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MONASH UNIVERSITY

LUCINDA LECTURE SERIES

FIFTH LUCINDA LECTURE 1997

THE AUSTRALIAN CONSTITUTION - A CENTENARY ASSESSMENT

THE HON JUSTICE MICHAEL KIRBY AC CMG

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LUCINDA'S HANDIWORK

For some reason which I cannot fathom, I long believed that the *SS Lucinda* was a paddle-steamer plying the Murray River in the 1890s. Perhaps it was a trick of the mind: assuming that the factious politicians who refined the first effective draft of the Australian Constitution would only agree to meet on neutral territory: the water between the two principal colonies. Such an assumption would have been legally

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* Fifth Lucinda Lecture, adapted and updated from a text on which was based the author's Sir Ninian Stephen Lecture, the University of Newcastle, 20 March 1997.

inaccurate[1]. But, more importantly, it was historically erroneous. The *SS Lucinda* actually belonged to the Queensland Government which had generously put it at the disposal of Samuel Griffith for use in February and March 1891. The chosen delegates who climbed aboard in Sydney Harbour for its historic journey to the Hawkesbury River hammered out a draft which became ten years later, Australia's federal Constitution[2].

The Committee, under Griffith, worked on a draft Bill prepared by Inglis Clark of Tasmania. Alas, Clark was laid low by influenza which was later to affect Griffith; but not before he had worked over the long Easter weekend on the revised draft to be presented to the First Convention. Clark's illness caused Griffith and his fellow draftsman, Charles Kingston of South Australia, to invite Edmund Barton to join them[3]. It was an auspicious choice. Barton became very influential in the Conventions. He went on to become the first Prime Minister and, with Griffith, a member of the first High Court. This core of

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1 See *Graham v The Queen* [1984] VR 649; cf Sir Samuel Griffith's letter transmitting the draft of his Criminal Code cited by Brennan J in *Thompson v The Queen* (1989) 169 CLR 1 at 25.

2 J A La Nauze, *The Making of the Australian Constitution,* MUP (1972) at 65.

3 *Ibid,* at 64.

drafters, with a group of lawyers from all invited colonies except Western Australia and New Zealand (who had not arrived) made up the *Lucinda* party.

On the first day the weather was unkind as Sydney weather in March so often is. But then it settled down to idyllic conditions as the drafting progressed. The *Lucinda* returned to Middle Harbour, Sydney on Easter Sunday. The New South Wales Government Printer produced a fair copy for the delegates on Monday 30 March 1891. Ironically, some of the *Lucinda* revisions were later to be numbered amongst the few provisions of the Constitution repealed after securing the necessary majorities in the 1967 referendum[4]. Much tightening of the language occurred so that it resembled, even more than Clark had intended, the sparse text of the United States Constitution rather than the more prolix English drafting of the *British North America Act*. Important changes were made to the structure and nomenclature of the federal judiciary, including the High Court[5].

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4 This refers to the insertion in s 51(xxvi) of the exclusion of the power to make laws for people of the Aboriginal race in any State (which followed concern expressed about the New Zealand Maori) and the insertion of s 127 relating to the reckoning of the number of people of the Commonwealth wherein "Aboriginal natives shall not be counted". These provisions were deleted in 1967. See La Nauze, above n 2, at 67.

5 *Loc cit.*

The labours of this small band of the framers of the Australian Constitution were well spent that Easter weekend, north of Sydney.

Now, more than a century later, as we approach the remembrance of the adoption, enactment and proclamation of the Australian Constitution, we do well to look back to that fateful journey and the labours of those who took it. Had their draft been more expansive, idealistic and liberal it might well have set back the cause of federation. Other colonies, might have left the Sydney Convention disillusioned and, like New Zealand, dropped by the wayside. The protest that the federation of the Australian colonies was inevitable could have elicited Justice H V Evatt's later response (mentioned by Professor Winterton in his Lucinda Lecture[6])about "the gradualness, the extreme gradualness, of inevitability"[7]. The conception of "a nation for a continent and a continent for a nation" was an alluring one. But had the drafters on the *Lucinda* devoted more time to guarantees of what we now call human rights than they did to the 35 clauses dealing with finances and taxes, customs, excise and ´bounties, the bright hope of

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6 G Winterton, "The Evolution of a Separate Australian Crown" (1993) 19 *Monash Uni L Rev* 1 at 22.

7 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 518.

Australian federation might have faded for a time or even forever. This, therefore, is the context in which we pay tribute to the crucial work which the hard-nosed federationists - Griffith, Kingston, Barton and their colleagues - accomplished. They perfected a draft which would command sufficient interest and assent to promote, and not retard, the federal movement in its infancy.

In the mood of cynicism and disparagement which is a common feature of Australian public life today, it is usual to hear criticism of our Constitution. A people so successful and prosperous by the world's then standards, should, we are told, have been more adventurous, independent, republican and right-asserting. What could you expect, we are asked, of meetings comprising only men? What else could have come from mediocre local politicians of strictly limited imagination?

