical thought as to the ways and means of lawyers, as to professional standards, or to the effectiveness of justice and its trappings. The rule of law is at the heart of democracy, yet the techniques of the law really require continuing review to ensure it serves the needs of modern society. I was brought up rightly or wrongly convinced that there was nothing to approach our system of traditional British justice, yet I am aware now that some Australians in the past regarded it as repressive. The philosophies are great, but many worry about its efficiencies and its capacity today to serve all the people. Our jury system has been eulogised down the ages. Day by day judges address Australian jurors, emphasise their value, and stress that our right to be judged by our peers is an essential feature of democracy, is our safeguard against the whims of the evil and powerful, the dictators.

We do not talk about verdicts which at times defy logic or understanding, the costs, the delays, the inefficiencies of the system, nor, may I say, the impact or influence the modern media coverage may exert – including the opinion of high profile
commentators who should know better but no longer fear the consequences of contempt proceedings.

My thoughts today would be regarded as heresy by many bar councils and the average lawyer. I will not see the day of change, but I believe it is unlikely that our jury trial system will survive far into the next century. Some years ago I delivered a paper entitled ‘Discharge the Jury?’ My concluding words were:

Which means I think ... that in the administration of the criminal law the common sense of the man and woman in the street is an irreplaceable asset (Muirhead 1989, 14).

Today I have my doubts.

Since I left the Bench six years ago, and including my three and a half years as Administrator in this Territory, I have chatted to people from all walks of life (including Americans who talked of the jury system in the aftermath of the Los Angeles riots). I have developed changing perceptions of the law; they may be terribly flawed, I know not. When you are a judge, and known as a judge, people who are basically considerate, are loath to criticise the workings of your profession. I do not intend to go into detail but it is clear to me we still have much to do. New court-houses, splendid conditions and libraries have not perhaps much assisted the disposal of cases or reduced the law’s delays or decreased the inefficiencies. The work of Law Reform Commissions and other domestic agencies have had but limited effect; updating of Rules of Court has not in the general jurisdiction of the State and Territory Trial Courts done a great deal to simplify or accelerate disposal. Why can’t we get it simpler? Why can’t we make it quicker – both the period before trial and after trial awaiting judgment? Cannot our civil trial system cope with shorter written judgments and in appeal jurisdictions? Why do we so often experience a plethora of written judgments? Perhaps these things illustrate the complications of the law. We maintain and tinker with sophisticated systems of pre-trial procedures and pleadings, yet in our efforts to bring the courts within the reach and understanding of the common man, have we succeeded? Does the law today really facilitate solutions to the every day problems of the ordinary people – have we developed efficiency in our trial systems? I would like to think so but I fear we are plodding somewhat slower than care for justice requires. And I fear that public perceptions of the law and lawyers are not what we in the profession would hope for. There is concern and cynicism; frustration at what many see as the failure of the courts to protect the young, the weak and the old from the deprivations of criminals. It is no coincidence that we find today that law and order are raised as political issues. Too simplistic? Of course it is; but out there the sentiments are very real and victimology is a growth branch of sociology. This has little to do with constitutional reform, save that it may be said that as in Australia we are so over-governed, it is inevitable that we have a multitude of courts which in turn tends to impede a national approach to reform despite regular gatherings of Attorneys General. Efficiency in legal administration is, I submit, a hallmark of good government. I fear, at least in State and Territory courts that we have much to do before we can, without sacrificing justice, obtain expedition and efficiency.
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The Honourable Austin Asche is today Chief Justice of the Territory. Ten years ago, he was speaking in Victoria about the creation of a national system of Law Courts in Australia, a live issue in those days. He said:

Because such a solution is so obvious, so sensible and so logical, it must necessarily be impossible. We need spend no further time on it.

Unhappily he spoke as a realist. I fear he was right.

References

INTRODUCTION

The Hon Steve Hatton
MLA, Northern Territory

The genesis of the conference that these proceedings report arose from the activities of the Legislative Assembly Sessional Committee on Constitutional Development, of which I am privileged to be the Chairman. That Committee has been active for some time in seeking the views and submissions of Territorians and others on proposals for a new, home grown, constitution for the Northern Territory.

Some of those present may recall that in 1988, the Northern Territory Law Society promoted a conference in Darwin on the question of a possible grant of statehood to the Territory within the Australian federal system. The papers of that conference were subsequently published under the title *Australia’s Seventh State* (Loveday and McNab 1988). That conference was primarily concerned with the legal and constitutional issues of statehood and not so much with the content of any Territory constitution. The Committee on Constitutional Development is more concerned with the latter issue. To that end, the Committee has published under the authority of the Legislative Assembly a number of papers, copies of which are generally available (SCCD 1987a, 1987b, 1987c, 1989a, 1989b, 1991, 1992). It has visited a large number of communities in the Territory in pursuance of its terms of reference. It has received voluminous evidence on the form and content of a constitution for the Territory as a new state. The topics covered in these submissions are quite vast and have yet to be fully collated and analysed. They include the possibility of introducing a new constitution for the Territory prior to any grant of statehood, as well as proposals on the various topics listed for discussion in the conference programme (see Appendix 2).

The Committee has also undertaken some comparative research of constitutional developments elsewhere in Australia and overseas. It quickly became apparent that the constitutional position in many places is in a state of ferment and change. In Australia this includes questions arising from the work of the Constitutional Commission set up some few years ago by the Commonwealth Government. The failure of the 1988 constitutional referendums and the resulting disillusionment has now been followed by the establishment of the Constitutional Centenary Foundation, an incorporated, non-government body under the chairmanship of Sir Ninian Stephen.

A number of the States of Australia have also had significant constitutional issues to deal with in recent times. Overseas constitutional change is occurring in many countries, not the least in the countries of the former eastern bloc as well as in the European community.
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One of the proposals made by the Northern Territory Bar Association to hearings of the Committee on Constitutional Development was that a further conference should be called. It was felt that such a conference should concentrate on the subject of constitutional change generally and not on the subject of a possible grant of statehood. The Committee was attracted to this idea and decided to promote it. Support for the idea came, not only from the Constitutional Centenary Foundation, but also from other sponsors and supporters, including the North Australia Research Unit of the Australian National University, the Law Society of the Northern Territory, the Northern Territory University Law Faculty and the Chief Minister’s Department.

Action was put in train to undertake the necessary planning. I pay tribute to those responsible for the detailed work involved with the conference, and in particular that of Mr Rick Gray the Executive Officer of the Sessional Committee.

The conference objectives were defined as being to:

- facilitate the development of a Northern Territory constitution and the principles upon which it could be based;
- consider contemporary comparative developments in constitutionalism;
- identify and discuss special constitutional problems within the Australian federal system which may be reflected in the state or federal constitutions; and
- examine the ways in which a constitution can facilitate the processes of reconciliation in a diverse multicultural society.

The task set for the conference, if somewhat daunting, was to examine some of the major contemporary constitutional issues of the time, not just in relation to the Northern Territory, but also to Australia and beyond. The major themes of the conference, as set out in the program reflect this.

Clearly, the themes of democracy and the rule of law are vital and relevant subjects at this time, as the world comes to terms with the demise of communism as a controlling force and the extension of the principles of liberal democracy, and while it also has under close examination so many examples of the abuse of power and breaches of the rule of law and human rights by various regimes.

The further and more general theme of contemporary constitutional development is designed to allow speakers to elaborate on some of the more general trends and issues, particularly from Northern Territory and Papua New Guinea perspectives.

The question of accountability of government is one of which we have all become acutely aware in Australia for one reason or another.

The theme of indigenous rights is one that cannot be ignored in the Northern Territory context, given the special place of Aboriginal people in the Northern Territory and the fact that many of them still maintain traditional lifestyles. It is also a theme of expanding national and international connotations.
Finally, the theme of reconciling diversity clearly has relevance to Australia as a whole, and to the Northern Territory in particular, as we struggle to adapt our developing multicultural heritage and to our evolving place in, and as part of, the Asian region and the wider world.

It should be recognised that constitutional change is not just a matter for the Federal Government and the Australian Constitution, but is a matter of relevance at all levels of government and for all peoples. The lack of appreciation amongst our citizens of the relevance of constitutional matters in our society and in our daily lives is frightening and of concern. In some cases, there may be certain vested interests in maintaining a level of ignorance. More often it is a matter of apathy and lack of appropriate education. I know that the Constitutional Centenary Foundation is intent upon doing something about this in the field of public education and awareness. In its own small way the Committee on Constitutional Development has been trying to do likewise.

The maintenance of a free, just and harmonious society depends upon a reasonable level of knowledge and appreciation of certain constitutional fundamentals, so often taken for granted. The well known saying, I believe attributed to Jefferson, is that eternal vigilance is the price of liberty. Vigilance is, of course, dependent upon knowledge. I am strongly of the view that constitutional issues should not just be the preserve of lawyers, politicians and academics, although clearly people in those categories have a central responsibility for carrying the debate to a wider audience and for enunciating the issues in a clear and understandable form. This is what we have tried to do within the limited means available to the Sessional Committee and is a goal for them both and the conference that gave rise to it.

Although I stress again that the conference and these proceedings are concerned with issues extending beyond those of immediate relevance to the Northern Territory, let me conclude by making a few remarks specifically on the Territory. Of course in a federal system constitutional change is just as important at a State/Territory level as it is at the national level.

It is my hope that this book, like the conference, will stimulate and focus debate and interest in the processes of further constitutional change in the Northern Territory. In many ways this is the most interesting jurisdiction in Australia from a constitutional point of view. It has already come a long way in terms of constitutional development, and it is the only likely place in the foreseeable future that could be the subject of a grant of statehood within Australia’s federal system. The acquisition of this status would be a unique event in Australia’s legal history. It will only occur if the will is there, not only amongst the politicians, but also among Territorians themselves. It can only occur on terms and conditions which the generality of Territorians are prepared to accept. This was recognised very early by the Committee and has determined the manner in which the Committee has outlined and carried out its program and developed proposals for further change. Significant problems remain to be resolved, including the terms of a new constitution, the form and manner in which further
change is to be effected, the question of the extent of state-type powers to be granted to the new State, as well as the issue of federal parliamentary representation. It cannot reasonably be expected that Territorians would accept a grant that is thrust upon them, at least without adequate consultation. Nor will they accept some sort of second class grant of statehood. Nor can it be expected that Territorians will be content with a grant of statehood without constitutional arrangements that reflect, in a reasonable and balanced way, the interests of all the various groups that comprise this multicultural community. Much more work needs to be done before we can hope to achieve unanimity on these issues.

A far greater effort is required if further Territory constitutional development is to become a reality. But given the necessary facilities and the commitment, it is my view that the Territory could target the centenary of the Australian nation, the year 2001, in which a further major constitutional step could be undertaken. Such a target date is achievable and sits very comfortably with the target date of the Constitutional Centenary Foundation in relation to constitutional development for the whole of Australia. It would be a fitting measure for the Territory to then join in full and equal partnership with the rest of Australia as part of a new and revitalised federation for the 21st Century, one in which Australia is equipped to more adequately take its place in the family of nations generally and in the Asian region in particular. The Northern Territory is, I believe, uniquely positioned to make a significant contribution in this regard.

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STATEHOOD FOR THE NORTHERN TERRITORY:
THE NEED FOR ACTION

The Hon Marshall Perron, MLA
Chief Minister of the Northern Territory

To many people, constitutional change may sound like a pretty dull subject, but potentially it is the stuff that dreams are made on. This is especially true here in the Northern Territory where successive generations have been struggling for the degree of control over our affairs that other Australians take for granted. We need the remaining state-type powers that were denied us when limited self-government was granted in 1978. We need greater representation in Federal Parliament. And we need a constitution. Along with the other less populous States, we also need a fair share of federal tax revenue to ensure a reasonable standard of government services, and would therefore argue strongly that the principal of fiscal equalisation should be embedded in the Federal Constitution.

Developing a constitution to enable us to take our place as full and equal partners in the Australian federation and meet the challenges of the 20th Century is an enormous challenge. That is why we look to the experience of other States and other nations for guidance. In turn, our constitutional development may well have implications far beyond our borders. Particularly relevant to others, I imagine, will be how we meet the needs, enshrine the rights and embody the aspirations of our multi-racial society. In view of the Territory’s many remarkable and unique features, we see our future as one of great opportunities and boundless possibilities.

Although we constitute barely one per cent of Australia’s population, we occupy one-sixth of the continent – a vast area rich in natural resources and next door to the most densely populated and most dynamic economic growth region of the world. We are also the most multi-racial society in Australia. Nearly a quarter of us are of Aboriginal descent, we have a particularly strong Asian influence, and, in addition to those of British ancestry, we have people of virtually every major race and religion. We are keen to develop our resources, capitalise on our proximity to Asia and continue to build a stable, cohesive society so that we and future generations can live in harmony and prosperity.

We have the resources and the geographical location to enable us to rival the development of the southern States. But relatively little progress occurred until self-government because we didn’t control our destiny. Major decisions about the Territory have always been made by people who live elsewhere and whose priorities lie elsewhere. There is no doubt the Territory would be a much different place today
if it had always enjoyed the same constitutional status as other parts of Australia. I suggest that the nation as a whole would also be considerably different.

Aboriginal Territorians were trading with Macassan fishermen for centuries before the First Fleet arrived. The British first attempted to settle the Territory in the 1820s for defence reasons and because they wanted to create another Singapore in northern Australia to trade with the Dutch East Indies. There was also an early vision of developing the north with the help of Asian immigrants.

People who have settled here have always been excited by the Territory’s possibilities, but have been continually frustrated by lack of southern interest and support, and by the lack of control over their affairs. The interminable battles to gain due political representation at last seemed near an end when the Territory was granted self-government in 1978. But many here will recall that Malcolm Fraser, the Prime Minister who gave us self-government, also proclaimed that life wasn’t meant to be easy.

Our experience of limited self-government seems to have proved him right. In practice, our current constitutional status denies us full responsibility for half of our land, withholds powers that all States have enjoyed since federation and relegates Territorians to the rank of second-class Australians. Federal laws have been used to frustrate Territory government policies and projects, and our repeated requests for the remaining powers of self-government have been continually stone-walled. Even though we are treated as a state in financial matters, have an annual budget of two billion dollars and have demonstrated for the past fourteen years that we are perfectly capable of running our own affairs, we are still a ‘colony’ of the Commonwealth. And any of our legislation can be vetoed by Federal Parliament. We employ 14,000 public servants and 700 police, and appoint our own statutory officials, including Supreme Court judges for life. But the Federal Government still refuses to give us industrial relations powers. It refuses to let us administer our two largest national parks even though our Conservation Commission has an outstanding record in national park development, administration, conservation and research. It won’t transfer control of the Northern Territory Aboriginal Land Rights Act to the Territory Legislative Assembly despite the fact that elsewhere in Australia land rights are a State responsibility – and despite the fact that such a large proportion of us are of Aboriginal descent, and that Aboriginal Territorians in turn comprise about eighteen per cent of Australia’s total Aboriginal population. We have even offered to allow Federal Parliament the right of veto over any changes we make to the Act to make it more workable once it’s transferred, but all to no avail. In refusing to hand over administration of Kakadu and Uluru national parks and responsibility for the Land Rights Act, the Federal Government is denying Territorians a large part of our birthright.

Yet there is no legal, administrative, financial or constitutional reason why all remaining state-type powers could not be transferred to us. The reasons are purely political. Tragically, the Territory’s constitutional development and economic development have both been caught up – and are being held up – by the great Aboriginal and environmental debates which other Australians are engaged in.

As Professor Geoffrey Blainey (1992) recently pointed out, in southern cities there is an influential attitude of hostility to northern development: ‘This attitude finds
concrete expression in the policy that as much as possible of the northern part of Australia should be tied up — locked up forever if possible — in Aboriginal lands with unique occupancy rights or in wilderness areas protected by United Nations conventions’. He continued that, ‘too much of the Territory’s land has been quarantined — turned into’ what he described as ‘a vast national museum, a living museum of natural history’. The great majority of Territorians, including Aboriginal Territorians, want to unlock the door.

And we wish to develop a constitution that will meet the aspirations of all Territorians and help us live and work together. Under the present system, the Territory is, in effect, divided into two separate ‘states’. One is occupied by predominantly non-Aboriginal people and is governed by a democratic government elected by all Territorians. The other is made up of Aboriginal land occupied mainly by Aboriginal people, and is in many respects controlled by land councils responsible to the Federal Minister for Aboriginal Affairs. Under this system, the heads of the two largest councils, the Northern and Central Land Councils, have acquired great power and therefore have a vested interest in maintaining the status quo.

We accept that the Federal Government has special responsibilities in relation to Aboriginal people, but we do not accept that it should paternalistically and undemocratically control nearly half the Territory through the Land Rights Act.

The aim of the Territory government, of both Territory political parties and most Territorians is to have the Land Rights Act transferred to our Legislative Assembly so that we can have a say in its provisions and the way it is administered.

Our voice is not heard at present because we elect only three of the 224 members of Federal Parliament. Those who live on Aboriginal land have few rights, little say and no control. That is not the spirit of the Land Rights Act, but under the Federal Government that is how it works. Unfortunately, the present Federal Government sees this system to its own electoral advantage with its southern constituents.

Some people have idealistic notions of the Territory returning to the situation which existed before Europeans and others arrived. Some would like to turn the Territory into a ‘black’ state, or somehow link together Aboriginal land in the Territory and elsewhere in Australia to form an Aboriginal nation. The reality is that we can’t turn back the clock even if we wanted to; and Australia never was an Aboriginal nation but rather a continent of different Aboriginal tribes speaking different languages. Having one government for Aboriginal Territorians and another for the rest of the population is not only divisive, paternalistic and undemocratic — it is just not practicable.

Today, the majority of Aboriginal Territorians live on Aboriginal land, but more than a third do not. Some members of Aboriginal communities follow a fairly traditional lifestyle, albeit with many modern aids, while others prefer a more western lifestyle. Aboriginal Territorians living in urban centres can be found in every walk of life. Only under a Territory government with full state powers can the aspirations of all Aboriginal Territorians be realised.

Understandably, many people around Australia have a keen interest in Aboriginal issues and a deep-seated desire to right past wrongs; but they do not have a legitimate right to foist on Territorians, Aboriginal and otherwise, a divisive system that is
unworkable and counter-productive. The Territory’s current constitutional status is unsupportable. It must be changed, and changed quickly.

Even the most strident Aboriginal critics of Territory administration acknowledge publicly or privately that the Territory Government’s record in meeting the needs of Aboriginal people goes far beyond that of any State; indeed far beyond what is democratically achievable in any of the States. There is no doubt in my mind that under a Territory government with full state powers, Aboriginal Territorians will have greater scope to maintain their culture and manage their own affairs than Aboriginal people living anywhere else in Australia.

Here it is recognised and accepted that Aboriginal people have a special position by virtue of their traditional ownership and cultural traditions which they have every right to maintain. And there is a strong commitment to meeting their special needs. One option being considered is to go further than the Land Rights Act and entrench the right of ownership of Aboriginal land in the Territory constitution. Extensive consideration is also being given to how our constitution may recognise Aboriginal customary law.

We all see ourselves as Territorians, regardless of our racial and cultural backgrounds. I believe I speak for the great majority of Territorians when I say that we regard each other’s culture as part of our common heritage. We take pride in the fact that we have a rich mixture of races and cultures. That is what helps to make living in the Territory so enjoyable, and most of us wouldn’t have it any other way. It helps to give us all a strong sense of identity.

I look forward to our constitutional progress and the development of our constitution as a means of bringing us all even closer together. Despite slow progress in the past, I am confident that we will gain most of the remaining state-type powers in the fairly near future. I have no doubt that we can develop a constitution to enshrine the rights and meet the needs of all sections of our community because there is a genuine desire throughout the community to work for the common good.

Our ultimate goal is to become a state on equal terms with existing States, with Territorians having the same constitutional rights, privileges, entitlements and responsibilities as other Australians. We demand no more. And we will settle for no less. That includes representation in Federal Parliament on the same basis as existing States.

We are well aware that, under the present system of State representation, this would result in our having so many federal politicians to serve such a small population that many Australians would be appalled at the prospect. They may also be alarmed at the resultant increase in the size of the House of Representatives due to the nexus between numbers in the House and the Senate. I suggest that the Federal constitution should be changed to facilitate the admission of new states, and one possible solution would be to reduce the size of the Senate.

Reference

COERCIVE FEDERALISM: THE COMMONWEALTH, THE STATE AND THE CONSTITUTION

The Hon Ray Groom, MHA, Premier of Tasmania

Politics and the law go hand in hand. Where you find politicians, you inevitably find lawyers. And wherever you find politics and lawyers, in time the discussion turns to the Constitution.

From time to time attempts have been made to dispense with lawyers. In 1404, Lord Chancellor Beaufort in framing the Writs of Summons prior to the Parliament of that year inserted a prohibition on any man of the law being elected. According to Lord Campbell, the ensuing Commons was the most reckless ever to be elected and has often been described as the ‘unlearned Parliament’. For better or for worse, lawyers have survived and they continue to be part of the political scene in most countries around the world.

This is an important and timely conference. It is important because the agenda covers a number of fundamental topics which go right to the heart of our democratic federal system.

And thus because the Northern Territory is moving towards statehood and also because in a relatively short space of time Australia will be celebrating the centenary of our constitution. As you would appreciate, Tasmania has been at the forefront of the ongoing battle between the Commonwealth and the States, especially in respect to the use or misuse of the external affairs power. The Franklin Dam was to have been built in my own federal electorate of Braddon, so I naturally took a keen interest in that matter before the High Court; and also as Tasmanian Minister for Forests, I was very much involved in the challenge mounted by Tasmania against Commonwealth action to deny forest companies access to the Lentharmyle Forest.

Over the past decade, Tasmania has looked to the [Australian] Constitution for protection on a whole range of issues but in most instances has been disappointed in the outcome. The test of the Constitution however, is not whether you win a case, or two or three; but whether in a broad sense the Constitution is serving the people and the democratic principle well.

At the time of federation there was a strong desire in the Australian colonies to seek a national identity through some form of inter-colonial union with the British Empire and under the British Crown. The colonies had many things in common — and one would have thought that the process of creating a national government would be relatively simple. People involved in the process shared a common language and similar religious, cultural and racial backgrounds. There was at the time, to use the
words of Sir Henry Parkes, that ‘crimson thread of kinship running through us all’. Yet despite all these common elements, the six colonies conducted their affairs as if they were six separate countries.

Direct links with Britain did enable the imperial government to ensure that some common standards were met.

The colonies erected their own tariff and customs barriers, and there was little free commercial intercourse between them. In time however, other influences drew them closer together. These included:

- the need for some form of common defence arrangement to counter increased European activity in the Pacific;
- the very severe economic downturn of the late 1880s and early 1890s which highlighted the need for a common approach to banking and currency laws;
- the need to establish an Australian court to hear appeals from State Supreme Courts; and
- the realisation that without some form of union the colonies would not be able to deal with challenges they faced in the new century.

The question became: what kind of union should the colonies have?

In the end we decided to form a federation. There is no doubt that the primary reason for this was the sheer size of the country. Their geographic isolation caused the colonies to support the creation of a federal system. It enabled them to come together on matters of common interest while, at the same time, retaining their own identities.

I believe it’s fair to say that the wish of the States to have a degree of control over their own destinies and their own identities remains strong today. This feeling is particularly evident in the so called ‘outlying States’. All this is very understandable because it’s a natural part of life for people to want to belong, and to identify with a unit of society that is small enough for them to feel a part. So in a country our size regional feelings remain very influential. Even in England, which is physically much smaller than Australia, people are still proud and protective of their regions. A good recent example here was the elation and the anguish over the AFL premiership cup leaving Victoria and, horror of all horrors, being taken right across the Nullabor to Western Australia. The Bronco’s victory in Rugby League aroused similar emotions.

So even 90 years after federation, the different histories, circumstances, customs – even the different sports played – still influence the way people in different parts of Australia intuitively feel about some issues. Just as people in the bush often look at things in a different light from those in the city the people in Tasmania and the Northern Territory often feel differently about things from those in New South Wales or Victoria.

I regret to say that these differences are too often overlooked by some in Canberra. I mean no offence to anyone when I say it can be fairly galling dealing with those in positions of power in our federal capital who sometimes appear to think that they are the sole repositories of all that is right and good. One often gets the feeling that they think anyone with a view different from theirs is somehow a lesser being – hardly
worth the trouble of dealing with. To many in Canberra, and especially to the bureaucracy, the States are little more than a troublesome nuisance.

Queensland, Western Australia and Tasmania tend to be regarded as particularly difficult – like errant schoolboys who don’t really know what’s good for them. I know the Northern Territory is often put in the same basket. My advice is: don’t worry about it (but equally don’t expect the situation to improve when you gain statehood).

During the last twenty years we’ve seen the emergence of new and, I would argue, undesirable trends in relations between Canberra and the States. It can best be described as ‘coercive federalism’. It has two main elements. The first is the Commonwealth’s more ruthless use of its supremacy in Federal/State financial relations; the second undesirable trend is the way the Commonwealth constitution has been interpreted to redefine the balance between the powers of the Commonwealth and the powers of the States.

It was Alfred Deakin who made the prophetic statement: ‘He who holds the purse strings holds the power’. There’s little doubt about who holds the purse strings now – and the last couple of decades have shown that the Commonwealth has not been reluctant to use them to achieve its ends. It is history now that the introduction of uniform taxation in 1942, and its retention since, has made the States financially dependent on Canberra.

There was a chance of respite in the late 1970s when the States were offered the opportunity to develop greater financial responsibility by adding a small levy to income tax. It’s always been theoretically possible but the advance offered in the 1970s was the comment that the Commonwealth wouldn’t punish the States for doing so. State leaders had been demanding this right for a long time but when they finally had the chance they didn’t take it up. The reason was that they had seen the likely electoral consequences.

These days the Commonwealth does not hesitate to use its financial muscle. It’s not often seen publicly, but behind closed doors it’s used frequently, and it has great coercive power: ‘you do what we want, or else’. Usually it operates through tied grants, using section 96 of the Constitution: ‘the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit’. This is the Commonwealth’s ultimate big stick: ‘do it our way or you don’t get the funding’. It’s not very subtle but it’s highly effective, at least from the Commonwealth’s point of view!

Since World War II there has been a very substantial increase in the use of tied grants, Politicians of all persuasions have seen votes to be won by moving into what used to be regarded as State areas of responsibility. Sometimes it’s all Commonwealth money, sometimes the funding is shared.

On occasions the Commonwealth and the States agree to share funding for new programs – programs the States would not have entered into had it been left to them and then the Commonwealth withdraws its funding altogether.

This leaves the States with the option of meeting all the costs of a program they didn’t want or need in the first place or face the political odium of winding it up.
A variation on the theme is the way the Commonwealth can use this power to force uniformity across the nation. This time the argument is that to get the funding you must build your schools, design your hospitals, run your programs as pre-ordained by Canberra regardless of local circumstances. This can lead to dreadful duplication or programs that may meet needs in some States but not in others.

To quote Deakin again the States are ‘financially bound to the chariot wheels of the Commonwealth’. The Commonwealth knows that it holds the purse strings, it knows the power this gives them, and it doesn’t hesitate to use it. This financial bullying is destroying the balance so essential to federal harmony.

Federal constitutions inevitably invite legalism. It’s not unique to Australia for it is a feature of other federal constitutions as well. Until 1920 judicial interpretation favoured preserving the powers of the States, now it very much favours the central government. The impact on the Federation has been dramatic — take the Franklin Dam case which I mentioned earlier. Here we had a High Court decision, by a bare majority of one, which not only stopped the building of a major hydro dam but also stopped the economic planning and direction a State had been taking for decades. The decision effectively terminated a particular policy of economic development in a region of Australia; a policy which, until then, had enjoyed support across the nation.

Taken at a broader view, the dam case shows that the High Court, and the constitution itself are no longer an obstacle to centralist policies designed to circumvent the federal nature of the constitution. The treaty making power of the Executive Government can now be used to widen the scope of the legislative authority of the Federal Parliament. This is a potent new instrument in coercive federalism.

Today this coercive power of the Federal Government extends to the environment, land use matters, and any other matter which may properly be the subject of an international treaty. It’s scope is virtually boundless. In Tasmania we have recently seen a good example of how the Commonwealth Government can use its external affairs power to coerce a State and business interests. In August 1992 a federal minister intervened by proclamation under the World Heritage Conservation of Properties Act to stop activities in a local quarry. The quarry had been operating for more than 40 years and employed five people directly, with others carting the limestone it produced to the zinc works in Hobart a valuable little business in an area of high unemployment.

The quarry had been the subject of a special agreement which I signed in 1988 as a State minister with my then federal counterpart. That agreement said:

The Commonwealth agrees that the operation of Benders Quarry within the Exit Cave area nominated for World Heritage listing can continue provided acceptable limits are set to the scale and development of the operation.

Should any financial loss result from any limits placed on the operation, the Commonwealth will pay compensation direct to the company involved.

As well as being signed by me and the then Federal Resources Minister, that agreement was also set out in another written agreement between the Commonwealth and Tasmania signed by the then Tasmanian Premier and the then Prime Minister. There has been no change in the scale and development of the operation, and the Commonwealth hasn’t attempted to argue that there has been. Nonetheless, it has decided to close the quarry.
Further, the Commonwealth now argues that it has no legal obligation to pay compensation to the operator. Indeed, they won’t even use the word ‘compensation’ when they talk about it — they call it an *ex gratia* payment. Their argument is the Commonwealth cannot make an agreement which circumscribes its legislative powers. That may be so but if the Commonwealth will not honour its written undertakings with a State on a matter like this, it makes the practical operation of the federal system very difficult indeed. I mention this case because it highlights some of the problems the States are facing.

The matter originally arose because the Commonwealth was under political pressure to add substantial areas to Tasmania’s World Heritage area. To help it decide which areas, if any, should be added, it established the Helsham Commission. Knowing the dam case gave Canberra power to add whatever areas they liked, Tasmania cooperated with Helsham and argued the science of what constituted areas of World Heritage significance. In the end Helsham recommended that the Commonwealth should ask the International Union for the Conservation of Nature (IUCN) in Geneva, the United Nations body that formally approves World Heritage listings under the treaty, that another 30,000 hectares should be added to the eastern edges of the area. The Commonwealth rejected this and decided to nominate 300,000 hectares — a tenfold increase.

The Commonwealth then held discussions with Tasmania with a view to getting our concurrence to a joint nomination. I was present, so I can give you the inside story, and so was the then Prime Minister, or some of his ministerial colleagues and the then Tasmanian Premier. The Commonwealth wanted a joint nomination because the IUCN had indicated it did not want to become involved in adjudicating on disputes between national and provincial governments over listings. This was about the only card Tasmania had to play, and we played it as hard as we could. We didn’t salvage much but one of the things we did achieve was keeping Benders Quarry open. We agreed to a joint listing only because we received written undertakings on a number of issues, including the continued operation of Benders Quarry.

Since that time the Commonwealth has refused to honour a number of its other undertakings given in those negotiations. I won’t go into details because they are mainly matters of local concern. Nonetheless, they are important to Tasmania.

I am not making these remarks in any party political sense. They are relevant to an understanding of how the Constitution is working in a practical way. Because of the way the Constitution has been interpreted, this kind of situation could arise whatever the political colour of the parties involved.

These experiences highlight the fact that it is now very hard for the States to operate on a firm basis with Canberra. I suspect that’s especially so when one of the smaller States, with only a few federal seats, is involved. And there’s a special message in this for the Northern Territory: for at least the foreseeable future you will have very few federal seats and will not have the political muscle of NSW or Victoria, so successful outcomes won’t be easy to achieve.

In my opinion, the expansionist view of Commonwealth power taken by the High Court in cases like the dam case is in reality a rejection of the federal compact and undermines the delicate federal balance. The danger is that if the High Court is seen to become an unelected political law maker, it will damage its credibility as the final
arbiter of legal disputes. Yet constitutional law and politics have always been intertwined and probably always will be. The fact that the Court is called upon to deal with so many quasi-political matters perhaps indicates a more serious problem affecting the political process.

In recent years there have been attempts by the States and the Commonwealth to keep the High Court out of some politico-legal problem areas. One example is the agreements between the Commonwealth and the States over off-shore oil and gas developments; but at the other end of the spectrum, there have been cases where the political system has been unable to provide workable solutions to difficult issues. The problem has then been shuffled off to the Court to deal with. In those cases it is hard for politicians to complain if their Honours, in effect, become legislators. Nonetheless, the Court should not allow itself to be seen as a willing instrument, sanctioning artful measures to avoid the constitutional limitations placed on either the States or the Commonwealth. The High Court has been generally very well respected, but if it becomes a more obvious political instrument it will not be immune from criticism and full accountability for its actions.

The manner of the appointment of High Court judges is also crucial to maintain the Court’s integrity. In recent years the States have been consulted on appointments, but in practice consultation only means what people want it to mean. There is still the risk that the Executive can abuse the process and appoint only judges whose views are similar to their own. There are various ways of dealing with this contingency. One would be to have appointments approved by Federal Parliament, possibly through a committee system. However, recent American examples suggest that this would not necessarily solve the problem of partisanship. Another would be to have a system where the States have a more effective role in the appointments. This has more appeal but would not necessarily solve either the problem of political leanings or of centralist versus federalist views.

But something needs to be done. We have seen that the judicial function can, in effect, be legislative. Legislators, by the very nature of the position they hold, are directly accountable to the people. The fundamental question is: should judges be made accountable? and, if so, how are they to be made accountable? I believe that the Court should make increased efforts to sit outside Canberra. Canberra is very different from the rest of Australia, and it does no harm for their Honours to move outside that unique atmosphere.

I want to turn now to the role of parliaments and governments for a moment. I believe it’s true to say there is great deal of disillusionment with the whole process of representative government at the present time. There is something of a crisis of confidence in the system and there’s no doubt that politicians and political leaders have a role to play in lifting their game and increasing public confidence in the parliamentary process.

This lack of confidence has led to calls for direct public participation in the system most notably through voters veto and citizens–initiated referendums. In Tasmania we have both these measures under consideration at the moment and will be making decisions before the end of the year. However, whether or not we adopt them, the fact that the calls have been made is a clear signal that there is concern in the community about the current state of parliamentary government in Australia. Parliaments need to be more responsive to the feelings of their electors and governments at all levels need to understand that a majority at the polls is not licence for tyranny. Understanding this and acting accordingly has always been part of the art of the successful politician. On
the other hand, failure to understand it will only increase disenchantment and inevitably lead to the courts’ expending their quasi-legislative role.

All this foreshadows possible major changes to the Westminster system as we know it. There are many options, for example, appointing ministers with particular expertise from outside the ranks of parliament. As time proceeds there will need to be an increased recognition of the reality that we are a multicultural nation and that the British inheritance is no longer our only inheritance as a people. I am pleased to see that the important subject of the role of indigenous people in constitutional development is to be discussed at this conference. There is also the critical need for more constitutional reform in a less political atmosphere and how that can be best achieved.

I’m pleased to see the Northern Territory preparing in this way for statehood; but in joining the federation as a State the Northern Territory will not be joining as the States in 1901 joined. The nature of statehood has changed through a vast body of law, financial practice, administrative arrangements and newly signed international treaties. In practical terms, States today have a lesser role than they enjoyed in 1901; but despite this, I would still, in the strongest possible terms, urge the Territory to proceed down the path towards statehood. I trust you will seek to protect your unique character and qualities. In your dealings with the Commonwealth and the other States during the transition to statehood, I hope you will keep this uppermost in your minds.

There will be many changes in the nature of our federation as time goes on. If you wish to help shape those changes you must be part of the process and you can best do that as a State. Because of the size of this country and because power should not be in the hands of a few but should be dispersed, the federal system will continue to be the best option for Australia; but we want a genuine federation where the role of the States is clearly defined and understood.

Finally, I want to say that I have no doubt that as we move towards the end of this century and to the centenary of our Constitution the right atmosphere and mood will exist to put into effect appropriate changes to our constitution. If we are to achieve proper change, our political leaders and constitutional experts will have to show the wisdom and foresight displayed by those who worked so hard and so effectively in the 1890s to formulate our Constitution. If there is application, goodwill and commonsense on all sides, then we will have a Constitution which will help make Australia a successful nation in the twenty-first century. In the end, it’s up to us.
A GOVERNMENT OF LAWS, AND NOT OF MEN?¹

The Hon John Toohey AC
High Court of Australia

The theme of this part of the conference, ‘Democracy, The Rule of Law and Constitutionalism’ is designed, I suggest, to raise for consideration the relationship in our society between the authority of the legislature, democratically elected, and the rule of law with its insistence on adherence to fundamental principles, especially the recognition of human rights. Constitutionalism is ordinarily thought of as the concept of government under law. In the context of the overall title of the conference, the term no doubt seeks to place the concept within the framework of constitutional change.

The rule of law

The idea of the rule of law has an ancient lineage. Aristotle (1905, 16) said: ‘the rule of law is preferable to that of any individual’. What underlies the expression is that there are known principles according to which decisions should be made affecting the relationship of state and citizen on the one hand and citizen and citizen on the other. The rule of law demands that these principles should be applied, not as a matter of discretion but by their own force.

At its core is the conviction that law provides the most secure means of protecting each citizen from the arbitrary will of every other. By being constrained to govern by means of general laws, the rulers of society cannot single out particular citizens for special treatment. The law is to constitute a bulwark between governors and governed, shielding the individual from hostile discrimination on the part of those with political power (Allan 1985, 112–13).

Events of the twentieth century have led to an expanded and more positive approach to the rule of law so that in 1959 the New Delhi Congress of the International Commission of Jurists concluded its report with this declaration:

The Rule of Law is a dynamic concept ... which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized (Marsh 1959, 3).

In England, as early as the thirteenth century, the jurist Bracton (1968, 305) concluded that the king was sub Deo et lege: ‘law ... is the bridle of power’. In the famous case Prohibitions Del Roy,² the Judges of England put an end to the attempts of James I, as head of the executive government, to exercise judicial power. The answer given by the Judges was
The King in his own person cannot adjudge any case, either criminal ... or betwixt party and party ... but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England.\(^3\)

The judicial power of Parliament continued for many years in the form of impeachments and attainders and through private Acts such as private Acts of divorce. But the courts were not content only to reject the judicial power of the executive. In 1610 Sir Edward Coke boldly announced in *Dr Bonham’s case*:

> And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.\(^4\)

Yet Coke’s challenge was not pursued by the courts and ‘it was generally believed that the notion did not survive the fundamental constitutional and political changes which followed the Glorious Revolution and the enactment of the *Bill of Rights* of 1688 and the *Act of Settlement* of 1700’.\(^5\) However, the debate has resurfaced as will appear later in this paper.

The common law, which sprang from customary law as developed by the judges, did not meet all the challenges of newly developing societies, even with the graft of equity. So Parliaments enacted their own law in the form of statutes, the sheer press of which grows constantly. But the common law continued to flourish and the idea of the rule of law has not only remained but also assumes particular importance today as a protection against the misuse of legislative and executive power.

**Parliamentary sovereignty and the rule of law**

Sir Owen Dixon acknowledged the supremacy of an elected Parliament when he observed in an address to the Tenth Convention of the Law Council of Australia:

> It is a proposition of the common law that a court may not question the validity of a statute but, once having construed it, must give effect to it according to its tenor (Dixon 1963, 206).

Within this framework of the common law, the general will of the people and the existence of an independent judiciary, commentators have contended that:

> ...the expectation of the common lawyers was that Parliament would leave the central features of the common law largely untouched so that the common law of the constitution would continue to guarantee individual liberty, liberty of discussion, freedom of assembly and rights of property. E.C.S. Wade in his introduction to Dicey, speaks to the partial continuation of this silent understanding by pointing out that although a vast body of administrative law and practice had begun to submerge the older accords, at least general libertarian traditions had been maintained ... The importance of this remark lies in the association of an idealized common law with at least some major proportion of the symbolism associated with the rule of law (Harden and Lewis 1986, 38–9).

Geoffrey Marshall notes that

> though it is rarely formulated as a conventional rule the most obvious and undisputed convention of the British constitutional system is that Parliament does not use its unlimited sovereign power of legislation in an oppressive or tyrannical way. That is a vague but clearly accepted conventional rule resting on the principle of constitutionalism and the rule of law (Harden and Lewis 1986, 29).
Such an underlying ‘assumption’ has been reflected in the judiciary’s approach to statutory interpretation, as explained by Isaacs J in *Ex parte Walsh and Johnson; In re Yates.* There his Honour postulated the existence of certain fundamental principles which form the base of the social structure of every British community ... The principles themselves cannot be found in express terms in any written Constitution of Australia, but they are inscribed in that great confirmatory instrument, seven hundred years old, which is the groundwork of all our Constitutions — Magna Charta. Chap. 29 (sometimes cited as Chap. 39) contains them all. Its words, rendered into English, and so far as immediately material here, are: ‘No free man shall be taken or imprisoned ... or exiled ... but ... by the law of the land.’ The chapter, as a whole, refers to other rights as well, and recognizes three basic principles, namely: (1) primarily every free man has an inherent individual right to his life, liberty, property and citizenship; (2) his individual rights must always yield to the necessities of the general welfare at the will of the State; (3) the law of the land is the only mode by which the State can so declare its will. These principles taken together form one united conception for the necessary adjustment of the individual and social rights and duties of the members of the State. For their effective preservation and enforcement the Courts have evolved two great working corollaries in harmony with the main principles, and without which these would soon pass into merely pious aspirations. The first corollary is that there is always an initial presumption in favour of liberty, so that whoever claims to imprison or deport another has cast upon him the obligation of justifying his claim by reference to the law. The second corollary is that the Courts themselves see that this obligation is strictly and completely fulfilled before they hold that liberty is lawfully restrained.

That this remains the approach of Australian courts has been recognised as recently as the High Court's decision in *Balog v Independent Commission Against Corruption* where in a unanimous joint judgment the Court held:

that where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred.

At the same time it is not the role of a court to frustrate the obvious purpose of an Act of Parliament. A literal construction may well defeat the intention of the legislature, particularly in the case of a statute that is not well drafted. Over the years the courts have developed various approaches to give effect to the intention of Parliament where that intention could be discerned. And the legislatures have themselves imposed on the courts an obligation to prefer a construction 'that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not)'. To that end jurisdictions now confer a statutory warrant on the courts to have regard to extrinsic material to ascertain the meaning of a provision. However, in the end the task of the courts is, as Sir Owen Dixon observed, to give effect to the statute 'according to its tenor'. The key is the language which the legislature has employed; if that language is inadequate to achieve its purpose, there are limits to the extent to which a court may impose its view of what may have been intended.

It has been noted in relation to British legal and political developments, which also occurred in the Australian colonies.

In the nineteenth century the trappings of modern democracy were superimposed on an existing constitutional structure, and a modern administration similarly grafted on to pre-existing patterns of government. Because no real crisis of legitimacy occurred, the need to pledge inalienable rights, to set firm limits to the exercise of executive power or to speak specifically to tailored forms of redress against the state was never felt to be as strong a need in Britain as elsewhere.
Given the British genius for maintaining political stability, questions concerning the inner content of notions like the rule of law were never seriously posed (Harden and Lewis 1986, 27–28).

The consequence, suggested by Sir Douglas Wass writing in 1986, is that in the United Kingdom

the distancing of the judiciary from anything approaching a challenge to substantive political decision has left the way clear for executive government ... to enjoy a power and a freedom which is unrivalled in the liberal democratic world. Thanks to the enforcement of strict party discipline in the House of Commons and the minimal financial and reforming powers of the House of Lords, there is in practice little formal check on arbitrary government.

