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THE SIR EARLE PAGE MEMORIAL TRUST

ANNUAL LECTURE 1993

SYDNEY 25 NOVEMBER 1993

OF POLITICS, JUDGES & CROWN

*Welcome to the Eighth Annual
Sir Earle Page Memorial Lecture*

*Thursday, 25th November 1993
The Musuem, Parliament House, Sydney*



Sir Earle Page

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The Hon Michael Kirby AC CMG*

SIR EARLE PAGE REMEMBERED

It is easy to forget the political and other leaders who contribute to the welfare of our democracy. One of the less endearing features of the Australian character is the desire to tear down and denigrate the "tall poppies". I look on the republican movement in Australia as infected with this propensity. It is seeking to tear down the tallest poppy of them all - our Head of State and Sovereign. But this is not the only instance of such departure from time honoured conventions and traditions, as I shall show.

Sir Earle Page, for whom this lecture series is established, was the 15th Prime Minister of Australia. Nowadays we hear little, if anything, about his energetic, restless spirit and his lifetime's devotion to the political affairs of our country. When we do read about him, it is usually in terms designed to pull his memory down a peg or two. Thus, in a review of Prime Ministers of Australia in the *Sunday Telegraph* in September this year, Sir Earle Page received very low marks.¹ His remarkable career was encapsulated in but 21 lines. Even less kind was David McNicoll in his column in *The Bulletin* on 7 September of this year.² He recalled that Page was dubbed "the tragic treasurer", a "tag" which Mr McNicoll thought "might be revived for the present incumbent".

It is amazing how myths can linger, embedded in the brain and resistant to compulsion by the facts. All my life I have believed that Page was named as he was (Earle Christmas Grafton) because he was born early on Christmas Day in Grafton. Well, he was certainly born at Grafton, the fifth of eleven children. But it was not at Christmas, for his birthdate was 8 August 1880. And the hour is unrevealed.

He was a clever boy, winning scholarships to Sydney Boys' High School and the University of Sydney where he qualified in medicine. He went back to practise his profession in Grafton. But he was an entrepreneurial kind of man who soon branched out into dairy farming. Before long he was taking an interest in local government and various businesses. A visit to New Zealand, before the War, had inspired in him a keen interest in dams and hydro-electric schemes. When War came he enlisted and went to France. After the War, he promoted water conservation schemes and they played a large part in taking him into Federal politics. He also supported the New State movement for New England.

It was Page's initiative which brought together ten other farmer members of the Federal Parliament. They held the balance of power in the House of Representatives. W M Hughes's government depended on their support. After the 1922 Federal election, Page secured the removal of Hughes and his replacement by Mr Stanley Bruce. He thus became the principal architect of the coalition between the urban conservative parties and the Country Party. That coalition was to dominate Australian politics for sixty years. Its day may yet return in the inevitable cycle of politics.

In the coalition, Page strengthened the rôle of the Commonwealth Bank. As Federal Treasurer he initiated the use of s 96 grants in aid to simulate national development. It was Sir Henry Gullett who described Page as "the most tragic treasurer this country has ever had". With the advent of the Depression, the label stuck. But it seems undeserved. He could hardly be blamed for the Depression.

On the death of Lyons in 1939, Sir Earle Page was commissioned as caretaker Prime Minister for 19 days. He sought to prevent the accession of Robert Menzies,

but without success. Such was his vitriolic attack on Menzies that he never regained his national pre-eminence in the coalition, as Menzies's star rose.

In the darkest days of the Second World War, Page was sent to London as Australian Representative to the War Cabinet. Though he was kept there for a time by the Curtin Government, he became caught in the cross-fire between Curtin and Churchill. He returned to Australia and it was not until the election of 1949 that he resumed public office, as Minister for Health in the Menzies-Fadden Government.