It is true that the Australian Constitution lacks ringing phrases. Its authors are, for the most part, little known a hundred years on. All but a handful commemorated by Canberra suburbs are forgotten. Critics point out that the document misrepresents Australian democracy as if we were all the serfs of a foreign monarch. The Prime Minister is not even mentioned in it. The Public Service and the Defence Forces appear as if in the private employ of the Queen. These and many other criticisms are frequently advanced to denigrate the achievements of the

founders and to dismiss the Constitution as a document unworthy of the Australian people.

Those with a taste for the rewriting of history doubtless find such criticisms congenial. But as one who lives every day with the text and spirit of the Constitution and sits in a courtroom in succession to Griffith, Barton and O'Connor (whose portraits are there to remind me of their spirits and achievements) I have a somewhat different perspective. In order to offer a balance to the criticisms and denigration of our Constitution, I wish to suggest that we should, a century on, reflect upon the blessings which the Constitution has bought for us. This is not put forward out a sense of self-satisfaction and complacency. These are emotions alien to my character. Rather, it is suggested out of a belief that any true reform must be grounded in a thorough understanding of what we have - its strengths as well as its weaknesses. Even those who have gone before in this series, and who have criticised particular faults and suggested errors in the interpretation and application of the Constitution, concede that those on board the *SS Lucinda* would not have been disappointed with the overall outcome of their handiwork a hundred years on[8]. Nor should we be. Out of a

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8 D Rose, "Judicial Reasonings and Responsibilities in Constitutional Cases" (1994) 20 *Monash Uni L Rev* 195 at 213.

sense of fairness and proportion, and in justice to ourselves, the people of Australia, whose forebears approved and who accept the Constitution, we need to weigh its strengths as well as the weaknesses. That is what I propose to do.

SUGGESTED FAULTS

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

It would be unsurprising if there were not a catalogue of faults in the Australian Constitution. Just compare the different age of the *Lucinda* and the world of today. That was a time when the British Empire was reaching its apogee. The penal settlements in Australia had changed themselves into rustic settler societies. Men of affairs controlled the colonial governments of Australia. For the most part, women's suffrage but was a distant dream. It was a time of White Australia, in which most of the immigrant settlers who came to this land derived from the United Kingdom of Great Britain and Ireland. The Aboriginal and other indigenous peoples of the continent were generally regarded as uncivilised nomads. Their land was taken without compensation. Their culture was ignored or belittled. If they were not killed, they were all too often marginalised or promised complete assimilation. The fear of hordes invading from the north was ever-present in the colonial

mind. Imperial preference in peace and the Royal Navy in war were the foundations of Australia's national security. Yet, in an astonishingly short time these settler societies had won for themselves self-government. They had busy, elected parliaments earnestly debating the statutes and issues of the day. They had established independent courts which reflected the legal traditions of "home".

Contrast that world with the world we live in, a century later. The composition of Australia's population is radically changed and rapidly changing. "White Australia" has been officially abandoned. An attempt, often faltering, to achieve a new accommodation with the indigenous people of Australia and a correction of past injustices is reflected in the law[9] and in the policies of successive governments. The British Empire has completely faded away. Symbolically, its last substantial vestige, Hong Kong, is to be surrendered in little more than three months time. Imperial preference in trade has been replaced by strong trading links with the countries of the region and a commitment to global liberalisation of trading restrictions. A great network of international and regional institutions has sprung up to respond to the many problems which defy national

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

solution and to the opportunities which demand global cooperation. Nuclear fission and information technology have revolutionised war. Our species has walked on the moon and now explores the outer reaches of space. Computers are linked across the world, integrating a million minds and defying national borders. Genomic research promises even the possibility of a redefinition of the human species. Cloning of human beings is serious debated.

We should not, therefore, be surprised that many of our fellow citizens point to defects and call for change. Ten areas, in particular, may be singled out as the subject of the most persistent and oft-repeated criticisms needing constitutional consideration:

1. ***Aboriginals:*** A number of commentators assert that the Constitution should be amended to reflect the special place in our nation of its indigenous peoples. As originally enacted, the Constitution even omitted people of the Aboriginal race from the powers of the Federal Parliament to make special laws with respect to the people of any race[10]. That exclusion was repealed after the passage of

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

the *Constitution Alteration (Aboriginals)* 1967[11]. However there is still no recital about the special position in Australia of the Aboriginal and Torres Strait Islander people who are descendants of the people who inhabited this land before the settlers arrived. Some advocates propose the inclusion of recitals which acknowledge the special position of the indigenous peoples. Others call for a constitutional "Treaty of Reconciliation". Still others suggest the need for substantive provisions affording larger rights and constitutional compensation for past wrongs. These are controversial questions. They continue to trouble many Australians.