That the Diceyan concept of the constitution has survived the emergence of a dominant all-pervasive state and a large public sector is perhaps due to the fact that those who have held public office have refrained from abusing the powers which their command over Parliament has conferred on them. Whether the exercise of arbitrary power was tempered by reflections that office was not a permanent entitlement and that one day the governors would be the governed, or whether it was checked by the unwritten custom that in a democracy the majority should always pause before overriding the articulated protests of the minority, the anxiety concerning arbitrary government was less acute a generation ago than it is today (Harden and Lewis 1986, x–xi).

But today there is an increasing recognition of the tension between deference to the will of Parliaments as expressed in legislation and maintenance of the rule of law, as Parliaments are increasingly seen to be the de facto agents or facilitators of executive power, rather than bulwarks against it. In the past it was asserted that regular popular elections were a sufficient safeguard against any possibility of legislative activity failing to conform to principles of generality, prospectivity and sensitivity to basic human rights. Optimism that Parliaments would only depart from such principles in circumstances of compelling social need led English and Australian commentators to consider that express justiciable limitations on legislative power were unnecessary and might only have the effect of curtailing legislative flexibility in those rare circumstances of national calamity when a little latitude might be needed.

In considering some rather draconian delegated legislation in the wartime case of The King v Halliday⁹ Lord Dunedin said:

It is pointed out that the powers, if interpreted as the unanimous judgment of the Courts below interprets them, are drastic and might be abused. That is true. But the fault, if fault there be, lies in the fact that the British Constitution has entrusted to the two Houses of Parliament, subject to the assent of the King, an absolute power untrammeled by any written instrument obedience to which may be compelled by some judicial body. The danger of abuse is theoretically present; practically, as things exist, it is in my opinion absent.

... Parliament has ... risked the chance of abuse which will always be theoretically present when absolute powers in general terms are delegated to an executive body.

Part of this passage was cited with approval by Starke J¹⁰ in the High Court’s decision in Walsh and Johnson mentioned earlier.

Limitations on legislative power

It cannot be said that individual liberties are as well protected in Australia as in those jurisdictions which have express constitutional guarantees of such liberties which
preclude legislative or executive infringement. It may well be that liberties are as well or even better enjoyed in Australia, but that is different from the proposition that rights are no less protected. Of course it is easy to point to countries which have constitutional guarantees to which no more than lip service is given. But the imposition of judicially enforced limits on legislative power, so that intrusive provisions which under the traditional interpretative approach would merely be read down can actually be invalidated, does constitute an additional protection. The significance of the absence of such limits was keenly discerned by Professor Harrison Moore when he said of the rule of law.

It is one of three great principles which, taken together, really summarize our political system— the rule of law, self-government, Parliamentary sovereignty. Of these, the most modern is Parliamentary sovereignty, and it remains to be seen whether this and the rule of law in any but a formal sense are able to live together. For the ‘rule of law’ has in the main meant the prevalence of an idea of right against arbitrary will; and the sovereignty of Parliament is the assertion of the supremacy of will. The notion of law itself becomes so far changed that the best known definitions of law declare it be nothing other than an expression of will by a competent political superior.

This is a grave matter. A community which is familiar with the real subordination of government to law, is one which has no place for the doctrine that ‘Reason of State covers all’, and that ‘Necessity knows no law.’ Its standards of internal government at once express and create a mode of thought which is a good guarantee for its respect for law in its external relations. If, however, our conception of law is no more than an expression of will and power, it loses its moral value and ultimately its efficacy in the control of man’s relations. Within the State, it is a standing invitation to resistance; and contains the paradox that as laws increase and multiply the respect for law may sensibly diminish. In external relations, it offers nothing but the clash of wills and forces (Menzies 1917, 3–4).

As to why most Australian and English constitutionalists should have been more sanguine than their American counterparts about the extent to which parliamentary sovereignty might jeopardise the rule of law, the histories of their respective nations are instructive. In the United Kingdom, Parliament had been the liberating agent from monarchical despotism, so that it was perceived as a guardian of liberty. The great faith reposed in it was reflected in the traditional attitude of English and Australian courts to its legislative commands. For the United States, by contrast, nationhood and the constitution adopted to formalise it were the products of a revolution into which American colonists had been galvanised by what they considered to be the abuse of plenary power by the United Kingdom Parliament.

the American need for a constitutional arbiter to protect colonial interests against a sovereign Parliament ... was part of the collective unconscious(s) of the framers of the United States Constitution (Reid 1989, 988).

The American perspective involved a more pessimistic view of human nature, but it was a scepticism born of painful and bitter experience. James Madison, that leading architect of the United States constitution,

was convinced that it was ‘in the nature of man’ to develop ‘[a] zeal for different opinions concerning religion [and] government’ and ‘an attachment to different leaders ambitiously contending for pre-eminence and power’. These features of human nature, Madison thought, ‘divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good’ (Barnum Sullivan and Sunkin 1992, 366).
Hence his celebrated conclusion in *The Federalist Papers*:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. (Hamilton Madison and Jay 1961, 301).

This view had been endorsed by the English writer James Burgh when he wrote in 1776:

In planning a government by representation, the people ... ought to establish a regular and constitutional method of acting by and from themselves, without, or even in opposition to their representatives, if necessary. Our ancestors therefore were provident; but not provident enough. They set up parliaments, as a curb on kings and ministers; but they neglected to reserve to themselves a regular and constitutional method of exerting their power in curbing parliaments when necessary (Reid 1989, 988–989).

A concern that such observations might well be right, and a call for a re-assessment of the orthodoxy as to the absolute nature of parliamentary sovereignty, appears to be incipient in some common law jurisdictions where that principle has hitherto prevailed.

In Australia and the United Kingdom, evidence of this concern might be found in the greater prominence accorded to ‘natural justice’ as a ground for judicial review of executive action taken pursuant to statutory power. It has been said:

In the case of natural justice ... there is no legitimate basis for judicial review comparable to that for *ultra vires*. To appeal to the implied intent of the statute is a transparent fiction, but to make common law the basis of judicial intervention is to invite questions about the nature of the common law itself. To present it in Dicean fashion as ‘nothing else than the rule of established customs modified only by Acts of Parliament’ will not do where new administrative schemes are being created, for *ex hypothesi* no ‘customs’ exist and it is the nature of the scheme created by the Act of Parliament which is itself in question. But to treat the common law as a source of principles which require application to changing circumstances is in this context to recognize the need for a theory which defines and gives coherence to the ... role of the courts in trying to ensure that power is exercised legitimately (Harden and Lewis 1986, 198–199).

Some judicial statements in jurisdictions previously enamoured of parliamentary supremacy appear to approach a direct questioning of legislative will. In the recent House of Lords decision of *The Queen v Home Secretary, Ex parte Brind*¹¹, Lord Bridge of Harwich said:

But I do not accept that this conclusion [namely, that the European Convention for the Protection of Human Rights and Fundamental Freedoms was not part of English domestic law and therefore did not control the exercise by the executive of a statutory discretion] means that the courts are powerless to prevent the exercise by the executive of administrative discretions, even when conferred, as in the instant case, in terms which are on their face unlimited, in a way which infringes fundamental human rights.

This statement seems to go further than the ‘reading down’ in favour of liberty which was traditionally contemplated, though it is perhaps merely an expansion of that approach rather than a challenge to legislative capacity expressly to confer unqualified executive power. However such a challenge has been issued in *obiter dicta* by some New Zealand judges, particularly Sir Robin Cooke.
Fundamental rights as a limitation on legislative power?

In *New Zealand Drivers’ Association v New Zealand Road Carriers*¹² Cooke, McMullin and Ongley JJ expressed

reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights.

In *Fraser v State Services Commission*¹³ Cooke J opined:

It is arguable that some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them.

Later that year in *Taylor v. New Zealand Poultry Board*¹⁴, his Honour suggested:

I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament cannot override them.

In *BLF v Minister for Industrial Relations*¹⁵, Kirby P cited the characterisation by a majority of the House of Lords in *Oppenheimer v Cattermole Inspector of Taxes*¹⁶ of a pre-war German decree depriving Jews of German citizenship as so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.

Also in *BLF v Minister for Industrial Relations*¹⁷ Street C J observed that the dicta in recent New Zealand cases were:

reminiscent of Thomas Jefferson’s historic and moving words of 1776: ‘We hold these truths to be self evident’ as well, of course, as of the seminal assertion of Lord Coke in 1610.

In short, the statements suggest a revival of natural law jurisprudence – that for law to be law it must conform with fundamental principles of justice. This philosophy of law commended itself strongly to the American founding fathers who urged adoption of the Bill of Rights and it enjoyed renewed popularity in the immediate post-war period, as illustrated by Professor Edward Corwin’s assertion:

From Cicero to the latest decision of the Supreme Court stretches a continuous tradition of two thousand years which asserts that there are rights made of no human hands and beyond the rightful reach of human hands (Corwin 1948, 169).

Natural law philosophy underlay the characterisation of the War Crimes trials of the late 1940s as involving the pursuit of legal procedures against individuals for palpable crimes against humanity. For the trials and their aftermath to amount to more than arbitrary punishment by the victors of the vanquished for actions only retrospectively made illegal, it was necessary that the German laws which authorised the conduct in question be deemed invalid. That is, it was necessary to conclude:

The Nazi laws which had ignored the central legal value of treating like cases alike, while differentiating cases which were not alike, did not ... partake of the character of law at all; they were not just wrong law, but were not law of any kind (Kelly 1992, 418–419).

Adherents of this philosophy, whom Professor Ackerman calls ‘rights foundationalists’ are:

impressed by the fact that even a democratic legislature might endorse any number of oppressive actions - establish a religion, authorize torture ... and when such outrages occur,
the foundationalist insists that courts intervene despite the breach of majoritarian principle: Rights trump democracy ... Provided, of course, that they are the right Rights.

And there's the rub (Ackman 1989, 467).

Another commentator recently observed:

The advantage of natural law is that 'you can invoke [it] to support anything you want. The disadvantage is that everybody understands that.' ... There is no escaping that 'natural law' is a matter of prescription masquerading as description, dependant on who is doing the prescribing. A secularist is skeptical that any human being would feel more confined if authorized to act on the basis of 'natural justice' rather than on the basis of his personal policy preferences.

And so, in BLF v Minister for Industrial Relations18, Street C J concluded:

I have a strong affinity for the judicial philosophy revived by Sir Robin Cooke in the 1980s. I am constrained, however, both by the absence of any decision commanding acceptance as authoritative in which a doctrine of fundamental rights has actually been applied to invalidate a statute, and by Lord Reid's authoritative rejection of such a doctrine in British Railways Board v Pickin19, to accept that there is no such doctrine standing alone.

In the New South Wales Court of Appeal's recent decision of Greiner v Independent Commission Against Corruption20, Mahoney J A stated:

It has been suggested that, where there has been a sufficiently serious infringement of the rights of the individual, the courts may put aside and ignore the laws that Parliament has enacted ... In my opinion, that view has not been accepted by the High Court of Australia.

Judicial review of a written constitution and the rule of law

However other considerations arise where legislative power is conferred and controlled by the terms of a written, entrenched constitutional framework such as that possessed by the Commonwealth of Australia. The very fact of an entrenched federal structure within which powers are distributed between branches and levels of government is conducive to maintenance of the rule of law. In entrenching the jurisdiction and tenure of the federal judiciary in Ch.III, the Commonwealth Constitution precludes the federal Parliament from arrogating to itself the exercise of judicial power.21 And in dividing powers with respect to subject matter between the Commonwealth and the States, the Constitution ultimately makes the scope of powers possessed by each level of government a matter for judicial interpretation.

In a recent comparative study of 'judicial activism' across a wide range of societies, it was observed:

There appears to be a strong correlation between a real division of powers between levels of government and the potency of the national judiciary (Holland 1991, 7).

The judicial task of defining the limits upon the powers of each level of government may incidentally promote individual liberty, as it did when the High Court held invalid the Communist Party Dissolution Act 1950 (Cwlth).22 However the preservation of liberty may be only a fortuitous by-product of that power-dividing process, as the example of the Australian Communist Party case well illustrates. Individual rights were sustained by the conclusion that the legislation in question was beyond Commonwealth power, only because it so happened that State Parliaments were not disposed to exercise their power to enact similar legislation. Professor Zines
(1991, 41) has noted that the reverse situation existed in Canada, and Canadian courts held the curtailment of freedom of communication to be beyond the competence of provincial legislatures at a time when the national Parliament lacked any similar inclination to restrict that freedom.

Of course, judicial review can directly and effectively influence the protection of liberties if a written constitution enshrines them in express terms. However, in the absence of such express articulation, a question arises as to whether a court which is established as guardian of a written constitution within the context of a liberal-democratic society may to any extent imply limits upon the powers with respect to subject matter granted by that constitution so as to protect core liberal-democratic values.

In Australia, the existence of implied limits derived from the federal nature of the polity is well established but historically the High Court has not implied limits derived from the liberal-democratic nature of the polity. Yet, as Dixon J. observed in *Australian Communist Party v The Commonwealth* government in Australia

is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.

It might be thought that, in construing a constitution, to deny plenary scope to heads of power where a wide reading would afford capacity to infringe fundamental liberties is an analogous approach to that which is well settled in relation to construction of statutes. This is particularly so if one regards the traditional reading down of statutory language which threatens intrusion upon core values as being extended by the recent dicta emanating from the House of Lords.

Of course the traditional approach as applied in *Walsh and Johnson* was to read a statute as narrowly as its express commands would permit where those commands potentially curtailed basic common law liberties, but then to give a plenary construction to the constitutional heads of power purportedly pursuant to which the statute was enacted. Thus it was considered that the Commonwealth Parliament’s capacity to curtail common law liberty by legislation relating to the subjects of its legislative power was unlimited — it just had to do so unambiguously. Yet it might be contended that the courts should take the issue a step higher and conclude that where the people of Australia, in adopting a constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties — a presumption only rebuttable by express authorisation in the constitutional document. Just as Parliament must make unambiguous the expression of its legislative will to permit executive infringement of fundamental liberties before the courts will hold that it has done so, it might be considered that the people must make unambiguous the expression of their constitutional will to permit Parliament to enact such laws before the courts will hold that those laws are valid.

If such an approach to constitutional adjudication were adopted, 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.

**Is judicial review anti-democratic?**

The cry may be heard that judicial review, however virtuous in its preservation of the rule of law, is fundamentally anti-democratic. Here are appointed judges, with tenure until the age of seventy, passing judgment on the validity of clear expressions of will from popularly-elected Parliaments and sometimes invalidating them. Yet democracy need not be defined narrowly to mean no more than majority rule. Rather, it might be regarded as involving recognition of a range of fundamental principles concerning the manner in which people exercise power over each other for common purposes, of which majoritarianism is just one principle, equally fundamental with others, but not necessarily more so.

In this context it is important to dispose of a serious misconception concerning the character of judicial power, which finds expression in two passages from recent articles in prominent American law reviews as follows:

> The crucial thing about the American constitutional system is that it is built around a lawyers' constitution. Parliamentary supremacy was replaced by judicial supremacy and the myth of the rule of law. I say myth precisely because all governing in the ultimate analysis is ruling done by men and women. The real distinction is whether elected representatives or life tenured judges have the last word when it comes to saying what the law is. Charles Evans Hughes spoke the unvarnished truth when he explained that, '[w]e are under a Constitution, but the (Constitution) is what the judges say it is' (Mason 1962, 143 cited in Roberts 1991, 1560).

To have certain basic issues of social policy - for example, whether to have liberalized abortion or government aid to religious schools - decided for the nation by majority vote of the nine Justices of the Supreme Court, rather than by majority vote of the people of each state, is clearly to have less democracy in the United States.

The exercise of judicial review can never amount to "government" because it can never transform itself into positive power. As Alexander Hamilton explained in the much-cited words of *The Federalist* No. 78 (Graglia 1992, 1026):

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive (Hamilton, Madison and Jay 1961, 465–466).
Leaving aside the judiciary's power-apportioning role vis-a-vis levels of government in a federal system, judicial review of legislative action can operate to frustrate the will of parliamentary majorities only in ways which protect and promote individual liberty. Judicial review does not result in any greater restriction upon fundamental liberties than would prevail in its absence. Hence the recent statements cited are clearly equating 'democracy' with untrammelled majority rule, so that the capacity of judicial review to frustrate the will of the majority in any circumstances is deemed anti-democratic. Yet, contrary to the suggestion in the second of the two passages quoted earlier, the will which judicial review may frustrate is that of a current majority of members of a legislature, which does not necessarily coincide with the will of a majority of citizens. Hence when judicial review occurs pursuant to a written constitution which was adopted and can be amended by means reflective of the popular will, it may be regarded as not even anti-majoritarian. As Professor Ackerman (1989, 464) has suggested in relation to the United States constitution, and as can equally be said of our own, written constitutions establish a two-track law-making system. If our elected politicians hope only to win normal democratic legitimacy for an initiative, they are directed down the normal lawmaking path and told to gain the assent of the House, Senate and President in the normal ways. If, however, they hope for higher lawmaking authority, they are directed down a specially onerous lawmaking path.

The integrity of such a 'dualist' system of law depends upon the existence of institutions which safeguard the terms of the higher law from derogation by means other than those specified by the majority within that higher law. These institutions discharge arepeal established constitutional principle by the simple expedient of preservationist function. [They] must effectively block efforts to passing a normal statute. They must force the reigning group of elected politicians to take to the higher lawmaking track if it wishes to question the judgments previously made in the higher law accents of We the People (Ackerman 1989, 465).

The power of popular amendment to remedy any failure of a constitution, as interpreted by the courts, to reflect prevailing community values is far from merely theoretical. G R Johnson (1987, 240) notes that on four occasions in the history of the United States a constitutional amendment has been used directly to reverse a Supreme Court decision. Here in Australia, the Menzies government sought to amend the constitution effectively to reverse the High Court's decision in the Australian Communist Party case. The amendment proposal was defeated at a referendum, yet soon thereafter the Menzies government was re-elected, exemplifying the reality that a majority of citizens may well prefer a particular government to the available alternatives, whilst wishing to place certain matters beyond its legislative competence. Judicial review is a vital vehicle for upholding the majority will in this regard. To equate the consequent potential for judicial review to obstruct the actions sought to be pursued by a majority of legislators with obstruction of the will of the popular majority who elected them is to imply that the will of the majority is reflected in every action of a government which they elect, a proposition that many would regard with some scepticism.

Thus, whatever one's definition of democracy, judicial review pursuant to a written constitution which is susceptible to popular amendment cannot be characterised as anti-democratic. In his article 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism', TRS Allan (1985, 140) opines:
There remains an ineradicable tension between the democratic principle of majority rule and the restraints of constitutionalism. Every democratic society has to decide what reconciliation is appropriate to its own needs and traditions. The principal objection to judicial review of legislation, on the basis of an entrenched bill of rights, is that that tension is enhanced. ... An appeal to consensus or shared values, whilst plausible in the context of interpretation, seems inadequate as a basis for overruling the explicit decisions of the legislature.

... The rule of law, whilst requiring an application of social policy which is sympathetic to fundamental liberties, nevertheless leaves the ultimate reconciliation of conflicting values with Parliament alone. It does not deny the right of the majority to flout judicial conceptions of society's fundamental values — where that intention actually does enjoy majority support and is expressed in unambiguous form.

Again, the reference to ‘majority support’ blurs the distinction between the majority of citizens consciously considering an issue and the majority in a legislature, subjected as they may be in Australia to rigid party discipline and thus often to de facto executive control.

Allan’s perception of Parliament’s suitability to serve as reconciler of tensions within a polity might be thought questionable. By entrenching fundamental values and defining the scope of powers in a constitutional document, it is the people voting at a referendum who become the ultimate reconcilers; perhaps the tension between legislative and judicial powers ultimately cannot be reconciled in any other way which is not perilous to either the rule of law (if Parliament is held supreme) or responsible government (if the judiciary is held supreme in the absence of a constitutional document capable of popular amendment).

The debate in the Northern Territory concerning the desirability of such measures in any future State Constitution, as evidenced by the Discussion Paper on a Proposed New State Constitution for the Northern Territory (SCCD 1987) is therefore a very positive development.

Conclusion

Whilst entrenchment of fundamental principles does not create an impenetrable barrier to the destruction or diminution of society’s liberal-democratic character, it does place hurdles in the path of regressive change, the surmounting of which requires conscious effort. Referendum requirements compel citizens to consider the merits of particular fundamental changes in isolation from the question of whom among available alternatives they would prefer to have in government.

Some principles are fundamental and it is the role of an independent judiciary to give effect to those principles, within the rule of law, as best it can. Thus, although the relationship in our society between the authority of the legislature and the rule of law fluctuates over the course of time, the rule of law is the dominant factor in the relationship. This explains the efficacy of the rule of law as a means both of protection against the misuse of legislative and executive power and of promotion of fundamental rights and principles.

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Endnotes:

1 The expression is to be found in *Marbury v Madison* (1803) 5 US 87, at p 103 where Marshall C J said: 'The government of the United States has been emphatically termed a government of laws, and not of men.'

2 (1607) 12 Co.Rep. 63 [77 ER1342]

3 ibid., at pp 63–64 [p 1342 of ER]

4 (1610) 8 Co.Rep. 107a, at p.118a [77 ER 638, at p 652]

5 *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372, per Kirby P at p 403, Dixon O, 1965

6 (1925) 37 CLR 36, at p 79

7 (1990) 169 CLR 625, at pp.635–636

8 See, for instance, *Acts Interpretation Act* 1901 (Cth),s.15AA

9 [1917] AC 260, at pp.270–271

10 (1925) 37 CLR, at p.133

11 (1991) 1 AC 696, at p.748

12 (1982) 1 NZLR 374, at p.390

13 (1984) 1 NZLR 116, at p.121

14 (1984) 1 NZLR 394, at p.398

15 (1986) 7 NSWLR, at p.403

16 [1976] AC 249, at p.278

17 (1986) 7 NSWLR, at p.387

18 (1986) 7 NSWLR, at p.387. 2 1

19 (1974) AC 765, at p.782

20 Unreported, 21 August 1992, at p.8 of his judgment

21 In *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, at p.689 I suggested that 'a law, which purports to make criminal conduct which attracted no criminal sanction at the time it was done, may offend Ch.III, especially if the law excludes the ordinary indicia of judicial process'.

22 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1

23 See *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192

24 The existence of an implied guarantee in the Constitution of freedom of communication was argued in *Nationwide News Pty Limited v Wills* and *Australian Capital Television Pty Limited v The Commonwealth*. Although orders were made in these matters on 28 August 1992, at the time of writing this paper reasons for judgment had not been delivered.

25 (1951) 83 CLR, at p.193

References


DEMOCRATIC CONSTITUTIONALISM

Mr David Solomon, Chairman
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There is something a little disconcerting about the title of this paper. It is not that there is anything wrong with the notion of democratic constitutionalism, the problem arises when one begins to consider what would be encompassed by non-democratic or undemocratic constitutionalism.

What is it that gives constitutional rule or authority (to take the Macquarie Dictionary definition of constitutionalism) the quality of being democratic?

I propose to discuss that issue from two distinct perspectives.

First I will look at a number of well-known constitutions to see how well they fit into the democratic ideal. I will do that fairly briefly, because they are indeed well-known. Then I propose to look at recent developments in the human rights arena to see whether that can provide us with any further information about the way democratic ideals are being applied today in relation to a fundamental issue for constitutionalism.

The United States Constitution

Let me begin with the most ancient of modern written constitutions, that of the United States. It begins with the most democratic of sentiments: ‘We the people of the United States .... do establish this Constitution for the United States of America’. The people, however, did not get much recognition when it came to the practicalities of determining who should be in the Government and in the Congress. The democracy which is enshrined in the original United States Constitution is for the most part of an indirect and representative kind. The people were not permitted by the Constitution to vote directly for their President, nor, until 1913, for their Senators. And the original Bill of Rights, as the Supreme Court demonstrated so tragically during the events which led to the Civil War, might have been thought to be more concerned with property than with human rights.

The separation of powers doctrine, which the American Constitution enshrined, is not so much a democratic device as a balancing one. We are accustomed to seeing it as a limitation on governmental power. That will often be the result. But it is possible to recall situations when, for various reasons, the three arms of government are not in collision but in collusion – the second term of Roosevelt’s New Deal provides an example.
The United States Constitution may be changed directly through a process of amendment which is also an example of the indirect or representative democratic method. Congress has to agree, by a two-thirds majority, to any proposal for amendment. Three-quarters of the States, either through their legislatures, or through representative conventions, must approve of the changes. The amendment process, it must be added, has proved workable. Significant changes have been made to the United States Constitution.

There have also been significant changes to its workings which have been effected through interpretation by the Supreme Court. The Court has probably allowed for a more rapid accommodation of the Constitution to the pressures of the modern world than would otherwise have been the case. The Supreme Court has been seen as an essential part of the political process and the appointment of its justices as a political act of the President, subject to the veto of the Senate. The Constitution itself has prevented the ultimate form of democratisation of the justices – their election.

The British Constitution

Now a brief look at the British Constitution, which doesn’t exist in quite such a handy document as that of the United States. Still, it does have some documentary elements. Some of its parts are of mainly historical interest such as the Magna Carta and the Bill of Rights, and the Reform Acts. Others, such as the Parliament Acts, are more readily seen as being constitutional in nature, as is its accession to the Treaty of Rome.

Since moving to Queensland I have developed something of a fascination with the Bill of Rights of 1688, and only partly because it is assuredly part of the law of Queensland (see Imperial Acts Application Act, 1984, section 5 and the First Schedule.) For present purposes, what is important about it is that the rights it asserts are the rights of parliament, and they are rights vis-à-vis the King. The Bill of Rights was not concerned with the rights of the people, other than their right to petition parliament. Other rights of the people were expressed to be subject to the laws made by parliament, for example, the right to have arms (a particular favourite in Queensland at the moment) was expressly conditioned upon being ‘allowed by law’.

And in a sense, very little has changed since 1688. The people now have some individual enforceable rights, thanks to the European Convention on Human Rights. And certainly the Parliament has become more democratic, though it is possible for a small minority of the people of Britain to determine which party should control the House of Commons and hence (by virtue of the Parliament Acts) the Parliament of Britain. For example, at this year’s British election, there was a turnout of about 78 per cent, of whom almost 42 per cent supported the Tories – that is, less than one third of the eligible voters supported the present government.

Leaving aside the small surrender of power which has been made to Europe (and just how small that surrender has been was indicated by last month’s sterling crisis and the continuing row over Maastricht) the important, fundamental element of the British Constitution is the sovereignty of Parliament. Parliament, not the people.

The common law, which is so frequently said to be the foundation of the fundamental rights of Englishmen (not to mention the Scots and the Welsh and perhaps the Irish,
and for sometime this century even women) may be ignored by the Parliament and altered by the House of Lords, or even lower courts. The Constitution itself has no superior position in British law, other than to the extent that the Parliament might recognise that a particular aspect should not be changed without special attention being paid to it.

Parliamentary sovereignty elevates Parliament above any rights that the people who elect the Parliament might have. A constitution based on parliamentary sovereignty is democratic only to the extent that the Parliament determines that it should be. And in times of war, for example, the Parliament may well decide that democracy also may be suspended, whether in the country as a whole (no elections during World War II) or in a particular area which is under threat (Northern Ireland).

The Australian Constitution

Having referred to the two Constitutions on which such reliance was placed when the Australian Constitution was drafted 100 years ago, I should now briefly refer to some of the characteristics of our own national Constitution. The first point which should be made is that the Constitution as originally made was an Act of the British Parliament. It contains it own variant of the American ‘we the people...’ in the form of the recitation ‘Whereas the people ... have agreed to unite in one indissoluble Federal Commonwealth’. And though this might seem to be a less enthusiastic endorsement of democratic ideals, the Australian Constitution is in fact the most democratic in origin of the three. It was, in substance, put to and approved by the Australian people (as they were to become) before its enactment in a slightly revised form by the Parliament of Westminster.

The Parliament is directly chosen by the people, and the Government is chosen from the membership of the Parliament. A limited number of rights is protected by the Constitution. The Constitution also spells out in section 128 the manner in which its provisions may be changed. Amendments, as we know, have succeeded on only rare occasions, partly because of the requirement that there be majority support in a majority of States, as well as a majority overall of the voters. Had the Constitution provided merely for a simple majority vote of Australians, the number of referendums approved would have jumped from 8 to 13 (out of 38). It is clear from a study of the convention debates that the method of changing the Constitution which was adopted was intended to be ‘as difficult as possible’. (The relevant material is reviewed in Solomon 1992 146–8).

Like the United States Congress, the Commonwealth Parliament is not fully sovereign. Its powers are limited by the provisions of the Constitution, and the powers of the Parliaments of the States are limited by the Constitution and by the exercise by the Commonwealth Parliament of its law-making capacity in fields where the Commonwealth law may override State law.

The Constitution has proved to be flexible, on occasions, because of its financial provisions and because of the way in which its provisions have been interpreted by the High Court. I shall have to return later to the question of whether this is an undemocratic feature of the Constitution.
Democratic Constitutionalism Today and a Bill of Rights

The courts also play a significant role in the human rights area which I now propose to touch upon to see whether that can provide us with any useful guide to understanding democratic constitutionalism in the modern world.

I think at this stage I should give notice of a disclaimer. The Commission of which I am Chairman is currently conducting a review of the preservation and enhancement of individuals' rights and freedoms. We expect to report to the Queensland Parliament and the Premier in about May/June 1993. As yet the Commission has not been considering any recommendations, nor has it considered what general approach it should take to the question of whether we should recommend that Queensland have its own Bill of Rights, though that is an obvious issue which will have to be considered. The views I express here should not be taken as indicating that I have reached any conclusions about that or other related questions.

Now, back to the overseas Bills of Rights. I don't propose to explore the American model, because that really is well known and understood. I wish rather to look at the two latest Bills of Rights which may have considerable relevance for Australia. They are the Canadian Charter of Rights and Freedom and the New Zealand Bill of Rights. The former is incorporated in the Canadian Constitution, the latter has no direct constitutional force. What is important about both is that unlike the American Bill of Rights, they do not appear to elevate the rights of individuals untouchably above those of society generally. The Canadian Charter begins with a statement that it 'guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. This subjection of the rights to the needs of society is echoed in the New Zealand Bill of Rights of 1990, which in section 6 says the rights in the Bill 'may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

That formula ultimately leaves it to the courts to determine whether a law which does impinge upon the rights and freedoms in the Charter or the Bill has been or may be 'demonstrably justified' as a 'reasonable' limitation. In Canada over the past 10 years, the jurisdiction of the court has been frequently invoked, and as a result both federal and provincial laws have been struck down to accord with the provision of the Charter. The Charter has had a profound effect in the expansion of rights of accused persons. New Zealand has had its Bill of Rights in operation for only two years, but there too the Courts have been extensively used and their decisions have had a 'considerable impact' on New Zealand laws. (The quotation is from a paper given by Professor Jerome Elkind, of the University of Auckland, at a seminar conducted by EARC in July this year. I have relied on that and an unpublished paper given by Professor Robert Sharpe of the University of Toronto at the same seminar, for some of the factual material in this paper.)

Both the Charter and the Bill contain a more fundamental limitation on the universality of the guaranteed rights. The Charter in section 33 allows either the Federal Parliament or the Parliament of a Province to 'expressly declare in an Act of Parliament or of the (provincial) legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in' those parts of the Charter dealing with fundamental freedoms, legal rights and equality rights. That
option has been utilised by Quebec excluding all its laws from the operation of the Charter. The position in New Zealand is that the Bill contains a provision in section 4 which specifically states that other laws are not affected by the Bill of Rights. This would be the case in any event in relation to laws passed after the Bill of Rights, in view of the fact that it has no special constitutional status. Section 4 additionally exempts laws passed before its enactment from its control.

Thus we have a situation in both Canada and New Zealand where the people have been told that they possess certain fundamental rights and freedoms, but the extent of those freedoms under the law is determined by the courts, while the parliament retains the power to override the rights and freedoms, and the decisions of the courts.

It is my impression that this outcome involves the creation of a democratic variant of parliamentary sovereignty. What has emerged is a system whereby the power of the parliament is not diminished, but the exercise of that power may be affected and influenced both by judicial review and by public opinion. In both countries, the courts carry the responsibility for determining the content of a particular right or freedom, then whether a law or governmental action has intruded upon that right, and if so, whether that intrusion may be ‘demonstrably justified’ as ‘reasonable’. These are not purely ‘legal’ questions. The assessment of the balance between the needs of the society as a whole (or a part of it) as against the rights of an individual is essentially a political one. That political judgment may then be reversed by the parliament, if it wishes.

The Bill of Rights has given the courts a new role; to provide a forum for minorities or even individuals who have little chance of making themselves heard in the legislature. Parliaments are apt to protect the needs and interests of the majority. The courts allow the minority, a minority even of one, to propound a view and to seek to have it judicially endorsed. The parliament, in the light of the court’s decision, and taking into account such political weight as the court’s decision might be expected to attract to the minority view, may still decide that the majoritarian view should triumph. What is important is that the parliament’s ultimate decision is not taken ignorantly; the parliament is fully informed of the effects of a particular law or governmental action on what have earlier been proclaimed to be fundamental rights or freedoms before it acts to set those rights or freedoms aside.

It seems that the Canadian and New Zealand Bills of Rights have been fashioned at least in part, to meet widely held fears about judicial review in the field of human rights particularly and perhaps in relation to the interpretation of constitutions more generally. While there is little dissent from the view that the courts must be involved in the interpretation and protection of rights and constitutions there is concern that unelected judges may override the decisions of democratically elected parliaments and that non-accountable judges can change the nature of constitutional settlements approved by the people.

The answer to that quite elderly dilemma which has now been provided by Canada and New Zealand is to give the courts a slightly less decisive role in what is increasingly an intensely political field. The effect of the systems adopted in New Zealand and Canada is that what the courts say will often be determinative, and will invariably be influential, but may, in exceptional circumstances, be overruled by the majority interests represented in the parliament.
The Bills of Rights also seem to deal with a second problem inherent in written constitutions – their inflexibility. In operational terms, neither is fully entrenched. The legislature’s capacity to suspend or override particular rights or the whole set of rights overcomes a general complaint which is made about rigid constitutions, namely, that the drafters have imposed their views on succeeding generations, binding their successors to particular arrangements which may be inappropriate or unworkable at a later time. No matter what democratic rights such constitutions guarantee, their inflexibility detracts from their democratic virtues. The problem is heightened when the primary means of altering the constitution involves obtaining special kinds of majority approval from the electorate. There is additionally a particular problem in federations. By their very nature, it is not possible to leave with either the central parliament or with the parliaments of the federal units, a unilateral power to change the arrangements for sharing power. But I must avoid entering further into the question whether federal constitutions, of their very nature, are necessarily undemocratic. Or indeed whether measures such as those adopted under the Premiers’ Conference initiatives in relation to what I have called National Scheme legislation, may have overcome some of those problems, while creating quite new and exquisite ones for the parliaments of this particular federation. There will be a reference to this problem in a report which the Electoral and Administrative Review Commission will shortly be presenting to the Queensland Parliament and Premier (Report on Review of Parliamentary Committee, October 1992, Vol.1 pp180–5).

To return to the human rights developments. What I find interesting is the elevation of parliament as a representative democratic assembly over the popular referendum as the ultimate determinant of those rights and freedoms which apply in the state at a particular time or for a particular purpose.

As I suggested earlier, what seems to be occurring is the introduction of a modified version of parliamentary sovereignty, in which the courts and public opinion have a major contributing role. We seem to be reverting to indirect democracy as the most workable method of dealing with constitutions and their evolution.

The Canadian and New Zealand developments suggest that in evaluating how ‘democratic’ constitutional authority is in a particular instance, there are a number of current concerns. In particular it seems that the new Bills of Rights have been developed in a way which try to come to grips with complaints about the undemocratic nature of entrenchment and judicial review.

Reference

THE ROLE OF AN ELECTED CONVENTION IN CONSTITUTIONAL REVISION

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As is well known the referendum procedure embodied in section 128 of the Commonwealth Constitution was adopted from the Swiss Constitution. It was also the method for ratifying amendments to State Constitutions in the United States. What is not so well known is that at the 1891 Convention, it was recommended that amendment proposals made by Federal Parliament should be approved not at referenda but by conventions elected under laws made by the Federal Parliament and held in the individual States. The requirement was that the proposal be approved by a majority of those conventions, ie 4 out of 6 State conventions. Among the reasons given by Sir Samuel Griffith for supporting the convention method of ratification was it allowed for more deliberation on the details of proposals. Referring to American practice he said:

People of that country who are practical people recognise that millions of people are not capable of discussing matters in detail. They deal with general principles and select men whom they trust to deal with details. That is the principle of conventions. That is why I think they are far preferable to a plebiscite (referendum). If the question were to be a kingdom or a republic there might be a plebiscite on that but suppose the question was set in favour of a kingdom, what would be the basis? How many other questions would you have to put. You must have a complicated document and in order that the electors may exercise an intelligent vote they must be thoroughly familiar with every detail. Is that a practicable state of things?

This view was opposed by Alfred Deakin who expressed the opinion that the voters would only vote for convention members to say yes or no and not to exercise their reason in any way. In other the words the delegates would be tied to voting for policies and would not have a discretion in the light of debates at the convention to make up their own minds.

Article V of the US Constitution provides alternative methods for ratification of constitutional alteration proposals: either by approval of three fourths of the legislatures of the States or by conventions in three fourths of Conventions held in the States (Congress determines the particular method of ratification). Only one group of conventions for ratification of a constitutional amendment has been held. That was to consider the repeal of the prohibition amendment. It appears that the delegates to those State conventions saw themselves as representing their constituents in the sense that they were obliged to say yes or no to the proposal. In any case no convention for ratification has been held since the 1930s when the proposal for repeal was adopted.
There has however, been much discussion about the convention method of initiating proposals which is also contained in Article V.

To return to the Australian situation it is well known that at the 1897–8 Convention, the proposals for constitutional conventions to ratify proposals was not proceeded with and in its place was substituted the double referendum requirement i.e. approval of an amendment proposal by a majority of electors in a majority of States.

It is often said that the reason for the failure of referendum proposals is this double majority requirement. It is argued that a mere national majority requirement should be substituted for it but that would breach the federal principle embodied in section 128. When we look at the fate of referendum proposals we find that only 8 out of over 40 proposals have been approved, a success rate of less than 20%. The reason for failure in my view is not the rigid requirements of section 128 but the fact that most proposals have been for centralisation of Commonwealth power, or for changes to the times of holding elections either in terms of a longer term for the House of Representatives or simultaneous elections for both Houses of Parliament. These proposals have often reflected the political program of the government of the day or a desire to secure terms or election dates which would be most convenient to that government.

What I am proposing is a return to the convention method of initiating proposals. The method by which our Constitution was drafted was the convention method. While expense may often be given as a reason for not adopting it, it has the benefit of historical success in its favour. Perhaps that comment may not be entirely correct. In 1921 the Prime Minister of the day Mr W M Hughes moved a constitutional convention bill to initiate proposals for constitutional reform in the economic and industrial area. He received support for a constitutional convention from State Premiers and Parliaments and the Australian Natives Association. But there was a big difference between his convention proposal and the 1897–8 convention. That convention consisted of 60 members with 10 members being elected from each colony, i.e. equal representation. Under the Hughes proposal there were to be nominated delegates and 75 elected delegates, but elected on the basis of population which would mirror House of Representatives divisions. This aspect of the proposal was opposed by Dr Earle Page who advocated equal State representation and additionally a system of proportional representation for election of members of the convention. Mr Hughes did not proceed with the bill, perhaps rightly judging that there was not a majority of members of the House in favour of his proposal.

Since that time various methods have been used for advising the Parliament on proposals for amendment: Royal Commission, Parliamentary Convention (nominated), and Constitutional Commission. None of these methods has achieved any success. The 1973–1985 Convention was a convention of parliamentarians from the Federal and State spheres. More often than not the members divided on party lines. When the whole process was wound up in 1985 there was very little to show in terms of agreed proposals for reform. The succeeding body, the Constitutional Commission, was even less successful, although many of its reports have become a source of ideas on constitutional revision. The whole process of reform was short circuited in 1988 when the government of the day put to the electorate proposals, some of which cut across Commission recommendations. What emerges from these
failed methods is that the initiation proposal must be as bipartisan as possible and involve, in my view, elected representatives.

In the United States, conventions in the State sphere are called by the legislature and the call (as it is termed) must be submitted for approval at the next election, usually a general election. In some States the call proposal must be submitted to electors periodically. The following features of the provisions of State Constitutions or legislation may be noted. If the constitution does not provide for a number of delegates the number may be determined by the State legislature. As to electorates, in some States they are based on upper house (State senate) districts, in others on lower houses (house of assembly) districts. In many States there are elections at large in addition to district–selected candidates. Provision is made for non partisan ballots in a number of States although that does not prevent electioneering and grant of party support to candidates. As to the agenda for a convention, if the constitution is silent on the matter it may be limited or unlimited ie restricted in subject matter or covering any topic. Limited conventions appear to be more practical in the sense that the amount of time required and therefore the expense of a convention could be regulated.

In the federal sphere in the United States there has been much agitation for the calling of a constitutional convention for proposing amendments. The areas specified in calls by the State legislatures have ranged from the abortion decision in Roe v Wade, the ‘one vote one value’ decisions of the Supreme Court, and a proposal for a balanced budget to be incorporated into the US Constitution. The first two involve overriding of Supreme Court decisions. While the number of States requesting a constitutional convention has not reached the required 3/4 majority, proposals for passing legislation regulating the calling of a convention have been opposed in Congress on the basis that it should not lose the right of initiation of proposals. Fears have been expressed also that if the agenda was unlimited there could be a ‘runaway’ convention whose proposals could erode the basic structure of the Constitution or some important parts thereof. Even in relation to a limited convention, there are fears that amendments could be introduced which could affect the status of the Constitution as fundamental law. Of course these concerns demonstrate a lack of faith in the processes of popular democracy.

If we were to consider seriously the introduction of an elected convention to propose amendments to our Federal Constitution, it would be necessary to tackle problems that have been noted in the United States. Of course a convention could be established without an amendment to section 128, but the resolutions of such a convention would only be in the nature of recommendations to the Federal Parliament. If the convention were to have an independent role, constitutional alteration would be necessary; but who would determine the nature of the proposal for the convention to be put to the people under the existing section 128? Wide consultation of various parties including federal and state interests would be necessary, as well as popular input including an input from various community organisations. But the final form of a convention proposal, if it were pursued, would have to include matters such as the method of calling a convention, fixing an agenda, qualification of members, method of election, and method of presentation of the convention proposals to the electorate.
My tentative views would include provision for a limited convention, a convention size of between 120–150, and no ex officio or nominee members. The members of a federal convention should be fully elected. An application for a convention would be made either by the Federal Parliament or a majority of State Parliaments. Applications could be dealt with by a body of independent Commonwealth and State officers (or presiding officers of the parliaments). The most controversial issue would be whether there should be equality of representation for the States or election of delegates on a population basis. I would suggest that the former would be the only practical way of securing all-Australia support. My other observation would be that it would be preferable for party designations not to appear on the ballot paper ie to have a non partisan election of members. Finally, in relation to the presentation of conventions proposals to the electorate I would suggest that before being submitted to its voters, any proposals emanating from a convention should be presented to the Federal Parliament which would could then decide whether it would present alternative proposals of its own.

I do believe that this convention method would be a major way of securing an Australia wide consensus without the intrusion of too much political interference in the formulation of proposals for alteration. While it might lead to the weakening of Commonwealth initiation, it would have the crucial benefit of bringing the people into the process of constitutional reform at the earliest stage; but the ultimate ratification of any constitutional amendment proposed by a convention would be left to the people at a referendum.