His dream of a separate State of New England faltered and failed. But he secured the establishment first of the College and then of the University of New England of which he became first Chancellor in 1955. He retired from the Ministry in 1956. He died in December 1961 from cancer. His death preceded, by a few hours, the official declaration of the poll in his electorate, which he had narrowly lost. He did not hear the grim news.

We do well to remember this lively, practical, determined, resourceful Australian politician. Although he was a leading figure of the conservative political tradition of Australia, he was in many ways a determined reformer. He did anything but he did not stand still. He increased the power of Federal agencies. He enhanced the Federal rôle in our Constitution by the use of grants in aid. He had a lifetime's devotion to regional autonomy and to educational and other initiatives. He had a longstanding devotion to better use of Australia's scarce water resources. He thrice sought to introduce a national health insurance scheme, the last time successfully as Minister for Health in 1952. As a country surgeon he had seen the injustice of forcing sick people to depend upon charity for essential health care. I therefore see Sir Earle Page as an Australian reformer and a moderate progressive.

Some may not agree. In an earlier lecture in this series, the Right Hon Ian Sinclair MP declared:

"Another factor producing disillusionment is a perceived failure by conservative politicians to resist forces seen as destructive to the foundations of institutions of our society - such as the family,

*marriage and the rule of law. The self-styled progressives in the Labor party, the union movement, education and statutory bodies - the Gareth Evanses, John Halfpennys, Justice Michael Kirby and Dame Roma Mitchells - together with those in the media, especially the ABC, who work to develop and promote this attack, seem not only to be leading the debate, but controlling the agenda."*³

Alas I control no agenda any more: I can scarcely keep up with my own. It is important, as we view the life of political and other figures in Australia, to avoid falling into the trap of stereotypes. When it comes to fundamental issues, in particular, people often display important differences. For it is then that their basic value systems are put to the test. It is then that they must either fall silent and turn to private concerns or make their voice heard and their actions felt. Over half a century of public life, Sir Earle Page did this according to his strong beliefs. His attack on Menzies in 1939 was undoubtedly sincere; but plainly extremely perilous to his political career. Yet he did it because he thought it was right. At a time of conformism and pressures towards political correctness, it is vital that Australians should uphold the right of every citizen to speak out on matters keenly felt - especially those which concern the fundamental character of our constitutional government. Even when they disagree. A life such as that of Sir Earle Page gives us inspiration and encouragement, even when, on particular issues, we would dispute with him. His life of constructive action in a democratic society provides an example to us of the kind which we need today.

JUDICIAL INDEPENDENCE

If Sir Earle Page were alive today, I suggest that there are three features of our current political scene which would surprise and concern him:

1. The breach of the convention which formerly protected judicial tenure and independence;
2. The barrage of attacks upon the High Court of Australia; and

3. The calls for a republic.

In the years in which Sir Earle Page operated within the Australian political system, judicial independence was assured, the high deference for and repute of the High Court of Australia was unquestioned, and the place of the Sovereign as Australia's Head of State was accepted with virtually universal loyalty and enthusiasm.

How much has changed? Not all for the good. I wish briefly to explore these three themes because they represent an enormous contrast between our society today and that of the first half century in which Page played an important part in our democratic society.

Take the issue of judicial independence. It has come under something of a battering in recent years from governments of different political persuasions. We have seen the serious breach of fundamental conventions. There has been a complete lack of concern about judicial tenure which is the foundation of judicial independence. Slowly, we are returning in Australia to the position of England in the time of the Stuart kings, where judicial officers are being rendered answerable and removable at the whim of the Executive Government.

The rot began during the Federal Labor Government of Mr Hawke. A decision was made to abolish the Australian Conciliation and Arbitration Commission and to replace it by the Industrial Relations Commission. There was nothing unusual in this. The institutions of our Federal arbitration system have changed radically over the years. However, when the *Conciliation and Arbitration Act 1904* was repealed, the independent body which it established, the Arbitration Commission, was abolished. The transitional provisions contemplated the appointment to the new Commission made up of the former members of the Arbitration Commission. On 27 January 1989 the Minister for Industrial Relations, Mr Peter Morris, announced the new appointments. Only the name of Justice Staples was missing from the list. Even Justice Coldham, who had been appointed a Deputy President in 1972 and who was expected to retire in February 1989, was recommended for appointment to the new

commission. He was in due course appointed a Deputy President. So was Justice Elizabeth Evatt with her dormant commission. But not Justice Staples.