2. ***The Crown:*** The suggestion that all references to the Crown should be removed from the Constitution and that Australia should adopt a republican form of government is not entirely new. Indeed, there were advocates (a small minority) who suggested that approach to the Conventions which drafted the Constitution in the 1890s. There have always been a number of Australians who favoured the

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11 Altering s 51(xxvi) and s 127 of the Constitution. See also *Commonwealth v Tasmania* (1983) 158 CLR 1; *Western Australia v Commonwealth (Native Title Case)* (1995) 183 CLR 373. On the topic of Aboriginal reconciliation, see W P Deane, Vincent Lingiari Lecture, reported *Canberra Times,* 23 August 1996 at 11.

severance of links with the Crown of the United Kingdom. Only in the past decade or so have they commanded much popular support. Some of the recent advocacy for an Australian republic seems curiously outdated: at least when expressed in the form of appeals to nationalism: more in keeping with the 19th than the 21st century. But other, more rational, voices suggest that a change in this feature of the Constitution is but a natural next step in an historical evolution. For them, the process began with the surrender of all legislative and executive powers belonging to the United Kingdom in respect of Australia, now finally terminated by the *Australia Acts* of 1986. It progressed through the gradual termination of judicial powers with the end of Privy Council appeals from the High Court and Federal courts[12] and, finally, State courts[13]. Now the only avenue of appeal to the Queen in Council is that vestigial remnant in s 74 of the Constitution which is contingent on a certificate from the High Court, which the Court has said it will never again give[14]. These constitutional

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

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

14 *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 159 CLR 461 at 465. See also *Attorney-General of the*

Footnote continues

developments, allied with the evolution of the Crown's new role in the Commonwealth of Nations and the changing composition and full independence of the Australian nation and people, lead a number of the more thoughtful advocates of a republic to call for the final termination of the last formal link with Australia's colonial past, in the person of the Sovereign as Queen of Australia. Obviously, this is a subject for serious debate. The appeal of the simple proposition often appears to founder on the disagreements about the alternative arrangements to be put in its place; the untroublesome nature of the present system; and the established reluctance of Australians to alter their Constitution by referendum[15]. Perhaps we will

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Commonwealth v T & G Mutual Life Society Ltd (1978) 144 CLR 161.

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

all be wiser after the Convention which the Federal Government has promised for later in 1997.

The Crown is mentioned repeatedly in the Constitution. The form and structure of the document, as well as the history of its operation, are profoundly monarchical. This would not change by the mere erasure of references to "the Queen". It would then simply be a constitution providing for a constitutional monarchy without a monarch. Indeed, there is a tension in the Constitution, for a federation is generally republican in character. Once the Crown is divided in many parts and the people are included with the Crown in Parliament for the referendum procedure under s 128 of the Constitution, the ultimate foundation of the legitimacy of the Australian constitutional settlement may appear to be the people of Australia who approved the Constitution and whose concurrence is exceptionally required for any formal alteration[16]. Yet so powerful in the mind of the Australian people at the time the Constitution was established was the idea of monarchy, with its centralising forces coming together in a personal

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

Sovereign, that the early federal notions, evinced in the original decisions of the High Court, soon gave way. The tendency to centralisation of power - a general feature of monarchy - continued to gather apace, at the cost of the federal elements in the Constitution. And centralisation of power is still a dominant characteristic of the Australian Constitution. It is thus monarchical and not federal or republican in its essential character. These features could not be changed with a few verbal erasures.

3. ***Parliament:*** It is probably fair to say that there is less respect today for the institution of Parliament than existed at the time of Federation. In part, this is because of disillusionment with the public performances of some Parliamentarians. But, in part, it is also a reflection of the loss of power from Parliament to the bureaucracy, to the judiciary and, particularly, to the Executive Government. Whilst the formal system of government in every Australian jurisdiction remains parliamentary, the realities have everywhere enhanced the power of cabinet, and especially of the head of government. This feature of modern realities is every day given emphasis by media coverage of political affairs. There is a widespread feeling that problems are now too complex for a representative Parliament of lay-people who often appear to concentrate their attention upon simple, symbolic issues associated

with the race for office rather than the difficult business of government when office is won.

4. ***No Bill of Rights:*** Then there is the absence of a general Bill of Rights. True it is there are particular rights guaranteed by the terms of the Australian Constitution. But Justice Dawson was clearly correct when he pointed out that the Founders of the Australian Constitution deliberately rejected the proposal to include a Bill of Rights, believing that the better safeguard for the liberties of Australians would be found in a democratic Parliament[17]. Such guarantees as existed in the Constitution, save for that found in s 92[18] have often attracted a rather narrow construction from a High Court respectful of parliamentary democracy and, until lately, unaccustomed to the jurisprudence of basic rights[19]. Australia is now one of the

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

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

19 See eg *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 581-582; *Kingswell v The Queen* (1985) 159 CLR 264. Cf *Cheatle v The Queen* (1993) 177 CLR 541 and P Hanks, "Constitutional

Footnote continues

few nations of the world without a constitutional charter of rights. Even the United Kingdom has a kind of charter in the *European Convention on Human Rights and Fundamental Freedoms*. Although not incorporated into domestic law, that Convention can afford an avenue of redress by citizens of the United Kingdom through proceedings in the European Court of Human Rights[20]. It can also affect local judicial decisions[21]. In Australia, the High Court has found implied constitutional rights, which are derived from the democratic character of the polity in the provisions of the Constitution[22]. International human rights treaties to which Australia is a party have come "inevitably"[23] to affect the content of Australia's domestic

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Guarantees" in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives,* Law Book Co, 1992 92 at 98-100.