State and Territory Constitutions

There is a lot to be said for favourably considering proposals for conventions in relation to the amendment of State constitutions and for the formulation of a new constitution for the Northern Territory. I note that the authors of a recent work in Western Australia have indeed proposed fundamental revision of their State Constitution in the light of what they perceive to be failures under the present Constitution to prevent events such as ‘Western Australia Inc’. Among the proposals of these constitutional ‘revisionists’ are the incorporation of the American doctrine of separation of powers into the State Constitution. This would involve a popularly elected governor. While this provision would appear to intrude upon the monarchical–republican debate in the States sphere, it would be necessary for any fundamental change to be ventilated at a widely representative body such as a constitutional convention. Whether State Governments could be persuaded to make provision for such a convention, even if it were to be an advisory one, is a matter of some doubt. But at least it would provide a basis for consideration of fundamental changes to those constitutions.

As far as the Northern Territory Constitution is concerned, what better method than a convention to formulate a new constitution for the ‘seventh State’? Already the Legislative Assembly of the Northern Territory Sessional Committee on Constitutional Development has issued a discussion paper on representation in a Territory constitutional convention. That Committee has detailed three different ways of forming a convention: either wholly elected, wholly nominated, or partly
elected/partly nominated. Perhaps I can quote the following passage from the report which I think sums up the situation very well:

Wholly elected conventions are the rule in the United States constitutional experience. Because of the electoral system devised (a combination of at–large and precinct contests) and the deliberate avoidance of overt partisanship, the outcome usually produced an adequate representational profile and thus a broad political legitimacy and community acceptance (SCCD 1987).

Some disadvantages as well as advantages are noted, for example, that it could be costly and time consuming. If the turn–out was low, representation may not be adequate. If the electoral system was ill–chosen, representation might be deficient. Also identified was the problem of whether suitable candidates would offer for election.

A wholly nominated convention would lead to accusations that the convention had been stacked by the government of the day. However, the Committee does give consideration to the mixed elected–nominated convention and points out that it offers a range of membership possibilities, including the participation of key groups that were not included in the electoral process directly. The Committee states that, in that way, nomination of a certain proportion of the convention could ensure an adequate representation of Territory interests.

In the light of the smaller population of the Territory compared with the States it may be that the mixed system is the best way to go. Of course as a matter of principle a wholly elected convention has the blessing, as has been pointed out, of democratic legitimacy. In the United States, therefore, a mixed type of convention is frowned upon, although Louisiana has in recent decades held such a convention. At least we can say the convention method is preferable to other methods such as the drafting the new state constitution within the Assembly or by a committee of the Assembly, where accusations of partisanship might be made. In the United States the Constitutions of the newest states, Alaska and Hawaii, were drafted by elected conventions.

Note

A more detailed analysis of this topic appeared in the University of Western Australia Law Review (1992). Additional material on the Northern Territory has been included in this paper.

Reference

EXPERIENCES IN CONSTITUTIONAL DEVELOPMENT IN POST-INDEPENDENT PAPUA NEW GUINEA

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We in Papua New Guinea were lucky that we came to independence at a period of colonial enlightenment, at a time when both the Liberal and Labor parties of Australia agreed that Papua New Guinea should be independent. So our struggle for independence and our struggle to write a constitution is different from that of the Northern Territory.

It was in effect an easy ride. We were given a free hand to write the type of constitution we wanted. It was not written for us in Marlborough House in London, nor was it written by expert academic lawyers in Canberra. We took three years to travel the length and the breadth of Papua New Guinea to speak to the people and to gauge their feelings and opinions. We wrote a document which has become the Constitution of the Independent State of Papua New Guinea. In doing so, the Constitutional Planning Committee which consisted of 15 elected members of parliament, both from the government and the opposition, took upon themselves the responsibility to assess the views of many and very diverse opinions, and to formulate a consensus view which was then presented to the former House of Assembly. This House, shortly before independence, reconstituted itself into a Constituent Assembly, simply for the purpose of debating and adopting the constitution. Having debated and adopted a constitution, the Constituent Assembly dissolved itself and ceased to exist.

We looked at many constitutions in the world, including the constitutions of communist states, and we tried our best to adopt what we thought was best and relevant for our cultural situations. We noted that constitutions are essentially political documents expressing political and economic philosophies prevailing at the time, and it was incorrect to think that the constitutions were mere legal documents. The constitutions were about power, use of power, abuse of power, misuse of power, and control of power. We had no misgivings about what constitutions do. Essentially, power is acquired through the barrel of the gun, or acquired through a ‘gentlemen’s agreement’. Indeed, recent history in the Pacific, indicates that the first option is still available and even the civilised states today recognise the effective acquisition of power through the barrel of the gun. This has been recognised in Fiji in recent times. The acquisition of power there has now been well accepted by particularly every state in the Pacific.

As I said, we started off with a realistic view of what the world is and an enlightened view of what the world should be. Also we fortunately adopted a course which the
Northern Territory now adopts – a civilised, calm consideration of every possible option, and adoption of options which are best suited for the needs of that particular society. I continue to hold the view that there are no perfect solutions, and that the only acceptable solution is an evolved solution, easily related to the social and cultural needs of the people at the time. Hence, I believe that a model constitution for New South Wales may not be suitable for the Northern Territory, nor would an English or an American constitution be suitable to the people and the needs of the Northern Territory. I also believe that the task remains with the people of this Territory to discover for themselves their aspirations, their felt needs within which to frame their political document, which will embody their moral and political values.

In the framework of the Constitution of Papua New Guinea we adopted the modern institutions of a legislature, the courts and the executive. They operate in principle as independent institutions, but, in effect, they are inter-dependent. The principle of inter-dependence is emphasised. We adopted a set of national goals and directive principles which are non-justiciable and a set of social obligations which are again non-justiciable.

The pre-independence law on human rights was adopted into the Human Rights provisions of the Constitution. The human rights are basically broken into two groups. The fundamental rights which apply to every person, a right to life, freedom from inhuman treatment, these rights are applicable to all persons, whether they are citizens or not. We also have qualified rights, which are by definition applicable only to citizens, the right to stand for public office, to vote, freedom of movement and so on. There is a great deal of debate on human rights. The Executive and the police argue that human rights essentially restrict operations of the police, and limit and seriously curtail the authority and power of the government to make legislation to deal with rapidly changing social situations. Having been in government for four years, I think that is a very persuasive argument which should be taken seriously. But, as a human rights activist, I do not believe that argument should override the importance of enshrining in a basic document like the Constitution, the basic commitment of peoples to basic rights, essentially, because all governments tend to be autocratic, whoever they are, and all human beings tend to be corrupt. I think it is important that such basic guidelines are enshrined.

To argue for instance that one can enforce his or her right through the use of civil remedies is to suggest that all people are equal before the law, and that has never been proven to be correct. The access of human beings to law is available only to the extent of one’s resources. Hence, I think, enforcement, especially in my country, of human rights through simple documents that can be prepared by the courts through the creation of rules are essential, especially where the demands for economic progress have to come into serious conflict with social and moral values.

Realising man is born corrupt, we enshrine in the Constitution a series of provisions which provide for a leadership accord which all leaders subscribe to. Under the Constitution every leader, member of parliament, judge, constitutional office holder, must declare to the Ombudsman every year their assets and liabilities. Any misconduct including being drunk in public is open to prosecution in a specially created leadership tribunal. This has happened; just before I left three members of parliament stood before that tribunal for misconduct in office.
Although we adopted an independent judiciary, in effect the working of the judiciary has proven to be ineffective in dealing with social change, and even more so, ineffective in dealing with tribal crime. Essentially because the adopted system emphasises the individual and his offence, the community approach to law deals with a community. And, the victim of a crime is very often, if not almost always, ignored in the introduced system. Hence, there has emerged in the country a system of people’s courts which are quite informal, quite outside the law, and they are essentially concerned with the victim. So much so that in 1974, it was necessary to formalise this system through a system of village courts, which essentially apply the customary law.

Customary law is formally recognised as part of the unwritten law of Papua New Guinea with the same strength as the English common law and equity. Litigants in civil cases will choose if they so desire, either civil remedy by custom, or a civil remedy through the common law. The courts have been reluctant to do this, but the pressure of the people has forced them in effect to recognise the relevance of custom. Customary law is strictly governed by custom, there is no higher authority, no higher legislation, no constitutional law which gives recognition to custom except the customary law. It exists prior to any statehood and therefore it exists on its own merit and according to its own regulations. Marriages, divorces, adoptions are also governed by custom and this applies even to this day. Succession to property, customary property is also governed by custom. Judges and lawyers have been reluctant to enforce custom. Last year when I was Attorney-General, I brought about legislation which said that ‘no foreign lawyer will practice law in Papua New Guinea unless he passes an exam in customary law’, and that is now being enforced.

The executive government is controlled by the ministers, and the Queen of England is adopted as Queen of Papua New Guinea. This institution has worked usefully to help Papua New Guinea unite its many tribes and languages but there is a lot of opinion being expressed now that by the end of this century, Papua New Guinea will and should become a republic. I do not see this as a major problem. However, it is not a priority. We have our basic priorities in providing basic needs. When this has been done we can look at other issues.

The legislature is a one chamber legislature and the Cabinet is drawn from that legislature. Its decisions, are governed by scrutiny of the public and also by the courts. Experience has been that the courts are all too ready to strike down government decisions and legislative enactments. Often, unfortunately, the courts are not open to scrutiny and they do not consider political issues in making their decisions; so often we find the courts’ decisions are quite irrelevant to the changing needs of our times. But the courts have a lot of respect and they continue to administer law according to the basic rules of justice.

Is Papua New Guinea a democratic country? I would say, perhaps more so than most countries, because we are by nature democratic, and communitarian: discussion, consensus views of other people are important in the decision making process. Will the question of it survive? There is no such thing as rule of law. There is only one thing and that is a rule of men. Men make laws. Laws do not make themselves. It is a fiction to believe that societies are governed by the rule of law, and it is a nice fiction to believe. But the truth is that human beings make laws and they change those laws to suit their changing needs of changing times. But the point about the rule of law is
that once a law is made, it should be followed, and it must be followed until it is changed again. I think that is the truth which if we ignore then we become slaves to theories of law which say that there is some idyllic law which we must all follow.

For a country of more than 700–800 languages, thousands of tribes, I must say that we have done our best in the last 16–17 years to make the Constitution of Papua New Guinea work. I can say that we are proud of what we have achieved with the help of some of our friends.
CONSTITUTIONAL DEVELOPMENT IN
THE NORTHERN TERRITORY:
PAST, PRESENT AND FUTURE

The Hon Steve Hatton, MLA

On the surface, the Northern Territory seems to operate much the same as the States of Australia. We have elected representatives in the Federal Parliament, we go to the Premiers' conferences and argue with Canberra about Commonwealth funding, we participate in ministerial councils. We have a Northern Territory Public Service and a local government structure. But these manifestations of apparent statehood exist only by the grace of the Federal Government. They are not protected by constitutional right as they are elsewhere in the States of Australia. Even the right of Territorians to vote and to have representation in the Federal Parliament can be removed at any time by the Federal Government.

That is why many Territorians, including myself, are so passionately devoted to the concept of statehood for the Northern Territory and to the cause of constitutional development because, at the end of the day, we are concerned not about some esoteric legal issue but about the rights of individual Australian citizens.

In the Australian constitutional experience, the achievement of full constitutional recognition and status has only been accorded to one of its territories, that of the former overseas territory of Papua New Guinea, now a sovereign nation. On the Australian mainland, the territories have never had constitutional equality with the Australian States.

The status, rights and responsibilities of those States are enshrined in the Australian Constitution and more recently in the Australia Act 1986, and residents of those States have the benefit of a variety of constitutional guarantees. Australian territories and their citizens, on the other hand, do not have those guarantees, because virtually all references to citizens are limited to citizens of the States, which by definition excludes all others. The territories continue as absolute dependencies of the Federal Government and Parliament, including those territories that have been granted a degree of self-government under federal legislation. This is despite the fact that the two main territories, the Northern Territory and the Australian Capital Territory, now contain significant populations. In the case of the Northern Territory, it contains one-sixth of the geographic area of Australia as well as having vast natural resources of major global proportions.

It is hardly surprising that in the Northern Territory we are particularly concerned with this anomaly that creates two classes of Australian citizens in terms of
constitutional rights, and as a result we have embarked on a course to achieve constitutional recognition and equality. To put this into perspective, I intend to describe three distinct stages in the development of constitutional issues in the Northern Territory.

The first period of historical development extends from 1863 to 1978, during which the Northern Territory as a total dependency was controlled firstly by South Australia to 1911 and then by the Commonwealth to 1978 when the Northern Territory was given self-Government. During this period, the business of government and conduct of Northern Territory life was remotely controlled, by Canberra or bureaucrats, with limited local consultation. Constitutional change was limited, sporadic and uncoordinated.

The second period covers self-government from 1978 to the present. In this time, the Northern Territory has experienced 14 years of self-government and has developed many of the characteristics of a de facto state, but without the constitutional protection that goes with a State.

Unlike the States, the Territory has never been afforded the opportunity of developing its own constitutional rules and mechanisms. Regardless of whether self-Government is viewed as a success or not, it fails the test of ‘autochthony’, that is, the local democratic development by a community of its own constitutional destiny. The ‘dramatic’ change in 1978, was primarily a Commonwealth exercise, with virtually no Northern Territory community consultation. It has been overlaid with continuing Commonwealth controls in significant state-type areas. Further changes since 1978 have been limited and have been based on government to government negotiation.

The third period begins in about 1985, when the Legislative Assembly of the Northern Territory first established by resolution the Committee on Constitutional Development. That period overlaps with self-government, and is still in a preliminary stage of development. The primary focus of this stage is the development, by a process of consultation and other democratic methods, of a new constitutional framework for the Territory, within the Australian federal system.

This last approach is clearly the most desirable method of achieving further constitutional development of the Northern Territory. This conference serves as an admirable means for the Committee to develop, in an informed and rational way, its thinking and recommendations on issues that are pertinent to a diverse multicultural community such as we have here in the Northern Territory. It complements the Committee’s efforts in community consultation.

1863–1978

To begin with the first of these stages: without going into major historical discourse on the Northern Territory, the annexation of the Northern Territory to South Australia in 1863 serves as a good starting point in the Territory’s constitutional history. In the period 1863 to 1911, South Australia ruled the Territory as if it were a colonial outpost. There was considerable doubt regarding the exact constitutional status of the Northern Territory and whether it was an integral part of South Australia or a separate dependency. It was not until federation that the matter was finally decided when Section 6 of the Commonwealth of Australia Constitution Act 1900 provided by
definition that the new State of South Australia included ‘the northern territory of South Australia’. Thus the Northern Territory was from the inception of federation a part of an original State, and its residents enjoyed the same rights as other Australians.

Shortly after 1900, the South Australian Government commenced negotiations with the Commonwealth with the aim of getting the Commonwealth to take over the Northern Territory with its assets and, more particularly, its debts. This was achieved in 1911. One of the deals that was negotiated in the surrender and acceptance package was that the Commonwealth would construct a trans-continental railway to Darwin. South Australia had insufficient resources to develop its northern expanses, and the railway was seen as an essential part of northern development and also as part compensation to South Australia for its loss. That particular arrangement has not yet been fulfilled, despite being solemnly incorporated in an inter-governmental agreement scheduled to both South Australian and Commonwealth legislation. Unfortunately, it was held by the High Court to be legally unenforceable.

This is a prime example of the need for rights to be guaranteed by constitution. It is not enough to have certain rights simply by virtue of the Federal Government’s agreement, because those rights can be rescinded at any time. In the Northern Territory we have seen the Federal Government renege on financial arrangements made under the terms of the Memo of Understanding: constitutional guarantees are needed on self-government. As Premier Groom said last night: you cannot trust the Federal Government – you need constitutional guarantees.

On assuming control of the Northern Territory in 1911, the Commonwealth proceeded to establish its own administrative system under Commonwealth officers. It was in a real sense merely the substitution of remote control by one government for another.

A major concern for Northern Territory residents at the time (being former South Australian citizens) was the loss of representation in both Houses of the South Australian Parliament and in both Houses of the Federal Parliament. The Territory thus lost all semblance of democratic rule. In fact, the residents of the Northern Territory were stripped of all constitutional rights. What we have seen since then has been the slow and difficult process of clawing back those rights.

Local demands for some sort of federal representation became a familiar theme during the decade leading up to the 1920s with catchwords such as ‘no taxation without representation’. It was not until 1922 when the Northern Territory gained its first House of Representatives member, although he was little more than an observer. At first the position was that of a non-voting member until 1936 when the right was given to vote on motions for disallowance of Territory Ordinances. In 1957, the member was allowed to vote on any question relating solely to Territory matters. It was not until 1968 that full status was granted – 44 years after the Northern Territory sent its first Member to Canberra.

In respect of Senate representation, attempts in 1968 and 1970 to introduce legislation failed. However, in 1973 a joint sitting of the Federal Houses of Parliament passed legislation which provided for two Senators to be elected for each mainland territory. It was not until 1975 that Territory Senators took their place in Parliament after narrowly withstanding High Court challenges by several States.
When we turn to look at the issue of local representation in a Northern Territory Parliament, the story is equally shameful. The question of a local representative legislature received prominence in the 1930s. The Territory member for the House of Representatives successfully moved for the inclusion of an Advisory Council comprising the Administrator as Chairman and four elected members. However, this proposal was not implemented. The Second World War intervened and all thought of change was shelved.

It was not until 1947 that the Northern Territory first acquired its own Legislative Council, with a minority of elected members. The others were appointed from the ranks of Commonwealth Public Service chiefs employed in the Territory. The clearly undemocratic nature of this arrangement was obvious and Commonwealth control of the Territory continued largely unimpeded. A variety of tactics was used by local people seeking more democratic arrangements. In 1962 a Remonstrance, an archaic device of the Westminster Parliament which sets out a list of grievances, was sent to Canberra. The Federal Government was not impressed. The elected Members responded with various forms of protest, including withdrawal of support for taxation bills, and then resignation, in their fight for a greater degree of autonomy. Another tactic was the establishment of a Select Committee of the Legislative Council in 1963. Some local input was achieved through local government in a few major towns and through representation on various statutory bodies.

The Northern Territory finally gained its first fully elected Legislative Assembly in 1974 consisting of 19 elected members. A Commonwealth Parliamentary Joint Committee in the same year endorsed this change, and also advocated a significant transfer of executive power to the Territory members. These recommendations were endorsed after Cyclone Tracy.

In the 1975 election campaign, Prime Minister Malcolm Fraser promised that the Northern Territory would have ‘statehood in five years’. However, this was quickly re-interpreted both at Commonwealth and Territory levels as merely comprising the granting of self-government for the Northern Territory. There followed intensive negotiations between Territory members and federal politicians and officials from 1977 to mid 1978 on the form and timing of self-government. Self-government was granted by the Commonwealth on 1 July 1978.

**Post 1978**

The aim of statehood had not been dropped. Self-government was seen as a transitional phase to eventual statehood, and there was a commitment to this both at Federal and Territory levels. The Northern Territory (Self-Government) Act 1978 of the Commonwealth Parliament can for all intents and purposes be regarded as the Northern Territory’s present constitution, a *de facto* constitution.

It is important to note that this legislation is only an ordinary Act of that Parliament, capable of being amended or repealed by that Parliament as it sees fit. There have been amendments since 1978, although none of them has radically changed the nature of the grant. Whether the Commonwealth would ever seek to retract the grant or significantly reduce it is a matter that has not yet been tested. In legal theory, the power remains.
The other significant feature of the grant is that it established a new, separate body politic under the Crown, with its own Ministers selected from and responsible to the Legislative Assembly. The executive authority of this new polity is stipulated by national regulation and covers most of the conventional state-type functions. This grant has been extended by amendments to the regulations since 1978.

Major exclusions that still remain in the domain of the Commonwealth relate to industrial relations, uranium mining and Aboriginal land rights and the control of two major national parks in the Territory, namely Uluru and Kakadu. Apart from these exclusions, the Northern Territory is usually treated in much the same way as a State in so far as this is constitutionally possible, although the Commonwealth retains a range of powers held in abeyance.

In several ways, self-government can be said to have been a major improvement. It has resulted in a much greater degree of local involvement in matters affecting Territorians, acting through elected members rather than appointed officials. Hence, it has enhanced the democratic nature of the system.

However, the framework of this system was determined largely by the Commonwealth Government, with limited input from Territory politicians and virtually no consultation with the Territory population. It was even difficult to get copies of the drafts of the Bill until it was introduced into the Federal Parliament. Passage through both Houses was swift to meet the tight deadlines. It was a bureaucratically designed piece of legislation, mechanical and uninspiring, perhaps reminiscent of a much earlier era. Innovation and responsiveness to contemporary issues and concerns are largely absent. It does allow for significant local control of most state-type matters on traditional Westminster lines, although with reserved powers designed to maintain the threat of Commonwealth intervention.

The Act allows virtually no scope for the implementation of further constitutional development without the concurrence of the Federal Government and Parliament. Although the Territory Government has sought further changes, in particular by way of the extension of its powers into the remaining state-type matters not yet transferred, little progress has been made. The negotiations have largely been carried out in private between Territory Ministers and Federal Ministers, although several years ago the broad parameters of the Territory’s claim were incorporated in the published document *Full Self-Government* (Northern Territory 1989). Almost no progress has been made with those proposals due to the lack of firm direction from the Commonwealth.

Despite this lack of progress, the period of the 1980s has been one of consolidation of the powers of self-government and the acceptance by all other Australian Governments of the existence of the Northern Territory in its own right as a permanent fixture of the Australian constitutional landscape. In this early settling-in period, little enthusiasm was indicated for further progression towards statehood, although all major political parties maintained general support for statehood as an eventual objective.

After 1985, the deteriorating financial relationship between the Territory and the Commonwealth began to provide more impetus to moves for further legal protection to the position of the Territory. The Northern Territory was gradually brought within the same financial arrangements as apply to the States, but without the constitutional
guarantees applicable to the states such as the protection from acquisition of property by the Commonwealth on other than just terms. This, combined with the ever-present threat by a capricious Federal Government to veto any Northern Territory legislation of which it did not approve, brought home to Territorians the tenuous nature of their basic rights compared with other Australians.

This raises considerations extending well beyond mere questions of the transfer of further powers within the existing framework of self-government. Constitutional development involves much broader issues of substance than transfer of powers or even the extension of federal constitutional guarantees. It involves the very nature of the society we wish to see established or maintained. In addition, there is also the important issue of constitutional methodology. When it comes to such basic questions as determining how we are to be governed and what sort of society we want, the means used to achieve resolution of these issues can be as important as the final result in the form of new constitutional provisions. Northern Territorians still do not have those fundamental rights that were stripped in 1911, and although there has been a gradual return of many of those rights, they are not based on constitutional guarantees.

1985 onwards: the Constitutional Development Committee

The third period centres on the work of the Constitutional Development Committee. So far it has operated in tandem with the self-government process. The aim of the process of this third period is that of major constitutional reform in the Territory. It centres on the formulation and acceptance of a new, home-grown Territory constitution. It is a stage that is linked by the terms of reference of the Committee to a possible future grant of statehood, but it is capable of being progressed independently of any such grant.

The Committee appointed by the Legislative Assembly was formed by resolution in 1985. It has always had equal numbers of Country Liberal Party and Australian Labor Party Members, with equality of voting. It is a matter of some pride that despite political differences, the Committee has been able to continue to function reasonably effectively and harmoniously over the years. The limits of staffing and budget have perhaps restricted the Committee’s workload and output somewhat, but considerable progress has been made. The Committee is essentially concerned with community consultation and citizens’ participation in the process of change. The central task is to prepare a draft new constitution for submission to the Legislative Assembly. The Committee, however, only sees this as the first stage; it envisages that there will be three stages in adopting the new constitution. The first stage is to prepare a Committee report, which will include a draft constitution, for presentation to the Legislative Assembly. Options, where necessary, are to be included. To assist in this task, the Committee has developed a number of discussion and information papers relating to a proposed contents of a Northern Territory constitution and the methodology for adopting it.

The second stage is to put the draft constitution before a Territory Constitutional Convention, which would be established by the Legislative Assembly and which would include broad representation from the Northern Territory community. The work of this convention would be the development and adoption of a proposed constitution for submission to a Northern Territory referendum.
The convention is the most important and crucial stage of the whole constitutional development process, and its composition and method of appointment of members are still to be resolved, with a variety of options under consideration. The convention would be charged with the work of preparing a final document. It would have regard to the work of the Committee as well as other available sources of information, and it would take into account those issues which are pertinent and reflect modern day Northern Territory society.

The last stage is to put the proposed constitution of the Northern Territory as adopted by the convention to a referendum of Northern Territory electors. Holding such a referendum is important, not only to remove local fears, but also to convince both Federal and State politicians and the general Australian population of the desire, strength and worthiness of the Territory case. It would give legitimacy to the Northern Territory approach to the Federal Government to implement the constitution as the centrepiece of major constitutional reform. If this was to be done in conjunction with a grant of statehood, it would also necessitate the negotiation of the terms and conditions of that grant.

In my opinion, the Northern Territory has proved that it has the ability, the maturity and the fortitude to develop its own constitution. However, the Northern Territory remains a creature of the Commonwealth and has only limited grant of self-government. It does not have an entrenched constitutional status and its citizens remain deprived of the democratic and civil rights taken for granted by the citizens of the States.

The process of constitutional evolution is not complete and the ultimate objective will be achieved only if the Territory is placed on the basis of constitutional equality, in the same position as other Australian States in the federal system. We have a unique opportunity here to develop a modern constitution that may well provide thought for reform elsewhere in Australia. The process which we have begun will be the most exhaustive, most comprehensive and (I submit) most democratic basis of any constitution in Australia.

At no other time in the history of Australia has a community been given the opportunity to be involved and to be part of such a momentous process. These proceedings are a part of this process, and I trust that what we are doing here in the Northern Territory will ultimately have a substantial impact on the nature of the Australian federal system and on the principles that are at the foundation of the Australian Constitution.

**Reference**

CONSTITUTIONS FOR ALL AUSTRALIANS

Miss Lois O'Donoghue CBE AM
Chairperson, Aboriginal and Torres Strait Islander Commission

Issues of indigenous rights are becoming prominent in contemporary discussion about constitutional reform. There is growing recognition that the current constitutions of Australia, both Commonwealth and State, are not constitutions for all Australians and there needs to be reform to make them so.

This paper, 'Constitutions for All Australians' attempts to put these issues in the broader context of constitution-making. It expresses a vision of the future and I hope the experts can give it constitutional form and authority. It represents the thoughts of a layperson on developments which would make constitutions more relevant to contemporary society. Certainly, it comes from an indigenous perspective.

We should not be complacent about our status as a parliamentary democracy or indeed one in which democratic rights are upheld. For many Australians, particularly indigenous Australians, the framework of law provided by constitutional government has been as much a chain imprisoning Australia to the past, as a framework for equality or a vision for the future.

We should be looking at how constitutions can provide a framework of law which improves Australia's democracy, which fosters equity, and which provides the basis for the recognition and protection of rights of minorities and in particular the special position of the indigenous peoples of Australia. We should be questioning how the political participation of minorities can be reconciled with the rhetoric of democracy so that one vote one value does not become the tyranny of the majority.

While I do not want to say too much about the republican debate, and certainly not to take sides, I raise it because it is indicative of a mood which seeks redefinition of ourselves as a nation. It parallels the quest by many Aboriginal peoples for proper recognition as a part of the Australian nation.

It is an undeniable truth that the Australian Constitution was framed in an environment which discriminated on the basis of race. The consequence for Aboriginal people was not just non recognition but negative recognition. We were specifically excluded from Section 51(26) of the Constitution – commonly known as the race power. We were ignored for the purposes of determining the population of Australia. There were no other references.

It was not until the constitutional change flowing from the 1967 referendum that the obnoxious clause 'other than the Aboriginal race in any State' was deleted from the
race power. Now the Federal Parliament can make laws for the people of any race for whom it is deemed necessary to make special laws – including Aboriginals.

However by the time of the referendum the world had changed. To make laws based on race was increasingly recognised both internationally and within Australia as anomalous, outmoded and even sinister. It is the irony for Aboriginal Australia that the race power became the foundation for the acceptance by the Australian government of a special responsibility for Aboriginal peoples and Torres Strait Islanders.

Since that time the appropriateness of basing the Commonwealth’s responsibilities with respect to Aboriginal peoples on the race power has continued to be questioned. The Constitutional Commission of 1988 recommended its replacement by a new paragraph which would give the Federal Parliament the express powers to make laws with respect to the indigenous inhabitants of Australia. It suggested that the recommendation was made largely because the nation as a whole has a responsibility for Aboriginals and Torres Strait Islanders and it would remove some of the uncertainty about the extent of the present power. It was suggested it would retain the spirit and make explicit the meaning of the alteration made in 1967 which Justice Brennan described as ‘an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and the primary object of the power is beneficial’ (Constitutional Commission 1988, 718)

The race power extended a shadow of racism across Australian society which had been inherent since the birth of federation. It helped make what should have been an aberration in the minds of men into a legally based fixture in the social and legal landscape. It retarded the development of an equitable society for all Australians.

While the High Court has searched and probably found a pathway to make the race power relevant to the more enlightened attitudes of today, at its core such a power – defined by race – has no place in contemporary Australia. Yet it is so difficult to change. It is the problem of constitutions that they are difficult to amend – even to correct a wrong.

I would like to mention another issue raised in the report of the Constitutional Commission in 1988. It relates to the possibility of a new preamble to the constitution. I would have to say that the recommendation made in its report not to proceed in this direction is one that would continue to lock us into the past rather than open doors to a better future. While the Commission recognised the significance of the inclusion of fundamental sentiments and the symbolic importance it considered there were real problems in what to say and how to say it and that it was undesirable to graft a preamble onto the constitution 90 years after federation. I do not agree.

In my view a contemporary constitution must look to the aspirations and basis of our nationhood at the end of the twentieth century not at its beginning. When I spoke to the press club at the 25th anniversary of the 1967 referendum earlier this year I spoke of the aspirations of Aboriginal peoples for recognition of our status as the first Australians. I spoke also of the need to redefine the basis of the authority of our constitution as one which was derived from the people including the Aboriginal peoples of Australia. It is in my view fundamental to reconciliation that not only
should, what I term, negative recognition be rejected but so too should non recognition.

The Aboriginal peoples of Australia do have a special place in Australian society and it needs to be specifically recognised. The deliberations of the United Nations and its Working Party on Indigenous Rights specifically underpin this sentiment. It was of course a great moment for Aboriginal peoples and Australia when the High Court in the Mabo case rejected the doctrine of terra nullius. For me however it was tempered by a lingering disappointment; an anger, also, that Aboriginal people had been dispossessed at law for so long; disappointment that recognition of indigenous rights in law had not been addressed in our constitutional framework.

There is something intrinsically conservative about constitution making. Partly it is due to the need to seek agreement and to accommodate the interests of its constituent parts. Whatever our vision, someone in the end will have to draft the words to capture the spirit of our nationhood and set down the clauses that govern the relationships between peoples.

Indigenous minorities are in a precarious position in a democratic system of government. The unique cultural background and values of Aboriginal peoples often do not sit easily with mainstream or majority aspirations. However, the issue of protection of rights including special rights, the basis for political participation and the scope for self-determination are matters which should not be skirted.

Australia is something of an exception amongst western democracies in terms of formal recognition of its indigenous peoples within its framework of government. There is no Constitution Act such as has applied in Canada from 1867 which gave its federal government legislative authority with respect to Indians and Indian lands. There are no treaties such as the Treaty of Waitangi in New Zealand or those applying in the United States and Canada.

Whatever the merits or shortcomings of these treaties the process has, I think, brought about an increased consciousness in those countries compared with Australia that indigenous peoples need to be included formally in the structures of government. In Canada, for example, there has been an active debate on Aboriginal constitutional issues for many years. The right to Aboriginal self-government has been a central element of this debate reflecting two essential principles of that society: that self-government in its various forms is a basic element of that democracy and the unique place of Aboriginal peoples in that society. The principles are equally relevant to Australia; but Australia must find its own way from a different historical position. We must have an open, frank, and mature debate about forms of Aboriginal self-government in Australia.

There is a number of influences which will help enlighten attitudes and inform the constitutional reform process. International developments are important. The Working Group on Indigenous Populations, which operates under the auspices of the United Nations Sub-Commission on the prevention of discrimination and protection of minorities is emerging as a standard setting body. An International Labour Organisation Convention, ILO 169 which seeks to set out the rights of indigenous and tribal people, and the responsibilities of governments towards those peoples is currently under consideration by the Australian Government. Within Australia the Royal Commission into Aboriginal Deaths in Custody has also been, and continues to
be, a powerful influence emphasising the importance of empowerment and self-determination if the unequal position in which Aboriginal peoples find themselves is to be redressed.

The Commonwealth Constitution is of course not the only constitution in Australia. The States too have written constitutions and the Northern Territory is also proceeding in this direction. They, too, must grapple with the dilemma of creating a document which provides the structure and process of government and, a stable and equitable framework which is adaptable to social change.

Unlike the Commonwealth Constitution, State Constitutions are generally capable of change by the respective State Parliaments – a much easier process than bringing about change at the Commonwealth level. They evolved significantly in the mid and late 19th century with the development of responsible government and confer a general power of law-making subject to the Australian Constitution.

Local government authority is conferred largely through State constitutions and the nature and extent of their powers, authorities and duties are subject to the laws of the States. Meeting the needs of all Australians through adaptation of existing processes which may foster self-determination through forms of self-government are matters which need to become more central to our thinking – just as one hundred years ago the quest of white Australia was for responsible government.

These are particularly significant matters for the Northern Territory with its large Aboriginal population. The framework for its democracy needs to provide for recognition, participation and equity if it is to provide a legitimate source of authority for its Parliament. The Northern Territory recently issued a discussion paper, Recognition of Aboriginal Customary Law (SCCD 1992) which sets the scene admirably and its support of this conference is I think a very positive development which needs to be acknowledged.

I believe that constitutional reform can play a part in the process of reconciliation. I am aware that bodies such as the Constitutional Centenary Foundation and the Council for Aboriginal Reconciliation, of which I am a member, are looking towards the centenary of federation as a target for change.

I am however also mindful of the hazards involved. It would disappoint me very much if constitutional reform became something of a catch cry where slogans could substitute for substance and where effort was diverted from practical programs to improve the lot of Aboriginal peoples and Torres Strait Islanders.

I am, however, optimistic that if we as Australians can approach the reform process with resolve in an open and honest way we can truly achieve constitutions for all Australians – constitutions which provide a legal framework which recognises the special place of Aboriginal peoples in Australian society. Australians have rejected the negative recognition which stigmatised our Constitution at federation; we need to move beyond the non-recognition of the present. The special place of indigenous Australians must be secured in the future within our constitutions, making them constitutions truly for all Australians.
References

TOWARDS A TERRITORY CONSTITUTION

Mr Brian Ede MLA
Leader of the Opposition

My involvement with the Sessional Committee on Constitutional Development goes back to 1986 when we were going through the whole process of constitutional reform. The committee’s first job was to look at the various State Constitutions and the Australia Act and basically do a cut and paste job on those parts it thought were relevant to the Northern Territory scene. But the most important issue that exercised the minds of the Committee at that time was whether there should be a constitutional right of the Queen to vote in Parliament. It was generally agreed that the Queen had the right to come in and sit down in our Parliament and to speak, but did she have the right to vote in divisions? The thought of the Queen being used by a Chief Minister or Leader of the Opposition who thought that they had her vote in their pocket stirred the Committee for some time, before eventually it was decided that she would probably have to vote for Her Majesty’s government. So, it dissolved into a party line brawl. However, our new Chief Minister, Steve Hatton MLA, took a fairly enlightened view of constitutional development. It was eventually decided that it not form part of a Northern Territory constitution.

Another aspect to the process of constitutional development, I remember, was inherent suspicion and opposition from Aboriginal people. This was based, to a large extent, on the fear that the Federal Government might hand over the Northern Territory Aboriginal Land Rights Acts and control of sacred sights to the Northern Territory Government. In the urban and predominantly non-Aboriginal areas of the Territory, constitutional development can best be categorised as total indifference to the whole subject: an attitude of “wait and see”.

The Committee has conducted quite a number of public hearings and meetings throughout the Territory – both in bush communities and urban areas. There is a significant difference between the two. The visits to the bush communities were very well attended and people wanted to discuss the issues. In some of the communities the Committee was able to do this with the benefit of interpreters, but in others it was just a matter of sitting down and discussing the issues over and over again, trying to do the best we could with the concept and practicalities of constitutional reform.

The urban areas were quite different. For example, the committee would call a meeting for the Friday night, down at the town hall, and four or five people would turn up. Somebody might have a couple of notes down on a written submission and that was basically it. The meeting would be over in an hour. In terms of feedback, it was not nearly as substantial as the meetings in the bush communities.
However, in spite of those problems, it was an important part of the process of identifying Northern Territory constitutional issues; the process of constitutional development is nearly as important as the final result. It is a form of state and nation building. It is a matter of working together to identify issues that can be agreed upon and negotiating through differences. In order for that to occur there needs to be a degree of understanding as to the different types of cultures that abound in the Northern Territory. It also means trying to understand the very real fear that non-Aboriginal people have about acknowledging Aboriginal rights and demands.

In other countries people have grown up with treaties set in place in the eighteenth and nineteenth centuries. The treaties protected indigenous rights. In Australia the concept of working with treaties or negotiating agreements is very new. Another aspect is the different perspectives of Aboriginal and non-Aboriginal people regarding the term ‘land’. Non-Aborigines see land as a wealth generator, not just in the Northern Territory but throughout Australia.

There is also a genuine mistrust of the term ‘sacred site’. There are differing perceptions as to what is meant by a sacred site and how it should be protected. For the Aboriginal people it is a place of great significance requiring a degree of protection, whereas for the non-Aboriginals it may not be of great significance and if it was so, it would require a great deal of evidence to demonstrate or prove that importance. These conflicts are based primarily on a lack of understanding each other’s culture, values and priorities.

Non-Aboriginal people have to develop an understanding of Aboriginal people’s desire to keep their culture. For many Aboriginal people, in this rapidly changing world – in a socio-political climate where people do not have a great deal of control over their own lives – culture gives meaning and security to their lives and land. Aboriginal and non-Aboriginal people have to reach an understanding and to confront the fears that each other has, in order to effectively deal with them.

This is a political process and politics, by its nature, is a fairly divisive occupation, particularly when there is a conflict of cultures. When people are reconciling differences and compromising often a petty difference will blow the whole thing up again. In mature societies people should argue on the basis of an accurate appreciation of facts, values and reality. Unfortunately in the Territory as yet facts are often ignored, power and money are the highest values, and stereotyping passes for reality.

Nevertheless, through a process of protracted discussion and negotiation in light of the Northern Territory’s needs and aspirations, a constitution will be written, and both sides of Northern Territory politics assume it will form the legitimate basis for statehood.

In dealing with these issues what should go in a Northern Territory constitution? Although not an exhaustive list, a Northern Territory constitution must include the entrenchment of basic human rights and there must be certain additional principles to underpin Aboriginal people’s need for security over their land and their culture. Aboriginal people will find it very difficult to become part of the process until they decide that entrenchment, in a Territory constitution, of these issues is better than leaving them at the political whim of a political party in Canberra, which may be totally antagonistic to the objectives that they are trying to pursue.
The second area of entrenchment in terms of Aboriginal land and culture will depend on all Northern Territorians agreeing to the process of a referendum to change a Territory constitution. A crude 51% option could completely disempower Aborigines and is just not good enough.

A Territory constitution should also establish a series of laws which are similar to the organic laws that are written into the Papua New Guinea constitution. These laws which will flesh out in more detail both the principles of human rights and the laws in relation to Aboriginal land and culture and would be entrenched beyond the ability of a simple parliamentary majority to amend them.

Apart from this, the Northern Territory, as a people, is ready for statehood, but the question remains as to whether the States will accept the Territory as a state. Full statehood also means full Senate representation. It is a novel situation about having twelve Senators for the Northern Territory. A better way around the problem would be to remove the nexus so that in fact there are six from each State. The Northern Territory cannot accept a second class form of statehood. If the Territory accepts the present form of representation I believe there are implications that will apply in all areas and that is something that may return to haunt us, particularly when the lawyers decide that they want to make their own interpretation of the Constitution.

The Constitutional Development Committee has, up to this stage done very well. It is not often that people in the Aboriginal communities see half a dozen politicians from both sides of politics descend on a community outside an election period. It is probably the first time in Territory history. The Committee’s approach has greatly assisted some of the urban members of the Northern Territory Parliament to look at those communities and be able to assess the strength of feeling from Aboriginal people in terms of their desires in preserving their culture and their land. One very important issue that came from these visits was the perception that Aboriginal people were able to relate that a constitution is something which fitted in with their beliefs of Aboriginal Law, that is, Aboriginal law is unchanged from time immemorial and passing on into a determinate future unchanged. The Constitution is the closest to their concept of law; that is, it is not an ordinary law of the Northern Territory.

Further bush work is also need to get a greater input from Aboriginal organisations. Even if these organisation do not agree without the stated aims of the Committee, the necessity is to try and get Aboriginal organisations involved in the debate.

The town meetings have failed and urban discussion on the whole constitutional process is lagging. Politicians have got to find effective and innovative ways to raise the issues involving the community whether it is through community groups or just going down to the markets on the weekend, to the shopping centres or late night shopping.

However the starting point in this whole process is to get agreement from all cross-sections of Northern Territory society on the development of a constitution, and eventually, statehood. What is needed (and what I term as ‘win win’ scenarios for the different power centres in Territory politics) is to present clearly identified scenarios and show people where each of the different aspects can be of benefit to them. It should be possible to convince people that they can be involved. If the different groups have enough power and interest to take part in that process, people can assess and achieve those gains by allowing other people to obtain gains as well.
In conclusion, I feel confident and hopeful about the process. At the moment I must admit that there are more people interested in talking about the things that divide us, rather than things that hold us together as Territorians. There have been recent political statements and antics to do with Uluru and administrative matters relating to service delivery, which have left me with a particular lack of confidence in the process for the short term. This in turn widens the gap between the people and develops a strong desire not to have anything to do with the Northern Territory government in any of its manifestations.

But these issues can be resolved. We can build faith and trust and it is possible to go forward. However, in the longer run, if we are prepared to say ‘Well, let’s look for what we can all gain from this process’ and attempt to use it as a means to a part of the process of coming together, part of defining our relationships, we as Territorians can all enjoy our place under the sun.
THE AUSTRALIAN CONSTITUTION IN THE 1990s: CONTEXT AND AGENDA FOR CHANGE

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Introduction

This paper aims to:

1. put Australia’s Constitution into some comparative context for the 1990s. This will be a period of quite extraordinary constitutional innovations and change;

2. point to some areas where change is desirable, and some where it is not;

3. relate this where applicable to the Northern Territory. In particular, I’ll be suggesting we need more innovative institutional arrangements for granting Northern Territory statehood and accommodating Aboriginal self-determination.

Contemporary Constitutional Developments

We live in the time of constitutional rethinking and restructuring. In Europe, nation states which have previously waged wars against one another are moving, albeit with some uncertainty, towards closer political as well as economic union. The result will probably be a new kind of confederal, not federal, association but perhaps with variation among nations as to their stake and status within this new Europe. In the domain of the failed Soviet Union, some association, or even associations, of at least some of the independent republics seems inevitable, although what form the present Commonwealth of Independent States may finally take, if it survives, is unclear.

We see in these examples of European integration and the dissolution of the Soviet Union a number of trends which suggest some of the political givens for institutional design and constitution making in the 1990s. These are:

1. the failure of empire and centralised rule over large territories and agglomerations of peoples, in this instance with different political histories, cultures and aspirations; yet

2. the inadequacy of nation states or small autonomous republics to satisfy the economic and political requirements of modern peoples; and

3. the need for creative institutional design and constitutional thinking: to preserve those aspects of nations states or independent republics which are appropriate,
while adapting old arrangements, - eg confederal and federal - or inventing new ones to enable decentralised transnational associations.