Justice Staples refused to accept the abolition of his office by the abolition of the independent tribunal on which he sat. He appealed to the legal profession; but he secured muted support. I condemned this breach of convention in a radio broadcast of February 1989. I did so in my capacity as a Commissioner of the International Commission of Jurists. This is a body concerned with the defence of judicial independence. Amongst the international rules protecting judicial independence is the basic principle that where a judge's court or tribunal is abolished he or she must be appointed to a judicial office of the same or equivalent rank. Otherwise, the promise of judicial independence, resting on safe tenure, is completely undermined. Judges in Australia hold office, unless protected by the Federal Constitution, at the whim of passing majorities in the legislature and the fickle will of the Executive Government. By a quirk of constitutional history, Justice Staples was not protected by the Federal Constitution. The *Boilermakers' Case*⁴ had held unconstitutional the previous Court of Conciliation and Arbitration. Page was probably in the Menzies Ministry when this problem was presented to it by a decision of the High Court. To its credit, the Government immediately honoured the appointments of the judges of the unconstitutional court. All of them - no exceptions - were offered appointment, either to the new Industrial Court or Arbitration Commission. The old "court" was even allowed to remain on the statute books until the last of its judges had died or resigned. These were the conventions which Menzies and earlier Governments of Australia of all political colours respected and which Page would have demanded.

The Staples case was a shabby affair where principle passed with little support from any of the main political parties. Their eyes were obscured to the true principle involved by their opinions of the individual involved.⁵ It was a bad precedent.

Sadly, this precedent has been followed. In New South Wales, the present Government followed it upon the abolition of the Courts of Petty Sessions. One hundred Magistrates of that court were appointed to the new Local Court of New

South Wales. Five were denied appointment, although they were undoubted judicial officers. The Court of Appeal held that they were not entitled by law to be appointed as of right. But they were entitled to have their claim for appointment considered fairly against the background of a strong convention.⁶ The High Court of Australia, in the case of *Quin*, overruled this decision.⁷ Undoubted judicial officers were thereby effectively removed from office by the simple expedient of the abolition and reconstitution of their courts.

Precedent breeds on precedent. We have now seen a further instance in Victoria under the Kennett Government. Ten undoubted judges of the Compensation Tribunal of Victoria were removed from office by the simple expedient of the abolition of their court. What kind of judicial independence can you have if all State judges in Australia are at risk of removal from office in this way? The action of the Victorian Government was a disgraceful blow to judicial independence in this country.⁸ Sadly, it has been followed since with the abolition of another office, the Commissioner for Equal Opportunity, where independence from the Executive was the promise offered by Parliament when the office was created and the office-holder appointed.⁹ Unfortunately, there are now reports, elsewhere in Australia, that judges are at risk of effective removal by this simple means of circumventing constitutional conventions.

Both sides of politics have acted shamefully in this respect. They have breached longstanding constitutional conventions. They have attacked, by their action and by their silence, one of the foundations of our society. The rule of law, of which Mr Sinclair spoke, depends upon having judges independent and courageous to do strong and brave things when necessary. Page, who was there when the *Boilermakers' Case* was decided and saw the way it was properly attended to, would have been as outraged as I am at the lack of attention to constitutional fundamentals. This is not the self-serving opinion of a judge. The only value of judicial independence is as it advances and defends the rule of law for our society and its people. That was once a pretended boast of our society. But is it still?