20 See N Lyall, "Whither Strasbourg - Why Britain should think long and hard before incorporating the European Convention on Human Rights into domestic law" (1996) 18 *Liverpool Law Review* 115.

21 See eg *Derbyshire County Council v Times Newspapers Ltd* [1992] 1 QB 770.

22 See eg *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v The Herald and Weekly Times Limited & Anor* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211. But see J Miles, "The end of Freedom, Method in *Theophanous"* (1996) 1 *Newcastle LR* 41.

23 *Mabo v Commonwealth [No 2]* (1992) 175 CLR 1 at 42.

law. In these circumstances, proponents of constitutional change urge that a more modern, democratic and honest way to enshrine basic rights is now to adopt a constitutional Bill of Rights given legitimacy by the approval of the people. Proponents fear that such a proposal would founder on the rock of constitutional conservatism. Opponents fear the politicisation and excessive empowerment of the judiciary at the expense of the other, more accountable, branches of government.

5. ***Federal weaknesses:*** Within a federation, it is inevitable that there will be debates about the distribution of powers between the national and the sub-national areas of government. These debates accompany political life in every federal state. Critics take to task both the heads of power settled in 1901 and the interpretation of the approach to the constitutional grant of power to the Federal Parliament which was established in the *Engineers' Case* in 1921[24]. As a result of that decision, the federal Parliament's powers were enhanced. No implication, derived from federation itself, could stand against a clear grant of power to the Commonwealth. Advocates of

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

federalism urge a reassignment of powers to enhance those of the outlying governments. They are specially concerned about the diminishing avenues of State revenue which have a potential to erode the viability of the surviving functions of State governments. The failure of the Constitution to provide clearly for the democratic character of State governments[25] is also said to be a weakness which requires attention before any redistribution of powers from the centre can be contemplated.

6. ***Local government:*** Local government is not mentioned in the Constitution although it long preceded the establishment of the Commonwealth of Australia. There are some advocates of change who contend that a proper redeployment of power within Australia should be between the federal Parliament and government and local government, bypassing the States. If this seems too adventurous for a nation which has been described as "constitutionally speaking, a frozen continent"[26], the recognition and protection of the democratic character of

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

26 G Sawer, *Australian Federalism in the Courts,* Melbourne, Melbourne University Press, 1967 at 208.

local government could be an appropriate reform which would have many supporters.

7. ***International treaties and external affairs:*** One area of concern in several quarters has been external affairs power in the Constitution. It has been the source of the effective expansion of the power of the Federal Parliament by the making of laws with respect to external affairs[27]. Fears are often expressed that this head of power, allied with international treaties dealing with topics hitherto the subject of State law, may be used to undermine the federal compact and to redistribute power to the Commonwealth's advantage without the "irksome" necessity to secure the approval of the people. Concern about the direction of international treaties, ratified for Australia by the federal executive, came to a head after the decision of the High Court in *Teoh v Minister for Immigration and Ethnic Affairs*[28]. The decision produced State legislation purporting to afford relief from some of its implications[29].

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

28 (1995) 183 CLR 273.

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

A Bill introduced into the Federal Parliament designed to overcome the effect of the decision lapsed with the prorogation and dissolution for the 1996 general election[30]. The Federal Government announced proposals which will afford the Federal Parliament a greater role in the scrutiny of international conventions, with their now clearly revealed scope for affecting Australian domestic law[31]. Critics of the Constitution urge the adoption of a clear break on the power of the Federal Executive to ratify international treaties without the concurrence of the States or at least of the Senate established to reflect State diversity. Some even urge the need to secure the approval of the Parliament as a whole. This is one area where the growing influence of globalisation and regionalisation are not reflected in a constitution drafted in a different age. Yet its adaptation by court decisions has sometimes, in effect, altered the distribution of powers, reducing not merely the powers of the States under the Constitution but also the prerogative of the Australian people to approve or disapprove such changes.