The trend away from traditional institutional arrangements within nation states, be they unitary or federal, is also apparent. The move towards transnational associations within Europe and, increasingly, North America, has a significant, and at this point unclear, impact on national autonomy. This is especially so for distinct regions with some existing institutional basis, such as Scotland within the United Kingdom or Quebec within Canada. It is reasonable to expect less threat from, and less paranoia about, the national majority and the national government, and perhaps greater scope for preserving the differences of sub-national quasi-autonomous entities. It is also reasonable to expect that a national government is weakened by membership in a transnational association and this is shown by Britain's baulking at closer integration with the European Community.

Presumably, as well, participating in new transnational associations changes old mindsets about national unity and sub-national minorities. The developments in Spain towards regionalisation and in Belgium of the accommodation of long-standing ethnically-based divisions have both been assisted by the incorporation of these two countries within the larger European Community. The trend within, as among nations, is therefore towards greater constitutional complexity and variability to accommodate cultural diversity or to address new and old economics and political aspirations, interests and needs. The real world is moving ahead of established models and conceptions of institutional design and constitution making.

Germany is a good example of a modern nation taking on more complex arrangements of government. Besides a three-tier system of domestic government with a federal system and local government stronger than ours, Germany is leading the drive for closer European integration. Arguably it should have used an additional and specially devised institutional arrangement for unification, instead of incorporating the German Democratic Republic (East Germany) on the basis of smaller traditional Lander which had no institutional base. The method of incorporation destroyed at one stroke the old GDR centralised state infrastructure and economy which was its purpose, but at a price that is only now becoming apparent. A better tailored arrangement - a fifth level of government - might have worked better.

Canada is another example of a country embracing, to a point of almost being swamped by, constitutional change. It deserves special attention because it is a 'most similar' country to Australia. In the late 1980s, Canada forged a free trade association with the USA to safeguard and extend its dominant trading ties when the USA seemed bent on becoming more protectionist. That required a substantial marshalling of national power for what is inevitably a de-nationalising association. With subsequent inclusion of Mexico in the North American Free Trade Agreement (NAFTA), Canada will be part of an even larger trade bloc. At the same time, Canada has been tortuously working out a complex series of domestic constitutional adjustments to recognise the special status of Quebec as the provincial homeland of Canada's Francophone co-founding people. As part of winning support from the other provinces for a constitutional settlement with Quebec, and to alleviate regional alienation in the western provinces, Canada proposed to further restrict central powers and boost those of the provinces. In my view, too much so because Canada is already highly decentralised and potentially quite fragile.
I agree with the proposed principle of compensating provinces which opt to provide their own programs which are of sufficient quality instead of participating in share-cost Canadian programs in areas of provincial jurisdiction. I do not agree with the proposals to extend exclusive provincial powers over cultural matters within provinces, tourism, housing, recreation and urban affairs. In another key respect which I shall return to, Canada proposed to constitutionalise the Inherent Right of its Aboriginal Peoples to self-government. All of this was to no avail however because the whole complicated package of proposals agreed to by political elites, known as the Charlottetown Accord, was voted down by the Canadian people in 1992 (Russell 1993).

The trend internationally and within comparable countries is towards more complex, multi-layer structures of government. Countries are adding trans national arrangements and also adjusting domestic structures to better accommodate diverse regions and aspirations of Aboriginal people.

What about Australia? What are our needs and capacities for institutional innovation and constitutional redesign? What can we learn from international developments and comparable countries? How does this relate to the Northern Territory?

There is one view that we are all right: constitutionally, if not economically, Australia remains the lucky country. So, why meddle with something that has worked pretty well? In any case, the disillusioned constitution reformers will chip in; Australian voters are conservative or stupid, and will invariably reject proposals for change. Australia seems destined to remain, in this view, ‘constitutionally, the frozen continent’, as Geoffrey Sawer put it (Sawer 1967, 206).

Of course that claim is incorrect. The Australian Constitution is regularly being adjusted, albeit in a haphazard way as cases come to it, by the High Court. The recent decision on political advertising in which the High Court found a basic right to free political speech in the Constitution is an example (Australian Capital Television v Commonwealth (1992)).

My view is that, while Australia, by and large, has been a lucky country constitutionally, we have become too narrowly set in our constitutional thinking and ways. I acknowledge the considerable constitutional adjustment and change that has occurred, covertly through judicial review, and practically through the changing balance of inter-governmental politics and arrangement. But the public agenda and conceptual horizon are too narrow and constrained for this decade of constitutional review.

There are at least three major issues that should be addressed and will require creative constitutional design. These issues are dealt with further on in the paper which relates to closer political association with New Zealand, statehood for the Northern Territory, and self-determination for Aboriginal people.

Let me first deal with three other key issues which are usually flagged for consideration:

- the head of state (a proxy for republicanism);
- federalism; and
- a bill of rights.
First of all I should make clear that in my view there is little about the existing Constitution that I would want to change. One exception is recasting the Executive chapter to say what it means. This is more of a formal than a real problem except in crisis. But crises do occur as in 1975, and the existing provisions are deficient.

Briefly, the Australian Constitution is in fact, but not in its text, a hybrid of law and convention. Some parts of the text mean what they say, eg Chapter I on the Parliament; but other parts of the text obviously do not — eg Chapter II on the Executive. Here we have, if we read them literally, quite outrageous claims of monarchic absolutism. For the Executive then, conventions should rule over what is written in the text. The problem arises from ill-informed lawyers who describe these as ‘mere conventions’ that are trumped by law or what is written down. We have a problem with the Executive chapter of the Constitution because, with the undue influence of lawyers, we are unable to appreciate and operate our hybrid constitution. So better to specify what the Executive institutions and rules really are.

Besides the well-known problems with specifying the viceregal office and defining the prerogative power, there is the additional emotive issue of symbolism. The head of state is currently a surrogate for the Queen, attachment for whom is alive in traditional quarters, if declining overall. Walter Bagehot (1872), in his classic exposition of the English Constitution more than 100 years ago, explained the genius of the English system in retaining the symbols of monarchy for the ignorant masses which disguised an efficient, essentially republican, system of executive government. Australians have romanticised the symbols of monarchy, but also changed them. Among Australia’s recent governors-general, Paul Hasluck saw himself as simply a surrogate for the Queen; Ninian Stephen mainly represented the Australian people to themselves; while Bill Hayden is a quiescent republican. While ever the symbolic character of Australia’s head of state is ambiguous, it will be difficult to define.

**Federalism**

Until fairly recently, many Australian commentators, progressives and Laborites advocated either the abolition of federalism or substantial centralisation of powers in Canberra for example, Bob Hawke (1979) in his Boyer lecture. Now, however, there is widespread tolerance, and increasing preference, for federalism. Hawke as Prime Minister and a majority of Labor Premiers launched the recent Special Premiers Conference process which was a milestone in receiving, and practically improving, inter-governmental arrangements. There is a long way to go, but a positive start has been made.

Hawke’s and Labor’s reconciliation with federalism, however, was by way of practical acceptance of an established fact: if we’re stuck with it, as indeed we are, let’s try to make it work better. Others like the Business Council of Australia, call for levelling of government structures along with everything else — except their own corporate positions of privilege — and reduction of the States to administrative agencies.

My own view, and I think increasingly that of others, is that federalism is positively beneficial for reasons of enhanced democratic participation by the Australian people, greater institutional responsiveness to complex policy needs, and institutional checks
on government which protect rights and force compromise and consensus in policies. If we didn’t have a federal system we would be now inventing one. The world is moving towards greater institutional complexity – more levels of government to deal with policy issues at local, regional, national and international levels. We already have the core part in federalism, so let’s keep it.

A Bill of Rights for Australia

Towards the top of the agenda of items for serious consideration in the 1990s – at least for the Sydney Constitution Centenary Conference in April 1991 – was the issue of protection of rights. How well are rights protected in Australia? Do we need a bill of rights? If so, what should be in it?

This is an issue which affects the Northern Territory since a national bill of rights is a nationalising instrument. As well, a bill of rights is a judicialising instrument, taking a range of major policy issues, from abortion to retiring ages and police practices, out of the parliamentary political area and into the courts. And of course, it is an issue for Aboriginal people.

A bill of rights is partly with us by implication, according to the High Court. The recent decision overruling the ban on political advertising read in or out of the Constitution an implied right to free political speech. ‘A Government of Laws and not of Men’ means realistically for the present men and women of the High Court giving laws a help along; if not actively engaging in their conception, then inducing and heralding their birth. With judges like Justice Toohey and his colleagues, do we need a bill of rights?

Political Association with New Zealand

This is clearly an option but, in my view, one worth serious exploration and, I hope, eventual consummation. If Australia is feeling the heat in the emerging international economic order with, unlike Canada or Britain, having no obvious trade block to join, New Zealand is more at risk. Closer economic relations have proceeded smoothly, although the pay-offs are limited because there is limited complementarity and inter-dependency in traded goods and limited scale even in our pooled national markets. Certainly much less than Canada’s stake in NAFTA or Britain’s in Europe.

But here is a local transnational agreement on which we can cut our teeth. The political cultures are so similar that the challenges of combining a small unitary state with a larger federal one in a transnational association that is satisfactory to both is achievable. The experience would shift our institutional horizons beyond the Australian continent where, increasingly in the 21st century, we will need to operate.

My remaining two examples of Northern Territory statehood, and self-determination for Aboriginal peoples require, in my view, expanding our constitutional horizons within Australia.

Statehood for the Northern Territory

I am all in favour of Northern Territory statehood. It seems to me inevitable that the Territory will achieve statehood – the issues are when and on what terms. In working towards firm proposals for a Northern Territory constitution, there needs to be very careful and systematic consideration of details because a constitution is a fundamentally important instrument. The Sessional Committee on Constitutional
Development is leading that process and its series of information and discussion papers evidences a high quality of work.

What I want to do is reflect briefly upon the principles and constraints entailed.

A major constraint is the narrowness of our constitutional thinking: in particular there is an obsession with, and on the part of Northern Territory leaders, a fixation upon equality of sameness with the other states. The Northern Territory is not like other states; it is not equal to the others. It is quite distinct with a tiny population, enormous relatively underdeveloped geographic area, a large Aboriginal population, and extensive Aboriginal lands.

The principle that should guide us here is an old one stated by Aristotle: ‘Give equal things to those who are equal; but unequal things to unequals. Translating this axiom of distributive justice to the reality of institutional design, we should not make the Northern Territory the same as other states. I realise of course that other states are not equal, but Tasmania, the smallest, was a founding state. The Northern Territory is so different as to be in a class of its own. It is unique and special and should be so treated in constitutional matters.

Applying the above principle, the consequences include:

1. having special status and recognised claims on national revenue for development and equalisation;

2. not having equal representation in the Senate — that would be a silly claim given current State Senate representation. Nor is it realistic to expect Australians to change the nexus clause just to suit the Northern Territory, although it would be beneficial if that restriction were broken.

So, without going into further details, I believe the Northern Territory’s case and preparedness for statehood would be facilitated by working out a unique constitutional arrangement appropriate for its special character.

**Aboriginal Self-Determination**

The current position of Northern Territory government leaders, as I understand it, is a willingness to guarantee special provisions for Aboriginal people regarding land rights, customary law, and so on by entrenchment within the Northern Territory constitution. As well, Aboriginal Territorians would have a major stake in the democratic political process of Northern Australia (if that is what the new state is to be called) as they do in the current arrangements for self-government.

In my view, this is not enough. I would be very surprised if Aboriginal Territorians did not claim more. Nor do I believe that Australians through their national government (the national government has a duty and a right to be involved) should accept Northern Territory statehood on any basis that is not satisfactory to Northern Territory Aboriginal people.

The appropriate step is not to hand back the Commonwealth Aboriginal Land Rights Act to the Northern Territory government but to Northern Territory Aboriginal people. If they, the Northern Territory Aboriginal people, wish to merge their basic interest and land rights with other Territorians in a state constitutional arrangement, then let them negotiate those guarantees. If, on the other hand, they want to retain
sovereignty over their own land and their affairs they should be able to choose that along with the appropriate institutional arrangements that would be entailed. So, in principle, we need to acknowledge the right of Australian Aboriginal people in Australia, but especially in the Northern Territory, to self-determination.

Once that principle is accepted, the Northern Territory will be an exciting and innovative place for new constitutional arrangements suitable to its unique status as a state and as a homeland, more intact than in the rest of Australia, with appropriate institutions of self-determination for its Aboriginal people. Aboriginal people, Territorians and Australians should not expect or settle for less in working out the Territory’s new constitution.

References

THE CONTENTS OF CONSTITUTIONS

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This paper is about the subject matter of constitutions; what is put in them and how that is expressed. I accept that generalisations on this subject are risky, the best constitutions tend in fact to be highly pragmatic documents based on compromisable consensus and tailored to what is seen to be the needs and experiences of the society for which they are designed. A lot of borrowing goes on between constitutional models, but, in the end as Bernard Narakobi notes (Chapter 6), it is important for each constitution to be ‘home grown’.

Nevertheless some features are common to most constitutions. One such feature is their effect. Whatever other function a constitution may perform, it gives a special status to the matters included in it. This is true even in the United Kingdom where as you know there is no formal constitution, but certain rules or instruments are accepted as having constitutional status, and venerated for that reason. Further, a constitution which is more difficult to amend than the ordinary law (and that is the case with most constitutions) also gives extra protection to the subject matter. These two functions of constitutions point to the obvious, that constitutions should contain the most important and fundamental rules to provide a framework for the ongoing operation of government in that society. On the basis of that, it is possible to divide the content of constitutions into at least three broad potential categories: the first is the source of authority for the constitution and who says it is fundamental and overrides all other laws. The second is that group of provisions dealing with the institutions and processes of government defining that term widely to include the courts and the amending process. The third category is that in which the constitution sets out some of the basic values on which the society is base. I will return to these later.

There are two other sets of considerations which are likely to have an influence on the content of constitutions. The first concerns the method of enforcement of a constitution and the second the method of amendment. Let me just briefly dwell on each of those.

As far as enforcement is concerned there is no single way to enforce a constitution and no requirement for the same enforcement procedure to apply to the whole of a constitution. Many constitutions have provisions that are set out only as guiding principles with no intention that they be enforced at all. Many constitutional provisions are intended to be enforced only through the political process. Provisions dealing with the relations between Houses of Parliament tend to fall into that
category. Some constitutions have what look like enforceable provisions but which really turn out to be unenforceable in practice.

The traditional and most common mechanism for enforcement of a constitution in this and many other countries is through the courts. This sometimes inhibits the inclusion of some material in constitutions, on the ground that that particular subject matter is inappropriate for judicial interpretation and review. This is one of the familiar arguments mounted against constitutional guarantees of civil and political rights for example. I do not necessarily accept that it is a convincing one given the role that the courts have been expected to play in the evolution of the Common Law over the centuries, but, nevertheless it is an argument that is often heard.

One solution to that problem of course is to provide for the enforcement of provisions deemed unsuitable for judicial review by some other means. This is a solution that is increasingly being tried in other countries as they experiment with the content of constitutions. There is interest in some quarters for example, in the inclusion in constitutions of social and economic rights to employment, security, shelter, education, all of which are inherently non-justiciable. Similarly, there is some pressure for the inclusion of environmental rights which also are not the sorts of matters with which courts can deal.

There are important questions where the principles of this kind are appropriate for inclusion in constitutions, whatever method of enforcement is used. On the one hand the consideration that suggest they should go in, is that they may represent fundamental values to which a society is committed or wishes to say that it is committed. But, on the other hand, the inclusion in a constitution of principles which are not only unenforceable but may also be unattainable, may risk bringing the rest of the document into disrepute.

Let me move briefly to the considerations that arise from the amendment process. One effective constitution which is entrenched or subject to a special amending procedure will be to protect its subject matter. There is a wide range of options for constitutional entrenchment, some of which offer better protection than others. The one with which Australians are most familiar is the referendum which under our procedures requires a proposed amendment to be passed first by the Commonwealth parliament and then by the people with double majorities. There used to be a tendency in Australia to denigrate the referendum process, but I suspect that time has passed, and, we are seeing instead the referendum idea catching on around the world with referendums in France and New Zealand in September 1992, and another major referendum in Canada in late 1992.

Nevertheless for whatever reason, our constitutional amendment process has so far offered a fairly rigid mechanism for constitutional change and there are other models which are more easily triggered which are available. One which is familiar in most State Constitutions is the requirement for special majorities to be obtained in the Parliament. The relevance of entrenchment to the content of constitutions also works in two ways. On the one hand because it gives protection from too ready an amendment. On the other hand, particularly where the Constitution is very hard to amend, considerations of the procedures suggest the need for caution in the inclusion of material that is relatively transitory in nature. Somehow it is necessary to strike a balance between protecting the essentials of the system of government and
entrenching forever the views or perspectives or traditions or values of the framing generation. That problem is aggravated by the inevitable tendency to draft constitutions to deal with today’s or sometimes even yesterday’s problems.

Now, there is another solution to that of course, instead of limiting what you put in the constitution, you might alter your amending procedure to make it more readily used. I met a scholar from the United States recently who was conducting a major survey on the relative rigidity of constitutions around the world, and he had developed a spectrum. There was an optimal spot right in the middle that meant the constitution was able to be amended just enough, and not too much. And, he looked at me sadly and he said: ‘You have got troubles in Australia, your Constitution does not fit there it is too far along the end, it is not sufficiently easily amended.’ I said, ‘What do you suggest?’ and he said: ‘You will have to change your amendment procedure, the referendum procedure will have to go.’ I said, ‘I do not think the Australian people want the referendum procedure to go?’ So he said, ‘Well then, you need more new states.’ That is a special Northern Territory story.

The question of what should go into constitutions, how they should be enforced, how they should be amended and what the relations between all three of those considerations should be, are of current importance, not just in the Northern Territory where of course they are very important, but elsewhere in Australia and in countries around the world. These are issues for most of the Australian States, whether they realise it or not. Most State Constitutions date from the last century. They tend to be a jumble of modern and outdated provisions and a jumble of the fundamentally important and the incredibly minor. Most of them are subject to patchy amending procedures which are not a problem in themselves, but which lack an underlying rationale. These are issues for the Commonwealth also, where as I noted earlier the amending procedure is relatively difficult. The Commonwealth Constitution is not in fact frozen, but has developed considerable flexibility through judicial review (see Galligan, Chapter 10). But also should be noted that it is not without its cost. There has been an unusually vehement degree of criticism of the court in recent times particularly in the wake of Mabo which has served to remind us all again of the very delicate and difficult line which a constitutional court must tread and of the importance of community support for the decisions which a court makes. The court has of course more recently recovered its popularity with its decision in the political broadcasts case.

These questions of the content of constitutions and amendment and so on, are also issues in the most extraordinary number of countries around the world at present: the United Kingdom, Canada, South Africa, eastern and central Europe, wherever major constitutional renewal or change is under way. One example is Canada. In putting together the massive package of constitutional changes which was put to referendum in that country on 26 October 1992, the Canadians came squarely up against the problem of content, partly because it was a very consultative process and everybody wanted their issue to be covered by the constitution in one way or another. If the package had been accepted it would have been a statement of Canadian values at the beginning of the constitution. This could have been used by a court for the purposes of interpretation, but it was also a list of non-justiciable social and economic rights and goals which were intended to guide the political process, a statement of the principle of fiscal equalisation which may indeed be justiciable.
The particular part of the content of constitutions on which I want to focus is the part dealing with the institutions or the process of government. I do so largely because the theme of this section of the proceedings is accountability, and the institutional framework which constitutions provide are most relevant to this. But I choose it also because this is the one set of rules and principles which all or most people would agree are appropriately included in constitutions.

Some of my remarks are prompted by a talk I heard recently in Melbourne on constitutional reform, or probably more accurately anti-constitutional reform. The speaker argued that constitutions should only enshrine process and never outcomes. He did not specify what he meant by process, but clearly he meant the institutional structure of government, the procedures for law making and for governing and for the adjudication of disputes. The exclusion of outcomes was intended to eliminate any constitutional provisions dealing with rights, and with them most opportunity for judicial review.

It was a somewhat irritating talk, not least because of an inconsistency which emerged halfway through to the effect that a right to property was a justifiable exception to this rule of thumb. But as is so often the case on occasions like this it prompted a line, or in my case several lines of thought later on. The first is this: it may be a genuine option at least in theory to establish a political process which makes entrenchment of outcomes unnecessary. That is becoming an increasingly less rational option as international norms develop and are accepted on behalf of Australia. But in any event if we chose ultimately to take that option we would need to give a lot more thought to the design of the political process than we hitherto have done.

The second point is that it is not obvious to me anyway where the line is drawn between process and outcomes in this context. The recent High Court decision on political broadcasts is a useful case in point (Australian Capital Television Pty Ltd and Ors v Commonwealth of Australia (No 2) 19921). In that case the court relied on the principle of representative democracy which is an aspect of the process of the Constitution, to find a constitutional implication in favour of the freedom to communicate political ideas. Arguably all the political rights, to political speech, assembly, association go to making the democratic process effective as much as they also represent substantive values. That talk made me wonder how well our constitutions do in fact deal with institutions and process and this is the point that I now want pursue.

In the Australian constitutional system there are two sets of principles that might be called process in this sense. The first is the principles of parliamentary or responsible government through which representative democracy is achieved in Australia and the second is the principles of federalism. I want to concentrate on that first group which directly affects the constitutions of the states and the territories, as well as of the Commonwealth. My starting point is to ask, what are the main features of the Australian democratic system which we assume and expect in Australia in the 1990s? Then I want to go on to consider briefly how they are reflected in our various constitutions.

Now the main such features which occur to me are the following. First we assume that government ultimately in some mysterious way, derives its authority to govern
from the people. Second, our parliaments are elected and are representative of the people. Not only that, but we now accept by and large that we should have universal suffrage, electoral boundaries drawn roughly on an equal basis by an independent electoral commission, and compulsory voting. We assume the values of preferential voting for most lower houses and a proportional representation in the Senate. Third, we accept that elected parliaments are there to make law, authorise taxation and control expenditure. Fourth, governments hold office because they have the confidence of parliaments and governments are responsible to parliaments individually and collectively. We assume, probably unreasonably, parliamentary procedures which make this practicable.

Next, the head of state acts on the advice of elected governments in all but the most extreme circumstances.

The next proposition: the government operates within the framework of the law, which we can call the rule of law. Unlawful government action can be dealt with in the courts. Increasingly also, we expect grievances against government to be able to be dealt with in other forums as well, including tribunals, commissions, and by the Ombudsman.

Finally we expect a degree of openness in government through the actions of the media, but more particularly in recent times through the influence of freedom of information and legislation and statutory rights to reasons for government decisions. In this respect at least the Australian system of parliamentary government has developed quite differently from that of the United Kingdom where a much greater level of secrecy seems to prevail. I was startled to read a statement during the recent British election campaign that after the campaign a document might be released that would list the names of cabinet committees, and that was a very dangerous step to take. This means that criticisms are based on inference from results rather than knowledge of the process. We at least have moved on from that point, as far as openness in government is concerned.

Now all of those points that I have listed I would describe as process and I have tried to choose only the features which I consider fundamental. But there is precious little discussion of most of these points in the average Australian constitution. Now that is obviously true for those provisions that deal with the powers of the head of state and executive government. It is notorious that our constitutions are very sparse indeed in spelling out the details of those arrangements.

More surprisingly however, is the way in which our constitutions deal with the constitution and role of parliaments. If you pick up any of the constitutions you will usually find that the part of the constitution dealing with the parliament is quite long, and if you cast your eye quickly over it you will also find that it seems to be setting out something in excruciating detail. But most of what it is setting out are not the fundamentals that I have been discussing. You can usually find some sort of statement that says that parliaments are elected, and that is the provision on which the High Court hung its hat in the political broadcast case. But, as for the right to vote, a description of who can vote, the equality of electorates, independent electoral commissions, the voting system or compulsory voting, none of that appears in the Commonwealth Constitution and very little is in the Constitution of most States.
Similarly, the rule of law which we take for granted in this country, but in most constitutions we do very little to protect it. One exception is section 75(5) of the Commonwealth Constitution, which gives the High Court an inherent constitutional jurisdiction to deal with unlawful actions of government, and that section has by now provided the underpinning of the Commonwealth’s administrative law system. But, again for the most part, our constitutions do not have provisions of this kind.

There are reasons for these apparent inadequacies. One reason is tradition. Australia inherited this part of its system of government from the United Kingdom where very little of the above is written down. There are statements in the convention debates where the framers of our Constitution expressly decided not to write some of it down, because they would look foolish. There are problems about articulating some of these rules and I do not underestimate those, particularly the rules dealing with the circumstances in which government loses the confidence of the parliament and so on. And, of course the Australian constitutional systems have evolved since those constitutions were written, and we want to ensure that they continue to evolve and not to stultify them unduly. But, while all of those reasons help to explain why the constitutions take their present forms, they do not necessarily justify their continuing to do so.

Does it matter that constitutions deal with these issues in so cursory a fashion? I would argue yes, for all sorts of reasons, not the least of which is that this is what constitutions are supposed to be about. These are the safeguards that make other safeguards unnecessary. But, there are other reasons as well. One is that the obscurity of the constitutions on all of these points enables genuine uncertainties and ambiguities about the fundamentals of the constitutional systems to be papered over and to persist. A notorious example of that is the powers of the Head of State. Another may be the role of parliament. I am not sure that we all agree on what parliaments are there for. That agreement is encouraged to persist by the way in which we deal with those institutions in our Constitution.

Another reason may be that if the existing rules are obscure, it makes it more difficult to develop the system to meet new challenges; to determine principles, to deal with the proper function of parliament in relation to charges and the user pays system for example; or, to adjust the role of parliament to deal with all the new challenges that are coming for that institution from inter-governmental arrangements, so well chronicled by the Western Australian parliamentary select committee recently.

The accountability of public institutions relies on clear rules and public knowledge of them. Constitutions are not just for lawyers and politicians, they are not even specially for lawyers and politicians. Constitutions are for people, and if the people do not understand them, and do not feel some affinity with them, our system of government is that much weaker. We are fond of saying in this country, that the people are not really interested in constitutional matters, they would not be really interested, it is terribly hard to get them revved up at referendum time and so on. I am not sure that that is so. I think it may be that we just have not approached the issue properly up until now. But, I think it may also have something to do with the character and opaqueness of our constitutions.

The Northern Territory is in a unique position to draft a modern constitution to meet modern needs, and not only would it be relevant here, but throughout Australia.
Endnote

1 Australia Capital Television Pty Ltd and Ors v Commonwealth of Australia (No.2), 1992. 66 ALJR 695 (Australian Capital Television Case). Also delivered on the same day was Nationwide News Pty Ltd v Wills (1992) 66 ALJR 658. The reasons relied on by the Court in the latter case did not, unlike the decision which is the subject of this article, rest solely on a finding of an implied constitutional guarantee of free speech. See, for example, Mason CJ, at 8 and 11, who relied on the test of reasonable proportionality in Castlemaine Tooheys Ltd v South Australia (199) 169 CLR 436.
CONSTITUTIONS AND ACCOUNTABILITY OF PARLIAMENTS

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Parliament is, and should be, the only true voice of the people. The requirement that parliaments should be accountable to the people they serve is the basic platform of any democratic system. The manner in which this accountability is achieved often has as its basis the provisions of a constitution.

Created states invariably have written constitutions of some form, evolutionary states not always. The United Kingdom, the country that has virtually given parliamentary democracy to the modern world has no constitution although it does have the Bill of Rights of 1688 and the Act of Settlement of 1700 which established by statute the relationship between the crown, the parliament and the people. In recent years there has been considerable interest in replacing the framework of precedent and custom that governs British constitutional practice with a written constitution.

In Australia the Commonwealth Constitution provides the jurisdictional power of Parliament: Section 49, to make laws for the ‘peace, order, and good government of the Commonwealth’; Section 50, its powers, privileges and immunities and the order and conduct of its proceedings; and Sections 51 and 52, its principal legislative powers. There are other sections which complete the legislative framework of the Commonwealth.

In New South Wales the Constitution only provides that the legislature, ‘shall, subject to the provisions of the Commonwealth of Australia, Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever.’ It further provides the framework for elections, the meetings of the parliament, provisions relating to Members, and certain revenue matters.

I suppose we need to ask ourselves whether the more detailed provisions of the Commonwealth Constitution provide any greater insurance that the Parliament will perform in the best interests of the community than the ‘global’ root of power contained in the New South Wales constitution. Intrinsic to both Constitutions are the powers, privileges and immunities of the House of Commons in the United Kingdom. The tenets of Commons practice, documented as they are in Erskine May (Gordon 1983), have evolved through years of trial and error, developed and amended to suit an emerging need for functional accountability. The Standing Orders of Australian Parliaments generally adopt the practice of the Commons for matters upon which their own rules are silent.
True accountability lies in the conscience of the people and their representatives. No amount of documentation will necessarily safeguard a state. It is the respect that the institution of government generates that is both the shield and the sword which will protect and defend that state. My comments therefore will fall into two categories, those which touch on legislative power, and those which touch on performance.

With regard to legislative powers there seems to be little need for a State constitution to define a legislative jurisdiction beyond the form of New South Wales. The nexus between the powers of the Commonwealth and the States gives the States an erodable concurrent power and an amorphous residual power. To define the residual power in an attempt to ‘clarify’ would be most unfortunate and merely provide employment for needy constitutional lawyers. The real problems the States face vis-a-vis their concurrent powers stem from the smothering embrace of our Federal politicians and departments who continually push the line for more and more power. Sharper clarification of the Commonwealth’s jurisdictional power and a less imaginative interpretation of the Section 51 grants would strengthen and simplify our system of government considerably.

It is my belief therefore that a State does not need to define the legislative power of its parliament beyond the ‘peace, welfare and good government’ ambit. It is interesting to note the difference between the Commonwealth words and those of New South Wales, the former talking of ‘order’, the latter of ‘welfare’. Are the States thus more constitutionally bound to ‘care’? In the long run I suspect it matters little as long as the ‘root’ is there, which brings me to my second head of consideration.

Respect for parliament is founded in both respect for the institution itself and respect for the individual member. It may also be found in its collective image, that is, general appearance, accessibility, public education programs, behaviour of Members both in and out of the Chamber, and processes for public accountability such as registers of pecuniary interest, anti-corruption commissions, ombudsmen, and a strong parliamentary committee system.

Respect for the individual may be found in the personal conduct of the Member, of the diligence in attending to the electorate, public profile on major issues, and generally the degree of professionalism the Member brings to bear upon their parliamentary role. The problem facing the individual is that there are no training courses for Members of Parliament, there is only the long hard road of experience, a path which incidentally is getting shorter for most Members. In New South Wales the average length of service is currently six years and four months, not really long enough to learn much of the culture of public representation.

There has been some debate in recent times on the subject of parliamentary ethics and codes of conduct. If we establish such codes, however, what then should follow upon a breach of such code and who is to judge the breach? Is there to be a penalty? And, in a contemporary situation, how can an alleged breach be fairly and dispassionately considered? These are important matters for consideration before we venture too far along that path.

In the final analysis it comes down to the persons themselves and their perception of their duties and obligations. We are living in a world generally without dignity. Why then should we expect our politicians to be any different? Perhaps not, but whether
they like it or not they are seen as leaders in the community and have, I think, an additional obligation to strive for better community standards at all times. Often what brings the politician unstuck is not so much deliberate impropriety but lack of judgement. The variations of situations in which conduct may be compromised by bad judgement are endless. In the final analysis it is the individual’s evaluation of their obligation, their inner sense of propriety, which provides either a secure path or creates the pit into which that individual falls. There may be a role to assist, to provide access to resource material which provides enlightenment, but as with other professions the straight-out teaching of ethics does not necessarily produce an ethical practitioner.

Parliamentarians are not highly thought of collectively, although they may be individually. This is because, collectively, they are seen by the community to have abandoned those standards which attract respect. Unseemly behaviour in the House, a lack of respect towards one another, a lack of ethical standards and personal dignity in the electorate, and too many public falls from grace have done much to damage the image of our elected representatives.

The most tangible area in which there can be improvements in both the perception and reality of parliamentary accountability is in the exercise of its legislative powers. A constitution may give to a parliament its basic root of power, it may define its electoral process and give it the power to determine its procedural rules, but it cannot detail the manner in which these functions are carried into effect. The perception that the role of parliament has declined to ‘rubber stamp’ status is not new. As a keen Gilbert and Sullivan fan I learnt from Iolanthe that,

When in that House MPs divide,
If they’ve a brain and cerebellum too,
They’ve got to leave their brain outside,
And vote just as their leaders tell ‘em to.

There is a growing perception that there are other and better forms of expressing the community voice than parliament, the courts, the media, the Church, single issue groups, universities, collective public forums and so on. Each of these is fundamentally flawed as a true expression of the voice of the people because at the end of the day they cannot be held accountable. We should not be seduced by the alternatives, at best they express opinions, at worst they are the basis of dictatorship.

The growth of interest in the election of independents to parliament is I think not simply a matter of disillusionment with the party system: it is a manifestation of the public’s concern and frustration that the parliament they elect is impotent to carry their views through to the legislative process. The difficulty independents face is that, whilst they can exert muscle on a government and thus the legislative process in situations where the government does not have a majority, their influence still has little impact unless the standing orders and the procedures of the parliament allow them to articulate their views into legislative reality. If they could, however, does the influence of a tiny proportion of representatives over the much greater numbers of the combined government and opposition constitute a democratic process?
In searching for an answer we must be careful not to throw the baby out with the bath water. Firstly, I believe, we must look to the role of parliament. There are five functions of a parliament:

To provide a government.
To provide for the finances of the State.
To debate issues of public concern.
To pass legislation.
To scrutinise the actions of the public service.

The first two elements can be provided for constitutionally, the others by the procedures of parliament. One approach, much talked about over the last twenty years has been the role and purpose of a committee system. Committees may examine legislation and subordinate legislation, review executive government action, or examine matters of public concern. A recent contribution to *The Economist* (3 August 1991, p. s2) said,

The real question is how much, if any, independent life should parliament have, beyond providing the forum for the rituals of government and opposition. In theory, it is the cockpit of the nation’s life, where independent-minded legislators guard liberties and query the activities of the state and its servants. In practice it is a less bloody and useful arena in which committees are meant to help correct the balance. By gathering backbenchers across parties, they encourage them to think as parliamentarians, not as party yes-men. By enabling them to track particular departments for months or years, they give them a level of knowledge about government that few MPs would otherwise have. One chairman said they ought to be providing a third force in parliament between the two big parties – and should get a third of the chamber’s debating time too.

Committees can have a positive impact on the process of returning power to parliaments. It is important however, for committees to have adequate resources if they are not to be simply reduced to another form of ‘rubber stamp’ for government actions. In particular they must have access to suitably qualified staff, able to provide skilled and independent advice. It is also important that real debate occurs in the House after the reports of such committees are tabled. Members who are not on the committee have a special responsibility to read and debate reports in a meaningful fashion. Perhaps reports could recommend positive forms of action which would become binding on governments if the report was adopted without amendment. This imperative would surely draw out the true feelings of the parliament on the issues raised by the report.

As a long time observer of parliaments I have become aware of the lack of real debate on most questions before the House. Many members read set speeches, often one suspects, written by a staffer or a person outside, then leave the Chamber without any attempt to really participate in debate on the issue. In a recent sally veteran U K parliamentarian Roy Jenkins (1991, 616) wrote of the ‘whipped cohorts who trudge in for the division from dining room or library with their minds unsullied by the arguments’.

Any return to a ‘meaningful’ chamber would be a welcome step. The challenge lies with members and their procedural advisers, including the clerks at the table and the permanent staff of the parliament. It is a part of the multi-faceted role of parliamentary representation which separates the parliamentarian from the politician.
Having mentioned the clerks I should touch on their vital role in maintaining a strong and independent parliament. The currently high turnover of membership within many parliaments does not allow political maturity to develop to a significant level. Further, the length of a member’s service does not always equate with an equivalent depth of interest and understanding of the parliament. The preservation of parliamentary standards is therefore very much in the hands of the continuing entity within the parliament, that is, the clerks and their staff. Members would often be wiser to accept the guidance of the clerks rather than follow a path based on their own, or their colleagues very imperfect knowledge of how a parliament works.

Another part of the answer is changing the culture of Australian parliaments. Members need to be more conscious of the institution of parliament and their role in it. Parliament must be seen as more than just an extension of the party conflict or a means of carrying out a party’s program. Members need to realise they also have a role as parliamentarians with a wider community responsibility than is represented by an insular party interest. Australian political life has far too rigid a party discipline. This destroys the sovereignty of parliament in favour of the supremacy of the executive. Certainly the government needs to be able to govern but there are many legislatures in other countries in which the government is called to account by its own members on issues which particularly affect that member’s constituency. The problem in Australia is that ‘crossing the floor’ or criticising one’s own party is portrayed in the media as an act of treachery on the part of the individual or as a sign of weakness within the party. Instead it may well be simply the manifestation of a healthy democracy, the encouragement of which would lead to stronger and better government. The committee system certainly can give some force and legitimacy to differing points of view within parties, the safeguard lying in the mantle of continuing discussion, which in turn provides a range of options upon which ultimately consensus can be achieved and public division of opinion avoided.

No doubt there are many procedural initiatives which can be explored in any attempt to enshrine the sovereignty of Parliament and thus the people, whose voice it is. The underlying tenet is the opportunity for any member to initiate debate on a matter of public concern. In many cases it is not the fate of the question before the House that is important, it is the capacity to air the subject, to explore alternatives, to expose wrongs and injustice, under Parliamentary privilege. Parliament will be accountable to the legislative root within its constitutional base if it can achieve that goal.

It is also vital that the separation of power between the Parliament and the Executive is formally recognised. The Parliament must be able to exercise its functions even if they are in conflict with the views of the Executive. It is the right to challenge the Executive which provides the real brake to an over-zealous or unwise use of authority. Reporting to the parliament, unfettered capacity to call committee witnesses, control of its budget are all fundamental to a parliament’s sovereignty. A new constitution could well incorporate provision for a separate Appropriation Bill for the legislature in which Members have both the power and responsibility to vary their budget according to need. Parliament should not be prevented from fulfilling its proper role because it does not have the finance to carry out its functions.

Finally I could not conclude without touching on a subject very dear to my heart. It is my unshakeable belief that a vital element in re-vitalising the sovereignty of parliament is the acceptance of an independent, non-partisan speakership. Elsewhere,
I have outlined my proposal for achieving this by statutory definition, as distinct from the function of convention as exists in the UK House of Commons. Some of the main elements include: the election of the speaker by secret ballot for a period not exceeding ten years, the resignation of the speaker-elect from any party political affiliation, as a condition of assuming office, the speaker to stand down from electorate representation in favour of a notional state-wide constituency, ineligibility of a retiring speaker to continue as a member, the removal of the speaker from office only by a two-thirds majority vote in the House.

The independence of the presiding officer, or officers, and the administration of the parliament is necessary as a buffer against possibly undesirable influences of both individual members and the Executive and should be preserved at all costs. Clearly it must be the speaker who is the ‘minister’ for the parliament and the speaker, for example, who must introduce an Appropriation Bill if there is to be one.

The Parliament is but a part, certainly a vital part, of the democratic system. It does not operate in isolation but within a framework of systems which interlock to provide for the ‘peace, welfare and good government’ of the state. There is no finite formula which will provide the best system. The framework must be created, fine-tuned, balanced to meet the perceived needs of the community it is to serve. It must be capable of further amendment if those needs are seen to have changed, but not so easily as to allow frivolous, vexatious, or ill-thought through proposals to be the foundation of change. If it is such a framework it will attract and hold the respect of citizens. As I said earlier it is the respect which is generated that will provide both the shield and the sword of true democracy.

References
ACCOUNTABILITY – MYTHS AND REALITY

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In keeping with the theme of this section, my contribution will focus on the nexus between constitutions and accountability of government in Australia. It will not be a discourse on the current state of public accountability paths and forms which have developed in recent times: that is too broad a task. Rather, I intend to look at the structure of government which has been legitimated by Australian constitutions and by political practice and, more specifically, at the decay of the mechanisms which, in the theory of responsible government, were supposed to ensure and promote accountability. It is useful to note that the new regime of accountabilities evolved in part because of the failure of the older mechanisms of responsible government.

Much has been written about innovations in Australian accountability relationships but, while some attention has been given to possible constitutional provisions, particularly a bill of rights, it has not been a major part of the reform debate. Moreover, much of the relevant discussion has concerned the Commonwealth situation: the position of State Constitutions has received little attention. Here, I will argue that, if the present system of government is preserved at the Commonwealth and State levels, there is little prospect of enhanced structural accountability and whatever advances are made in other areas – legal, managerial and constituency relations – there will still be a glaring deficiency in the inner citadel of political accountability. But the constitutional changes necessary to effect that enhancement are so radical and, for Australia, so unconventional that they are unlikely to be seen as appropriate for inclusion in any future Australian constitution. They would amount to a revolution in constitutional revision, or, in the case of the Territory, formulation.

It has long been recognised, at least in academic circles, that the Australian form of government has developed its own autochthonous character. Whether or not it ever resembled the classic formulations of ‘the Westminster system’ or ‘responsible parliamentary government’ is a matter of some dispute but there is agreement that the contemporary form, both at Commonwealth and State levels, has departed far from the Westminster theory. In essence, it assumed an unbroken chain of accountability of the bureaucracy to the political executive (the cabinet/ministry) of that executive to the parliament and of parliament to the electorate. Central to the theory were the conventions of ministerial responsibility and of collective (ie cabinet) responsibility which together with periodic elections ensures system accountability. Any reputable general text on Australian politics includes a damning critique of their efficacy. Only the politically naive or the artful are still able to muster a case for the continuing
significance of the responsible parliamentary model. Yet together they are numerous enough to sustain a lingering mythology that the line of accountability is intact and effective as a defence of democracy or that it can remain so.

The reality in Australia is very different from the original model as indeed it is in other polities which have forms of government derived from the Westminster system. There may be disagreement on the extent the problem, but observers concur with the conclusion that the accountability linkages are woefully inadequate, if not entirely nugatory. All note the debilitated situation of parliament and the dominance of the executive over the parliamentary process. Effective control of the Executive has been debauched by the power of disciplined mass parties. ‘Responsible parliamentary government’ has been replaced by what Richard Lucy (1985) and others label ‘responsible party government.’ In that configuration, elections provide the main device for popular control but, at best, they are crude instruments of legitimacy and accountability.

That critique is not to deny that there has always been some capacity in many Australian parliaments to counter full educative dominance. Upper houses – the Senate in Canberra and the Legislative Councils in bicameral States – have often been counters to the Executive’s power in the lower houses, usually when the Opposition has a majority or when the balance of power is held by minor parties or independents. There is a persuasive argument that the upper houses, particularly the Senate, have become the more effective chamber in legislative and oversight terms, notably through their committee work. In the unicameral polities – Queensland, the Northern Territory and the ACT – the situation, perhaps unfortunately, can not occur. It should also be noted that, in recent times, even lower houses have improved their performance through structural and procedural changes and, more fortuitously in some, through minority governments. Nevertheless, executive supremacy over parliament generally is well-established and irreversible if the present form of government is maintained.

Executive dominance is not only sustained by the form of government but also by its powerful effect on the behaviour and expectations of politicians. Typically, those in Opposition complain about the structural limitations on their capacity to call the executive to account and the demise of ministerial responsibility. They pronounce grandly on the need to assert the primacy of parliament. Once in office, however, the same politicians find it convenient to ignore those claims and easily accept the contradictory position that parliament should not act as a barrier to executive dominance.