JUDICIAL CREATIVITY AND CALUMNY

I also believe that Sir Earle Page would have been shocked at the recent criticism voiced of the High Court of Australia, especially following the *Mabo* decision. Typical of the criticisms is that voiced by the Tasmanian Premier, Mr Groom, who, speaking of *Mabo*, said:

*"It seems to me extraordinary that the High Court, an unelected body, could move in one decision to overthrow all the land tenure laws that have served Australia so well for two hundred years."*¹⁰

The Hon Peter Connolly, a former Judge of the Supreme Court of Queensland, has addressed the question "What was wrong with the decision" with these replies:

*"It was sheer invention or, if you prefer a politer word, sheer legislation. As Dr Colin Howard has observed 'the philosophy of the common law is, above all, evolutionary, not revolutionary. Mabo is above all, revolutionary, not evolutionary. ... My thesis is that this is the naked assumption of power by a body quite unfitted to make the political and social decisions which are involved."*¹¹

And these are some of the more polite criticisms of the High Court. One Federal Member of Parliament described the Justices in Parliament as "pissants."

I acknowledge the concern which has been expressed about the radical nature of the High Court's decision in *Mabo* and the question whether a court - even the highest court - has the available methodology and the legitimacy to make decisions having such a far-reaching effect. I acknowledge, as arguable, the contention that the High Court ought simply to have confined itself to resolving the case of the Murray Islands which was before it and not the land rights of all Australian Aboriginals throughout the continent. These are points of view upon which individuals may legitimately differ. A citizen should realise that the High Court Justices are not in a

position to answer back to calumny and personal criticism. Their judgments must stand as published. They cannot enter the political domain and argue for them. It therefore falls to others both to criticise and to defend them and to portray what they do in the wider context of the development of the law.

In Sir Earle Page's day the High Court was dominated by Sir Owen Dixon, a Chief Justice who believed that the law would have no meaning if its rules did not pre-exist the case to be determined. Sir Owen Dixon's approach was shared by most, if not all of the Judges of his time. It was the declaratory theory of the law. More recently this approach has been described as a "fairy story",¹² which nobody believes anymore. Judges face choices. They cannot find the solutions by a magic formula or in verbal precedents. It is naive to believe that they can. Especially in the highest Court there is a proper and legitimate rôle in creation and expansion of the common law and broad interpretation of the Constitution and statutes. It is only in this way that the Australian Constitution and the common law have been adapted to the vastly different society of today, when compared to that of the turn of the century.

A number of recent cases illustrate the way in which majorities of the High Court have taken important steps to push forward the principles of the common law:

- * In *Trident General Insurance Co Limited v McNeice Bros Proprietary Limited*¹³ the High Court by majority¹⁴ held that a person, not a party to an insurance contract, was entitled to enforce the indemnity against the party's liability to pay damages as the result of a successful claim in negligence against the party. While the ramifications of the decision remain to be explored, the decision may have dispensed with the doctrine of privity of contract. It may have done so by court decision; and this despite the many calls for legislative reform which earlier fell upon deaf ears in Parliament;
- * Similarly, in *McKinney v The Queen*¹⁵ the High Court, by majority,¹⁶ laid down a "rule of practice for the future" to be applied in the context of confessions made by a person in police custody. The "rule" was that, wherever police

evidence of a confessional statement allegedly made by an accused while in police custody was disputed at trial, and its making was not reliably corroborated, the judge should warn the jury of the danger of convicting on the basis of that evidence alone. Law reform bodies had for years cried out for legislative reform in this area (as Justice Brennan noted in a powerful dissent)¹⁷ The court-mandated requirement has clear implications for police practice and resources. Yet the High Court would wait no longer for legislation based on law reform reports. It acted resolutely itself to defend the justice of proceedings in all Australian courts;