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

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

8. ***The judiciary:*** The growing appreciation of the importance of the High Court of Australia in deciding the federal balance, and in the general development of the law, has led to demands, strident of late, for constitutional controls upon the appointment of Justices of the High Court and of other Australian courts. The spectacle of congressional hearings, such as accompanied the nomination to the United States Supreme Court of Judges Bork and Thomas seem out of place and even undesirable in Australia. Yet by their decisions the Justices of the High Court have a large influence on the shape of the law. So long as the rhetoric of the declaratory theory of the judicial function was accepted, democratic scrutiny of judicial appointments was considered inappropriate. Alternatively, it was sufficiently satisfied by the appointing function of the Executive, answerable to Parliament. Once it became plain, and generally acknowledged, that judges in deciding cases have inescapable choices and are not engaged in a purely mechanical function (least of all in constitutional controversies) appointments to the judiciary - and especially the High Court - become more arguably a matter of legitimate political and public interest. The qualities appropriate to appointment also become more debatable. The notion that lawyers skilled in the traditional areas - where they construe the Constitution - are necessarily the

most suitable to have a seat on the High Court becomes more controversial.

9. ***Outside power:*** There is a growing recognition that changes in the realities of the world in which the Constitution operates affect the capacity of the Australian political system it establishes to afford good government to the Australian people. Transnational corporations, the international market in capital and global media operate, to a large extent, beyond the power of the governments of any but the most significant nations. What can be done about this increasingly important feature of the world we live in is unclear. Perhaps it merely underlines the diminishing significance of the nation state, and the constitutions by which they live. As governmental and regulatory powers increasingly pass to international agencies, it becomes imperative that a national constitution, such as Australia's, should reflect the realities of the regional and global environment to which Australian institutions must respond and which they must try to influence.

10. ***Difficulty of change:*** There is finally the obstacle of the mechanism for change of the Constitution. Very few amendments have secured the majorities required by s 128 for a valid alteration. The number is even smaller when it is remembered that three of the eight proposals approved

by the necessary majorities were adopted on the same occasion in 1977. Critics suggest that the requirements for formal change are too burdensome and that this is part of the reason for the pressure to adopt an expansive interpretation of the Constitution, out of recognition of the fact that formal amendment is next to impossible. A simpler procedure, combined with community education in the desirability of more regular formal constitutional change, are said to be the path proper to a people who take their own responsibility for modernising and reforming their basic law. It is to the people, rather than judges, that we should look in the future as we adjust the centenary Constitution to the rather different nation and circumstances it must serve in the century to come.

I trust that I have done justice to some of the major demands for constitutional change in Australia. Others exist. They include the position of the States, the system of responsible government envisaged by the Constitution (claimed to be the "big mistake" of the Constitution[32]) and the demand for a more appropriate and realistic reference to the public service than exists in the antique fiction that they are merely part

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

of the Executive power vested in the Governor-General as the Queen's representative[33]. Some of the language[34] of the Constitution is assailed as outdated, inappropriate and misleading. Some of the bright ideas enshrined in the Constitution are now, effectively a dead letter[35]. Some transitional provisions are clearly spent. They could be tidied up without offence to anyone[36]. But these are trifles. The basic system of government established by the Constitution endures. It is this achievement which deserves recognition. In my view it merits celebration at the very time that, as a free people, Australians contemplate the changes that might be needed to adapt the Constitution to the future.

INSTITUTIONAL ADAPTATION

Given the great changes which have occurred in Australia and the world since the *Lucinda* voyage and the establishment of the Commonwealth, it has been imperative that the institutions created by the Constitution should adapt. And adapt they have.

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33 Australian Constitution, s 61.

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

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

36 See eg ss 69, 70, 95.

1. ***The Crown:*** At the time of federation, it was the decision of the people to whom the Constitution was twice submitted for a vote, to federate "under the Crown of the United Kingdom of Great Britain and Ireland"[37]. Recent research has shown that the Founders, who participated in the debates of the Convention, were by no means rabid imperialists. They rather liked old Queen Victoria, who had been on the throne for most of the century.

   Over the century, the Crown in Australia, as in England, has ordinarily performed its duties as the ministers advised. So it was when Governor Strickland, under Royal instruction, extended the duration of the New South Wales Parliament in 1916. He was then relieved by the King for his initial hesitation[38]. So it was when King George V accepted, reluctantly it is true, the insistent advice of Prime Minister Scullin that Sir Isaac Isaacs, an Australian, should be appointed as his representative and Governor-General[39].

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37 Preamble to the covering clauses of the Constitution.

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

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

King George V gave his assent to the Statute of Westminster enacted by the United Kingdom Parliament to confirm the complete legislative independence of the self-governing dominions of the Crown. King George VI assented to the *Statute of Westminster Adoption Act* 1942 (Cth) by which it was enacted that no Act of the Parliament of the United Kingdom, passed after the commencement of the Act, should extend or be deemed to extend to a dominion unless expressly declared in that Act that the dominion has requested and consented to such enactment[40].