If the accountability linkages between the political executive and parliament and between parliament and the electorate are tenuous, what about the third in the chain – the relationship between the executive and the bureaucracy? In all Australian jurisdictions, but especially the Commonwealth, attention has been given to strengthening political answerability. Although opinions are mixed about the relative success of that quest and there are many areas which defy precise qualification, academic commentators generally perceive a heightened level of political sensitivity and responsiveness in the bureaucracy; but that does not mean that it has become more accountable to parliament and thence to the electorate. If there is no effective accountability role for parliament then it follows that political control of the bureaucracy is an end, however useful, in itself.
Real advances in the accountability of the bureaucracy, and sometimes the political executive and parliamentarians, have been extra-constitutional and largely extra-parliamentary. They include the extensive reforms in public sector management and the new administrative law (ombudsmen, administrative review mechanisms and freedom of information legislation) as well as Royal Commissions, other committees of inquiry, and special bodies such as the Independent Commission Against Corruption in New South Wales and the Criminal Justice Committee in Queensland. The resort to such devices is an open admission that parliament is incapable of proper supervision from its own sources. But many questions remain about the level and consistency of bureaucratic accountability even with the flurry of innovation.

Although on an individual basis Australians now have more avenues for redress against administrative actions, it is extremely problematic whether the citizenry as a whole, or that part of it which considers the question to be significant, feels that it is the ultimate master of the bureaucracy. Nor can they be confident in the ability of the political executive to ensure a full measure of accountability.

If it is conceded that a deficit in public accountabilities still constitutes a problem in Australia, there are three broad reform avenues which can be taken. The first is a continuation of the pathway along which reform has been introduced in the last two decades and will involve a strengthening of administrative law, a refinement of public sector accountability and further managerial strategies. Devices such as 'Citizens' Charters' and codes of ethics can also be utilised. In that avenue, there will be little or nor need for constitutional revision as such reform can be accommodated within the existing political system. Indeed, that is the most likely, if not certain, prospect as the major stakeholders, the electorate included, see little reason to change the basic structure of government. At the Commonwealth level, it would also avoid the difficulties traditionally encountered with constitutional referenda.

The second avenue involves the weakening of the partisan grip on Australian parliaments which, together with the majoritarian philosophy, has been a major factor in the decline of those institutions. It is already happening but its extent and continuance are impossible to predict. If party solidarity and dominance are seen to be barriers to the ability of parliaments to call the executive to account, then their effect could be mitigated by changes to the electoral process. For example, the use of proportional representation systems make it more difficult for the major parties to dominate parliaments. While it could lead to government instability and frailty in certain circumstances, it could allow greater parliamentary leverage over the executive. That type of change would, however, not remove the problems with elections as a form of public accountability nor would it necessarily lead to improved bureaucratic control. As most States and the Commonwealth have much of their electoral provisions in ordinary statutes, such electoral reform could be implemented extra-constitutionally. On the other hand, with the exception of the Commonwealth, any new system could relatively easily be put into constitutional form and even entrenched to afford protection against amendment. Electoral change aside, partisanship could be tempered by the use of constitutional provisions safeguarding parliamentarians' rights to vote independently. Again, however, any measures, constitutional or otherwise, to counter the effects of major party dominance would be fiercely resisted by the major parties and stand small chance of implementation.
Fundamental constitutional reform is the third avenue. It involves the scrapping of the fused parliamentary model and its replacement by a system which incorporates the separation of legislative and executive powers and the concomitant checks and balances. Other aspects of the American constitutional experience like the Bill of Rights, direct election, instruments of direct democracy (initiative, referendum and recall) and fixed terms of office should also be included. Only by such a radical structural reformulation can the legislative arm be provided with the status and power to contest executive domination and demand political accountability. It would address one of the glaring gaps in the Australian accountability matrix and, over time, might even improve the accountability relationship between representatives and constituents and serve to erode the primacy of parties and majoritarianism. Co-existence with the prevailing bureaucratic fabric and its accountability regime could also be achieved quite readily.

Critics of a wholesale introduction of American constitutional forms and practices will doubtless emphasis its alien character and its incompatibility with Australia’s political culture, traditions and institutions. They will cite the familiar litany about the defects and problems of the American system. Such claims are all arguable but the critics’ contention that the difficulties inherent in its introduction are formidable is better based. Although, following Campbell Sharman (1990), a persuasive argument can be made that the Westminster model was the interloper in Australia’s political framework, the source of much of its continuing contradictions and thus dispensable (in my view), the transition to an American system will be hard. Whether the new arrangements could be introduced in a piecemeal fashion among the several polities or as a simultaneous change in all is one question to be resolved. So too is whether a derivative of the American system can fit with Australia’s constitutional monarchy. Is a republican form of government required?

Propositions like the new constitution for Western Australia put forward by Martyn Webb (1991) show creativity but not such an eminent academic as Professor Hugh Emyn sees some virtue, at least in theory, in adopting the American system. Australian constitutions generally, but State Constitutions in particular, are skeletal documents which say almost nothing about the purposes of government or the limitation of power. If significant innovations are to be made, they will be in State Constitutions as they are, despite some entrenchments, easier to amend. But the chances of their occurring is remote because executives largely do not favour reform and certainly not that of the radical variety.

Although the new state constitution of the Northern Territory will afford an opportunity for modern constitution-making in Australia, I suspect that it will not depart from the prevailing structures of processes of government and will include only those special provisions (ie protection of Aboriginal land-ownership) which are deemed necessary for Commonwealth acceptance. Entrenchment will be used widely but I doubt whether even a bill of rights will be included. In terms of accountability, little other than the conventional will be mentioned. As elsewhere, accountability will have to depend on extra-constitutional means and electoral and political chance.
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ACCOUNTABILITY AND THE FISCAL CONSTITUTION

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The issue of political accountability in federal systems of government is one that is absolutely replete with puzzles and problems. Many of them arise from the fact that federal constitutions do not simply divide power between the different levels of government, in a fundamentally important sense, they share powers between governments. This is much more obviously so in some written constitutions than others, but it is invariably the case. In the case of the Australian Constitution, it is a simply irrefutable fact that the Constitution, including such amendments as have been made since 1901 gives the Commonwealth relatively few exclusive powers: principally those over customs and excise duties coming of money and initiation of referendums for constitutional change. The bulk of Commonwealth powers, in fact, are defined as concurrent with the States. These include powers over taxation, defence, foreign affairs, social welfare benefits, Aboriginal affairs, postal and communication services, as well as quarantine, matrimonial causes, currency banking, insurance, copyright and so on. Of course, the Constitution also gives Commonwealth law paramountcy in the powers which it can exercise concurrently with the states, and the Commonwealth has established very substantial legislative and administrative authority around all of these powers. But in neither a legal nor a practical sense does the Commonwealth always fully occupy the field. Indeed, in some cases such as taxation, to do so would be to abrogate the fundamental rights of the States and Commonwealth law cannot require taxpayers to make payments of their tax obligations to the Commonwealth ahead of meeting their obligations to the States.

More generally, especially in fields such as matrimonial causes, Aboriginal affairs, and even the notorious external affairs, the Commonwealth works with, or extensively consults with the States, and it sometimes defers to the States in the exercise of its potential jurisdiction. On the other side of the coin, for those residual powers left exclusively to the States. The Constitution, through section 96, gives the Commonwealth Parliament the power to make grants of assistance on such terms and conditions as it sees fit, providing it with the capacity to extensively influence and reshape state policy-making and administration. A capacity which we all know, is used in various ways over the life of the federation and increasingly in ways that are regarded by the States as excessively intrusive.
The point of this discussion of the so-called division of powers in the Australian Constitution is to emphasise that those powers are in fact, as much shared as divided by the Constitution. Contrary to the claims of some this is not to be regarded as a design failure on the part of the constitutional founders. The very essence of a truly federal set of constitutional arrangements is that it simultaneously creates a vehicle for the expression of national perspectives and a national identity, and a voice through which national majority views can be heard. On the other hand, it puts that national majority in competition with, not above, regional majorities. It does not give the national majority the natural right to impose its will on the regions, nor does it imply that the national interest is defined by the national majoritarian view alone.

In stressing competition, I am not suggesting that open bitter conflict is the natural continuing order of things in federal systems. The competition I am referring to is about revealing differences in political and policy preferences that are salient to the determination of policy outcomes. It is about searching out the parameters within which accommodations of differences must occur through inter-governmental arrangements and agreements. It is about encouraging innovation in policy development as governments at different levels try to win support from citizens, voters and interest groups. The potentially productive features of competition that I am describing sometimes can collapse into polarised conflict. If this happens it seems to me a sign that the issues at stake are highly politically salient, that preferences differ greatly, and that resolution or accommodation of the differences will require time and skill, not the imposition of a single will. It also can signal that the mechanisms for shaping and managing inter-governmental relations contain blockages or friction that need serious attention.

What has all this got to do with accountability, let alone the other half of my title, the fiscal constitution? The answer is that it is absolutely fundamental to appreciate that like many other concepts in Australian political, administrative and legal thought Westminster style conceptions of political accountability are applied with great difficulty to the federal structure of government.

The point is, that ambiguity in the definition of the boundaries of political jurisdiction are an intentional design feature of federal systems and an inevitable outcome of the struggle by governments for influence. And if that is so, then there inevitably is some uncertainty about accountability narrowly conceived. We have a constitutional court, the High Court, to adjudicate on major disputes about jurisdictional boundaries and about powers. How well or badly it does its job may be a matter on which judgements differ. In the vast bulk of policy areas political transactions between spheres of government and their respective communities are continuously reshaping the boundaries. However, these boundaries are constrained by the limitations of political power and administrative jurisdiction. Of members of at least three overlapping political jurisdictions, local, state and commonwealth, we the people, expect all of them to be concerned with all aspects of our well-being. We may have some reasonably clear idea about who is principally responsible for what major services or functions and certainly the major interest groups do; but we also know that a certain amount of shopping around between them can pay political dividends. It is precisely these features of the system that provide multiple points of political access and a high degree of political responsiveness. This is the source of some of the major virtues that are claimed for a federal over a unitary style system.
Yet when the Commonwealth and the States and Territories, and to a certain extent local government, got together through the special premiers' conference processes that characterise the Hawke new federalism, there was more or less agreement between them in principal, that a much clearer, separation and delineation of the roles of various spheres of government was a highly desirable objective. Not only that, they supported this claim by reference to the fact that eliminating overlap would improve efficiency and would clarify accountability. From the narrow perspective in which they presented their arguments, the participating governments may well have been right. There is little doubt that narrowly conceived political accountability through the ballot box is much more easily secured when the roles and responsibilities of governments are neat and clear and non-overlapping.

But even where it is technically feasible to make them clear and non-overlapping, to facilitate accountability through the ballot box is to de-emphasise vital aspects of responsiveness in the political system. It would reduce the number of access points in the system for citizen voters and interest groups. What is more, part of the objectives of both Commonwealth and State and Territory governments in making the system neater and tidier and less over-lapping was to strengthen the power of central agencies over their line agencies thereby diminishing the need for, and the significance of, inter-governmental arrangements. In short a set of proposals for reform of inter-governmental arrangements to increase political accountability poses the serious risk of making the system work effectively in the interests of its intended beneficiaries by making it less accessible and less responsive.

I concede that there are some difficult issues raised for concepts of accountability by the complexity of inter-governmental arrangements and by the fact that typically the arrangements and agreements are made between executive levels of government, often with negligible participation by parliaments before they are presented as a fait accompli. But these difficulties, it seems to me, are inherent in the nature of federal systems. They are virtually inevitable by-products of securing the maximum advantages of federal systems.

The appropriate response, I suggest, is not to seek to constrain the domains of spheres of governments, or to seek to impose more complex parliamentary procedures on the development of inter-governmental arrangements, or even to seek to reform the whole structure of the parliamentary system. Rather what is needed, is just a redevelopment of thinking about traditional concept of accountability, which contains within it a recognition of the role and the significance of other relevant concepts such as access and responsiveness.

It seems to me that a key element in that reshaping of language and ways of thinking about federal systems, and the appropriate interpretation of accountability, is to reduce the emphasis we put on accountability as a procedure and increase the emphasis we put on judgements about federal structures and federal processes, and the extent to which they are likely to support effective and responsive policies and programs. I use the word processes with a degree of nervousness after Professor Saunders' earlier comments (Chapter 11), but I emphasise I am not arguing that we should favour processes over outcomes: I am arguing we should favour processes over procedural elements of the system.
Although I wish I had a slightly different language for expressing it what I really have in mind is that rather than focussing on the relatively sterile and static concepts inherent in traditional notions of accountability, we should be examining our constitutional structures and arrangements to assess whether they support, for want of a better term, ‘federal balance’ or ‘federal flexibility’ or responsiveness. By federal balance I do not mean an unchanging situation in which everyone occupies their rightful place according to some theorist’s conception of the appropriate division of powers. Rather, I have in mind a much more dynamic conception in which within very broadly defined constitutional parameters all spheres of government might constantly be attempting to alter the nature of the roles and functions they undertake in response to political pressures they face. Exactly what is required to ensure federal balance in this sense - equal capacities for responsiveness — is difficult to say. One thing that does seem clear is that taxation powers — the fiscal constitution — has a key role. It would seem logical to suppose that where responsibility and representation are not only divided but also shared there should also be a commensurate division and sharing of the power to tax. More specifically, it can be argued that it is a fundamental principle of accountable and responsive government that, as nearly as possible, parliaments which authorise expenditures should be responsible for authorising the revenues to fund them and should have guaranteed access to revenue sources adequate to enable them to do so. This might, somewhat loosely, be characterised as the principle that there should be no representation without taxation — the complete reverse of the old familiar adage. It is a principle which is in some sense fundamental and which applies obviously to more than just federal arrangements. All governments should possibly be subject to constitutional limits on their capacity to engage in deficit financing of expenditures, and that there should be some limits on the way that they can use regulations or cross-subsidisation through public enterprise pricing to achieve what otherwise would require explicit subsidies are also applications of that principle. Open and accountable government requires that the costs of policy action should be explicit and directly attributable to those responsible to them to the greatest possible extent.

Where federal finances are concerned the principle thought I want to emphasise is not just about accountability, fiscal accountability, or trying to promote efficiency in public sector decision-making. As important as those may be — I now think that we should be stressing their role as important contributions to balance in access to revenue sources and as an important prerequisite for federal balance in a broader sense. If the capacity of federal systems to provide multiple opportunities for participation and access and more responsive government are to be secured, then access by all levels of government to flexible and adequate sources of revenue is an essential pre-condition.

Of course, in all federations sub-national governments invariably depend to some extent on grants received from other spheres of government. They spend moneys for which they do not have political responsibility or accountability for raising. Usually this reflects desires of high levels of government to provide tied grants to achieve objectives outside their strictly defined spheres of influence, it is part of a compact which ensures stability and equity in the federation, for the federal level has responsibility for making some form of equalisation transfers between sub-national jurisdictions. Within the conception of flexible and responsible federal arrangements I am arguing for, neither of these sources of grants can be rejected as undesirable. I
am not convinced that any sensible constitutional prescriptions can be drawn-up that appropriately would shape or constrain their design.

What is of particular concern about Australia's federal fiscal arrangements compared to those of other federations, is not the presence of significant grants in funding sub-national governments, nor even just the fact that the dependence of sub-national governments on these grants is exceptionally high, what is of particular concern is that in Australia the States and Territories are highly dependent for financing their own purpose activities on grants the size of which is subject ultimately to unilateral determination by the Commonwealth. There are good reasons for believing that in principle we would want major tax bases such as income tax and consumption taxes to have a high degree of commonality in the definition of the base. A common and shared system of administration and collection might have advantages too. But that does not translate into a presumption that the revenues collected in common should be effectively owned by, and the amounts distributed to other governments, on terms unilaterally determined by, the level of government which actually collects the revenue.

In Canada, except in the case of Quebec, the Provinces in effect piggyback on federal income tax defining their residents' income tax liabilities to them as a specified proportion of those residents' federal income tax liabilities. In Germany the states will only receive as their primary sources of revenue constitutionally guaranteed shares of income tax collections and negotiated shares of joint value-added tax collections. In Belgium, under new constitutional arrangements which are still in transition, sub-national jurisdictions also receive their principal revenues from shares of income and value-added taxes. The common feature of all of those arrangements is that they potentially underwrite federal balance, as I am defining it, by providing at least guaranteed shares of revenues to the several levels of government. In the cases of Canada and Belgium, there is additional built-in revenue-raising flexibility for sub-national governments which is even more strongly supportive of political responsiveness by sub-national governments.

Give or take a few specific details, this sort of tax-sharing with flexibility was in effect what the States and Territories proposed for Australia in their ill-fated proposals for discussion at the third Special Premiers Conference scheduled for November 1991. With the benefit of hindsight, the timing of their proposals could not have been worse and it provided prime ministerial challenger, Paul Keating, with a ready-made rocket to launch at Bob Hawke and at his new federalism initiative by appealing to the very un-federalist views of the majority of the Labor Party Caucus. But possibly for the first time in the post-war period, a proposal to substantially re-balance revenue-raising capacities had the backing of Commonwealth Treasury, and the whole new federalism exercise has given the states and territories a keener appreciation, both of the significance of their role in the federal system, and of the importance of the question of ownership rights and to revenue sources. That, I think, is a very welcome and positive development because, as I have argued, adequate balance in access to revenue sources underpins federal balance, and given the inherent complexities and the virtues of federal systems a concept like a dynamic flexible notion of federal balance is needed as an addition to, if not a replacement for the traditional limited and problematic concept of accountability.
REGIONS AND PEOPLES: SOME TRENDS IN INTERNATIONAL CONSTITUTIONAL PRACTICE

Professor Frederik Harhoff *

In the present consideration of providing a constitution for the Northern Territory, reference has often been made to Canada which is another federal country with both European and aboriginal peoples within its borders. In order to broaden this international perspective, I shall briefly draw attention to constitutional developments in other parts of the world, notably to some of the Nordic countries, in which important constitutional issues have been addressed with regard to the inclusion of human rights into domestic law as well as to the clarification of the status and rights of indigenous peoples in national constitutions. To further pursue this examination of international and constitutional practice, I wish to extend the view towards the recent development in Europe, partly with regard to the situation of minorities in the Conference on Security and Co-operation in Europe (CSCE) process and partly to the current relations between the European Community and its member-states under the Maastricht Treaty. On the basis of these interpretations, I finally wish to bring forward a few personal deliberations on the mythical concept of ‘constitutionalism’.

These issues may not at first sight seem immediately relevant to the Northern Territory’s constitutional future, but it is probably fair to say that in the end, most of the constitutional problems currently considered in a number of countries all stem from the fact that states are entering into a period of transition from enjoying classic sovereignty to becoming parts of an emerging international legal system with authority to produce certain directly applicable norms. I would see this trend as crucial to the determination of the Northern Territory’s future in the Australian federation.

The Small Nations of the North

Five countries constitute the group of Nordic states – Norway, Sweden, Finland, Iceland and Denmark. There are, however, several aboriginal peoples in this Nordic area: all have reached fairly high levels of self-determination through negotiations with their metropolitan mother-states. In order to show how other countries have managed to bring about viable political structures for their aboriginal peoples, I shall briefly run through them.

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In the northernmost part of Norway, Sweden and Finland, the Sami people have traditionally occupied the lands and used them for reindeer herding. They did so long before the establishment of the present national borders. The Sami have their own distinct culture, they speak their own language which by no means is affiliated with the Nordic languages, and they are indisputably the original inhabitants of these northern areas. Today, however, the borders represent a serious impediment to their preservation and the further development of their culture and life-style: hydro-electric power development has excluded them from huge areas traditionally used for their herding. Sami representation in the national parliaments of these countries has shown to be insufficient to improve their conditions, but the creation of new Sami institutions with the task of advancing claims and establishing Sami self-government with legislative and administrative power now seems to be a reality.

The Åland Islands, strategically located in the entrance to the Gulf of Bothnia between Finland and Sweden, were ceded to Finland from Sweden after a referendum in 1921 under the auspices of the League of Nations. They now enjoy full autonomy under the recently renewed Finnish Åland Autonomy Act of 1991 and extensive legislative and executive powers are vested in the autonomous institutions of the Islands. Foreign policy, currency, and the exploitation of mineral resources are still in the hands of the Finnish Government, although the Åland Islands have their own separate delegation in the Parliamentary Assembly of Nordic Council.

In Greenland and the Faroe Islands, both under Danish sovereignty, Home Rule has been established through Danish legislation to meet local demands for control over political, cultural and economic development. Greenland is inhabited by Inuit of the same culture as Inuit throughout the arctic rim (including Canada, Alaska and Russia) and the Faroe Islanders are believed to be the last descendants of the Nordic Vikings. Both speak their own languages and both are aboriginal or indigenous peoples in the sense that they were the first people to live there.

Home Rule was established on the Faroe Islands after World War II, when Denmark was occupied by Germany and relations with these North Atlantic islands were consequently interrupted. During the War, the Faroese assumed political control in cooperation with the local Danish Governor, who acted on behalf of the Danish King. In the absence of financial transfers from Denmark, the United Kingdom undertook the responsibility to provide for a flow of money to the islands (which was to be reimbursed by Denmark after the War) and the UK was given the right of establishing radar and sonar warfare installations and military strongholds on the islands. After the War, however, it was unacceptable to the Faroese to return to the pre-War Danish government structure and a strong demand for self-determination was pushed by the Faroese. It was rejected by the Danish government on the ground that irrevocable transfer of constitutional powers was inconsistent with the Danish constitution. In September 1946, it had come to the point where the Faroese opted for independence through a referendum. The immediate Danish response was to dissolve the Faroese parliament (the ancient ‘Lagting’, first established in 960) and dispatch a Danish frigate from Copenhagen to keep things under control. Following the political turmoil, new elections to the Lagting were held so that there was no longer a Faroese majority in this institution to turn independent. In the end, the Home Rule model was finally agreed by both parties and introduced by the Danish parliament’s adoption of the ‘Faroese Home Rule Act’ on 1 April, 1948. The main element in this model is the transfer of legislative and administrative powers in practically all areas of local
interest from the Danish Legislature and the Danish government to the democratically elected Faroese Lagting and a Faroese government, (the ‘Landsstyre’). Judicial power has so far remained with Danish courts, but could eventually be transferred as well. Powers over mineral and hydro-carbon resources, however, both in the Islands and under their continental shelf, remained a disputed area until 11 September 1992 when the Danish government and the Faroese Landsstyre finally agreed to have this area fully transferred to the Faroese. Financially, annual block grants continue to be transferred from Denmark to the Faroe Islands.

Greenland, originally traded by Norse Vikings in the 13th Century and subsequently included as Norwegian Treasury Land, became, or rather remained, a Danish colony when Denmark ceded Norway to Sweden in 1814 after the Napoleonic Wars. Its colonial status was repealed in 1953 when Denmark adopted its new constitution. Greenland was kept isolated from other countries until this time. After the inclusion of Greenland with Denmark into the European Community in 1973 — much to the resentment of the Greenlanders — and after the Danish Government’s granting of oil concessions to multinational oil companies to drill for oil right in the middle of the then lucrative fishing banks off Greenland’s west coast, it became clear that Danish authority over the island had to come to an end. After three years of arduous negotiations, a Home Rule model similar to that of the Faroe Islands, was established in Greenland on 1 May 1979. The only significant difference between the two Home Rule arrangements is the provision concerning rights to the mineral resources. Because oil may be found in Greenland, the Danish government was reluctant to give away the ultimate control over this area. Since no agreement could be reached on the question of ownership to these possible resources, Section 8 of the Home Rule Act simply stipulates that the Greenlanders have fundamental rights to Greenland’s non-renewable resources, and that concessions to explore and exploit such deposits are granted by the Danish Minister of Energy — but only with the consent of a joint Greenlandic-Danish Natural Resources Commission. This implies that both parties have the ultimate right to veto any decision regarding the development of non-renewable resources in Greenland. Lead and zinc were mined until 1986 and three exploratory concessions for oil discoveries have been unsuccessful. After the recent Faroese deal with the Danish government, it is likely that this resource management structure will be altered to increase Greenlandic control in this area. Financial resources are also being transferred annually from Denmark.

The purpose of this brief description of the small nations in the north is to illustrate how such autonomy or self-determination structures are becoming increasingly applied to meet the concerns of aboriginal peoples of rich countries who were left behind the decolonisation process taking place in the third world in the 1950s and 1960s. In this context, the Small Nordic Nations arrangements are not very different in type and purpose from similar models established in other areas, the Canadian Nunavut Agreement being one obvious example. These and other recent cases of self-determination would seem to offer valuable elements for consideration in the ongoing debate of the Northern Territory’s constitutional future.

Three components seem to appear in each of these cases: first, they provide for a substantial transfer of constitutional (ie legislative, administrative and judicial) powers from the metropolitan societies to the political institutions of the indigenous peoples. The areas in which powers are transferred are generally areas of particular local concern, (eg. education, health, housing, social welfare, industry, trade,
transportation, taxation). Control over natural resources, however, is usually covered by agreement, which to a greater or lesser extent includes indigenous participation. Moreover, financial grants are being provided for by the metropolitan societies since, in most cases, the territories in question are unable to be self-sufficient.

Secondly, the transferred powers are to be exercised within a particular geographical area (usually outback and remote) where the indigenous peoples have lived since time immemorial and where they form a majority of the current inhabitants. The idea, in other words, is to provide for local, indigenous self-determination within a delimited territory for the benefit of all who live in this territory — indigenous as well as non-indigenous. The immediate reason behind this fact is, of course, that when powers to legislate and administer are established, it is pertinent to define the geographical extent of these powers. Constitutional powers, however, can be based upon two different approaches. One is territorial in the sense which I have just described, that is, the powers apply to everybody within a given territory. The other, however, is personal in the sense that it applies to particular persons regardless of where they are. This approach, of course, is much more difficult than the territorial approach, since conflicts between different jurisdictions are likely to occur. The Sami Council, for instance, has claimed powers to regulate certain political rights of Sami people throughout Norway in order to keep in touch with Samis who live in urban and other areas outside Sami territory. Australian maritime law, just to mention another example, applies to all Australian seamen and officers even on the high seas. The most famous and successful example of personal jurisdiction, however, is that of the Holy See in Rome, which issues clerical regulations directly to all Catholic bishops and priests throughout the world.

Thirdly, the rationality of self-determination in these cases is the mutual interest of both the metropolitan state and the indigenous people to establish political control in culturally distinct areas to local institutions. For the indigenous peoples, it is crucial to assume control as a means to escape assimilation and cultural dissolution. For the metropolitan societies, on the other hand, it has proved to be the best and by far the most rational way of administering remote and culturally distinct areas. The well known problems of overdeveloped bureaucracy at extreme costs to administer outback territories can in fact be solved in a smooth and proper way by handing out the powers to those directly concerned and affected. This, at the same time, provides them with a solid and viable financial basis. States have increasingly come to realise this. Moreover, the transfer of substantial responsibility and power to indigenous peoples is a much more satisfying and dignified way of responding to the demands of the modern world.

European Integration

The breaking down and falling apart of the communist regime in the eastern European countries has released tremendous cultural unrest and energy, and Europe is no doubt facing the largest threats to peace since World War II. Since the European Communities were unable to assume control — except for the inclusion of former eastern Germany into Federal Germany — and since the UN Council for Europe did not include all European countries, the immediate challenge lay on the Conference on Security and Cooperation in Europe, the CSCE or the Helsinki Accord. This particular structure is interesting in various ways, of which I shall refer to one only, namely that of its jurisprudence. The Helsinki Accord was established in 1975, in the
midst of the Cold War between East and West. All or most previous attempts to control warfare and the arms race had vanished when it came to pinning down the details, and it was therefore in the attempt to find new ways that the CSCE-Process was established as a forum for good-faith consultations, through which political compromises and deals could be made without surrender of ideological stand-points. Accordingly it was decided that all resolutions and decisions of the regular CSCE meetings were only politically, but never legally binding. This approach was certainly successful as long as the traditional divergence between the USA and Soviet Russia existed; but because of the recent changes to the political map of Europe — and in the face of the severe threats to peace — a more potent power structure will probably have to be built into the CSCE.

In the present context, however, issues relating to minorities are of some relevance to Australia. Minority groups exist everywhere in Europe and the right of control over certain minorities has caused conflicts and wars throughout European history. The CSCE document on Human Dimensions, adopted in Copenhagen in 1990, includes eleven substantial articles on minorities issues. Despite the many political controversies over the minority issue, the Copenhagen Document does contain a number of substantially improved rights of minorities, in particular as regards the obligations of states to promote and encourage the members of minorities to fully exercise their culture, life-style and traditions, and at the same time allow them to take part in the wealth of modern societies. To quote just one article, Art. 35 of the Copenhagen Document:

The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the States concerned.

In the Paris Charter of November 1990 for a New Europe, it was confirmed that:

...the ethnic, cultural, religious and linguistic identity of national minorities will be protected and that persons belonging to national minorities have the right to freely express, preserve and develop that identity without any discrimination and in full equality before the law.

This is not just rhetoric. It implies that states are obliged to seriously reconsider their policies towards minorities under the constant scrutiny and evaluation of other member states and their minorities, all of which can bring forward petitions for examination of cases of alleged violations of the CSCE principles.

If we turn to western Europe and look at the constitutional process, the endeavours to establish or at least facilitate the creation of a European Union is interesting. This process is painful, for it has direct and far-reaching bearings on the very concept of states and of state sovereignty. Nevertheless, a great deal of effort, good will and imagination has been vested in this process. When the present European states were restructured, redesigned and reshaped in the beginning and the middle of the last century, these changes concluded a long process of transition from feudal and basically self-supplying entities to democratic and industrialising societies, which were incorporated into a European, and indeed a world economy. The borderlines drawn at that time did in fact unite and assemble many of the smaller kingdoms into new and much larger states. This was undoubtedly seen as something very rational at
the time. The new European states had grown in size and cohesion and had become just as large as they could.

Today, however, these borders – which were progressive devices 150 years ago – have now become impediments to further development and generation of industrial capitalism. For this reason, they are being dismantled in the visions of one united Europe, within which all industrial goods can circulate freely without the constraints of different national measures and demands. Hence the concept of the European Common Market. To further enhance this process, a political structure was to be built on top of that market in order to secure its full implementation and to generate popular support. In addition to this political dimension, an economic and monetary structure was to be established in order to avoid the problems of fluctuating rates of exchange between the European currencies. This was all put together in the Maastricht Treaty – unfortunately in great hurry. In the Treaty, the powers of the European Commission of the Council of Ministers were to be further and very strongly centralised, and the new European Central Bank was to assume full control over the finance policies of the member countries. As you know, my own country rejected the Treaty through a referendum, which is required in the Danish constitution for the purpose of transferring constitutional powers to international organisations.

The strong urge towards further centralisation of powers seemed in contradiction with the desire to include at the same time no less than five new member states in the Community, viz. Norway, Finland, Sweden, Austria and Switzerland. An enlargement of the Community would inevitably initiate an adverse trend towards decentralisation, simply because the Community would have become just too big to control everything properly at such a centralised level. This problem was not addressed in the Treaty. The plans of the Treaty to include the defence policies of the member states and vest military powers into the Western European Union (a cold-war device from 1948) seemed unacceptable to the Danes, who all along have sought to reduce military expenditures and potential. A great number of areas were only poorly addressed such as the environmental policy of the European Union, which Danes would have liked to see further addressed and given priority. Underneath these reasons, however, I believe that the Danes perceived the Maastricht Treaty as pushing the Community too far ahead in a manner which was simply unwise. As the French referendum revealed, they might be right.

Let me finally address just one issue in the Maastricht Treaty of particular importance to Australia, namely that of the principle of subsidiarity. This principle was originally formulated by the Pope in Rome in two decrees of 1932 and 1934, which were issued to the effect that families should assume responsibility over their members especially where the state failed to do so. The huge unemployment of the 1930s will be recalled and the Pope’s intentions was quite obviously to relieve the public social systems of some constraint by having families take over. The principles simply stated, that the closest and best equipped institutions should assume the responsibility as well as the power to rule each particular area. This principle was then adopted by the drafters of the Maastricht Treaty to mean that the Community should not necessarily assume control in areas where states in fact were better designed and placed to regulate. The wording of that provision in the Treaty, however, was subject to much interpretation and the extension of the principle is accordingly questionable. It could in fact be taken to mean that the Community should assume control unless the states were clearly more competent. My point in
drawing your attention to these aspects is that strong centralisation certainly has its limits. As Europe becomes even larger by inclusion of new member states, a process of regionalisation is likely to emerge and this will completely rearrange the political arena. We could, for instance, well imagine the creation of a new and autonomous Baltic Region in the Community, which would include only the littoral parts of Denmark, Sweden, Finland, Russia, Poland, Estonia/Latvia/Lithuania, and Germany. Other parts of Germany would then merge to form a Central European Region and other countries form a Region of the North Sea together with the North Sea communities of Belgium, Netherlands, France, Denmark and the UK.

To return to Australia, imagine an autonomous Torres Strait Region and a similarly autonomous region to comprise all Aboriginal communities in northern and western Australia? Professor Galligan referred in his speech (Chapter 10) to the increasing complexity of European institutions. Although I do not disagree in this, his interpretation seems to exclude the fact that Europe is in the midst of a dynamic process of reorganisation, which by the end of the day may lead to smoother and less centralised institutions.

Legal Implications

Let me at last turn to a few thoughts of legal rationality. It seems as if our legal systems have become increasingly unable to include ethical and value-oriented parameters in legal practice and dogmatic legal science. There is, unfortunately, only little room for making use of 'soft' knowledge, such as, for instance, environmental concerns, human rights and Aboriginal law. In the process of designing Australia's future, it would seem that this process is un成功的 as long as contentions of not being heard, not being seen and not being included are still strongly voiced. If by the end of this process we are not fully convinced that what exists is not right, we should revise the result. From what I have heard during these last days, there would seem to be issues which need to be worked out more diligently, notably the Aboriginal issues. It takes courage and most of all a fundamental pride in the cultural variety of this great country. I wish you good luck.
EMERGING NORTHERN TERRITORY CONSTITUTIONS IN CANADA: NATIONAL POLICY, SETTLER HEGEMONY, ABORIGINAL ETHNO-POLITICS, AND SYSTEMS OF GOVERNANCE

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Introduction

Australia and Canada share many significant features. Both are huge land masses with small populations. Both are federal nation-states with Westminster-style parliamentary government and the English common law (although Canada’s Quebec province has French civil law). Both were largely settled from Great Britain and Ireland in the same era. Both are wealthy ‘first world’ countries and members of the OECD. Both have failed over two centuries to come to terms with aboriginal inhabitants and culture – and today both are undergoing painful searches for ‘solutions’ to these old grievances and to the unsatisfactory socio-economic conditions which they have created.

Furthermore, Canada and Australia both have large outback and northern regions with extreme climates and sparse population. In these northlands the most permanent population are ‘aboriginal’, ‘indigenous’, or, in northern Canada, ‘native’ peoples. Both countries have northern territory governments whose futures are being fought over by white-dominated legislatures and aboriginal political movements. These are jurisdictions in which the Federal Government retains ultimate jurisdiction, despite a reluctance of national capitals to act except in certain resource development and aboriginal rights matters. Outside these territories both countries have even larger outback regions within states or provinces. These provinces and states often include aboriginal conditions worse than those in the territories, but are usually governed by urban majorities little interested in remote regions and peoples – except to extract their surface and sub-surface natural resources.

In this paper I will take the opportunity to discuss and reflect on the political and constitutional developments in Canada’s northern territories in their own right. They are usually discussed merely as an appendix to national constitutional norms or to northern development conflicts.

The evolution of Canada’s northern territories in the past 30 years has included unique processes of constitutional development. This experience has gone largely unremarked in Canada itself. In the national capital the northern territory
constitutions were left largely to administrators in the rump of the old colonial-style Northern and Indian Affairs Department; only recently have they involved the constitutional specialists within the same department or across town in the Prime Minister’s Department (the combined Privy Council Office and Federal-Provincial Relations Office). There is no convenient place to read about this subject, although one recent book has a collection of useful essays (Dacks 1990), so the reading list at the end of this paper indicates the most useful material.

White Contact, Settlement, and Development

The first known European contact with the Americas was the landing by the Vikings on the barren eastern coasts of what is now Canada’s Northwest Territories (NWT). They then proceeded south to Labrador and then Newfoundland where a Viking camp dating from c. 1000 AD has been found and thoroughly excavated. A few years earlier they had established themselves in several deep fjords with good meadow lands in south-western Greenland. Saga evidence, correct on other points which can be independently confirmed, indicates that they made summer visits to Labrador for timber in the following centuries. From the first they had encountered Inuit and probably Algonquian Indians. In summer they also sailed north annually from their Greenland sheep farms into Baffin Bay where they hunted polar bear, walrus, narwhal, and falcons for ivory, hide, and luxury trade with Norway, trips which brought them into contact with Inuit, a new migration of whom were moving into Greenland from the northernmost islands of what is now the Canadian arctic.

In a remarkable piece of northern constitutional development, Leif Eriksen, the first European to land, made a claim (on the northern tip of Newfoundland) to the right to call a parliament and take charge of the new country. His family fought and killed other Norwegians to maintain those rights in following years. Inuit and Indians were hostile and a sort of pattern was set: the Europeans assumed their own constitutional and economic rights without regard to the indigenous peoples.

The Viking Greenland base survived about 500 years, although little is known about it despite ample ruins still standing. When Canada re-appears in European awareness after Columbus, it is again the arctic. There European whalers and specifically British entrepreneurs were hoping for riches. (There is little doubt that Portuguese, Basque and other western European fishermen knew the rich fishing grounds of the north-west Atlantic before the first trans-Atlantic voyage of Columbus. They may also have dried fish and camped on portions of eastern Canada.) The establishment in 1670 of the Hudson’s Bay Company for trading furs confirmed a continuing network of Inuit-Indian-British ties in northern Canada. French settlement and exploration did not involve the arctic at first, being based in the Gulf and Valley of the St. Lawrence. Ultimately leading French fur traders reached the north by means of the inland Canadian river and lake systems. In the never-ending world war between France and England in the 18th century, recurrent struggles in which settlers and traders in Canada were minimal concerns, northern posts sometimes changed hands. But persistent and widespread development only came to the territories more recently with the Klondike gold rush of 1898, and with World War II and post-war activities in both Yukon and Northwest Territories.
Fur traders and missionaries remained the principal and usually the only whites in the regions which now make up the Yukon and NWT. Prospectors, the RCMP (Royal Canadian Mounted Police) and others began to trickle in after World War I. The north outside of the few mining camps remained an indigenous peoples' homeland until World War II when a more complex situation developed. The frontier model of resource extraction did not prevail all at once, even the 1898 Klondike gold rush turned into a white exodus within a few years. White settlement and development activities were sufficiently limited and scattered that those who supported indigenous traditions or lifestyles were often as numerous as those who saw the north as a future settled country of white enterprises. Even the missionaries sought to protect indigenous people from the white frontier and from loss of many aspects of their ancient way of life.

Americans served in or passed through the territories in defence-related activities and criticised Canada’s lack of northern policy during and after the war. Revelations of starvation deaths among Inuit post-war led in 1953 to creation of a federal department for the north. Its name said it all: the Department of Northern Affairs and National Resources. The Federal Government would manage local affairs in lieu of a provincial government while it developed natural resources for general Canadian revenue and other benefits. In announcing the new department to Parliament the Prime Minister said, in what has become a famous remark about northern policy, that Canada had hitherto administered the north in a continuing state of absence of mind.

Four Strands of National Policy

National policy in northern Canada has had four main strands:

1. **Assertion and protection of national sovereignty**

Sovereignty maintenance has involved several elements. Parts of the unorganised territory to be known as the NWT were assigned arbitrarily by Ottawa to existing or new provinces, thus normalising their political status. In 1898 a chunk of the NWT was broken off to become the Yukon. This was done to aid closer administration of the region in the Klondike gold rush which, it was feared, might attract American annexation moves, given the large proportion of Americans among the prospectors, miners, and other fortune-seekers and hangers-on. Even today the territorial north accounts for 40% of Canada’s land area (NWT being 34% and Yukon 6%). In post-war times the major sovereignty concerns have been the American cold war presence through joint radar stations and other facilities, the threat of Soviet-American military conflict exploding over northern Canada – especially in the form of missiles or long-range bombers, – and the American non-acceptance of Canadian claims to full jurisdiction over the channels among the islands of the vast arctic archipelago.

This last has been a very sensitive issue in recent Canadian-American relations, leading in 1987 to Canadian announcement of plans to build a nuclear submarine fleet to patrol arctic waters. This expensive scheme was later dropped but not before it had thoroughly upset the Americans (who feared that clumsy Canadians might damage American ships under ice) and
upset Inuit and environmentalists fearing radiation leakage or accidents. Advancing technology which may make all-season arctic shipping possible holds great environmental dangers if the marine sovereignty issue remains unresolved because Canada will not have sufficient powers or technology to control oil spills. Furthermore open water passages created by ice-breaking vessels through what is solid ice at most seasons will have unknowable effects on sea life— which provides the food of Inuit—and on local and wider environments. Canada has succeeded in adding a special national right to protect ice-covered waters to the recent Law of the Sea.

In both public opinion and official policy a contradiction in attitudes is remarkable. Canadians who have never set foot in the north are vehement in the defence of every square inch of ice. Meanwhile, Inuit who have lived there for many centuries and know every nook and cranny of the lands and shores were seen not long ago as ridiculous and unreasonable in their land claims to the same territory. The only explanation for this phenomenon apparent in Australia no less than in Canada, is a racial or cultural arrogance among the European-descended population. It is worth noting that the sort of common law and common sense concepts of property use and rights revealed in court cases like Mabo and Canadian equivalents (Calder 1973 and Sparrow 1990) is more ancient and continuous than that relatively recent upstart, the nation-state, and may long outlast it.

2. Economic exploitation

Economic exploitation has been the most constant lure of the north for governments. The notion that untold mineral and hydrocarbon wealth lies in the north has persisted, and has animated many sweeping northern policy gestures of newly elected governments. The forbidding costs of development and transportation, and the expensive and difficult technologies required to tap resources, especially undersea oil and gas, have meant that few projects have proceeded and that they have been short-lived. In recent years the persistent criticism by indigenous organisations, environmentalists, northern policy researchers, and other watch-dogs of the northern fantasies and plans of governments has not only forced helpful project inquiries but has also reshaped the thinking of the public and of government departments towards the north. Most potent of these was the Mackenzie Valley Pipeline Inquiry whose hearing process and 1977 report became a sort of national cause (Berger 1988).

3. Scientific and Symbolic pressure

The notion of the north as a preserve for uniquely Canadian values and symbols is hard to evaluate. Certainly Canadians have a fascination with and protective attitude towards the far north quite unrelated to their demonstrable hankering for southern living and conveniences along the USA border. Both northern and southern politicians and interest groups have successfully exploited northern images and stereotypes for their ends. The baby boom
generation have had a great impact with their penchant for the rugged outdoors experienced with the best and most expensive gear, taking the north back south as an essential experience. Perhaps new researches into socio-environmental history will help us understand our human need for such emblematic associations with wild places and the extremes of the planet. Inuit art has enjoyed a tremendous cachet for its arctic associations appearing everywhere in displays and in city homes, with few viewers or owners aware of its frequent shamanistic meanings or inspiration in personal tragedies.

The scientific notion is more clear: scientists have seen the far north as an ideal laboratory for studies. They have often argued successfully for special protection of areas, species, etc. The notion of the pristine north has been overtaken by findings of disturbing toxic levels in arctic eco-systems (due to ocean and air currents, not from locally produced pollution) and this has brought further public support for northern indigenous peoples and others who wish to maintain a healthy environment. This development may be timely: many northerners had become wary of righteous preservationists but now common interests often help them to cooperate. The exception is the animal rights movement which is hated and despised by indigenous and non-indigenous northerners alike, not least by indigenous families who have lost their sole livelihood of fur and sealskin sales.

4. Regional Socio-Economic affairs

Northern socio-economic policy has been a subject of idealism and deserved pride by many insiders, although unknown to most Canadians. The Federal Government has, since 1953, and not without many blunders of implementation strategy created a high level of personal and public services, and living conditions, for indigenous peoples as well as for public employees who are the principal workforce.