- * In *The Queen v L*¹⁸ the High Court unanimously¹⁹ rejected the notion that, by reason of marriage, there was an irrevocable consent to sexual intercourse on the part of a spouse. This legal fiction had survived for two centuries. It was peremptorily terminated;
- * In *Australian Capital Television Pty Ltd v The Commonwealth [No 2]*²⁰ the High Court, by majority,²¹ held invalid key provisions of the *Political Broadcasts and Political Disclosures Act 1991 (Cth)* upon the ground that they involved a severe impairment of freedoms previously enjoyed by Australian citizens to discuss public and political affairs and to criticise Federal institutions. An implied guarantee of freedom of speech with respect to public and political discussion was found to be inherent to a constitutional democracy such as Australia.²² This was despite the fact that previous suggestions by Justice Lionel Murphy that the Australian Constitution required freedom of speech and other communication²³ had been strongly rejected²⁴ ;
- * In *David Securities Pty Limited and Ors v Commonwealth Bank of Australia*²⁵ the majority²⁶ held that a rule, well settled for nearly two hundred years, precluding the recovery of money paid under mistake of law should no longer be regarded as part of the law of Australia; and
- * In *Dietrich v The Queen*²⁷ the majority²⁸ held that, in the absence of exceptional circumstances, a judge should, on application, adjourn, postpone or stay a

criminal trial where an indigent accused person, charged with a serious offence is, through no fault of their own, unable to obtain legal representation. If such an application were refused and the resulting trial were unfair, the conviction might be quashed upon the ground of miscarriage of justice. This decision was in marked contrast to the earlier decision of the High Court in *McInnis v The Queen*.²⁹ Again, the dissent of Justice Murphy in that case was approved, and followed, in the *Dietrich* case.

This line of recent cases shows the extent to which the High Court has been prepared in recent years to develop the common law in matters having a high policy content. The changes have been well known to the legal profession. Perhaps they have not been well enough known and explained outside.

The decision in *Mabo* is simply the most notable and controversial of the decisions in the line which I have mentioned. The case is also important, like others, for the new emphasis that was placed, desirably in my view, upon the harmonisation of the principles of Australian domestic law with those being adopted in international law by the community of nations.³⁰

The recognition of indigenous or Aboriginal land rights is by no means peculiar to the law of Australia. Indeed, Australia is one of the last of the common law nations to acknowledge, in its legal system, the legitimacy of indigenous or Aboriginal land rights. By its decision, the High Court has required the democratic organs of government in Australia to respond to what was perceived as a fundamental injustice and misapprehension on the part of the common law of this country. A law out of keeping with developments of the common law elsewhere and with universal principles of fundamental human rights.

Without *Mabo* the stimulus to legislation reform may not have been provided. It is a point worth making that, for 150 years of representative government in Australia, nothing was done by the elected lawmakers to correct the myth that Australia was an empty continent when the settlers first arrived. In other settler

societies a different foundation for the law of real property was laid from the start. In *Mabo*, the High Court determined that it was no longer just or acceptable to rest our Australian law of property upon a myth of an empty continent, when the facts indubitably established the prior existence of indigenous people with their own rules and with a special affinity to land.

When we established our own Constitution in 1901 we laid down for ourselves a strict rule that no property could be taken from us by the Commonwealth without just terms of compensation. It is not unreasonable to say that we should be prepared to offer the same entitlements to the indigenous people of this country. Yet for asserting this, the High Court has been condemned and attacked in terms never before seen in Australia.

My present point is simply that the decision of the High Court in *Mabo* should be seen not as an exception to the High Court's function. It is, indeed, a fulfilment of the very element of creativity which is the most striking feature of the common law system which we inherited from England. It is the capacity of creativity, change and adaptation which has preserved the common law of England in all of the jurisdictions of the old Empire long after the Union Jack was hurled down.

Views may legitimately differ about whether, in the particular matter of native title in Australia, the Judges of the High Court would have been wiser to stay their hands and leave reform to Parliament. My own assessment is that history will treat the decision kindly, as it will the Judges who made it.

THE REPUBLIC

Probably the most astonishing of the developments of recent times for Sir Earle Page would have been the calls for a republic to replace the monarchy enshrined in the Australian Constitution. Sir Earle Page was in Parliament when the Queen, at the beginning of her long reign, came to Australia in 1954. With the support of all political parties she became the Queen of Australia. Rightly, she was viewed with admiration, affection and allegiance. She still is by most of us.