It is in the reign of the present Queen that the most significant changes affecting the Crown in Australia have occurred. Soon after her accession, she approved her separate designation as Queen of Australia[41]. A separate Australian Crown was clearly established. In 1984, the Queen revoked the Letters Patent issued by Queen Victoria in October 1900 relating to the office of the Governor-

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

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

General of the Commonwealth of Australia. She issued new Letters Patent, more modern in form and more appropriate in content, doing so on the advice of her Australian ministers[42]. In 1986, in Canberra, the Queen gave the Royal Assent to the *Australia Act* 1986 (Cth). She assented to an Act of the same title enacted in substantially identical terms by the United Kingdom Parliament[43]. Amongst other things, these statutes finally terminated the remaining appeals to the Privy Council, save for the vestigial residue in s 74 of the Constitution already mentioned[44]. They repeated the termination of the power of the Parliament of the United Kingdom to legislate for Australia. They restated[45] the requirement that the Parliaments of the States must act in the manner and form required by law[46]. They entrenched and clarified the role of State Governors as representatives of the Queen[47].

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

43 1986 c 2. See discussion Lumb and Moens, above n 32 at 13-14.

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

45 *Ibid,* s 1.

46 *Id,* s 6.

47 *Id,* ss 7, 8.

Although the Crown and its representatives retain the traditional privileges of a constitutional monarchy (to be consulted, to advise and to warn) the convention has been that they invariably act in accordance with the advice of their Ministers. It is perhaps ironic that the reason often advanced as to why the events of November 1975 damaged the position of the Crown in the Australian Constitution is precisely because what happened contrasted markedly with the usual reticence of Crown representatives and appeared to depart from the traditions of candour and transparency which have otherwise marked the modern relations in Australia between representatives of the Crown and the elected government. There are rational arguments for the system of government which constitutional monarchy establishes - barring ex-politicians (or for that matter ex-judges) from the position of Head of State. In some ways the very absence of the Head of State from Australia creates a system which appeals to some. At the least the system, as such, has overwhelmingly performed as duty - not personal ambition or self-interest - required. We may change it. But we should at least make ourselves aware of its paradoxical strengths before we do.

2. ***Parliament:*** The Parliaments of Australia have also adapted to changing times. Under the Constitution, the Australian

Parliament contained two features which were unique when they were adopted. The first was the provision for direct election of the members of the Senate. This is still not the case in Canada. Only later was it adopted in the United States. The second is the provision for the resolution of conflict between the Chambers found in the provisions in s 57 of the Constitution[48].

Attempts have been made to win back popular confidence in the Houses of Parliament, notwithstanding the modern ascendancy of the Executive. House and particularly Senate Committees, by diligent work avoiding the worst excesses of partisan politics, have won, especially for the Senate, a respected and important role in federal government in Australia. The Senate is a deliberate break on majoritarianism which only the naive now believe constitutes the definition of a modern democracy. Although the Senate has not become, as such, a House of Parliament representing the States, it has ensured that the diversity of viewpoints reflected in all parts of this very large nation may provide a balance to the force of numbers reflected in the House of Representatives. Moreover, the

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

Senate has become a Chamber in which political viewpoints, which do not always embrace the two major political groupings in the nation, can have their say. This is doubtless viewed by some as a an irksome check on firm government and democratic mandates. However, because the Senate is itself elected, it is seen by others as the protector of diverse points of view. It has helped to ensure that our national Parliament is so much more effective in preserving and reflecting the diversity of the federation than, say the Canadian Parliament in Ottawa.

In addition to specialist committees, the parliamentary innovations for the scrutiny of Bills and of subordinate legislation have been pioneered by the Australian Parliament. Parliament has also established statutory guardians to help it in the performance of its own functions. The traditional office of Auditor-General, is now supplemented by the Ombudsman, the Australian Law Reform Commission, the Human Rights and Equal Opportunity Commission and other bodies which assist and stimulate the work of the legislators. They, in turn, have promoted administrative reforms for the assurance of lawfulness, fairness and general reasonableness in the

activities of the bureaucracy[49]. To observe how far the Federal Parliament, under the same Constitution, has developed in the course of the century, one need only compare the size, subject matter and variety of the federal legislation in the early years of the Commonwealth with the enormous output of lawmaking which exists today. It is difficult to conceive how an effective response could have been offered to the acute challenges of war and peace that have occurred in the century, without a national Parliament enjoying large powers.

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

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

There is no provision in the Constitution which reserves to the High Court the power of judicial review which it has exercised since its establishment. As in *Marbury v*

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49 A F Mason, "Administrative Review - The Experience of the First Twelve Years" (1989) 18 *Fed L Rev* 122; M D Kirby, "The AAT - Twenty Years Forward", unpublished paper, Australian National University, July 1996.

Madison[50], this has just been a constitutional power accepted as inherent in a federal system of government itself. It is necessary to have an umpire. From the first, the High Court of Australia established its independence and authority as the guardian and expositor of the Constitution. It recognised from the earliest days that constitutional interpretation required techniques which were different from those developed for other judicial tasks of interpretation[51]. Justice Isaacs in *The Commonwealth v Kreglinger*[52] pointed out that the Constitution was "made not for a single occasion but for the continued life and progress of the community". He stated that its meaning was to be derived from the "silent operation of constitutional principles". Similarly, Justice Windeyer in *Victoria v The Commonwealth*[53] explained that because the Constitution was the fundamental law of the land its "interpretation ... may vary and develop in response to changing circumstances".