The Limits of Policy

The policy areas described above have developed two different policy cultures. Nos 1–3 were long the staple of northern policy, attracting high-level officials and expertise, including the defence and foreign policy establishments. The culture here has often been hypothetical and full of grand designs, from fantastic technological speculations to world war and star war scenarios. It has been good fun, but not always very productive. In two areas it has impinged most usefully on real life: resource extraction and sea law. In the first case large expenditures on transportation and geological exploration have seen some results, although whether these justify the cost and political grief involved is a matter for debate. In the second, Canada has huffed and puffed but not yet blown down any of the edifices housing those who reject Canadian claims to arctic seas. However some secondary benefits from sea law creativity in the arctic have been beneficial.

No. 4 has seen the greatest development including the developments which have undermined Nos 1–3. That is, the northern population both white and indigenous has moved from being an administered frontier to a self-conscious political community —
or rather, several communities divided by race and region. Inevitably concerned with local daily life and opportunity rather than remote speculations: northerners have not only seized the northern stage from ‘the experts’ but have often discredited them.

After a period of anger and confusion through the 1970s and into the 1980s, the northern policy scene has been recast. The northern macro-policy people had been retreating into the star wars corner. Unlike the rest of the world, Canada remained officially suspicious of Soviet power until everyone else had forgotten it. Gorbachev’s friendly initiatives bore fruit at last and the Canadian Government, pushed hard by the Inuit and more discreetly, by dismayed supporters of coherent national policy in the north (For example, Robertson et al. 1988), swung round to enthusiasm for circumpolar cooperation abroad and for federal-territorial-indigenous co-management at home. Now we find that federal departments work cheerfully with Yukon and NWT Governments, and with indigenous organisations and communities, formally through claims settlements and other processes, and informally in virtually all areas of public policy. All levels work together in some cases. This outcome did not occur overnight.

The Rise of Northern Politics

The post-war political history is simple and clear. It closely resembles that in other countries such as Scandinavian Lapland, Alaska, Greenland, and northern Australia. Wartime brought egalitarian ideals and multi-racial military service, highlighting all too evident north-south, white-indigenous and material inequalities. It also brought transportation and communications systems into the north. Post-war ideals opposed to the racist and ultra-nationalist dogmas of the Axis powers and the boom which followed long years of depression and war demanded a new approach to northern society. The most evident disparities in northern social and economic conditions were no longer tolerable. Unlimited material expansion and development would dissolve all social and cultural issues in a new and universal prosperity, it was officially believed. Indigenous people were not seen as unique cultures but as poor people who lacked the white man’s education and amenities. So education and amenities began to be addressed.

Terrible famine deaths in Inuit areas drew Canadian public attention northwards in a sympathetic outpouring fuelled by the writings of a bestselling author (Mowat 1952, 1959). There seemed no question that indigenous culture was valuable; rather, it was the cause of outward ‘backwardness’ and material poverty. Despite the fact that Europeans had settled North and South America with similar viewpoints, and occasioned great suffering and death in the process, little had been learned. At least this time there was no doubt the individual worth of the indigenous human beings involved progress of a sort. The complaints of Inuit and Indians, when they were heard across the language barrier, were brushed aside. These people simply did not know what was good for them!

The Yukon, with its own territorial apparatus, however skeletal, thanks to the 1898 gold rush, had a different history from the NWT. There the Federal Government had a more entrenched and self-confident white settler opinion to cope with, a fact which did little for the indigenous people (Coates 1991).
In the NWT, however, federal ambitions were grand enough and the challenge great enough that whole new worlds were envisioned. Arctic Quebec was also thrown into this federal pot, a fact resented and ended by nationalist Quebec governments from 1960—with Quebec Inuit the losers, of course). Almost any idea was possible. Enormous submarines would remove northern resources silently under the thick sea ice. Domed cities with Babylonian gardens in the icy wastes were fantasised.

Until the end of the 1960s the ‘natural’ course of northern political development was generally seen in northern white and southern official circles to be the emergence of new provinces run by European-descended settlers. The aboriginal population would participate or not depending on their degree of assimilation—not politely called ‘acculturation’ in official circles. The only serious doubt about this in ‘mainstream’ Canada was the hope of some that the north could remain a sort of perpetual preserve for wildlife, Indians, Inuit, and science. This view, incredible as it may now seem, was held by many serious and high-minded people. The assumption was that no real civil society or large settlement could occur in the ‘frozen wastes’, and besides, with Ottawa pouring money into the north, should Ottawa not hold the north in reserve, a sort of resource treasury for national need? Furthermore, improvements in communications technology, education, and transportation, and the creation of centralised villages and towns out of the scattered hunting camps of indigenous peoples, created new realities and new pressures.

The northern territories’ white settlers viewed themselves as the natural social, economic, and political leadership class. The political questions which concerned them were how to get the best personal and community benefits from the transfers of national tax dollars directed by Ottawa to the north; and a full provincial-style legislature, with full provincial-type ownership and control of natural resources, to shrug off federal paternalism and get rich quick.

The indigenous peoples figured in the political thinking only of some missionaries, traders and others who had ‘gone native’, and of a minority of idealist officials. The remaining members of the NWT legislative assembly appointed by Ottawa, an already declining proportion vis-a-vis those elected, were resented in the north. Interestingly, these appointees were persons of high achievement and integrity who, if anything could be generalised about them, favoured practical steps in economic development and generous treatment of indigenous peoples. White settler opinion won, and the legislatures became wholly elected, and then gradually took on cabinet functions. However, the federally-appointed Commissioner of each territory remained very much the head of government to the late 1970s.

However, from the mid-1960s the post-war social changes, in Canada as a whole as well as in the north, saw more and more indigenous children going to school and reaching higher grades. These young people were seeing more of Canada, as well. The civil rights battles over race relations in the USA, British withdrawal from its colonial empire, and the plain English meanings of the political ideals taught in school were part of young people’s experience and environment. The flagrant disparities between the races in the north attracted their attention, while at school the denigration of their families’ social culture and their mother tongues humiliated them. Indigenous activism was growing in southern Canada and beginning to be noticed by press, public, and governments. It is not unfair to say that there was a considerable ‘top down’ organisational dimension in the emergence of indigenous associations, but
the grievances and issues were so universally felt among indigenous peoples that recruitment was never a problem. The clear history of British Columbia Province's aboriginal land claims and politics by Tennant is a classic study of such a process (Tennant 1990).

The example of the Alaska aboriginal land claims settlement had its effect in Canada. It was legislated by Congress in Washington, 1970, providing large cash payments, land, and new representative structures (modelled on American business corporations!). Until then many Canadians had thought 'land claims' far-fetched, but if even the hard-headed Yanks were doing it! Canada had its own developments. In mid-1969 the Canadian government issued a white paper on Indian policy following long cross-country hearings. The policy paper called for the sweeping aside of all 'special' Indian rights, privileges, and administrative structures, after a brief transition period. This liberal rationalist paper achieved two amazing results. It united all the Indians in Canada for the first time ever—and they have remained politically united on all basic issues ever since! Furthermore, it focussed the indigenous policy debate on a single fundamental issue: the imperatives of aboriginal rights and special historical status versus. the equal rights doctrine of liberal democracy. Then, in 1973, the Supreme Court of Canada found in Calder that aboriginal rights existed in Canada, with doubt only as to whether they continued to exist in the Pacific watershed. In those parts of Canada where indigenous lands had not been surrendered in treaties or other arrangements, notably the northern territories, Ottawa concluded that it would have to obtain such surrender if settlement, development, and land transactions were to proceed uncontested. Calder may be said to be Canada's version of Australia's Mabo decision.

Ottawa now moved to negotiate claims settlements with the Yukon Indians and their mixed-blood kin, the NWT Dene Indians and Metis, and the NWT Inuit—who soon broke into two claims regions, the Inuvialuit in the western arctic and Nunavut in the east. The territorial governments, their lands and resources owned and managed by Ottawa, were not parties to these negotiations except in observer and facilitator roles. The Inuit and Cree Indians of northern Quebec had pioneered modern claims settlements by signing in 1975, and a precedent was set. Some lands in full ownership, more lands with surface ownership, indigenous environmental and economic management powers and participation in new bodies created for the whole region in question, self-governing institutions, and large cash compensation payments became the typical claims contents. A clear review of northern and, indeed, all Canadian land claims is found in two articles by Crowe (1990 and 1991).

Although the Federal Government did not allow the territorial governments to participate fully in claims negotiations, a fact which they resented, Ottawa did insist that claims talks not include negotiations on self-government. The argument was that political institutions must involve all citizens. Never mind that claims agreements set up special statutory authorities setting and administering public policy! This policy caused cynicism among indigenous peoples because Ottawa negotiators and ministers so openly used self-government or claims processes to influence outcomes in the other. In the three-cornered Quebec-Ottawa-indigenous negotiation of the James Bay and Northern Quebec Agreement, on the other hand, creation of Inuit regional and local governments was an integral element. As for poetic justice, in the 1990s the Inuit made clear that they would not sign the Nunavut claims settlement unless a Nunavut Territorial government proceeded as well, whereupon Ottawa agreed.
The 1970s were a politically disputatious time in both Yukon and NWT. The white settler elites, apparently nearing their goals of obtaining considerable control of the territories, suddenly found themselves challenged by indigenous people. They had long preened themselves on having lived in the north a few years longer than short-term white administrators, but now the inhabitants of thousands of years, the real long-time northern residents, were asserting their demands. The whites responded with two main sets of arguments. One was that they, the settlers, represented the ‘mainstream’ Canadian political culture where everyone in the north was free to vote, with the indigenous people free to run for office like anyone else. No ‘special rights’ should accrue to any ethno-cultural group; indeed, this could bring national disunity. This has always been a powerful argument in liberal democracies, but the evident self-interest and reactionary statements of leading northern whites undermined their own credibility.

The second set of arguments hinted or stated openly that indigenous people were ‘not ready’ for power. This could mean many things, some harmless enough, such as inexperience with the medieval rites of Westminster-descended parliaments, or could be unspoken hints that non-European ‘primitive’ people might do unspeakable things once entrusted with power. Such matters are hard to answer when half-concealed. Also in the 1970s, a series of environmental conflicts in the north, usually involving indigenous interests as well, brought the north unprecedented notoriety. Most dramatic of these was the scheme to build a gas pipeline from deposits on the Alaskan north slope through western arctic Inuit and Dene-Metis homelands along the Mackenzie River to southern Canada and the mid-western USA. A federal inquiry process became national news because Judge Berger made sure that the indigenous peoples could testify in their own way and in their own villages, so that the decision would involve all those affected, not only high-priced company lawyers and a few interest groups. The Berger report of 1977 (reprinted 1988) was inevitably a political football. It also laid out a philosophy and approach to northern development which quickly drew world attention—and indeed, both author and report are well known internationally today, even in Australia. In the striking image of the report’s title, Northern Frontier, Northern Homeland, Judge Berger pointed out that while the north might be an exciting frontier for some, it was home for others. The indigenous peoples must be involved in any important decisions about the future. The report recommended delay of the pipeline for at least a decade while indigenous rights issues were addressed and other steps taken. Ottawa accepted the recommendation.

In June 1978 the Trudeau government in Ottawa launched its final great attempt to reform the national constitution. Among its proposals was one to invite indigenous peoples to be involved (Jull 1981, 45–48). This initiative had several motives, one being to consolidate the progress born of unprecedented government-indigenous conflict and indigenous policy reforms of the Trudeau decade before an expected conservative era, and another to overcome provincial resistance to indigenous service delivery improvements and other indigenous policies. In February 1979 the Trudeau Liberal government and the Conservative Ontario provincial government led the way in persuading the other provinces to begin face-to-face dialogue on indigenous constitutional issues with indigenous leaders. When the federal Conservatives won the May 1979 election, Prime Minister Clark stuck to the same policy and held a first meeting of federal and provincial ministers with indigenous leaders. When the Trudeau government returned to power in 1980, the Prime Minister launched an
agenda for indigenous-government talks which included ‘aboriginal rights’, treaty rights, indigenous self-government within Canada, and the question of service delivery by all levels of government to indigenous peoples. National developments inevitably had their impact on public policy in the north.

In 1979, also, political change came to the NWT. Elections returned a new breed of territory politician in a voter backlash against the conventional racial slanging and political confrontation of white leaders. These were younger whites who accepted aboriginal rights and the facts of aboriginal settlement, and some of the capable young indigenous leaders who had come up through the political associations. In an extraordinary session soon after their election, they repudiated the constitutional and aboriginal rights positions of their predecessors. They also set up a ‘unity committee’ of the Legislative Assembly to investigate the state of the NWT, the more so in light of Inuit demands that a new territory, Nunavut, be fashioned from the eastern and northern portions of the NWT (Jull 1992a). The report of the committee was damning: it found the NWT’s white political hegemony anachronistic and meaningless, and hailed a new era in which indigenous peoples would be full constitutional founders of northern territories, and answered white arguments against change. It recommended:

That this Assembly formally express what has been implied in its previous motions dealing with aboriginal rights and constitutional development, namely that it regards the present geo-political structure of the Northwest Territories, including the institutions and practices of government, to be an interim arrangement, subject to such change as may be negotiated by the leaders of the Northwest Territories’ peoples themselves, and subsequently affirmed by the peoples themselves (MacQuarrie 1980, 6; cited in Jull 1992a, 12–13).

In a plebiscite of April 1982 a desultory NWT public voted 56% to split the NWT and create Nunavut. However, 80% of the high Nunavut region turn-out so voted—a more important sounding. The NWT Legislative Assembly sponsored a Nunavut Constitutional Forum (NCF) and a Western Constitutional Forum (WCF) to conduct work on new territorial constitutions, with federal support and involvement. Each forum was made up of elected persons, some MLAs from Nunavut or the west, and elected leaders from the indigenous associations funded by Ottawa. In the western NWT no consensus existed on forms a new constitution might take, although Ottawa has made clear that indigenous needs must be taken into account in a new NWT constitution. In Nunavut the NCF developed comprehensive proposals (NCF 1993) and discussed these in public meetings in every community with virtually the full adult population, putting out a revised edition later with the benefit of these consultations (NCF 1985). Nonetheless, the course of Nunavut never did run smooth (Jull 1992a). Results were achieved, thanks to the Nunavut land claims settlement, and with the signing of a political accord by the Conservative Government in Ottawa on the contents, timing, and implementation of a federal Nunavut Act (TFN-DIAND 1992).

Nunavut clearly illustrates the central modern facts about the territories’ constitutional development:

1. constitutional development is sponsored directly or guaranteed by the Federal Government;
the needs and aspirations of indigenous peoples are essential elements of new constitutions and institutions; and

each new constitution has two parts, a framework for self-government throughout the territory in question and land claims settlements covering the same territory.

The Federal Government has the constitutional power to approve or deny territorial constitutional progress, but in recent national constitutional amendments bitterly resented by the territories the provinces must approve full provincehood. The main reasons for this clause were provincial fears that small federally-created and federally-dependent provinces could be manipulated by Ottawa in constitutional and inter-governmental fiscal negotiations, swinging consensus against the large provinces, or that additional provinces would upset the delicate balance in the constitutional amending formula. Needless to say, Yukoners have been angry that Ontario which has had full self-government since the 1840s should deny it to the Yukon in the 1970s or 1990s.

More persuasively, the Federal Government has taken seriously its moral and constitutional role as protector of indigenous peoples in territorial constitutional development. The indigenous-white history and relations in older settlement areas of Canada in the provinces have had little to recommend them to a modern generation. Ottawa has been anxious not to repeat those mistakes in the north. Post-war northern administration has benefited from post-war idealism and from the United Nations era with its race relations guidelines for the world. In practice this has meant that Ottawa has not moved forward on constitutional development in recent years unless both the legislature and the major indigenous associations in a territory agreed. In practical terms this has meant that whites have chafed at their lack of land and resource ownership and control pending indigenous claims settlements.

The claims settlements are, in fact, as 'political' and 'constitutional' as the self-government Acts. They include creation of statutory bodies with decision-making powers on matters normally reserved to legislatures. In the case of Nunavut, this means that bodies with jurisdiction over the management of wildlife (ie, the food source of the indigenous peoples) development projects, land and marine environments, comprehensive planning, and fresh waters, are forever assured that at least half their members are appointed by the collective Inuit land claims body, what Australians would probably call a 'land council'. Sitting with them are not pro-development fanatics, but government experts who are, in many cases, just as environmentally sensitive as the Inuit. The federal minister in question can only override decisions of these boards in some specified, few, narrowly defined cases. Although Australian commentators have noted that Canadian land claims selections are relatively limited as a proportion of the total ancestral territory of any indigenous people, they have failed to note that those peoples gain wide powers over the whole territory, as well as continuing revenue benefits.

The federal role in negotiating land claims settlements in the northern territories, and in legislating these beyond the power of territorial legislatures to alter (and in recent years even to entrench them automatically in the national Constitution itself) did not initially delight territorial white elites. However, this attitude has softened. As whites in the north came to understand that the indigenous people would prefer small isolated enclaves connected to remote bureaucracies rather than be at the mercy of
white settler governments, and that world opinion was shifting to favour aboriginal rights, they saw that Ottawa had a useful role. That is, the Federal Government could draw indigenous peoples into sharing a large region and its political institutions with the whites if basic indigenous rights were guaranteed in law beyond the power of frontier whites to amend. The result has been that in northern Canada the indigenous people have shown no less interest in economic opportunities and the development of the region than other citizens, provided that their concerns about cultural survival, protection of productive eco-systems, culturally appropriate public services, and genuine decision-making power are met. The whites, whatever they may personally think of ‘federal interference’, have seen that to end uncertainty damaging the northern economy and delaying projects has been worth the price.

The sort of social and political change that swept the NWT in 1979 was delayed in the Yukon until an election in 1985. Then a hard Right government was voted out in favour of a younger generation of centrist labour (NDP, the New Democratic Party) politicians. This new government worked hard to create a consensual process to design the Yukon’s future. An example was the Yukon 2000 project which even brought in the suspicious Right hard-liners (CARC 1988a). The mining base of Yukon life having collapsed, a disaster for the Territory, all sides of community opinion were forced to look at all options for future development.

**New Policy Twists**

From the mid-1980s the northern territories seemed to enter a sluggish period. Federal budget-slashing discouraged further northern experimentation and a constitutionally very conservative government in Ottawa seemed unable to come to grips with the challenge of diversity (Abele 1991; Hawkes and Devine 1991). Indeed, the Federal Government’s attempt to turn back the clock on socio-political diversity and multi-polar constitution-making proved fatal to the Meech Lake constitutional accord in 1990, and may have actually set in motion the destruction of Canada in the next months or few years.

In the north it was the claims process which provided continuity, the more so as federal Ottawa discovered that NWT legislature politicians did not always make very helpful constitutional partners. While indigenous-led internationalism in policy development surged, and the public and press became aware of the circumpolar north and Canada’s large and honoured place in it, Ottawa seemed unable to respond. There was a lack of purpose and energy in northern policy. The Inuit responded with a gigantic and awkward document which they styled ‘the arctic policy’. Concerned former government officials, scientists, and experts in various fields even banded together to produce ‘a coherent arctic policy’ as demanded by a parliamentary report (Robertson et al. 1988), and luckily the parliamentary parties had the grace and good sense to adopt its views, by and large.

Under this external prodding, and with the lure of national and international publicity, Ottawa stirred into life. The policy milieu had all changed now. The parliamentary report which had sought a coherent arctic policy spawned considerable activity. A focal event was a Canadian Arctic Resources Committee workshop on circumpolar issues in Toronto, October 30–31, 1986. At that gathering the usually antagonistic indigenous politicians and mining lobby representatives, government scientists and
environmentalists, military and social service personnel found new common ground, or rather sensed that they were occupying a new *ultima Thule* together. The consensus was cautious, but clear. A summary report of this workshop exists, although events moved so quickly afterward that it has probably received little notice (CARC 1988b). Politics, policy, and internationalism had met, and as usual the NWT legislature members missed the party.

**New Political Cultures**

The modern Yukon got an early and false start in the Klondike gold rush of 1898. White men were clambering all over the country. After a few years of boom there followed many decades of relative bust. The white man’s hegemony was established early, and was unquestioned in any official sense until very recently.

The Mackenzie Valley with its natural transportation corridor — the river itself — was part of the fur trade. The whites had little impact until the 1930s and then only in a handful of specific locations.

The Barren Lands (tundra) of the north-eastern NWT mainland and the many islands of the arctic archipelago were an altogether more difficult world, with almost no visitors of any kind, apart from a few early exploration parties, until World War II. Present were only a handful of missionaries and traders who had no desire to change the Inuit life on the land, even if they did wish to win favour for their particular agendas.

It may not be too early to draw some conclusions about the three regional political cultures of the northern territories: Yukon, western NWT, and eastern NWT (Nunavut). There is at least a superficial resemblance between their histories of white contact and their politico-constitutional emergence today. That is to say,

- the Yukon has white hegemony at all levels of society and in all regions, except the minimally populated far north, although indigenous rights in land and resource management, and much else, are newly ensured through land claims;
- the western NWT has a society divided between white towns and native villages, with control contested at all levels; and
- Nunavut has Inuit matter-of-factly resuming control of a region which they barely lost in two or three decades of great material change and attempted social engineering by a white welfare-style administration.

There is a new north today, and in 10 more years it may be quite unrecognisable. Indigenous people are neither marginal nor marginalised, but an enthusiastic community practising their newly won economic and political opportunities. Their peoples continue to face devastating social problems, but at least there are now indigenous professionals to help solve them and political opportunities to design the programs and institutions required. The races are in business together, the whites recognising the economic potential of the natives, while the natives want the benefit of white enterprise experience and skills. It will not be possible to lurch back to the past unless a bitter Anglocentric power rises throughout a residual Canada smashed by Quebec’s separation and attempts to roll back recent decades in a fantasy of lost
innocence. (That force is unfortunately alive and well in Canada, although it could surely not win more than a single election in a single historic moment of despair.)

In parts of far northern Europe and in Alaska it is possible to see new cultural hybrids emerging, and even vigorous arts born of cultural meeting and shared commitment to place. The same appears to be happening in Canada’s territories. Despite Greenland’s clear Inuit majority that society is anything but introverted. There is a sense across the north that many things are possible today. Many of the people who waited long in the cold for the frontier boom that never quite came may have left, but another sort of boom is happening without them or their hoped for Eldorado riches. The bitter northern conflicts about race and rights of the 1970s have given way in the 1990s to a ‘can do’ mood and emphasis on how to achieve practical results, regardless of origins. None of this would have happened if law and politics had not been exerted to provide a level playing field for indigenous and non-indigenous northerners.

Conclusions

Each northern territory, whether in Australia or North America or Europe, has a regional consciousness of uniqueness. While such self-consciousness may have its uses, it can also obscure realities. It is easy to describe the unique features of the Northwest Territories or the Northern Territory. More thought-provoking are the similarities. Most Australian arguments heard on every side of the northern development and northern constitutional debate, whether on land rights or environmental protection or ‘special’ policies for distinct cultures, has already occurred in northern Canada. It is my observation in Canada, Australia, northern Europe, the far north Atlantic islands, and Alaska that there are predictable processes of socio-political development (Jull 1991). Yet as a disturbing new survey shows, public policy, political agenda-setting, and even academic policy research in north Australia remain hopelessly caught up in old prejudices, booster bombast, and racial stereotypes (Crough 1993).

In northern Canada the indigenous Inuit and Dene peoples seemed, a few years ago, as ‘exotic’ and remote and isolated as any Aborigines in north Australia. They moved seasonally to harvest particular species in particular locations. The major feature of north Australian culture and geography which seems unprecedented among ‘first world’ northern territories is the spread of cattle pastoralism in lands which may or may not be able to sustain it in the longer term. With land degradation and environmental programs targeting such outback lands, even that unique factor may soon be remembered only as a mistake in some of the regions now grazed.

It is possible to draw conclusions of potential relevance to Australia from the recent constitutional history of Canada’s northern territories:

1. The constitutional development of Canada’s northern territories has blended continuing principles of British-derived political tradition with (a) Canadian social and political experience since the 1860s when the national Constitution was written and (b) unique regional and cultural imperatives of northern life. It is not surprising that a century of governmental development since the pioneer homestead era of southern Canada’s farm country should see substantial experience and reflection alter some
constitutional notions, especially when those are applied in the extreme climates of the barely settled northlands. Many areas of philosophy and law have also developed greatly throughout the 'first world', most notably in human rights, cross-cultural relations, community responsibility for the unfortunate, and environmental awareness. A constitution should not be a fossil but a living organism adapting to change. What is more, it is the unique value and even the purpose of federalism as a political framework to accommodate regional and ethno-cultural diversity, protecting and maintaining these within a larger unity.

2. In Canada since the late 1960s, as in Australia today, four separate streams – national constitutional review, aboriginal land and sea rights, northern territorial constitutional evolution, and aboriginal policy reform – have proceeded concurrently and with national prominence, each influencing the direction of the others. One could fairly add environmental awareness as a fifth item, although it has seemed of somewhat less of a direct influence than the preceding four.

Conflicts through the 1970s and into the 1980s on northern development projects, resource management, and environmental protection were the principal public battlegrounds for northern politics. It was there that indigenous organisations put their case and fought against a whole political and policy system which they saw as threatening to foreclose their future. The Inuit, for instance, saw Nunavut as the answer to their problems, but they had to fight in project inquiries and environmental hearings for the principles of their right to participate in decision-making. These conflicts had many effects, not the least of which was to sensitise federal and other governments on indigenous and environmental issues. Over time the indigenous viewpoint became better understood and respected within governments, and special units were set up to deal with it. The fact that Inuit could tell white experts many things they did not suspect about the environment, like Australia’s discovery today that Aborigines had complex fire management techniques which white scientists are struggling to understand, had considerable psychological impact on policy-makers. The final outcome today as Nunavut claims and self-government near implementation is that government policy and personnel are often 'on side' with indigenous people. The movement to comprehensive environment and land-use planning is a particularly interesting saga (Fenge and Rees 1987), and the whole era’s results have been remarkably decanted into the Nunavut claims settlement (Fenge 1992).

The influences in constitutional precedent have not been one-way in Canada. At the end of the 1960s southern Indian and Metis groups tended to patronise their territorial 'little brothers', but in the 1970s the strength and clarity of the territorial indigenous movement message came into its own. By 1981 in the most spectacular instance of national constitutional political campaigning – to restore aboriginal rights clauses to what would become the Constitution Act 1982 (Canada) – the territories’ indigenous leaders provided national leadership. During the heads of government conferences with indigenous leaders on the national constitution from 1982 to 1987, northern experience, especially the grass roots constitution-making in Nunavut and the Nunavut government model being put forward by Inuit, provided much interest and
some inspiration to the politicians and officials involved. This surprised NWT Inuit leaders who had informally agreed with Prime Minister Trudeau not to bring this essentially bilateral issue into the multi-lateral constitutional talks.

3. **A defined north and an overall national northern policy have provided many benefits, including specifically designed policies and programs, and more adequate service levels than those of provincial governments in their northern hinterlands adjacent to the territories (ie, areas equivalent to outback and northern Queensland and Western Australia).** The politico-administrative north in Canada is arbitrary: it means the Yukon and NWT, but not the northlands of seven provinces. Extreme climate and other conditions do not alter at latitude 60 north. However, provincial northlands are usually seen as backwaters by provincial capitals, to be exploited, but not to be a priority for public services or political structures, a doubly difficult problem for indigenous people who are the most under-serviced part of the population and whose lands and waters are the objects of government exploitation! A similar phenomenon is found in Queensland and Western Australia.

Because the north is defined as ‘different’, it has been much easier for Canada to devise special policies and programs. Furthermore, the southern public has never complained or resented the territories, even though very high levels of public funding, by any measure, have been directed to the Yukon and NWT until the present. Just as Canadians and their governments accept that the north is a unique national heritage, so they accept special responsibility for it. Given the disadvantages of small population, little intrinsic political power, and limited economic clout of northern territories within the nation, their justified claims of uniqueness are politically important. Yukon and NWT indigenous peoples and some northern white politicians have used these to great advantage.

National policies towards northlands today can no longer be based on rationalist and pseudo-rationalist arguments. Lest southern governments are prepared to respond to the unique needs and ethno-political conflicts of northern regions, they will merely fuel the very political dissidence and deteriorating race relations which they fear most (Jull 1991).

4. **Indigenous ethno-politics have been decisive in determining the pace and shape of Canada’s recent northern territorial constitutional processes.** For those romantics who imagine Canada a nice place with reasonable people it is important to set the record straight: the recent northern indigenous movement and its goals were for many years denied or ignored by governments, and were subject to scare-mongering by leading federal and territory politicians, to national unity fears, and even to security service ‘dirty tricks’ — as the McDonald Royal Commission, established 1977, revealed, not to be confused with the Macdonald Royal Commission on Canada’s future, established 1983. Initially the indigenous quest for land rights, cultural autonomy, and self-government had no forum for expression, nor any process through which to negotiate change. Whether or not the native associations met the same standards of representativity as liberal democratic parliaments,
they certainly voiced authentic needs and sentiments of the native peoples. Furthermore, as the Federal Government and southern public began to listen in to the inter-racial debate, they realised the legitimacy of much of what the indigenous peoples were saying. Soon it was the legislative assemblies of the Yukon and NWT, and their white-controlled administrative apparatus, which were being questioned in the south about their representation credentials.

This situation arose because the white population and their governments had initially left out of consideration the changing international and national public opinion on human rights and race relations, and found that better northern education and communications, far from assimilating indigenous peoples to white society, gave them a clearer notion of their rights and the means to demand them. The antiquated gold rush mentality of many northern whites, the evident narrow self-interest in their control of economic and political levers, and their failure to develop new ideas for new times left them highly vulnerable to changing attitudes. A change of generations and change of ideas in the 1979 NWT elections and the 1985 Yukon elections made possible reasonable, negotiated constitutional outcomes. The white community of the northern territories changed its thinking from the assumption that it had the sole right to define northern society and political institutions (as had happened in the provinces of Canada) to reconciliation with indigenous peoples and accommodation of their needs and rights. This process is by no means complete today.

There is some irony in the fact that a cornerstone of northern white political thinking is the belief that southern Canada is cynical about the north and only interested in exploiting it for the national wealth. Southern opinion is much more complex than that, and leans to genuine idealism about the unique environment and unique indigenous cultures of the north. Like Australian feelings about Kakadu, the Canadian view of the north is that it is a very special place whose character must be retained in a world out of control. Indigenous peoples and environmentalists have struck a much stronger chord among southern Canadians with their values of continuity and conservation than have pro-development whites, and have proven more sophisticated in their political campaigns. (One might also add that despite the historical and continuing significance of the mining and hydrocarbon industries in Canada, Australia alone of ‘first world’ countries takes those industries’ views seriously in sociopolitical and constitutional discussions [eg, Jull 1992b, 7-8].)

5. The new Canadian territory constitutions are made up of both federally-legislated self-government Acts and federally-legislated land claims settlement Acts. Federal intervention to umpire constitutional development and sponsor negotiation processes in the north has been necessary to reduce conflict and reconcile the races. Furthermore, Ottawa has not accepted territorial Legislatures as sufficient to negotiate new constitutions alone but has insisted on additional direct indigenous participation.

Most Canadians, and virtually all federal policy-makers, have agreed that the system of Indian reserves which emerged in southern Canada must be avoided in the post-war north. The reason for this was that reserves had often
become apartheid ghettos of poverty and neglect, ie, the original occupants of territory pushed aside by white settlers. Whereas post-war whites usually have seen the separation of indigenous people as the issue, indigenous reserve dwellers more often lamented the poor quality of public services on reserves and the small amounts of land and resources available for their livelihoods. The long-standing inability of federal and provincial governments to agree on cost-sharing of sufficient public services and land/resource needs of indigenous peoples has created an explosive mix in cities and country across western Canada. Ottawa has attempted to learn from southern mistakes in making its northern territory policies. But its preference for ideals of multi-racial harmony and equality, and of avoiding separate Indian and Inuit administration on the southern model, failed. Although a single unified northern administration was attempted, the reality was that transient and short-term white workers had the best jobs, housing, and living conditions while indigenous peoples had often miserable conditions. Indigenous peoples, therefore, viewed the system as unjust and demanded particular program attention and a recognition of their unique constitutional rights as is the case in the provinces with their federally-controlled Indian reserves.

The negotiation of land claims settlements (which include much more than land) and of new political arrangements have been the main reform processes. From the late 1960s to the end of the 1970s the NWT government and Legislative Assembly refused to accept either the demands of the indigenous organisations for a role in public policy or their demands for recognition of aboriginal rights. Racial tension increased. Indigenous people have made it clear that they will only participate in a shared governing system with whites if their rights are secure. Single unified NWT and Yukon public service administrations continue, but only because Ottawa has committed itself through land claims and constitutional processes to guarantee indigenous rights. The NWT indigenous groups would rather have local self-government linked to a remote federal bureaucracy, however insensitive, than to be subject to a white settler-run territorial government bent on dominating them and developing their lands and waters. Further, Ottawa has denied the territorial governments control of land and resources pending land claims settlements with the indigenous peoples. These facts have given the territorial whites and their governments a considerable incentive to accommodate indigenous interests and to welcome indigenous participation in territory-wide structures. Whites themselves voted hard-line territorial legislators out of office because they saw that intransigence was poisoning social relations in their towns and undermining economic prospects with uncertainty.

It is interesting to note that the territory governments did not acquire their own constitutional seats among the national heads of government until negotiations with Canada's aboriginal peoples began. With northern Inuit and Indians at the table, Ottawa and the provinces had no choice but to invite the Yukon and NWT governments, as well.

In its broad lines, Canada's national indigenous peoples policy has been multi-partisan for many years. Conservatives as well as Liberals and NDP (labour) support aboriginal land claims, aboriginal self-government, and
aboriginal cultural autonomy within national unity. Canadians are also more aware than Australians that world organisations and international public opinion can bring to bear unpleasant scrutiny and great political pressure when indigenous peoples are treated cavalierly by governments. (For instance, a major change of indigenous policy in Canberra under future governments to downgrade indigenous rights may be purely hypothetical because, in fact, the global opprobrium and international sanctions of several sorts which would be brought to bear would be unbearable, as Canberra well knows.)

6. The critical issue in the Canadian north today is constitutional, ie, the achievement of political settlements which accommodate the needs and internationally recognised rights of indigenous peoples within the national unity of a European population majority and political framework. Such settlements include land and marine tenure, environmental regimes, resource management and development, levels and delivery of public services, cultural autonomy, reform or creation of political institutions, and legal guarantees for some or all of these matters in perpetuity. The demands of outback and northern indigenous people are often seen, initially, as capricious. However, in all the northern hinterlands of ‘first world’ countries, including Australia, we find the same issues, the same arguments, and the same political dynamics (Jull 1991). A pattern is clear and, because it is sustained despite cultural and historical differences of peoples and regions affected, isolated from each other, with governments and indigenous peoples equally groping their way, it is most powerfully suggested that a common ‘politics of northern frontiers’ is at play. I believe that there is a definable package of issues which must be addressed for a return to political harmony and social peace. The Canadian experience is not merely interesting as a set of discrete case studies; it is the path that Australia will tread, willy-nilly. Australia can learn from others and save years of bitterness and conflict by developing appropriate policies, a move strongly urged in light of the Mabo decision.

7. The Canadians, like other ‘first world’ governments, have found that peaceful progress for indigenous peoples means not the denial of aboriginal rights but the recognition of them, and the use of them as building blocks for modern indigenous societies. The Mabo decision now confronts Australia with the same choice. Unfortunately many people in Canada and Australia have always chosen to believe that they can merely deny the rights of ancient indigenous societies living in their territories. However, that act itself guarantees that indigenous people will see the white man’s law and political institutions as fundamentally unjust, and its various enactments as undeserving of any respect. The aboriginal rights issue is political more than legal.

8. Canada’s two existing territories and third embryonic territory each has a distinctly different social and political culture, and each is developing a made-to-order constitutional framework to match. In one case a largely indigenous area is being reconstituted as a separate northern territory; in two others significant indigenous rights and needs are being built into northern territory institutions and law. They have not been homogenised,
nor has any final structure been imposed by Ottawa. What Ottawa did impose was the obligation to stop slanging and start reconciling.

9. The development of a stable, equitable, and peaceful civil society is as important as the rapid material expansion which often dominates the thinking of settlers on the frontier, and should be a national priority even when it is not one in northern capitals. The priorities of the nation and northern regional elites may differ. The material advance of one sector of the population may only aggravate class, racial, or sub-regional tensions in the absence of policies of social and political equity. In sparsely settled parts of the country which are not yet integrated into national society or economy such tensions may be potentially threatening to national security, even though northern settlers sometimes like to think that ‘uppity natives’ are a threat. In northern Canada, as in Alaska, Lapland, Greenland, and in northern Australia, this subject is one which national governments are reluctant to discuss openly, but is nonetheless on the minds of policy makers. Several arctic countries have independently groped towards accommodation with territorially-based minorities as the most practical and appropriate policy (Jull 1990).

There is a special role for research and knowledge sharing activities in north lands (Jull 1992c). These are needed relatively more in ‘exotic’ northern climes than in moderate southern ones. Also, research and knowledge are usually undervalued on frontiers, and tend to be monopolised by dominant special interests there.

10. Canadian northern peoples and government are creating or joining international networks for research, information-sharing, advocacy, and cooperation on hinterland issues. These are altering the perception of northern territories at home and abroad, and altering the nature and context of policy development. Australia seems to be missing out on the benefits of overseas experience, but nonetheless will be expected by world opinion to conform to the emerging international consensus favouring indigenous autonomy, resource management, and self-government within nation-states. Until very recent years, Canada and other far northern countries regarded their northern territories as socially embarrassing regions with spectacular scenery, sub-normal human intelligence, and vast sub-surface treasures. The north was anomalous, and once the locals had properly digested the values of those down south who knew best what they needed, they might hope to obtain serious consideration. Not surprisingly, northerners did not take the same view of things. The white settler leadership wanted a quick march to normalised political status, as provinces, primarily in order to gain control of northern land and resources. Indigenous people had a less exact view of the form of the new political institutions they wanted, but security vis-a-vis pro-development whites and a model of political institutions and responsive to them were the most clear demands. These two parallel northern revolts forced Ottawa, slowly and reluctantly, to back away from its paternalistic administration and move towards accepting northern politics. First Ottawa did this by validating and empowering the usual parliamentary-style legislature in each territory, but this only heightened the indigenous-white tension when the whites tried to use their knowledge and control of the
introduced system to set the political and development agendas without recognition of aboriginal rights or aspirations.

When the northern indigenous leaders became active members of Canada’s national indigenous political movement, they changed the context. When indigenous leaders of Yukon and NWT became involved in international forums, beginning with a 1973 meeting in Copenhagen, a whole new phase opened. While Indians and Metis became active in the World Council of Indigenous Peoples (WCIP) founded in 1977 in Canada, Inuit of Canada joined with Greenlandic and Alaskan Inuit – with the small Siberian Inuit population also invited to join – to create the Inuit Circumpolar Conference (ICC). While the WCIP has vigorously pursued aboriginal rights issues in a global context, with much of its focus necessarily on genocide in Central and South America, the ICC has used cooperation, information sharing, and joint strategising to further the agendas back home. Environmental protection, especially of arctic seas, and the achievement of self-government in law and in practice have been ICC’s principal concerns. ICC has had so great an impact in Denmark and North America, apparently stunning white governments and public with the notion that ‘the remote Eskimos’ would form a world body, that they have dragged national governments into a new era of cooperation. When the predictable white Canadian cries of ‘separatism!’ were levelled at them, they responded sweetly that if Canadians could be good members of the British Commonwealth and the Francophonie (French-language commonwealth), they could certainly benefit from an Inuit ‘commonwealth’. Now cooperation has reached a new level with recent creation of an Arctic Council of governments including a second tier of indigenous peoples committed to working together on indigenous, environmental and socio-economic issues as well as more traditionally international concerns of environment, scientific research, etc (CARC 1992). The internationalisation of northern territory issues in the northern hemisphere is a story in itself, and a great credit to Inuit (Jull 1991 67–69), to the foreign minister of Norway, and to Mikhail Gorbachev, among others.

While Australians north and south cherish illusions of outback distinctiveness – and nobody doubts that the Australian north and outback is a unique part of the world – they are missing the opportunity to learn from other northern territories. Many Australian problems in the north are not unique at all, but are banal and boring repetitions of archetypal human political processes, with predictable outcomes and predictable rhetoric along the way. The policy difference for today is that the northern circumpolar countries stumbled along alone in their search for workable policies: Australia today has the benefit of their experience, if we will only use it.

Canada, like other modern countries with northern territories, initially found northern regional and indigenous challenges threatening. The integrity of the national constitutional system and of political culture were said to be at risk. Within a few years, however, Canadians found that the constitutional system provided considerable flexibility. Also, they found that the process of reform was invigorating and would lead to a more inclusive and just society. Now they are rather proud of northern innovation. Indeed, the constitutional ‘revolution’ begun in northern Canada has now moved governments,
indigenous peoples, and public all across Canada to re-think indigenous policy and the political dimensions of aboriginal rights. There is no dimension of the current Canadian constitutional reform package more generally supported by the white Canadian public than the aboriginal clauses.

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INDIGENOUS LAW AND CONSTITUTIONAL CHANGE: 
THE ROAD AHEAD 

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In a national park in New England in the United States there is a memorial, a grave marker, with the inscription:

Here lies a woman, a Wampanoag, whose family and tribe gave of themselves and their land that this great nation might be born and grow.

I would wonder how many picnickers think of the fact that people like this woman and her family were victims of a mass genocide that followed the visit of Christopher Columbus to the Americas. They did not voluntarily give of themselves and their land. The nation was built on their involuntary sacrifice, just as this town was built on the involuntary sacrifice of the Larrakeyah (the traditional Aboriginal inhabitants of Darwin). The Larrakeyah have survived, but there has been no acknowledgment of their original title. Christopher Columbus in America; Captain Cook in Australia. The stories are the same sad ones.

The unresolved question for all indigenous people throughout the world who have had their lands taken from them by a western invading nation has been: by what right has someone taken our land and weakened our systems of political, economic and legal control and self-determination?

All indigenous nations have suffered through governments using their rights to make laws for the well-being and good order of the population. So often that idea has excluded the indigenous people. When it has included them it has often had the consequence of being detrimental to their well-being. The good order has often meant the order that the government would permit. That is things like: where we could live, what we could talk about, what language we had to speak, whether we could look after our own children, where we could travel.

We were not able to ‘freely pursue our economic, social, cultural and spiritual development in conditions of freedom and dignity’. Our self-determination was eroded by government statute. We were not able to have a direct say or control over our own affairs. Our wishes and rights were never given due acknowledgment in the implementation of government actions for our supposed benefit.

The invaders had mysterious notions to justify their position, uses and exploitation of the land, its resources and the people. They called them doctrines – sacred words. It
would be hard to argue with indigenous people who held the view that these sacred doctrines have simple meanings, namely:

**Conquest** — march in with guns, murder most of the people or drive them into the sea.

**Terra nullius** — pretend no-one is there and lock them up when they object.

**Discovery** — tell the locals that no other western power knows about this place and then enslave them.

**Settlement/occupation** — bring diseases and pests to the lands that never had them and exterminate the people by germs.

These doctrines, as defined by the nation states of the world are sacred to them as they provide the basis for their political and legal being — their dreaming in a sense. They have all been used to hide behind while governments have radically interfered with the inherited and inherent rights of the indigenous people.

The will of the indigenous people to survive and to refuse to conform or accept the designs of governments has underpinned the often brutal and callous interactions between the two groups over the years after contact. The legacy of these interactions is what we have been given by Columbus, Cook, Tasman, Dampier and others. As a nation we need to search for a road ahead that puts this legacy behind us. We need to heal the wounds.