In Adelaide last week, at the launch of the South Australian Branch of Australians for Constitutional Monarchy, I was asked a question. It was whether the Prime Minister and his supporters should not be impeached for treason, or at least sedition, for their energetic endeavour to propound an Australian republic. My answer was that our Constitution defends even those who would change it radically. This was established by the *Communist Party Case*.³¹ We must win the hearts and minds of the people to the merits of our Constitution. We cannot seek to bludgeon our way to defeat the proposal for a republic by the processes of law. Supporters of the Constitution must win by persuasion, not law suits.

My own view is that the merits of our system, built by people such as Sir Earle Page, are inadequately understood and appreciated. Perhaps as the centenary of the Constitution approaches we will hear more about the merits of our system of government. I hope so. I will be playing my part. There is a century of liberty to celebrate.

Why is it that I favour the retention of our present arrangements? It is because they are uniquely Australian. They were adopted by us at Federation. They have served us well. As a practical people, we should be very cautious about changing them for something as yet still undefined.

The most temperate and tolerant societies in the world tend to be constitutional monarchies. Look at them: the Netherlands, Belgium, Sweden, Denmark, Norway, Spain, the United Kingdom, Canada, Australia and New Zealand. Constitutional monarchy is not necessarily outmoded. Half of the countries of the OECD enjoy this system of government. There are countless impoverished, autocratic and tyrannous republics.

I hope I will cause no offence to the politicians present if I say that, having as a Head of State a person chosen by accident of birth, ensures that no politician can aspire to the number one job. The Queen keeps out of the position of Head of State of this happy country the pushing and shoving types who are necessary for democracy but who do not always engender universal respect, affection and trust.

The position of the Governor General spares us of the pretensions that normally attend a Head of State. The position also avoids the tension that could exist if the Australian Head of State were elected and claimed a legitimacy by reason of such election. Were this to happen, the Prime Minister would have constantly to look behind. We would invite the instability which has been tasted in Pakistan and in other countries in recent years.

Our system imposes upon all who serve in public office an appreciation of the fact that they are but temporary office-holders under the Crown. The long history of the Crown puts a break on pretensions and challenges to constitutional rule. In an internationalist age we should regard the call back to the bosom of primitive nationalism as completely out of date.

One thing that seems to concern some republicans is that the Australian leader, when overseas, is not welcomed as a Head of State. But ours is a Parliamentary system. Australians can survive the shame of a nineteen gun salute for their Prime Minister instead of twenty-one guns for a President. It is the Prime Minister who should represent us overseas. They like doing it and, for the most part, they do it well.

To the complaint that the Queen is not always with us, I would say this is an advantage of our system. The Crown provides the symbol of continuity. Yet we have avoided the pretensions of an aristocracy. But the Queen whose service has been faithful and dutiful comes when invited. This is, indeed, a unique system. It is a crowned republic. It may not be perfect. But it is a whole lot better than most of the republics that we all know of.

Then it is said that the Asian and non-Anglo Australians feel no affinity for the Queen. I believe that they feel an affinity for our stable system of government. It is for that *system* that many travelled across the world to come to enrich this country. They will feel instinctively the dangers of unnecessary change.

To those who say that a republic is inevitable I look at the history of referenda in Australia. And I then reach for a pinch of salt. Nothing is inevitable in the

constitutional record of this country, unless it has the strong will of the people behind it.

Yet, without mandate or prior consultation, the present Government of this State abolished the rank of Queen's Counsel. It endures elsewhere throughout Australia. It has endured for hundreds of years in our tradition. This happened contrary to the wish of the Bar and the Judges. Yesterday I received the list of the new "Senior Counsel" - SCs. So what has been achieved by this brave move? The removal of the tempering involvement of the elected Government in the choice of leaders of the Bar, from whom our judges are usually appointed. And the removal of the Queen's name in another step, like the oath of allegiance, on the path to creeping republicanism, without the courage and honesty of consulting the people, as the Constitution obliges.