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50 (1803) 1 Cranch 137. See K Booker, A Glass and R Watt, *Federal Constitutional Law - An Introduction*, Butterworths, 1994, 324-337.

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

52 (1926) 37 CLR 373.

53 (1970) 122 CLR 353.

As the century progressed, and the formal inflexibility of the Constitution became clearer with each defeated referendum proposal, it became obvious to every Australian, including the Justices of the High Court, that a broad construction of the Constitution was necessary if its words were to have any hope of adapting to the complex commercial, economic, social and political changes which were occurring in the nation[54].

The examples of the adaptation by the Court of the constitutional powers devised in an earlier age for later needs, are legion. The best known involve the expansion of the power with respect to industrial conciliation and arbitration[55]; external affairs[56]; corporations[57]; and the large expansion of the postal powers to embrace

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

55 See eg *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297.

56 See eg *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; cf *Victoria v Commonwealth,* High Court, unreported, 4 September 1996.

57 *Strickland v Concrete Industries (Monier) Ltd* (1971) 124 CLR 468. Cf *New South Wales v Commonwealth* (1990) 169 CLR 482.

successively broadcasting[58] and television[59]. In time of war, the defence power was given a larger ambit to meet the vital need to ensure the very survival of the nation[60]. As the power and responsibilities of the Federal Parliament and Government expanded, so did the powers of federal taxation[61].

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

The decision of the Court in the *Communist Party Case*[62] was certainly one of its most noble moments. By a

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58 *R v Brislan; Ex parte Williams* (1935) 54 CLR 262.

59 *Jones v Commonwealth* (1965) 112 CLR 206.

60 *Farey v Burvett* (1916) 21 CLR 433. Cf *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43, 83.

61 See esp *First Uniform Tax Case* (1942) 65 CLR 373; *Second Uniform Tax Case* (1957) 99 CLR 575; *Commonwealth v Sigamatic Pty Limited* (1962) 108 CLR 372.

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

majority of six Justices to one[63], the Court struck down as unconstitutional the *Communist Party Dissolution Act* 1951 (Cth). The decision came in the midst of what can now be seen as hysterical public and media concern about communists in Australia. The decision saved Australia from the legal excesses which manifested themselves at the same time in the United States of America, South Africa and other countries.

The Court has also vigilantly defended its authority whenever it was seriously challenged. Anyone in doubt should read the transcript of the exchanges with counsel recorded in *Tait v The Queen*[64].

The Constitution creates, or envisages, at the one time, the stable, unelected elements of government (the Crown, the civil service, the military and the judiciary) and the impermanent but elected elements (the two Houses of Parliament; the Ministers of State who are to be Members of the Parliament[65] and, in the exceptional case of a

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

64 (1962) 108 CLR 620 at 623-627.

65 Australian Constitution, s 64.

referendum under s 128 of the Constitution, the whole body of the electors, representing the people of Australia). This is a complex mixture of authority and democracy, of permanency and impermanency, of paradoxes, fictions, conventions, practices and law. By the world's standards, it works remarkably well.

BLESSINGS REMEMBERED

So what can we say are the chief blessings of the Constitution as its centenary approaches? Just to survive and endure a hundred years - even so turbulent a century as that past - is not enough. That our country is still governed under a Constitution devised in a different time could theoretically be as much a commentary on lethargy and indifference to the needs for reform as on the value of the system of government which the Constitution puts in place. As to the missing ingredient of excitement as the centenary approaches, perhaps this is because the imperial power which formally granted the Constitution was, by that time, no tyrant. The evolution of the Constitution owed more to the work of earnest, middle-aged, male settlers and their

descendants than to the revolutionary patriots who called forth the Constitution of the United States[66].

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

Objectively considered, many of the Founders were people of remarkable talent. They numbered three Prime Ministers (Barton, Deakin and Reid), one of whom, Deakin, is undoubtedly one of the greatest of our national leaders. There were 33 participants in the Conventions who were, had been, or later became Premiers of the States. There were two Chief Justices

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

of Australia (Griffith and Isaacs). There were several Justices of the High Court and of the State Supreme Courts. They were fine drafters. If the language of the Australian Constitution is not considered inspiring, it at least has the merit of brevity. Surveys show that, as a document, its content is completely unknown to most citizens. Yet its principles work silently and rarely impinge upon the consciousness of the people governed under it. Many are the peoples of the world who would value such a tranquil constitution.

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

1. ***Securing a nation:*** By the Constitution, Australians established a nation. They established a federation in a continental country which has survived a century of unstable national borders. If we look around the world today, we see the breakup of nations, particularly of federal states. The Union of Soviet Socialist Republic, Yugoslavia, Czechoslovakia and Pakistan have split asunder. Australia has done better than Canada and the United Kingdom because its Constitution recognised from the start the need, in a large and diverse country, to share the central and the outlying power. Our federal arrangements have their weaknesses. But no-one seriously suggests that the solution is the dissolution of the nation.