The road that I would like to find is the road that moves us, as a nation, from brutal interactions that deny humanity to positive interactions that value humanity. The road ahead is one where people’s rights, black and white, are mutually respected, willingly acknowledged and constructively built upon. Finding the road is difficult and requires people who are willing to travel together in search of positive change.

The starting point of that search has changed for the nation as a whole. In Australia, until recently, *terra nullius* — one of the sacred doctrines — has ruled supreme. That is no longer the case. The High Court on the 3rd of June 1992 in *Mabo v Queensland* recognised there is a thing called **native title** that was really always part of the common law that the British brought here with the convicts. This kind of title has to be asserted by people; but to be recognised as the group or individual who can hold such a title to certain types of land is not altogether simple.

Many groups will not be able to assert their claims to establish that right. Meeting the land and economic needs of those who have been dispossessed needs to be a priority for all governments as agreed by them in response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

For indigenous Australians, the High Court decision on native title has opened an area of debate that had been closed to us. It takes us a good deal further along the road of acknowledgment of recognition and reconciliation. It may even take us further along the road towards a restoration of self determination.

We can now say to all Australians that the time has come to reconsider the framework of the laws that have been used to define our dispossession. Our High Court has spoken and said that the common law has expanded now to recognise indigenous customary law. At least in relation to the ownership of land. The historical
dispossession of indigenous people has been due to the power of the Crown. Through statutes and the actions of governments. Not the common law.

How those elected to parliament in the various jurisdictions respond and decide upon this challenge will determine the state of this nation in the eyes of the world. Our historic dispossession, beginning in Sydney in 1788 and spreading like red ink on blotting paper, has not been totally completed. There are areas where dispossession has not occurred. Our Australian laws and morals would suggest that in those areas, no further dispossession should take place. I am talking about places where our law on land ownership stands firm. Where the ritual knowledge is still held in these places land is alive, it is a living relation. It is not a commodity at the service of the demands of masters who are detached from any understanding of land as the source of all life. In these places, old men and old women still hold the law of the land. The High Court calls this native title: it is indigenous title in the common law. Although not yet in statutes or in the Constitution, all Australians have an obligation, to cherish and value this Australian indigenous law.

Indigenous title is a fragile possession it seems despite its age and endurance after massive forced racial change. It stands ready to be discharged by the power of the Crown, albeit now with just terms and not in a manner that would discriminate racially. Holders of native title are now guaranteed the same rights of protection from government interference and expropriation as any other titleholders to land. It seems that the Crown still has the right to deal with the land but it now cannot ignore our traditional indigenous systems of political, economic and legal control, a fact that will require time and effort to resolve.

If we are to go down a new road then it is not a question of responding out of a sense of guilt for the past. It is a question of how to seize the opportunity to create together collectively and identify what is best for the nation as a whole. Perhaps the land owning law makers of indigenous Australia will be able to persuade the law makers of the Commonwealth, State and Territory governments to recognise that under indigenous law and now in common law they have a shared responsibility to look after the country. A shared road to travel. Indigenous people and Australian governments might then be able to work together to ensure that indigenous land ownership and cultural laws and traditions are maintained and looked after for future generations of Australians.

Regarding the need for a constitution for a possible State in the Northern Territory, the bipartisan Constitutional Development Committee has recognised that there needs to be a specific resolution of the place of Aboriginal people in this constitution, particularly in relation to Aboriginal land. Both main political parties have spoken of the possibility of constitutional entrenchment of Aboriginal land ownership rights. The best way of doing this, and the status of Aboriginal land granted under the Northern Territory Land Rights Act is yet to be resolved. These questions are difficult but resolving them with honesty is necessary if all Territorians are to regain the control over their own affairs that the Chief Minister and others are pursuing.

Redefining the relationship between indigenous law and Australian law in formal terms especially in those areas where indigenous law is the basis of native title would seem to be a necessary element of any constitutional recognition of Aboriginal rights in land. It is no longer appropriate for governments to make decisions that affect
Aboriginal customary land laws in ways that might devalue the inheritance of future generations of Aboriginal people. It is extremely important for all governments to recognise that Aboriginal people, communities and organisations need to be resourced adequately to discuss and consider these issues, especially as they may impact on their birthrights. In terms of the land ownership rights, of future generations, their aspirations must be taken seriously. It is not enough to imagine that Aboriginal views can be assumed and given recognition in abstract terms without the opportunity to develop their own opinions autonomously and consequently to be able to negotiate their positions as equals.

The Territory is socially, geographically and politically unique. Designing a constitution that recognises the social, geographical and political uniqueness of Aboriginal land and land ownership rights is a worthy challenge for creative constitutional design. A recognition of land ownership rights leads to a rediscovery of other rights, as we have learned in the Northern Territory. Indigenous peoples’ rights of self-determination have been asserted in various forms as a consequence of land ownership. These are a logical consequence of rights in land leading to attempts to positively define new rights on that land. Everything flows from the land.

At times the assertion of these rights has come up against the right of governments to make laws for the benefit of the community as a whole. Sometimes land ownership rights appear to conflict with the rights or interests of other sections of the wider community, such as the mining and pastoral sectors. All too often these disputes have ended up in the courts. Finding other ways than through the courts to resolve disputes in land is a challenge, especially when there has been little trust and confidence in governments to do the right thing by the indigenous peoples. Many are aware of the token promises and the fruitless consultations. Too often the positive experiences became overshadowed by the negatives.

At the national level, where these fundamental divisions, discord and disagreements exist we have at least the opportunity to try and find our way through some of this, in the hope that some of the hurt may be healed and some of the promises might have realities.

The Council for Aboriginal Reconciliation was set up to grapple with such circumstances and to try and find some light and direction on these matters as well as to help people come together at the local level to deal with the issues of disadvantage. The 25 member council, contains many sectors of the community. Some members have not been directly involved in Aboriginal issues. Some rarely work together, such as unions and employers, land councils and miners.

The council has adopted the following vision and will work towards its adoption across the nation by the year 2001. A vision that calls for:

a united Australia which respects this land of ours, which values the Aboriginal and Torres Strait Islander heritage, and provides justice and equity for all (Aboriginal Reconciliation Unit 1992, 2).

Reconciliation does not need to wait until the year 2001. Its meaning and expression will be found when people begin to work together to improve relations between indigenous and other Australians.
The council's strategic plan sets out key issues, that are a focus for the education needed to bring indigenous and other Australians together in mutual respect. One of these issues is the need for a greater understanding of the importance of land and sea in indigenous society. Another is to report on whether the reconciliation process would be advanced by a formal document and whether any such document would benefit the Australian community as a whole. It is crucial that information, debate and discussion, take place around these issues so that the levels of ignorance and prejudice can be overcome. We will be working towards a major conference in June 1994 to report on the progress of reconciliation.

Conclusion

In the past indigenous people in this country received recognition or benefits because other Australians thought it might be a charitable thing to do, and to some extent that was how the Council for Aboriginal Reconciliation was set up.

Now, with the High Court judgement on native title, we have a greater responsibility placed upon other Australians to recognise that indigenous Australians have rights and that now they have to change to accommodate those rights. While this places great opportunities and challenge before us, it also has the potential to intensify the conflict between us. If we are able to work and walk together with respect and some honesty at last, we will be able to tackle those matters that have caused disagreement between us.

For the Northern Territory, the road ahead is hard but exciting. The challenge is not only to get the words right in any constitutional document, but to ensure that the words and actions are embraced by all of its constituency. Central to the achievement of this reality is the need to transcend the history of race relations and to create the experience of well being for all Territorians.

If the proposed Northern Territory Constitution does not move towards enhanced Aboriginal self-determination; if it does not recognise and support Aboriginal native title in the light of the Mabo decision; if it is not based on the views of Aboriginal people formed through resourcing Aboriginal communities and organisations to discuss and negotiate these views, it cannot hope to succeed as a means of uniting Territorians towards a better shared future.

The same challenges that face the Northern Territory constitutional process apply to the issue of the process of reconciliation at the national level. We would welcome your participation in facing these challenges together on the road ahead. That way we may be able to get past the corrugations and bulldust and find the highways to change.

Reference

TWO CULTURES – ONE CONSTITUTION: A YOLNGU* PERSPECTIVE ON A NORTHERN TERRITORY CONSTITUTION

Mr Wes Lanhupuy, MLA

This paper attempts to provide a perspective on what I believe a Northern Territory Constitution may offer to the Aboriginal people of the Northern Territory.

The issues surrounding indigenous or aboriginal peoples and constitutionalism have taken the spotlight on the world socio-economic and political development stage. This shift has or is in the process of testing the existing constitutional and legal framework of first world countries that have for many years denied minority groups recognition of their culture and language. This imposition has undermined the complex traditional laws and cultural and kin relationships that have maintained the survival and determination of a way of life for indigenous people. It is through time that indigenous peoples’ culture and ways have been able to adapt to the changing forces and attitudes of the ‘western world’ to make known and acknowledge their presence in the world today.

Changes in attitudes within the western world have recently occurred in Canada, with the development of the Nunavut territorial government in the north. There is continuous work within the United Nations and other international forums with particular emphasis in the development of the recognition of indigenous and aboriginal rights. For example, the 1993 International Year for the World’s Indigenous People forum no doubt, is providing the catalyst for constitutional change and reform in many countries.

Looking now to Australia and the recognition of its Aboriginal people, it is well documented that European settlement in Australia is predated by some 40,000 years of Aboriginal occupation. It has only been recently within the two hundred years of European occupation that attempts in various forms of recognising Aboriginal occupation have been taken on by successive Australian governments. One of the most recent attempts is the Aboriginal Land Rights (Northern Territory) Act 1976.

Aboriginal society pre-European settlement and as it is today, is a society that has a complex and intricately developed set of laws and a cultural relationship which is based not only on the individual, but also the family and the community.

* An Aboriginal perspective
Aboriginal people comprise approximately 25% of the Territory’s population. There is a significant number of Aboriginal people who reside in the Northern Territory, who strongly believe that Aboriginal custom and ways are far more important to them, than living with and understanding European law. It is their strong belief that European law has its place in Aboriginal society, but it should not dominate and control all aspects of Aboriginal life.

In Aboriginal (Yolngu) eyes, European law meanders like a river on a flood plain that has no barriers to constrain its flow or direction. Although we can see merit in having a law that can adapt to changing circumstances, it is however in complete contradiction to Aboriginal law and custom, where practices and beliefs have carried on for many thousands of years in much the same way.

Being a member of the Sessional Committee on Constitutional Development I have had the opportunity to meet people from all walks of life within the Northern Territory, particularly with Aboriginal people who follow a mainly traditional way of life. Throughout these visits to Aboriginal communities and in discussions with traditional Aboriginal land owners it has been put to the Committee that there is a great desire for local Aboriginal self-management within the framework of the wider community. Wherever possible, it should be based on links with the traditional Aboriginal tribal lands, and with the preservation of customary law and traditional society.

Successive Australian governments both state and federal have primarily been concerned with the social and administrative arrangements dealing with proposals of Aboriginal self-management. These governments have shown little interest in the concept of recognising or preserving traditional Aboriginal society within and as equal partners of the wider community. It is my great hope that the reconciliation process that is being conducted presently in Australia will address and rectify this imbalance.

In respect of constitutional recognition of Aboriginal customary law and custom, none of the Australian Constitutions contain entrenched provisions. Having said that, the Commonwealth and some of the States have already legislated by referring to customary principles in their respective Acts, particularly their Aboriginal land rights legislation.

Without going into much detail, the Aboriginal Land Rights (Northern Territory) Act 1976 has been a major achievement in the process of upholding and maintaining Aboriginal culture and spiritual affiliation with the land. It has been a major force in advancing Aboriginal identity. It comes under political attack constantly by conservative forces.

Since European settlement in Australia, there has been no recognition of ‘native’ title to land. The very recent decision of the High Court in Mabo v Queensland has rejected the view that Australia was a land without occupants. The Mabo decision has corrected the historical facts regarding Aboriginal occupation. It may well be the first step in legally recognising Aboriginal law and culture and no doubt will provide continued impetus in the reconciliation process.

I have spoken for some time on the issues pertaining to Aboriginal people generally. However, it is important to present a national perspective in order to place in context
the Northern Territory situation. The Northern Territory is a territory of the Commonwealth, not a State, although it has ‘state’ like powers for the body politic that is the Northern Territory Government to govern in accordance with the *Northern Territory (Self Government) Act 1978*. This Commonwealth legislation for all intents and purposes can be regarded as a forerunner to the Northern Territory Constitution. However, for example, it explicitly excludes matters concerning Aboriginal land rights unless certain Commonwealth Acts specifically allow the Northern Territory to legislate on that matter.

In addressing Aboriginal matters in a future Northern Territory Constitution there are two most convincing arguments I believe for recognition of Aboriginal customary law and culture. In doing so, I draw on the arguments for recognition from the Committee’s latest Discussion Paper No. 4, *Recognition of Aboriginal Customary Law*, which was tabled in the Northern Territory Legislative Assembly on 20 August 1992 and they are:

(i) that Aboriginal customary law continues in practice to exist as a living system in the lives of many Aboriginal Territorians, influencing and controlling their daily actions and lives; and

(ii) that many of those Aboriginal Territorians have, in the course of the Committee’s consultations, expressed a deep desire for some form of formal recognition of their customary law (SCCD 1992, 41).

Because of the complexity in administering the general law of Australia and the diversified and secret elements of Aboriginal traditional law and expressing that law in a statutory form, it will be difficult to incorporate both under one entity such as a constitution. There is a need, however, to recognise our law and we must devise a mechanism that does so. Attempts at incorporating or accommodating two laws, ‘white and black’, have been addressed in the past by the Australian Law Reform Commission, which recommended against the notion primarily on the grounds of relating the diverse nature of Aboriginal communities and the demarcation of issues relating to the administration of Aboriginal law and non-Aboriginal law. I must note here that the Law Reform Commission dealt with many issues relating to Aboriginal society. I have drawn on the general aspects relating to this subject in broad terms.

The question is, should a Northern Territory constitution accommodate two laws and cultures where it has basically failed on the national level. I believe that a Northern Territory constitution would be able to accommodate this complex and untried issue.

One proposition to comprehensively recognise Aboriginal rights, law and culture in a constitution may be through a preamble referring to the historical and prior occupation of Aboriginal people in the Northern Territory, as individual and distinct societies reflecting their own culture and laws. However, such a preamble does not carry great legal weight. A second proposition is to have constitutionally entrenched powers relating to Aboriginal customary law and culture. Not only would this provision be legally enforceable it would be the first time in Australia’s history that there is some form of constitutional recognition of its Aboriginal inhabitants. The Territory could be seen to lead the way.
In order to achieve this desired position, there is a number of issues that would need to be addressed and overcome and again I draw from *Recognition of Aboriginal Customary Law* which would include the following:

(i) whether all aspects of customary law should be recognised, or whether some exceptions are necessary or desirable;

(ii) who should be bound by customary law as so recognised;

(iii) whether customary law as so recognised should apply throughout the Territory or only in specified areas; and as a corollary, whether it should only be applied in areas under the jurisdiction or control of appropriate institutions;

(iv) the inter-relationship and priorities between customary law as so recognised and the other sources of law in the Territory;

(v) how should customary law as so recognized be enforced and by what institutions (SCCD 1992, 44).

In the illustrated booklet put out by the Select Committee on Constitutional Development, a question was raised in regard to Aboriginal rights as to whether a Northern Territory constitution should take into account Aboriginal language, social, cultural and religious customs and practices (SCCD 1989, 10–11).

The manner and form this accommodation would take will primarily depend upon a Territory community that would be willing to work with and understand each other in a harmonious and cohesive environment. The Northern Territory as a community has no choice but to confront and address these important issues and no doubt, they will be debated by all persons at all levels within society.

The concept of entrenching Aboriginal rights may be the only avenue that is open to the Northern Territory community in overcoming the political stand-off between governments, Aboriginal organisations, Aboriginal communities, and the wider community as a whole. It is simply the next step in providing a just and equitable relationship between Aboriginal and non-Aboriginal people that has been denied them for the last two hundred years. It is clearly evident that the enforcement of an imposed culture and its laws has deeply affected the fabric of traditional Aboriginal society in many places throughout Australia.

The development of a Northern Territory constitution would provide an opportunity for the recognition of Aboriginal rights, laws and customs. This process would greatly restore and enhance the dignity and self esteem of Aboriginal people not only within the Northern Territory, but may prove to be a catalyst for constitutional change for the rest of Australia. It would give all Australians a place in the international community, that we can take with pride.

I would like to close with an observation by a senior Aboriginal leader during a visit by the Sessional Committee to Yirrkala in the east Arnhem region. He said that the opportunity exists for both black and white to work and live together. We must take into account the special ceremonial and religious rights of my people.

I am certain we can make it happen, otherwise that obstacle will always be there and the Northern Territory will remain powerless in its ability to accept and accommodate the fundamental rights of Australian indigenous peoples.
References


RECONCILING DIVERSITY: THE WAY FORWARD IS TO UNDERSTAND THE PAST

The Hon Margaret Reynolds  
Senator for Queensland

In Mount Isa recently the fact that an Aboriginal memorial to the original local people, the Kalradoons, was blown up illustrates the deep hostility and resentment of many Australians to the cultural resurgence of Aboriginal people. Similarly on Flinders Island, the painstaking historical research of the descendants of Tasmanian Aborigines sent to the experimental community of Wybalenah uncovered the precise location of over 100 graves. A memorial and individual crosses marked the sacred site for Aboriginal people reclaiming their history and their identity. Yet the non-Aboriginal community could not live with these stark reminders of the past. First the memorial was shattered and then each cross was removed from the re-discovered graveyard.

Why are non-Aboriginal Australians so aggressive in their rejection of Aborigines’ new found confidence and pride in their culture? Why is it that evidence of Aboriginal history prompts such belligerence among the non-Aboriginal community? Clearly Australia can claim to be perhaps the most successful multicultural society in the world. Despite incidents of racism and less acceptance of diversity in country towns and more isolated regions, Australians are still regarded as having a reasonable level of tolerance in regard to ethnicity. Yet this general acceptance of minorities does not apply to Australia’s indigenous people.

Myths and stereotypes dominate the attitudes of too many Australians who find it difficult to come to terms with the self assertiveness and new optimism of younger, better educated Aborigines who are justifiably more vocal in their demands for recognition and justice. Yet their arguments are well researched and presented in a persuasive style unknown a decade ago.

Australians cannot start to reconcile diversity within our multicultural society until we face the reality of our history and the implications this has for our future.

Australian law has finally caught up with Australian history and the June 1992 High Court decision recognising the Torres Strait Island land claim of Eddie Mabo is a turning point for Aboriginal/non-Aboriginal relations. The lie of terra nullius changes not only the possibilities in relation to land ownership, but it also creates a legal revolution which will involve governments and special interest groups in re-assessment of their relationships with Aboriginal people.
The time for consultation is over: indigenous people around Australia now have a High Court backed right to negotiation. Many non-indigenous Australians have argued self righteously against any consideration of the past history of Aboriginal/European relations as being a significant factor in public policy development to overcome disadvantage today. Yet these arguments have now been rejected by the High Court. The judges themselves have acknowledged Aboriginal right of ownership prior to 1788. They have determined that the past does impact on the present and in fact the Mabo case has given Australian Aborigines' past a legal potency which will significantly alter relationships between indigenous and non-indigenous people in the future.

In this challenging climate there is a risk that the opportunity for reconciliation will be lost if patient negotiation and flexibility is not exhibited by both Aborigines and other Australians. However, to those pessimists who would argue that reconciliation cannot be achieved by the year 2001, I would point to three areas of reform where some precedent for reconciling diversity has already been established.

The first example comes from Canada but Australians cannot ignore the internationalisation of the political agenda in terms of human rights and indigenous people, particularly given our efforts at the United Nations and the impact of International Year for the World's Indigenous People in 1993. In Canada the turning point for indigenous people was the Calder decision in the supreme court of Canada in 1973 when, like the Mabo case, aboriginal title was formally recognised and a comprehensive land claims process subsequently established.

The comprehensive claims policy of 1973 was reaffirmed with modifications by a 1981 policy statement pursuant to this. Three claims settlements have been negotiated: They are the James Bay and Northern Quebec Agreement (1975), the North Eastern Quebec Agreement (1978), and the Inuvialuit Final Agreement (1984).

The House of Commons Special Committee on Indian Self-Government (1983, 41) recommended that:

The Federal Government establish a new relationship with Indian first nations and that an essential element of this relationship be recognition of Indian self-government. The committee recommends that the right of Indian peoples to self-government be explicitly stated and entrenched in the Constitution of Canada. The surest way to achieve permanent and fundamental change in the relationship between Indian peoples and the Federal Government is by means of a constitutional amendment. Indian first nation governments would form a distinct order of government in Canada, with their jurisdiction defined.

While the Committee has concluded that the surest way to lasting change is through constitutional amendments, it encourages both the Federal Government and Indian first nations to pursue all processes leading to the implementation of self-government, including the bilateral process.

In recent years Canadian debate has focussed more directly on constitutional reform.

At the present time a Canadian Royal Commission is examining the history of relations between aborigines, the Canadian government and society as a whole; and the recognition and affirmation of aboriginal self-government, its origin, content and a strategy for progressive implementation.

If such policy direction seems well ahead of Australian thinking it is salutary to consider a Queensland Government discussion paper ‘Towards Self-government’
prepared by the Legislation Review Committee (1991) inquiring into legislation relating to the management of Aboriginal and Torres Strait Islander communities in Queensland. Released in August 1991 it advocated self-government legislation consistent with four principles:

1. there be a recognition of the pre-existing rights of Aboriginal and Torres Strait Islander people to self-government in the preamble, and the body of the proposed legislation;

2. minimum powers should be provided to Aboriginal and Islander communities to control their local and internal affairs, their physical and cultural survival and development, and their economy and resources;

3. these powers and their exercise should not be subject to government, ministerial, or departmental veto except according to clear and precise criteria stated in the legislation, and any such veto should be subject to review; and

4. unless a community indicates otherwise, the Aboriginal and Torres Strait Islander communities should have the jurisdiction to resolve disputes between themselves.

The paper provides a comprehensive examination of a number of self-government options as well as recognition of hunting, fishing, gathering rights. Included in reform proposals are historical and cultural site and resource management arrangements, recognition of customary law and community justice schemes for communities without land base.

The paper’s most challenging reform recognises the need for an Aboriginal and Torres Strait Islander structure to guarantee participation within the State Government administration. While the present status of this paper remains limited in changing policy direction, there is a wide-ranging consideration of issues, which will eventually need to be considered by all State and Territory Governments if self-government is to follow Canadian precedent and implement some of the rhetoric of the past decade.

No doubt many Australians would already dismiss the Canadian precedent and the forward thinking Queensland discussion paper as being out of step with the mainstream policy of this country, however a precedent for self-government by a special group already exists. In 1979 the Norfolk Island Act gave 1500 residents the right to elect its own government with many of the powers of State and Federal Governments including education, health, taxation, immigration, law and order and social welfare. The preamble of the Act notes ‘the special relationship of the Pitcairn descendants with Norfolk Island and their desire to preserve their traditions and culture’.

Speakers on both sides of the chamber advocated the special status for recognition of self-government because of ‘the distinctive feeling that the people of Norfolk Island have....that uniqueness, that sense of belonging to Norfolk Island’. The preamble continued, ‘We cannot avoid the question of Norfolk Island being part of Australia, yet at the same time we cannot be seen to be preventing the people who have lived there for so long from continuing to live in the way they have for so long’.
Clearly to date there is no sign from either major political party that these sentiments of over a decade ago are about to be directed towards the Torres Strait Islands, Melville or Bathurst Islands, Cape York or the Kimberley.

However the momentum for reform is gaining strength. For the time being the Federal Government is focussing its attention on a ten year reconciliation process leading up to the centenary of federation but the Council for Aboriginal Reconciliation acknowledges that the *Mabo* decision has brought forward that debate.

Constitutional reform is already being discussed with suggestions that the rights of indigenous Australians be enshrined in an Amendment which recognises the historical and cultural rights of Aborigines and Torres Strait Islanders to determine their futures. At a recent conference to discuss the implications of the *Mabo* case, it was suggested that Australians need ‘to put their brains into reverse’ to really start to accommodate the significance of the High Court decision. Certainly the only way to reconcile the differences between Aborigines and other Australians is to use the past to understand the future. That will take much re-education and reversal of attitudes.

References


OUR DIVERSE MULTICULTURAL SOCIETY:
A MATTER FOR THE CONSTITUTION?

Mr Steve Karas
Senior Member, Immigration Review Tribunal *

As far as is possible I have endeavoured to present a Northern Territory perspective based on my own experience in the Territory over a number of years, although much of the character and contents of this paper touch all Australians.

Since at least 1985 when the Legislative Assembly of the Northern Territory created the Select Committee on Constitutional Development on a bipartisan basis, concrete moves have been made to establish in time a document which will be most apt for this yet to be ‘new’ State of Australia. The Territory and its people have a unique opportunity to adopt a constitution which reflects their multicultural make-up and fundamental principles.

It is trite that the Northern Territory derives its present constitutional status and legislative authority from the Northern Territory (Self-Government) Act 1978. This Act, as an ordinary statute of the Commonwealth Parliament, is capable of being repealed or amended by the normal legislative processes of that Parliament without any real reference to the Northern Territory itself. Consequently, although the Northern Territory in the general sense performs state-like functions and is incorporated into the operation of Australian federalism as part of the Australian system of States, its total jurisdiction is limited and subject to federal control as it has not yet completed the transition to full statehood. However, during this transition period, it is consciously looking to develop, articulate and adopt the fundamental principles of this Territory and no doubt incorporate them into its constitution. The constitution will be its birth certificate as a State.

A casual stroll down the Smith Street Mall or the Casuarina Shopping Centre would emphasise the multicultural nature of the Northern Territory society in a pronounced fashion. One cannot but notice the racial diversity of the people in this northern capital of Australia where it is appreciated that geographically this country is part of a non-European region. Here one can emphasise with the local politicians’ clarion call that in reality Darwin is closer to many Asian cities than those States of this Federation. Therefore one should not embark on an examination of whether our

* The views expressed in this paper are my personal views. Whilst I am a member of the Immigration Review Tribunal, they do not necessarily reflect the view of the Tribunal.
multicultural society is a matter for the constitution by trying to justify the Northern Territory as a diverse multicultural society. The reality is there for all to see. Diversity does not mean division. For all its diversity, the Northern Territory is a largely united entity which does not suffer social upheavals like major race riots and the like. This may in large part be because of its history, which includes a distinct non-European community, a prominent and successful participation in community life by its Australian-Asians, intermarriage between cultural groups, and a lack of ethnic ghettos and the like.

The indigenous people have a higher profile and are a higher percentage of the total population of the Northern Territory than in other parts of Australia. Of the Territory’s 175,000 people, almost a quarter are of Aboriginal descent. These original inhabitants of this land should be given a special place and acknowledgment in a constitution that should recognise them and their unique place in our multicultural society. Such an acknowledgment would also help to rectify the previous discrimination against them contained in the Federal Constitution – which was later corrected by the 1967 amendment.

So far as other ethnic communities are concerned it appears that the indigenous people of Australia are part of our multicultural society and the relationship has been progressive and encouraging. At conferences and meetings of the Federation of Ethnic Communities’ Councils of Australia that I have attended, motions of support for the Aboriginal people have often been carried by general acclamation. They have a special and unique place in our society and this needs to be acknowledged constitutionally.

A constitution should in part be a living, uplifting, inspirational and workable document with which its citizens have an affinity and a knowledge. As it deals with people and their lives it should be reflective of their aspirations and ideals. The Australian Constitution in 1901 referred to the people agreeing ‘to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom, Great Britain and Ireland, and under the Constitution hereby established’. As a result the role of ‘the people’ in the Constitution is recognised and acknowledged. It seems fitting therefore that any constitution, initially through its preamble, should be reflective of and refer to the people over whose lives it predominates. Thus the preamble to the Constitution should refer to the diverse multicultural make-up of our society with people from a variety of cultures and backgrounds cognisant of their responsibilities as citizens and residents of Australia with a commitment only to this country and its future.

Some may argue that there is no need for such a statement in the preamble or in any other part of the Constitution as we are all Australians, Territorians here. This suggests in part that somehow we all were or should have been assimilated into some identified dominant character or culture that was ‘truly British’. This old, tired policy of assimilation, if still not discarded or discredited, should be.

The policy of assimilation in my view arose in large part out of fear. It was assumed that an allegedly monolingual, monocultural and homogeneous Australian way of life was threatened if newcomers did not conform to it. No doubt encapsulated in this ideal was the romantic notion of a ‘true Australian’ or a ‘real Australian’. What is meant by an ‘Australian’ has changed down the years. This change in image has been
graphically expressed by Richard White (1981) in his book, *Inventing Australia*. Indeed, he felt that ‘we will never arrive at the ‘real’ Australia since he cryptically concluded ‘there is none’. As he found the ‘national identity is continually being fractured, questioned and redefined’.

Assimilation in itself is divisive and alienating. Unlike multiculturalism it sought to rob or deny a person of his or her individuality, dignity, self-worth and esteem. It was an impossible expectation to believe that a person from a different background, stepping off a plane or ship, could somehow divest him/herself of their ‘cultural baggage’ or of the language, customs, religion, ethics and traditions into which they were born and somehow adopt those of the host country almost immediately. This expectation was difficult particularly when the concept and character of ‘an Australian’ meant different things to different people. As well, there may have been confusion as to which traditions, cultural habits and the like were to be retained and followed as being those of the ‘true Australian’.

These things change no doubt from generation to generation. This policy of assimilation by trying to mould new arrivals and others into an ill-defined nostalgic ideal of a ‘true Anglo-Australian’, denied for a time this young, developing country a national character that was still emerging and that would be able to absorb ingredients of that character from all of its people including its ‘new Australians’. This is not to deny that there are distinguished Australian traits like egalitarianism, the rule of law, democratic ideals, the equality of the sexes and the like which are the basis of our developing national character and culture. Many of the Australian ideals emanated from our bush history and experiences during the nineteenth and early twentieth centuries. Yet it is noteworthy that at the time Australia was not the homogeneous, Anglo-Celtic society largely promoted and protected. A cattlemans ballad in the nineteenth century recited:

> When the cattle were all mustered, and the outfit ready to start,  
> I saw the boys all mounted, with their swags left in the cart,  
> All sorts of men I had, from France, Germany and Flanders,  
> Lawyers, doctors, good and bad, in the mob of overlanders. (*The Overlander*)

Integration over a period of time should be the goal of a multicultural society that is for all Australians. To suddenly and immediately try and deprive a person of his or her cultural and linguistic traditions results in a defensive almost hostile response. In time no doubt acculturation and the passing of generations will lead to a diminishing role of cultural traditions in many Australians as they too contribute to the evolving Australian character and as they become integrated. It should not be forgotten that if all immigration to Australia were to cease today the reality of our multicultural make-up would not dramatically change.

In the Northern Territory I have heard the present Chief Minister refer with pride to its multicultural make-up and how the rest of Australia could take a leaf out of its book in this area. My own experience bears out this claim. It is pleasing to note the general acceptance of the Northern Territory as a multicultural society where a person’s worth, not his/her colour, ethnic background or whatever, is the dominant basis of his/her contribution to society.

Territorians and Darwinians, have always been proud and boastful of their ethnic mix and of how tolerant and understanding they were. Therefore it is fitting and more than
appropriate that the multicultural make-up of its people be reflected in the Constitution.

Some would suggest that ‘multiculturalism’ is still a misunderstood term. The Report of the Committee to Advise on Australia’s Immigration Policies (1988) found ‘confusion and mistrust of multiculturalism’, and how ‘many people, from a variety of occupational and cultural backgrounds, perceived it as divisive’. This may be due in part to it not being adequately presented by all arms of the community including the politicians, the media and the educators.

Some have argued that multiculturalism has created a nation of warring tribes and led to separatist and divisive policies. This they submit has resulted from the nature of immigration which allows a significant intake of people from non-Judaeo-Christian cultural, religious and largely non-English speaking ethnic backgrounds. This has been even more marked since 1973 when Britain joined the European community. About this time the official policy of assimilation was abandoned thus putting paid to the fiction that Australia remained a nation of essentially British stock. Perhaps there was a feeling of unease and concern on the part of some Australians who felt their identity would be swamped and lost in a tidal wave of non-discriminatory immigration that succeeded the ‘white Australia policy’. However in reality Australia’s society had changed just as the character of Great Britain changed over the years with the influx of the Romans, Saxons, Normans and others including more recently many non-European people from its former empire.

We are all Australians and not exiles from other parts of the world. Gone are the days when as Australians we referred nostalgically to Britain as ‘home’. That is not to deny the great Australian institutions, the legal framework, the national language, parliamentary democracy and the like owed much to their British origins. However, Australians must give their sole and primary allegiance and commitment to their place of abode, Australia, and not their place of ancestry. Because Australian society has irretrievably changed so much especially since World War II, it may be that our symbols of nationhood should reflect this. Indeed, it is pleasing to note that the Northern Territory has a distinctive flag, unambiguously Territorian, reflective of its individuality without the usual symbol, typical of other States’ flags, of the Commonwealth, perhaps representing for a number of people their former colonial status and the times when they believed that only ‘British was best’. However, Australia needs to look to the future while being aware of its past. As a sign or symbol of its independent nationhood it should have its own uniquely Australian symbols to which all Australians can relate with pride.

Put simply, ‘multiculturalism’ is merely a word that describes the cultural and ethnic diversity, the reality that is contemporary Australia. We cannot escape or change this reality and fact, although we can promote it and see that it is better understood. It is not to be seen as being anti-British. Indeed, people of British origins form the most significant ethnic groupings in Australia. It is important that Australia not be defined by its Britishness but by its unique Australianness. This in no way advocates that Australia divide into rigid and distinct ethnic groups. Quite the contrary. Even though Australia has always been a culturally diverse society no doubt, ‘ethnic culture’ will lose its meaning over time. However, to manage our cultural and ethnic diversity there is also a ‘policy of multiculturalism’. 
In the ‘National Agenda for a Multicultural Australia’ (Office of Multicultural Affairs 1989), the policy of multiculturalism was said to have three dimensions involving cultural identity, social justice and economic efficiency. As a policy, ‘multiculturalism’ has contributed to the cohesion of our society in a way that this country has been able to absorb large numbers of people from different parts of the world without any major social upheavals or disruptions. Our multicultural policy refers to the fact that Australians live together in a non-divisive way that is reflected in our overriding loyalty and commitment to Australia and its future and not to any other overseas country. As well there are other limits on multiculturalism, which involve an acceptance of the basic principles and structures of Australian society. These include its constitutional parliamentary democracy, rule of law, equality of sexes, freedom of speech and religion, and English as our national language, as well as obligations including those of accepting the rights of others to express their views and values within the law. Although the concept of multiculturalism and a ‘fair go’ accept that it is the right of every Australian to live their life as they wish, this must always be within reason and the law. It also does not denote that people may indulge in child marriage, or ritual stoning and the like, because of ‘culture’.

Many of the rights and freedoms which we enjoy in Australia are characterised in large part by our civil society, our parliamentary democracy, and rule of law, all distinct parts of our British heritage. Most other English-speaking countries have, through a Bill of Rights or a Charter of Rights and Freedoms, sought to extend and protect the rights of their citizens. Legislation today in Australia seeks to remove discrimination on the basis of sex, race, disability, marital status and the like. However some inequities remain. Most Australians would agree that, for example, everyone is equal before the law and entitled to a fair trial. In reality there is no guarantee of this particularly for those who are not proficient with the English language. That is why there are moves afoot in many quarters to extend the right to use interpreters in courts and other parts of the legal processes. The pronounced aim for government in a multicultural society is to safeguard the rights of all Australians, irrespective of their language, ethnicity, race, culture or religion. After all it is part of the general ethos in Australia that everyone here is entitled to a ‘fair go’. That is not to say that I favour for example legal pluralism. Indeed I oppose this, but I favour all our legal processes and the law being more accessible to, and appropriate for, our diverse Australian society in one single unified and unifying system of law where fair and just treatment before the law is available to all.

However it needs to be acknowledged that no Australian constitution contains any embracing or comprehensive provision regarding human rights, especially civil and political rights. Some would submit that this is necessary to protect citizens against a strong and powerful executive and an all pervasive government supported by an all embracing bureaucracy. Some would oppose this on the basis that introducing a Bill or Charter of Rights in a constitution increases the power and control of the judiciary and leads in large part to a ‘lawyer’s bonanza’. Perhaps one could as a last resort consider including the ‘rights’ in the constitution in a way that leads to their consideration when interpreting legislative provisions rather than creating enforceable legal rights as such. This could be done by including such rights in the preamble of the constitution.

In Proposals for a New State Constitution for the Northern Territory (SCCD 1989) the following are listed as examples of human rights: freedom of speech, freedom of
religion, freedom of assembly, freedom to own property and land, and freedom of education.

To these examples I would add for consideration some others like: freedom of movement, freedom of information, freedom from discrimination on the basis of race, culture, ethnicity, sex, or marital status.

As well, given our diverse make-up, including a significant Aboriginal component in our population, consideration would need to be given to rights to enjoy equality before the law, equality of citizenship, and cultural and linguistic traditions within the law. Inherent in the latter is the freedom of choice i.e. the individual’s choice to belong to a cultural group or not, as well as an inherent right to accept the wishes of other Australians. This would not include any right to continue old or former hatreds and differences by or against identifiable groups in Australia that might threaten our nation’s cohesion and introduce social upheavals not known in this country. This is not to deny Australians their right, for example, to take part in peaceful assembly and protest, as Australians, even if it involves happenings in another country. The proviso would be that such a right is not based on any perceived allegiance to another country as a group’s homeland, while at the same time claiming an overriding loyalty and commitment to Australia. This is to say that I can protest about concerns that I might have, vis-a-vis occurrences in Australia or elsewhere, so long as such protest is not premised on the fact that my allegiance is to a country other than Australia and that I am continuing former hatreds or differences instilled overseas solely on that basis alone. One should not clothe in ethnic cultural garb the desire to continue and foster former differences and hatreds in Australia. As well practices contrary to law and alien to our way of life would also not be tolerated in practice as part of one’s cultural or religious beliefs. These will no doubt be some of the sacrifices that people coming to Australia will have to make since any cultural traditions must be within the law of Australia.

My own personal preference is that where possible a set of agreed basic human rights and obligations should be included in an Australian constitution for all Australians, and only if this were not achievable should the Northern Territory then set an example by considering their incorporation in any new State constitution. Indeed at the Constitutional Centenary Conference held in Sydney in 1991 and attended by a wide cross section of the community there was strong support expressed for a guarantee of basic rights as an important symbolic function, although it was acknowledged that this would be part of a long-term process of education and discussion. Without this being generally accepted and supported by the Australian community at large there will no doubt be a reluctance on the part of the authorities to move down the road towards a Bill of Rights.

It is interesting to note the recent favourable, almost exuberant, media reaction following the High Court’s decisions upholding ‘the fundamental right of free speech’ in striking down the ban on political advertising on television and radio during an election campaign, and that part of the Industrial Relations Act which made it an offence to criticise the Industrial Relations Commission or any of its members. At least one commentator has in part interpreted this to mean that ‘the High Court may be well down the path of establishing a bill of rights by piecemeal decision’.
Nevertheless, I presently sense a great deal of ambivalence, almost apathy, in the community in relation to a Bill of Rights. It is however incumbent on all including our politicians, members of the media and other members of society to involve themselves in the process and debate regarding an acceptable Bill of Rights as another sign of a mature, independent nation confident about its future. With an appropriate constitution, including a Bill of Rights, Australians may feel better able to instil a sense of national pride where all accept and declare that they are unashamedly Australian. The Northern Territory, given its inevitable move towards statehood, has a great, almost unique, opportunity to achieve this given its history, cultural make-up and the understanding of its people.

If, however, this does not come to pass then the legislators could consider recognising multiculturalism in the law, perhaps in the form of a Multicultural Act. Should ‘stand alone’ legislation not be considered appropriate, then some thought could be given to amending existing legislation. Since the abolition of the Australian Institute of Multicultural Affairs in 1986 there has been no definitive statement in legislation of our nation’s multicultural make-up and ideals (see, however, the Charter of SBS, Section 6, Special Broadcasting Service Act 1991). The law which commands the respect of all will be even further valued and respected if it reflects the interests of all Australians. The Constitution may be a facilitator of reconciliation, not a perpetrator of difference, and acknowledge Australia’s diverse multicultural society. It should be taught in the schools so that all children have a knowledge of it and its contents. Over time it will become a vehicle for instilling and promoting respect for our country, our diverse community, our institutions, our ideals and the like, especially among the future generations of Australians.

In conclusion, let me say that I firmly believe that with a commitment by all to our country; accepting and recognising our responsibilities as Australians; proud of our rights and freedoms; rejecting racism and intolerance by a sense of understanding; with a fair go for all; an acceptance of the reality of our multicultural society, it will no longer be a question of Advance Australia where! but of Advance Australia fair.

I look forward with excited anticipation to the day that all Australians will be accepted and rejoice in our fine country, which has received and peaceably settled so many people from all corners of the globe in a way of which we can all be proud. We all need to confront finally the fundamental fact that we are no longer an exclusively Anglo-Celtic country attached to Britain which has now for all intents and purposes firmly planted itself in Europe. However, in reconciling our diversity and finding and accepting our national character, there must be understanding and an acknowledgment and reflection of this in our Constitution.

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UNDERSTANDING OTHERS, RE-DEFINING OURSELVES: OUR DIVERSE MULTICULTURAL SOCIETY — A MATTER FOR THE CONSTITUTION

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Let us imagine that the unthinkable, the improbable has happened. We wake up one morning to the strident sounds of military marches on the radio. An unfamiliar and aggressive voice is urging us to keep calm, and reporting to us that a coup d'etat has occurred.

We reach for the television remote control. We find only a single channel in operation. We see the tanks moving through the streets of Canberra and all the other centres around Australia. We see people being herded into trucks and we hear the same, impersonal voice urging calm and inaction. The new leader is in place. One of his first tasks has been to appear on television, on radio, in the newspapers, to make clear the new rules.

The constitution is to be changed radically. The existing processes for amendment are to be disregarded completely. Parliament has been abolished. All representatives of the former government have been arrested and spirited away. We are now to be ruled by a Select Council. Freedom of the press, of speech, of religion, even of free trade are gone. We no longer have a vote, the ability to lobby. An independent judiciary is a thing of the past.

The new leader is insistent that in the media, in schools, in government administration, in the arts, in the courtroom, in places of worship — in all facets of Australian life — there will be total uniformity and conformity to his view. No thought, deed or action outside the philosophical path that the leader has chosen will be tolerated. There will be absolute conformity. Those who do not adhere to the rules will suffer punishment or death.

A new era has begun. Those who speak out or rebel against the new regime are herded into re-education camps. Thousands die. The leader is adamant that all minority groups within the community at large will be sent to these reeducation camps as a matter of course. Everyone will learn to conform. Only after they have proved their loyalty to the values of the leader will they be allowed to participate in the workforce, be educated, be seen, heard or read in the media, to have access to government services or participate in decisionmaking.
Televisions monitors are set up in schools, workplaces, offices, shops. Programming centres on the leader. The leader expounds constantly his definition of Australian values, his vision for Australia's future, his interpretation of Australia's history. He defines excellence in the arts, he talks of what can and cannot appear in the media, who can and cannot be employed and who is eligible for services. He expounds his passionate belief that all people in Australia need to conform to a single path, share the same values as the means to national strength and salvation.

Our leader is, however, a former public servant. He has a strong belief that any new initiative, including a new regime, should have within it the seeds for its own evaluation. He is committed to ensuring the effective and cost-efficient implementation of the new rules. He calls in his Select Council and they all spend a great deal of time developing measurable objectives and appropriate performance indicators.