CONCLUSION

So when tonight we think of Sir Earle Page let us think of the changes in this country during this century, in much of which he participated. The gradual emergence of an independent nation. The courageous defence of its interests, ultimately, of its territorial integrity and people. The growth of national unity and identity. We have avoided civil wars. We are still the only continent on earth that speaks a single tongue. We live in peace in a society still governed by the rule of law. We must uphold these great virtues of our system of government. They are precious things, not to be thrown away. Not whittled away by breaches of useful conventions and traditions.

Slogans and speeches are not enough. From politicians, and indeed from all citizens, we require attention to the abiding principles of the Constitution. A defence of the independence of the judges who must hold the balance. A respect for the judicial branch of government which cannot answer back to attacks. An appreciation of the merits of the Australian Constitution that has served us for nearly a century.

If Sir Earle Page were with us tonight I believe that these would be lessons he would urge, from the long eye of Australian history, to which he made such a notable contribution.

FOOTNOTES

1. *Sunday Telegraph*, 12 September 1993, 103.
2. *The Bulletin*, 7 September 1993, 25.
3. I Sinclair, "The Challenge to the National Party", Sir Earle Page Memorial Oration 1986, in *Thinking About Australia: The Sir Earle Page Memorial Orations 1984-1990*, The Sir Earle Page Memorial Trust 1991, 19 at 22.
4. See *The Queen v Kirby and Ors; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
5. M D Kirby, "The 'Removal' of Justice Staples - Contrived 'Nonsense' or Matter of Principle?" (1990) 6 *Aust Bar Rev* 1.
6. *Macrae and Ors v Attorney-General for the State of New South Wales* (1997) 9 NSWLR 268 (CA).
7. *Attorney General for New South Wales v Quin* (1990) 170 CLR 1.
8. M D Kirby, "A Disgraceful Blow to Judicial Independence" (1993) 5 *Judicial Officers Bulletin* 41.
9. See eg M Bruer, "Rayner's Sacking Wrong, Says state Bar Council", *The Age*, 23 November 1993, 2.
10. B English, "Groom calls for tighter controls on High Court" in *The Australian*, 13 September 1993, 5.
11. P Connolly, "Should the Courts Determine Social Policy" in *The Association of Mining and Exploration Companies Inc, The High Court in Mabo*, 1993, 5.

12. Lord Reid, "The Judge as Lawmaker" (1972-1973) 12 *Journal of Public Teachers of Law*, 20 at 22.
13. (1988) 165 CLR 107.
14. Mason CJ, Wilson, Deane, Toohey and Gaudron JJ; Brennan and Dawson JJ dissenting.
15. (1991) 171 CLR 468.
16. Mason CJ, Deane, Gaudron and McHugh JJ; Brennan, Dawson and Toohey JJ dissenting.
17. 171 CLR at 478-479.
18. (1991) 174 CLR 379.
19. Mason CJ, Brennan, Deane, Dawson and Toohey JJ.
20. (1992) 66 ALJR 695 (HC).
21. Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Dawson and Brennan JJ dissenting.
22. See also *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658 (HC).
23. See *Ansett Transport Industries (Operations) Pty Limited v The Commonwealth of Australia and Ors* (1977) 139 CLR 54 at 88 per Murphy J.
24. See, for example, *Miller v TCN Channel 9 Proprietary Limited* (1986) 161 CLR 556 at 579 per Mason J.
25. (1992) 175 CLR 353.
26. Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ dissenting.
27. (1992) 67 ALJR 1 (HC).
28. Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ dissenting.
29. (1979) 143 CLR 575.
30. See *Mabo and Ors v The State of Queensland* (1992) 175 CLR 1, 42.
31. *The Australian Communist Party and Ors v The Commonwealth and Ors* (1951) 83 CLR 1.