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

3. ***Rule of Law:*** The Constitution enshrines the rule of law throughout Australia. It is upheld by all the courts and supervised by the one national and federal supreme court: the High Court of Australia[67]. The independence of the

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

judiciary, protected in the High Court and in the federal judiciary by constitutional control over removal[68] ensure that judges will act, with neutrality and courage, separately from the other branches of government. Far from the rule of law becoming weakened with the complacency of a century of our constitutional government, recent decades have seen an enlargement in the facility of judicial review, both by the common law[69] and by statutes enacted by the Federal and State Parliaments[70]. No-one is above or outside the law in Australia. True it is, in practice it may often be inaccessible to ordinary citizens. When accessed, the law may sometimes be in need of reform. But, in the end, high and low are subject to its rule which is enforced by independents courts which are uncorrupted and highly trained. Cases are not decided in Australia by telephone calls to judicial officers by powerful people. Yet, as we know, this is the reality of the exercise of power in the wider world in which most people live.

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

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

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

4. ***Democracy:*** The Constitution enshrines the features of our representative democracy. Governments are peacefully changed by the vote of the people in elections conducted with integrity. It is a blessing we mostly take for granted to be citizens of a free country and regularly to live through peaceful changes of government. All the trappings of power change. The conventions are not challenged. Moreover, the fact that leadership of the nation *can* change means that ideas constantly compete for the acceptance of the people. In turn, this means that our society is faced at all times with new ideas competing for the people's support. Autocracy tends to be closed to new ideas. Our Constitution provides the governmental, legal and social environment in which ideas may flourish.

5. ***Federal government:*** The elected Senate ensures a break on unbridled majoritarian rule by ensuring that a different balance may be present in the Parliament. Senators are elected by the people in the scattered communities over the face of the continent. Minority viewpoints can be, and are, represented. The essence of a modern democracy - a reflection of majority will tempered by respect for minority interests - is better achieved in our federal arrangements than in most others.

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

7. ***The armed forces:*** Similarly, our armed forces are small in number, non-political in tradition and subordinate to the civil power. The command of them is vested in the Governor-General as the Queen's representative[71]. This fact symbolises their loyalty to the people of the nation, rather than to transient government. True, the Governor-General will act on the advice of Ministers. But the armed forces are not, in their self-concept or in law, the servants of any political power. Australia's strong tradition of a professional defence force which keeps out of politics is enshrined in the Constitution. It is also derived from the

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71 Australian Constitution, s 68.

English constitutional tradition which preceded it. The notion of our defence forces being involved in a military *coup d'état* is completely unthinkable.

8. ***Free expression:*** Without an express constitutional guarantee, free expression has been nurtured and has flourished in Australia for the whole history of the federation. Even the old legal inhibitions of sedition[72] and obscenity[73] have declined in the context of new media of communications and modern notions of the right of people to enjoy free expression. The High Court has found implied guarantees of free speech in the democratic and representative nature of the system of government established by the Constitution[74]. We live in a community which enjoys one of the highest levels of communication in the world. This is, in turn, an assurance of the free flow of ideas which is essential to sustain a modern society and a progressive economy. Some jurists contend that the right of free expression is the most important of civil freedoms.

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

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

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

Long before the implied constitutional freedom was found by the High Court, Australians enjoyed a high measure of freedom to express their ideas and opinions. They did so not because of constitutional guarantees as such, but because of the political system which the Constitution reflected and protected.

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

10. ***Freedom preserved:*** When great challenges have come to the tolerant and democratic character of the Australian Constitution, the institutions which it establishes have normally, in the end, provided the right answers. The Constitution has usually proved a noble protector of tolerance and diversity. No clearer illustration of this assertion can be seen than in the *Australian Communist Party v Commonwealth*[75].

With the wisdom of hindsight I have come to appreciate the courage and wisdom, the foresight and good judgment which the High Court of Australia displayed in the Communist Party case - at that testing moment in the Court's exposition of the requirements of Australian law. The same is now generally said of the Court's decision in *Mabo,* the *Tasmanian Dams* case and many other decisions. *Wik*[76] is but the latest of a long line of decisions which have attracted calumny and praise.

When, therefore, I reflect on the defects of the Australian Constitution - a document which may be traced to the work on board the *Lucinda* in Easter 1891 - I balance these thoughts with

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75 (1981) 83 CLR 1.

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

a remembrance of the continuity and change we have seen over the century. Of the rule of law secured by independent judges. Of the peaceful shifts of power attained by free elections accepted by all combatants. Of the civil service and armed forces who submit dutifully to the civil power. Of the ways in which the Constitution has served the people. Like every product of fallible human beings, it may be improved, as no doubt it will.

The coming centenary of the Constitution is a time once again to consider our Constitution's oft-catalogued defects. But let us also remember the freedoms which the Constitution has helped to secure to us. Nothing less is proper to a people who boast of their devotion to the "fair go".