A year passes and it is time to assess the results of the Great Evaluation. A Council meeting is called and the leader asks for a full assessment of the new regime against the indicators developed a year before. The Council members, reluctantly, tell the leader of great unrest within the community. Urban and rural guerrilla groups have formed. There are now hundreds of new, subversive organisations active all over the country. A huge underground movement has developed comprising groups such as the Revolutionary Judges' Front, Media Workers for Democracy, the Business Peoples' Democratic Shop Front, the Anti-Racism Union and even a Public Servants' Liberation Army. More frightening is the overwhelming community support for these and similar groups.

The re-education camps are full and over-flowing. Resources for new camps are limited. The regime has great difficulty in finding non-subversives to staff the centres. The re-education rate is abysmal and can only be assessed as a failure. Business, industry, government services are in disarray. Microeconomic reform is at a standstill. Productivity is at frighteningly low levels. Worse still, the ratings for the single television network have hit an all time low.

The leader is devastated. In the privacy of the Council he examines the statistics.

'I can't understand it,' he shouts, 'Our message is not so different from pre-coup days. The percentage of people from minority groups in positions of power is the same. The fact that I have limited any reflection of diversity in the media and other institutions hasn't made any real difference. It was limited before. And what's this whinge about racism and discrimination! We always wanted conformity, sameness didn't we? We didn't want our values contaminated by outsiders. Well that's exactly what I've put in place. They said that difference would destroy the fabric of this country. They said it would destroy Australian traditions, the Australian way of life, our identity as a nation. Well, I've removed the threat. I've given them what they wanted and they're still not satisfied.'

'They're complaining that they can't access services, that the education system is destroying creativity, that kids can't learn to think. They want to learn about each other. Did they know each other before? They're complaining about being robbed of the right to participate in decision-making. They want a constitution again for heaven's sake. They say there is no justice. They say that there is no equality before
the law. What’s the problem? It used to be only the fringe minority loonies who complained. Now it’s everybody! What is their problem?’

Well, let’s leave this unthinkable, improbable and simple leader to his soul-searching and focus on our needs as a society to find the best means for responding to our own cultural diversity.

Inter-territory, inter-regional, international migration has been taking place for hundreds of centuries. It has shaped and continues to shape the distribution of the world’s population. And for hundreds of centuries, those in power within countless societies have developed policies and mechanisms for responding to cultural diversity within their borders. These responses have included slavery, racist oppression, autonomous ethnic enclaves, genocide, apartheid, assimilation, integration and multiculturalism.

Whether they like it or not governments will always need to respond in some way, either implicitly or explicitly, to cultural diversity. And I would venture to say that healthy development, interaction and social cohesion within a society would be affected significantly by the nature of that response.

The Northern Territory is greatly renowned for its highly diverse population. It prides itself also in being responsive both in policy and program implementation terms to this diversity. In their current activities in the area of constitutional development, Northern Territorians will have the opportunity to acknowledge and respond to their diversity in a much more fundamental way.

The process of developing a constitution also provides the means to address the reconciliation process and the rights and freedoms of all Australians, enshrining certain values and processes which will reflect the character and the culture of the people for a long time to come.

Multiculturalism is a term which describes the ethnic and cultural diversity of contemporary Australia. It also encompasses government measures designed to respond to this diversity. It is a policy for managing the consequences and reaping the benefits of cultural diversity in the interests of each individual and society as a whole.

The Commonwealth Government’s definition of multicultural policy was announced in the National Agenda for a Multicultural Australia, released in July 1989.

As explained in the National Agenda, multicultural policy has three dimensions:

- cultural identity: all Australians are entitled, within carefully defined limits, to express and share their individual cultural heritage, including their language and religion;

- social justice: all Australians are entitled to equality of treatment and opportunity, including the removal of barriers of race, ethnicity, culture, religion, language, gender and place of birth; and

- economic efficiency: Australia needs to maintain, develop and utilise effectively the skills and talents of all its people regardless of background.
There are limits to Australian multiculturalism:

- Multicultural policies are based on the premise that all Australians should have an over-riding and unifying commitment to Australia, to its interest first and foremost. At the same time, of course, it has to be recognised that debate and dissent are a normal and natural part of our way of life. Australians quite properly will continue to express their views of government decisions and advocate change and reform.

- All Australians are required to accept the basic structures of Australian society – the constitution and the rule of law, tolerance and equality, parliamentary democracy, freedom of speech and religion, English as the national language and equality of the sexes. Our support for these basic structures does not, of course, mean that Australia’s laws and institutions will not continue to evolve and develop, nor that Australians should not seek reforms.

- The principles of multiculturalism imply obligations as well as conferring entitlements: the right to express one’s own culture and beliefs involves a reciprocal responsibility to accept the right of others to express their views and values.

The goals and principles of multicultural Australia were also stated:

- All Australians should have a commitment to Australia and share responsibility for furthering our national interest.

- All Australians should be able to enjoy the basic rights of freedom from discrimination on the basis of race, ethnicity, religion or culture.

- All Australians should enjoy equal life chances and have equitable access to and an equitable share of the resources which government’s manage on behalf of the community.

- All Australians should have the opportunity to participate fully in society and in the decisions which directly affect them.

- All Australians should be able to develop and make use of their potential for Australia’s economic and social development.

- All Australians should have the opportunity to acquire and develop proficiency in English, languages other than English, and to develop cross-cultural understanding.

- All Australians should, if they choose, be able to develop and share their cultural heritage.

- Australian institutions should acknowledge, reflect and respond to the cultural diversity of the Australian community.

Together with this policy, which has enjoyed by-partisan support, the National Agenda also sets out a range of initiatives designed to meet these fundamental objectives, including strengthening the Government’s Access and Equity strategy, developing a major community relations program, reviewing some of our laws and legal processes, along with initiatives in many other areas.
We also have a reasonably comprehensive set of Commonwealth legislation.

For example:

- Australian Citizenship Act 1948
- Law Reform Commission Act 1973
- Racial Discrimination Act 1975
- Ombudsman Act 1976
- Sex Discrimination Act 1984

The new Broadcasting Services Act refers to Australia’s cultural diversity in its objects. The ABC Charter states that our national broadcaster should have regard for the multicultural nature of Australian society. The new SBS legislation refers specifically to Australia’s multicultural society.

Such statements of public policy, acknowledgments in legislation and related initiatives and implementation are critical in recognising cultural diversity as a fundamental and positive feature of Australian life. But are they enough? How do we ensure that Australia has the best kind of multicultural society? How do we guarantee that all Australians, regardless of their background, participate fully in and contribute to a dynamic, developing, creative and cohesive society? How do we ensure social justice for all Australians? Equality of opportunity? The elimination of racism and discrimination in all its forms?

How do we ensure that we will live together in mutual respect, agreeing to disagree without questioning each other’s loyalty as Australians, to ensure that every Australian has the right to enjoy their freedoms without infringing upon the rights of others, and how do we ensure that all Australians are regarded as Australians, regardless of their background, regardless of whether they are not Paul Hogan, regardless of the way they look, what they believe, regardless of whether they love another country too — focussing only on their over-riding commitment to Australia and its future?

The indigenous peoples of Australia, the Aboriginal and Torres Strait Islander peoples, the movement of people from all over the world, primarily the United Kingdom and Ireland, the post-war influx of migrants from Europe and more recent increases in arrivals from the Middle East, Asia and Latin America have created an Australia comprising people from over 140 different cultural and ethnic backgrounds.

One in every five Australians was born overseas. Fifty percent of those who were born overseas come from a country where English is not the first language. Together with Australian born children, Australians from a non-English speaking background now make up fully a quarter of our population. Yet we still see this quarter of the population and the Aboriginal and Torres Strait Islander peoples grossly under-represented in or excluded from positions of power and decision-making structures in government, business, industry, the law, the media, major service deliverers, education — in fact all major institutions and structures within society.
Access too is a major issue. Access to information, services, and opportunities to develop individual potential and contribute to the development of society.

Many researches have noted that migrants and minority groups experience less strain and alienation in multicultural societies as in such societies it is possible to have supportive cultural networks, traditions and identities. In monocultural societies however, any cultural tradition other than the dominant one is often considered deviant and inferior and is therefore rejected. In Australia we have those who accept our cultural diversity as a demographic reality which cannot be altered and who recognise the need for measures to ensure that all individuals, and Australia as a whole, benefit from this diversity.

There are those however, who do not accept the legitimacy of Australia’s cultural diversity, who believe that somehow the process which led to this diversity can be reversed. They believe that we can return to a mythical monocultural state through repression of ‘unacceptable’ backgrounds, through questioning the loyalty of those who do not agree with their views and values, through exclusionary barriers to access and participation. This narrow and outdated understanding of the Australian identity is reinforced in part by the limited reflection of diversity in many of our societal structures and institutions. What is needed of course is a greater reinforcement of the legitimacy of cultural diversity as a positive force for social development and cohesion.

Recognition of the reality of cultural diversity, together with an expression of rights and obligations of all Australians are critical in a constitution, in legislation, as well as in public policy and community education. All play a part in setting the framework for defining ourselves and each other as Australians in a multicultural society.

The acknowledged and positively reinforced multicultural social setting more readily allows groups and individuals to maintain supportive cultural traditions and human networks which in turn contribute to greater social cohesion and opportunities for economic and social development in the community at large. We are able then to see more clearly that similarity is not the same as unity, that difference is not the same as separatism and that it is intolerance and rigidity, not diversity that causes alienation and division.

Our ability to appreciate more fully the inclusive, unifying potential of a multicultural Australia, our ability to conceive a more sophisticated definition of Australia and Australianness is critical not only for our healthy and cohesive development as a nation but also in the development of our ability to respond to the continuous and enormous changes happening around the globe.

Our world is changing. In the not too distant future technological developments will revolutionise the way we operate as a society and as individuals. Communications, access to an extraordinary variety of information and entertainment through a diverse range of media outlets, the way and where we work, how we shop, how and what we learn will change dramatically. Individuals will be able to program their lives experiencing cultures vastly different from each other. Diversity as we have never seen or experienced before and possibly alienation as we have never experienced before.
The researcher Hugh MacKay (1993, 286) has said that we perceive the world as if through a cage. Each iron bar is created through our background, our talents, our socio-economic status, our education, life opportunities, culture, ethnicity, in short our experiences from engaging with the world at large. They include our preferences, our prejudices and our fears. As we look out it is easy to forget, or perhaps never to have understood that our view is different from another’s. It is easy to assume that what we see is the whole picture, forgetting that the bars are there, are ours and that there are many things we cannot see because of them. Some of us may not even realise the bars exist and take what we see as the only real picture.

There is no doubt that we all need to consult with and learn about each other when debating and deciding upon fundamental issues and outcomes which will affect us all. We all have something different and valuable to contribute to such a process because each of us may see something another cannot. It is only logical that we need to make full use of the understanding each of us has about those issues.

The process the Northern Territory pursues for constitutional development will be followed with interest by many Australians. In particular, the Northern Territory has a unique opportunity to experiment with different means to ensure active interest and participation in the debate and the decisions by Territorians of all backgrounds. Aboriginal and Torres Strait Islander peoples, people of non-English speaking background should automatically share the right and responsibility to determine their future. There is an opportunity to make this truly a document of the people.

We need institutional structures, mechanisms, processes that are flexible, sensitive and responsive to diversity and change. We need a commitment to social justice, to ensuring access and participation and community well-being. We need to ensure that all Australians have the right and the means to participate in decisions about our collective future and that as individuals we have the power to control our own lives.

A reflection of our cultural diversity in our Constitution, in our laws, in government, the media, education and other major institutions, in all our decision making structures and processes would be the true expression of an inclusive approach to cultural difference. Such positive signals, reinforcing inclusion can lead to cultural broadening and enrichment without the alienation and cultural disintegration which comes with exclusionary, discriminatory practices.

We need an Australia which provides us with dignity, with the opportunity to develop our talents, our creativity and our skills and fulfil our aspirations without the barriers of intolerance, discrimination and racism. We need an environment which is truly free, which encourages an understanding and appreciation of difference, an environment in which there is healthy, active debate without pressure to conform to a single view. We need an Australia where we can each participate fully in the debate about a constitution, and each contribute to the economic and social well-being of this nation, where measures are put in place to ensure access and participation for all Australians. We need an Australia that is truly for all Australians.

Reference

RECONCILING DIVERSITY: A PERSONAL VIEW

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Introduction

Most of the countries of the world have had bequeathed to them national communities that are an amalgam of diverse cultures and peoples of different backgrounds. The artificial lines on the map that define the geographic boundaries of the contemporary nation-state rarely delineate with precision the boundaries between distinct ethnicities, linguistic groups, racial groups, religious groups or other identifiable groups of people.

Boundaries are largely the accidents of history, having been defined in tandem with the emergence of the so called 'sovereign' nation-states over the last 300 years or so, and as a result of the competition and conflicts between those nation-states. The desire for ethnic uniformity is only one of many factors that have contributed to this definition, although undoubtedly it is an important factor.

In this regard, there seems to be a common human tendency to favour mutual self-identification and exclusive association based on some commonality and to pursue separation from others who are perceived as being different. The forces of nationalism have harnessed this tendency for the preservation of the state. As a result, the concept of diversity of peoples within one jurisdiction is sometimes seen as a negative thing, to be avoided in favour of uniformity and familiarity. It is said that the ideals of national unity, manifested by a centralisation of power, a common language, culture, and religion, fundamental to the self-identification of the state, tend to express themselves in intolerant attitudes and repression of those who were perceived as 'others' (Thornberry 1991, 1).

This tendency is still very strong today and can constitute a motivating force propelling particular nation-states towards greater ethnic uniformity, or at least to the assertion of the predominance of a particular ethnic group. It is frequently countered by forces operating in the opposite direction and favouring a greater degree of diversity. This can occur as a result of voluntary or involuntary migration, permanent or temporary, or as a result of emerging forces operating within a particular jurisdiction. Significantly, it is also now being countered, in the latter part of this century, by the new focus on universalism, a force that is as yet of subordinate strength to that of national sovereignty, but one that is rapidly gathering momentum.

The result is that in many countries there are now stresses being placed on the nation-state: stresses emanating from the movement downwards towards some form of
differentiation or disintegration based on an ethnic or other form of distinction (Simpson 1991, 69), and those pushing upwards towards some wider form of unity. In some instances, the nation-state is being torn and divided in the struggle between the conscious attitudes of individuals and groups. It is a struggle about values. These forces can be very powerful and should not be underestimated. In some cases this has lead to national fracture, in others it has manifested itself in the maintenance of extreme measures to preserve national unity, while in other cases it has led to expanding regional links in association with an ever-increasing degree of international interdependence and cooperation.

Australia of course was not and is not isolated from these momentous global movements. Human diversity existed even before the European settlement of the Australian continent. The Discussion Paper Recognition of Aboriginal Customary Law (SCCD 1992, 7), records that there was, and still is, considerable diversity between the various Aboriginal laws and customs in different parts of Australia, accompanied by a great diversity of language, but with similarities in traditions, customs and practices. Although there were well-developed local and regional relations among Aboriginal groups before European settlement, we have no knowledge of wider political or administrative structures as found in nation-states today.

European settlement of Australia obviously added a new and distinct element to our cultural diversity. In itself, this wave of immigration, which still continues, has provided a complex mix of peoples, with those of Anglo-Saxon or Celtic derivation predominating until comparatively recently. For a long time, the forces favouring ethnic uniformity exercised considerable influence in Australia, using methods such as the ‘White-Australia’ policy. In more recent times, diversity has greatly increased, and the process of gradual absorption into the mainstream has been more than offset by the diversity of the new arrivals. There is now widespread acceptance of the concept of a ‘multicultural’ Australia. There is still a degree of opposition in some quarters to the immigration of people from certain countries who exhibit markedly different characteristics to the so called ‘traditional’ Australian human profile. The situation has resulted in some stresses. Fortunately, demonstrations of intolerance and bigotry have not yet reached the scale and intensity of many other countries where they have resulted in widespread social disruption and violence.

These Australian developments must be seen as part of contemporaneous and greater global developments. These include the completion of the process of nation building in the post-colonial era, the much greater facility for communication and intercourse among nations, changing patterns of global migration and the increasing links between different nations and peoples. The great diversity that exists in the human race is increasingly being reflected in the composition of the population of individual countries. The conditions, which in the past have made for ethnic uniformity, are weakening. In its place, there is a developing consciousness of our common global citizenship transcending this diversity and our national attachments.

To put it in the words of His Honour Justice Wilson ‘Both economically and socially the earth is now likened to a global village...’ (Koowarta v Bjelke-Petersen 1982 153 CLR 168, 248). This international perspective is increasingly being reflected in international law, as well as in the law of various domestic jurisdictions. In particular, it is evidenced in an explosion of interest in human rights. Thus, the international
community has declared its abhorrence of intolerance and discrimination based on race, colour, sex, language, religion, national or social origin etc. (see, for example, Article 2 of the Universal Declaration of Human Rights of 1948 and various other international instruments) and most countries now have entrenched bills of rights.

When viewed against this wider background, a nation-state which is trying to cope with significant minorities or diversity of peoples in its population basically has a threefold choice. Firstly, it can allow itself to be divided into more than one nation-state. Secondly, it can deliberately breach international law by adopting or maintaining discriminatory rules and practices favouring a particular group (extending in extreme cases to the use of force or violence against other groups such as is now happening in former Yugoslavia). Finally, it can accept the diversity and seek ways of adjusting its domestic arrangements to accommodate it in a manner that accords with international principles. That accommodation may, in appropriate cases, involve a measure of devolution or sharing of power based on ethnic or other lines, designed to meet demands for increased participation by minorities or indigenous groups in the business of government as it affects them.

Assuming for present purposes that division into more than one national state is not a practical option for Australia, and assuming also that Australia does not wish to deliberately breach international law in this manner, this leaves the last option, that of 'accommodation', or perhaps to use a more constructive word, that of 'reconciliation'. It is to this approach that attention is increasingly being directed, as witnessed by the recent passage of the Council for Aboriginal Reconciliation Act 1991, although in that case limited to Aboriginal/non-Aboriginal relations. In the Australian context it is my submission that any proposals for reconciliation, although obviously having to take into account the unique position of the Aboriginal people as the indigenous people of this continent and their special concerns, should not concentrate solely on those people, but must take into account the wider diversity that now exists. Such proposals should also take into account the great diversity that still exists among the Aboriginal people themselves, ranging from those who still lead traditional lifestyles and speak their own languages, to those leading western lifestyles with little or no traditional links. These differences are particularly noticeable in the Northern Territory.

Reconciliation can of course occur in a variety of ways. It might result, for example, at least on a short to medium term basis, from the subordination of one set of interests to another. However, it must be asked whether this can fairly be described as a true form of reconciliation at all. Reconciliation seems to carry with it the concept of equality, not dominance. Historically, the former has often been absent in the relations between majority groups and minorities or indigenous groups.

For those who might be committed to a fairer form of reconciliation, some might view it primarily as a legal matters to be dealt with by appropriate constitutional or legislative means designed to recognise the rights of minorities and indigenous peoples. Others may regard it as primarily a financial matters to be addressed by adequate funding or other material arrangements. In my view, both these approaches are inadequate. For any form of meaningful reconciliation of diverse interests to occur within one nation on a long term basis, it is most important that it be based on the right principles; that is, that it be reconciliation on a fair and equitable basis for all concerned. All persons, irrespective of race, culture, language, religion etc should be
regarded as having an equal place in the society and a right to participate fully in that society and in decisions that affect them. It should be a form of social partnership on equitable lines. For this to occur, there must be a significant degree of mutual trust, respect and understanding.

Further, reconciliation of diversity cannot involve any quest for the elimination of that diversity unless the respective participants voluntarily choose otherwise. The word reconciliation in this context necessarily involves two or more groups and has a meaning relating to the establishment between them of harmony and concord, of good relations, of unity but not uniformity. A form of reconciliation that concentrates solely on the acquisition of power and autonomy by any one group, without regard to the interests and unity of the whole, is a recipe for further conflict. To succeed, in my opinion it needs to stem from an appreciation of the uniqueness and variety of race, culture, language and religion that exists within the human family generally and within the Australian nation in particular. This diversity should be seen as something of manifest beauty, to be valued in itself, and not something necessarily inconsistent with a wider unity. Variety, and not uniformity, is at the base of organic society. Affiliation with a mother race, culture, tongue or religion should not exclude an appreciation of other races, cultures, languages or religions. Rather, one should view them as part of the common heritage of all humankind. The respective contributions that each group has to make to the whole should be seen as a factor that strengthens and enhances the beauty and richness of the whole. Reconciliation from this point of view involves a willingness to contribute and to share, an openness as opposed to any form of exclusivity, a recognition that each group has a wider loyalty in the common interest. Ultimately, it must extend to a recognition of our common humanity and that on this small planet there is really only one race, the human race. It would in my submission be a grave mistake to regard such a process of reconciliation as purely a legal exercise, to be accomplished through appropriately worded black letter law, even at an entrenched constitutional level, plus the legal means of enforcement. Nor is it just a matter of spending more money.

Civil definitions of political and economic status and entitlements, if devoid of ethical value and influence, are not equivalent to essential human rights, but express the expedients of partisan policy. Reconciliation, because it involves such a wide range of human issues, must be multifaceted to be effective. It must, as I have already indicated, be principle based, and be primarily concerned with attitudes and values. These are matters that are deeply entrenched in the human psyche and are not easily changed. A tremendous effort is required by the various groups comprising our population if their outlook and conduct is to reflect this conciliatory, partnership type of approach. On the part of some, it may be a matter of abandoning once and for all their inherent and at times subconscious sense of superiority, of correcting their tendency towards revealing a patronising attitude towards other groups, of persuading the other groups of the genuineness of their friendship and the sincerity of their intentions, and of mastering their impatience of any lack of responsiveness on the part of these other peoples who may have received, for so long a period, grievous and slow healing wounds. On the part of others, it may be a matter of a corresponding effort on their part to show by every means in their power the warmth of their response, their readiness to put aside the past and their ability to wipe out every trace of suspicion that may still linger in their hearts and minds. No groups or individual must think that the solution to so vast a problem is exclusively the concern of the
other. No person must feel absolved from the obligation to make an effort to develop a conciliatory, non-prejudiced attitude. Sincere and tactful efforts should be made to extend this approach into the education system, to the media, to the family, into social and economic affairs, into inter group activities and cultural awareness programs, to personal morality and religion as well as by changes to the legal system.

An example of a keen awareness of the need for a broad-based approach in dealing with one specific issue was recently displayed in the report of the Royal Commissioner into Aboriginal Deaths in Custody (Johnston 1991). Reconciliation of diversity within Australia, based on such a comprehensive approach and designed to maintain and enhance the harmonious and tolerant nature of Australian society, is clearly a far greater task than that addressed by the Royal Commissioner. It is a matter that is well beyond the scope of this paper to deal with other than in the most rudimentary way. However, it is a task of great importance, and should be constructively addressed on an on-going basis by every Australian from political leaders downwards. It should be espoused as a national priority goal. It should not be a matter to be shelved, relying on such generalised myths as Australian egalitarianism and fair mindedness. To do so may be to run the risk of allowing any festering divisions, prejudices and antagonisms to reach the point of social and economic dislocation, to be then dealt with as a matter of crisis management. We have seen the unfortunate consequences of this approach in other countries.

Law and Human Rights

Subject to these wider considerations, there is no doubt that the law still has a significant role to play in any process of reconciliation. It is appropriate in this paper to consider this legal aspect more fully, given that this conference has as its theme the matter of contemporary constitutional change.

It may be of some value to compare briefly the international legal approach to diversity in the human family. In a sense, the international system can be viewed as a global nation, incorporating within it the multitude of diverse nationalities and ethnicities in a wider and as yet very imperfect world order. Most people would agree as to the vital necessity of maintaining a reasonable level of peace and security within the global family of nations. Given the level of interdependence that now exists between those nations and their peoples, many would agree that for peace and security to exist, there must be some form of just accommodation or reconciliation between the diverse interests of those various nations and peoples. As an integral part of that accommodation or reconciliation, many may also agree that the developing global jurisprudence of human rights has a critical role to play. Legal theories which might in the past have limited or excluded such a role, such as the strict positivist school of jurisprudence, with the associated theory of unlimited state sovereignty, may have contributed to the many gross abuses of human rights that have occurred over this century under the protective umbrella of the doctrine of non-interference in domestic national affairs. Such theories have increasingly given way in recent times to the perception that certain minimum legal standards of treatment should be observed by all nations and peoples. National standards and practices should be measured against these wider international standards and national governments.
should be held accountable in the international arena for any failure to meet those wider standards.

The international community, through the auspices of the United Nations, has expounded on the law as to human rights at some length. The Charter of the United Nations expressly affirms the faith of the peoples of the United Nations in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small (Second Preamble). It expresses some of the purposes of the organisation as being respect for the principle of equal rights and self-determination of peoples and the promotion and encouragement of respect for human rights and fundamental freedom for all without distinction as to race, sex, language or religion (article 1.3, and see also articles 13.1b, 55, 56 and 76c). These provisions are in turn reflected in the Universal Declaration of Human Rights of 1948, which is declared to be a common standard of achievement for all peoples and all nations. Article 2 provides that everyone is entitled to all of the rights and freedoms set forth in the Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth and other status. However, neither the Charter nor the Declaration makes express provision for the rights of minorities or indigenous peoples.

The other two arms of the International Bill of Rights, namely the International Covenant on Economic, Social and Cultural Rights of 1966 and the International Covenant on Civil and Political Rights also of 1966, both expand upon the rights of individuals, to be applied without discrimination, although each from a different perspective. They have one provision in common in that they provide in article 1 that all peoples have a right to self-determination, and by virtue of that right may freely determine their political status and freely pursue their economic, social and cultural development. In addition, article 27 of the International Covenant on Civil and Political Rights states that in those states with ethnic, religious and linguistic minorities, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to enjoy their own language. This is a fairly limited right and contrasts starkly with the broad terms of article 1, a fact that has been said to invite implications as to the intended operation of article 1.

The international concept of ‘self-determination’ has proved to be somewhat elusive, particularly in its application to minorities and indigenous groups. There is debate about the groups to which it is capable of extending and about what the right encompasses. Initially it was envisaged by some states as applying to the re-establishment of former countries occupied during World War II, extending in the post-war demise of colonial empires to the grant of national independence to former colonial territories – the so-called ‘salt water’ doctrine, being applicable to countries separated geographically from former colonial rulers.

More recently, with the explosion in interest in the rights of minorities and indigenous peoples, strenuous efforts have been made to extend the international concept of self-determination to those minorities and indigenous peoples within existing nation-states. However, such claims have yet to find their way into express and detailed guarantees in multilateral international agreements. The reasons for this are not hard to find. The individual nation-states forming the international community
generally place great importance on territorial integrity and unity and display a
distaste for geographic fragmentation and any resultant destabilisation of their social
and political structures. The achievement of national division is often only possible at
the expense of violence and bloodshed. There is therefore considerable resistance, not
always openly expressed, to any international formulation of a right which could be
used to justify claims by minorities and indigenous people to completely separate
development.

On the other hand, attempts to distinguish between internal and external self-
determination, with the former being a restricted right applicable within the
framework of existing nation-states, have so far held little appeal for many
indigenous representatives in international forums (Brennan 1991 120–1). Notwithstanding this reluctance, the view is gaining ground that internal self-
determination is an aspect of the international right, and that in some cases it can
provide an acceptable and appropriate solution. The right, if it exists, is sometimes
described as one of self-management, self-sufficiency (see section 3(b) of the
Aboriginal and Torres Strait Islander Commission Act 1989) or self-government (Jull
1992; Jull and Roberts 1991). The Australian government in recent times has
sometimes preferred to use the term 'self-determination', although this is presumably
a term of domestic meaning without any guaranteed legal content.

All of these refer to some degree of autonomy to be exercised by and by reference to
an identifiable group within national borders, although the content of any grant of
autonomy may be variable from country to country. The term ‘autonomy’ does not
have any fixed meaning at international law (Hannum & Lillich 1980), nor at
domestic law. The options are vast. The form and extent of any such grant will very
much depend upon the particular circumstances of each country and the extent of the
commitment by those in authority (both at federal and regional levels) to devolve part
of their authority. Moreover, given the inherently dynamic nature of constitutional
arrangements, it cannot necessarily be assumed that the position will remain static
once any grant of autonomy is made.

Although these international legal developments have not yet reached any finality,
with work still proceeding on the further definition of the international rights of
minorities and indigenous peoples, there is a degree of consensus emerging that
would give particular legal emphasis to their rights where they comprise distinct
communities within any one nation-state. In the case of indigenous peoples, there are
also considerations arising from the fact that their rights already existed before
settlement by others. There is said to be a measure of truth in the remark that all
human rights exist for the protection of minorities, because such rights generally exist
for the weak, the vulnerable, the dispossessed and the inarticulate. The strong may
have less need of human rights, at least in a democracy committed to majority rule
(Thornberry 1991, 38). In part, this emerging emphasis may be said to be derived
from the express right to self-determination and also article 27 of the Covenant on
Civil and Political Rights. In part, it is the result of indirect protection arising from
many other international texts of more general application which contain provisions
of particular relevance to minorities and indigenous groups. Examples are, the
Convention on the Prevention and Punishment of Genocide 1948, the Convention on
the Elimination of All Forms of Racial Discrimination 1963, the Declaration on the
Elimination of All Forms of Intolerance and Discrimination Based on Religion or
Belief 1981, and the Helsinki Declaration on Security and Cooperation in
Europe 1975. Also of relevance is the ILO Convention No 169, 'Concerning Indigenous and Tribal Peoples in Independent Countries'. More importantly, there is an increasing awareness of the unique problems faced by these groups within nation-states and a greater expression and exchange of these concerns by and between these groups and their representatives. The international community as a whole is becoming more concerned about the inequitable treatment often extended to these groups by states.

It is inevitable that this international expression of concerns for minority and indigenous rights will increasingly impact upon domestic legal systems and in some cases will lead to grants of greater autonomy or the establishment of a more equitable social partnership of some kind.

Beyond the questions of autonomy and social partnership, there are those that would argue that the domestic constitutional regime should give particular recognition to the special status and contribution of minorities and indigenous peoples within the nation-state. This recognition, it can be argued, should afford them certain basic rights, capable of enforcement through independent judicial bodies and which cannot be easily derogated from by the will of the majority. If necessary, this form of recognition should be given special constitutional status by a form of entrenchment.

At present, such forms of constitutional protection are totally absent in Australia, both at the federal and state levels. To a limited extent, the process of granting protection by indirect means has been achieved in Australia by ordinary legislation at national, state and territory levels. Examples include the Racial Discrimination Act 1975 and the Human Rights and Equal Opportunity Commission Act 1985, as well as State equal opportunity legislation. In the Northern Territory reference can be made to the Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth and Territory legislation such as the Aboriginal Land Act and the Northern Territory Aboriginal Sacred Sites Act.

Australia has not so far gone further to adopt any form of constitutional recognition or entrenchment of minority or indigenous rights, unlike some other countries. Canada, for example, has already constitutionally entrenched certain general rights of relevance as well as indigenous treaty and customary rights and has considered the entrenchment of a right to self-government. (SCCD 1992, 33–35). There have been proposals that the Australian Constitution should, as part of the reconciliation process, recognise the Aboriginal and Torres Strait Islander peoples as the indigenous peoples of Australia (see, for example, the Concluding Statement of the Constitutional Centenary Conference 1991, agenda item 10(3)).

The Sessional Committee of the NT Legislative Assembly on Constitutional Development has given some consideration to this issue in the context of developing proposals for a new Northern Territory Constitution. This includes the possibility of a non-enforceable preamble to give particular recognition of the place of Aboriginal citizens in contemporary society, and the possibility of going further to include reference to their historical rights, including land rights. The Committee also expressed the view that there was undoubtedly some merit in recognising the pre-existing circumstances of Aboriginal citizens, including their language, social, cultural and religious customs and practices. The Committee added that having regard to the desirability of maintaining harmonious relationships within the new state, it is
preferable that any such recognition should be in a form acceptable to the broader new state community and compatible with its multi-racial, multicultural nature and the principles of equality and non-discrimination. The exact form this recognition should take was a matter for consideration (SCCD 1987). No doubt this will be considered further by the Committee in due course.

The advantage of entrenchment is that it removes the possibility of statutory amendment in accordance with normal parliamentary procedures. The degree of entrenchment can be adapted to meet the particular circumstances and the level of protection required. Entrenchment can occur by constitutional change at a national level or at a state level. In the case of a self-governing territory, a national statute has effect as a form of entrenched provision as far as that self-governing territory is concerned, although not from the perspective of the national parliament. Whether the national parliament should, as a means of entrenching certain rights, legislate specifically for such a territory such as the Northern Territory, at least without adequate Territory consultation, is an issue for consideration. On the other hand, there may be good arguments as to why the Northern Territory, in developing its own Constitution, should consider the adoption and entrenchment of certain guarantees, including minority and indigenous rights (SCCD 1987, 82–85). The Sessional Committee of the NT Legislative Assembly has pointed out that entrenchment in a Territory constitution can provide a legal method of safeguarding Aboriginal interests as to land, law, language and religion (SCCD 1989, 4–5).

Conclusion

The question of whether measures should be taken to promote reconciliation of diversity within Australia, and in particular between the indigenous people and other Australians, is one that is not going to go away. It is a question that will have to be considered in detail and addressed in a meaningful way at all levels of Australian society. In my opinion, for reasons already outlined, it is an issue that transcends the question of any legal formulation of rights, or the question of any constitutional guarantees or that of financial arrangements. It is an issue that relates to the type of society we want in Australia, the values upon which it is to be based and whether it is to be harmonious, fair and tolerant of diversity.

Beyond the question of harmony, fairness and tolerance at a national level are much broader issues arising from the increasing levels of international interdependence in a steadily shrinking world, one in which all member states and their peoples now find themselves in a minority. The necessity for international peace and cooperation increasingly demands a new approach to diversity at this higher level, a new world system ‘...in which all nations, races, creeds and classes are closely and permanently united, and in which the autonomy of its state members and the personal freedom and initiative of the individuals that compose them are definitely and completely safeguarded’ (statement of the Baha’i International Community to the United Nations Seminar on ‘The Promotion and Protection of Human Rights of National, Ethnic and Other Minorities’ Yugoslavia, 25 June – 8 July 1974). This requires the acceptance of the principle of unity in diversity, a recognition that we all dwell in one world and that variety is a vital aspect of that world, to be valued and preserved.
These issues raise profound legal, social, moral and spiritual questions affecting the global society. Unless the solutions to the existence of diversity at local, regional, national and international levels reach to matters of principle, and are not merely based on pragmatic political considerations or as part of some quest for power or self-gain, they will not be such as to justify identification as an effective form of reconciliation.

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APPENDIX

WHERE DO ABORIGINAL TOWN CAMPERS FIT IN?

Tangentyere Council

Fifteen years ago the vast majority of Aboriginal people living in town camps around Alice Springs had no legal rights to their land, no permanent housing and received none of the services other Alice Springs residents would expect.

The Aboriginal Land Rights (Northern Territory) Act 1976 in its final form did nothing for town campers as it only applied to people living outside town boundaries.

However, following pressure from town camp leaders, the government of Prime Minister Fraser in 1976 set up a mechanism for granting land to town camps on a ‘needs basis’. This procedure was well-established by the time of ‘self government’ for the Northern Territory in 1978. After self-government the Commonwealth Government turned over to the NT Government the task of finalising the process.

Tangentyere Council started in late 1977 as an Aboriginal response to the appalling living conditions and lack of land tenure endured by growing numbers of town campers in Alice Springs. During the last 15 years Tangentyere Council has assisted 14 separate Aboriginal Housing Associations obtain leases. Approximately a quarter of Alice Springs Aboriginal population live on the camps.

Town camps are not a stepping stone for Aboriginal people on their way to assimilation and mainstream society. People live on the town camps because they choose to. The camps provide the residents with a culturally familiar living environment and allow people to retain as much as possible of their cultural and social values.

Tangentyere Council has become strong and effective. It runs many programs: from the Housing and Tenancy Support Service to the Old People’s Service, from the Night Patrol to the Tangentyere Bank Agency, and, importantly, has recently developed a very successful Community Development Employment Program. All these programs meet the developing needs of the town campers. But the town campers have had to fight government to get, and keep, these programs under their own control. Over the last fifteen years there have been constant attempts, usually by the Northern Territory Government, to undermine the town campers’ own organisation in Alice Springs: Tangentyere Council. Now ‘mainstreaming’ is the name of the game, and town campers see this as another form of assimilation.

* Tangentyere Council acknowledges the assistance it has found in Peter Jull’s recent writings in the preparation of this paper.

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Recently Tangentyere Council has been working well with the Alice Springs Town Council. The Town Council is learning to respect the town campers’ right to self-determination and is working cooperatively with Tangentyere Council for the benefit of the whole town. At the same time the Northern Territory Government seems to have learnt nothing. The Government claims that town camp organisations such as Tangentyere Council are not authentic local governments so are not entitled to receive funding for its provision of municipal type services.

Tangentyere Council suspects that the NT Government’s motive is to use this conference of distinguished lawyers and academics to give the unpopular notion of statehood a veneer of respectability. The topic of ‘Indigenous Peoples and Constitutionalism’ is paid lip service to on the final afternoon. The NT Government’s continuing larrikin and racist behaviour – the antics of the Attorney General at the Variety Bash at Uluru National Park is a good example – make town campers suspicious of anything the NT Government advances.

Tangentyere Council opposes statehood in the NT until the town campers’ demands are met. Its delegation to the conference will make sure that town campers’ legitimate concerns are on the conference agenda.

Town campers reaffirm the principles of the 1988 Barunga Statement:

We the indigenous owners and occupiers of Australia call on the Australian Government and people to recognise our rights:

- To self determination and self management including the freedom to pursue our own economic, social religious and cultural development;
- To permanent control and enjoyment of our ancestral lands;
- To compensation for the loss of use of our lands, there having been no extinction of original title;
- To protection and control of access to our sacred sites, sacred objects, artefacts, designs, knowledge and works of art;
- To the return of the remains of our ancestors for burial in accordance with our traditions;
- To respect for and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects, including the right to be educated in our own languages, and in our own culture and history;
- In accordance with the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of all Forms of Racial Discrimination, rights to life, liberty, security of person, food, clothing, housing, medical care, education and employment opportunities, necessary social services and other basic rights.

We call on the Commonwealth Parliament to pass laws providing:

- A national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs;
A national system of land rights;

A police and justice system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere with our freedom of expression or association, or otherwise prevent our full enjoyment and exercise of universally recognised human rights and fundamental freedoms.

The world is changing fast. The drafters of the Australian Constitution nearly 100 years ago did not consider that Aborigines or land use were anyone else’s business. Times have changed rapidly since then. At the time that Australia is considering – Tangentyere believes foolishly – creating a new state in the Northern Territory it should examine developments worldwide. Creating a new state constitution in the Northern Territory that is a carbon copy – with minor changes – of the original states is just not good enough.

Statehood is likely to result in negative effects on the NT economy generally and civil liberties of all Territorians. At present the NT gets more financial assistance from the Commonwealth than any of the States. If this advantage was lost, the NT Government would have to cut services and increase taxes and fees.

Here are a few of the many reasons Tangentyere Council says that the NT Government’s proposed new state goes against the world wide trend towards greater recognition of indigenous rights, and will actually remove existing Aboriginal rights and protections:

- *The Aboriginal Land Rights (Northern Territory) Act 1976* would be transferred to the NT. The present NT Government has stated that it is eager to make changes seriously weakening this legislation.

- With statehood, the Commonwealth Government would no longer have the power to disallow NT legislation, so that the new state would be in the same position as the original states. There would, for example, be no possibility of the Commonwealth rejecting the NT’s inadequate sacred sites legislation. The Commonwealth would also not then be free to grant Territory crown land to Aboriginal land trusts.

- Ownership of Uluru National Park and Kakadu, for example, would again be taken from Aboriginal control and given to the NT Government. The parks could easily be put under private control.

- The NT Government’s track record is in contradiction to the recommendations of the Royal Commission into Aboriginal Deaths in Custody report. Most importantly this government has been unwilling to adopt the recommendations that deal with self-determination (Recommendations 188–204).

The treatment of peoples by governments is now very much an international concern. In a few short years indigenous people in northern countries such as Canada, and what used to be known as Lapland, have gone from invisibility under the law, to political, practical and legal recognition of their rights and autonomy. There is no reason why this should not happen in Australia.

In the post Second World War era the United Nations concentrated on self-determination for nation states such as Malaya (now Malaysia) and New Hebrides
(now Vanuatu). These countries, and many others, are now accepted by the world community as sovereign states. Now, in the post cold war era, the United Nations is finding that demands for self-determination for peoples within nation states, including Australian Aborigines, to be a crucial issue. The international law argument that the right to self-determination does not extend to peoples within nation states is now totally discredited. The High Court decision in the Mabo case has finally abolished the *terra nullius* doctrine. This recognition of prior Aboriginal ownership of land could be the start of a new era where governments start relations anew with two different but equal groups. Town campers, as Australian Aborigines, are looking for constitutional arrangements that devolve power to them.

Canada, which like Australia, is a federal state, has a bipartisan policy of support for aboriginal rights. Constitutional reform will no longer go ahead unless there is full protection for the cultural and political rights and genuine social equality of its indigenous minority.

In July 1992, at the conclusion of lengthy multilateral meetings in Canada about reform of its Constitution, consensus was reached on many matters including adding new clauses to the Canadian Constitution Act that recognise that:

- the aboriginal peoples of Canada have the inherent right of self-government.
- aboriginal governments constitute one of three orders of government in Canada.

One practical way in which Aboriginal governments in Australia could be recognised as constituting an additional order of government would be for the Commonwealth to have direct dealings with such Aboriginal governments over funding.

Aborigines have never said they want a new state in the NT (they never even said they wanted an NT!). The so called consultations with town campers and other Aboriginal people and organisations in the Northern Territory over the future of government in the NT have been a sham. In 1989 the Combined Aboriginal Organisations in Alice Springs complained about the public hearings called by the Legislative Assembly Select Committee on Constitutional Development being poorly advertised, called at short notice, intimidating and tightly controlled.

Tangentyere Council will not be a party to token consultations, but insists that negotiations on this vital issue proceed on the basis of equality between the parties.

The Commonwealth should not allow statehood in the Northern Territory until a process of face to face negotiations has taken place with the Aboriginal peoples including town campers, and a consensus has been reached between these equal peoples.

**Negotiations between equals have not yet started.**

Such negotiations must deal with the broad issues listed in the Barunga Statement and matters specific to town campers whose land is within existing towns. Town campers fear their right to self-determination may be overlooked.

Town campers’ basic demands are:

- Secure title to their land;
- The right to self government on their lands;
- The right to maintain their own culture, language and lifestyle.
Constitutional Change in the 1990s

A conference, Constitutional Change in the 1990s, organised by the Northern Territory Legislative Assembly’s Sessional Committee on Constitutional Development, was held in Darwin in October 1992. This book is a collection of the papers given at that Conference.

The objectives of the Conference were to facilitate the development of a Northern Territory constitution in the context of constitutionalism and contemporary constitutional development both in Australia and overseas. Major topics of this book are about the rule of law and constitutionalism, moves within the Northern Territory to develop an appropriate constitution and to obtain ‘statehood’ within the Australian federal system, discussion of ways in which constitutions make governments more accountable, and to examine ways in which a constitution can facilitate a process of reconciliation in a diverse multicultural society with a large Aboriginal population.

This book is a wide-ranging set of papers that is part of the process of promoting constitutional awareness within Australia and the Northern Territory. Hopefully it will assist debate and decision-making leading to new constitutional arrangements in Australia by the year 2001.