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REVIEW

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From the Editor

TONY RUTHERFORD

THE regular column by Brian Tucker which appears in these pages is called 'The Pyrrhonist'—and for good reason. A pyrrhonist, for those who never quite got around to looking it up in their dictionaries, is one given to complete scepticism.

Scepticism is an essential quality in public policy: is a problem a problem? is a solution a solution? Even before we test an issue of public policy against our well-tryed principles, we have to ask first if it is indeed an issue.

As we pointed out in the last issue of this *Review*, nowhere is the need for scepticism greater than in environmental issues. And nowhere is it less in evidence.

We think of environmentalism as a very modern phenomenon, although our predecessors certainly took some environmental issues seriously. Mediaeval monarchs went to great pains to preserve their forests, although they were perhaps motivated by a taste for venison, or the need for timber for ships, rather than an affection for trees. And that sort of careful, self-interested land management was widespread in pre-modern times. Indeed, it shaped much of the landscape of England and Scotland; landscape which we now think of as pristine.

Perhaps the first—and certainly the longest-lasting—environmentalist issue of modern times was set off by that dour prophet, the Rev. Thomas Malthus, 200 years ago. Observing that population seemed to increase faster than the food supply—'Population, when unchecked, increases in a geometrical ratio. Subsistence only increases in an arithmetical ratio'—he drew the entirely rational conclusion that starvation on a large scale was an historical inevitability. He was also, fortunately, entirely wrong.

What is peculiarly modern about Malthus and the food gap is that even though we now know that the issue is a non-issue, his belief has passed into the canon of environmental concerns almost subconsciously shared by millions.



Scenarios of the future—with the advent of the millennium, now more popular than ever—regularly make a great feature of chronic food shortages, a growing rift between rich and poor, and fearsome civil unrest. More generally, much environmentalist thinking has extended Malthus's concern for food to all the resources that keep us and our civilization afloat.

Malthus features in a characteristically incisive and commonsense essay published in a recent number of *The Economist*. Perhaps the best part of the essay is its description of the cycle of environmental issues.

In *Year One*, the potentially scary scientific hypothesis is proposed; in *Year Two*, it is picked up and publicized by the press; in *Year Three*, the environmentalists discover it, and set about polarizing opinion. *Year Four*, says *The Economist*, 'is the year of the bureaucrat'—the high level conferences and globe-trotting which foreshadow regulation. *Year Five* is the year of the villain—big business, the US, all the obvious suspects. *Year Six* at last brings forth the sceptics; while in *Year Seven*, we finally see the unheralded climbdown.

The timescale is not, of course, to be taken seriously; but as a description of the environmental policy process, it's hard to better—match it against most of the environmental scares you can think of, and see how well it fits.

In the case of 'greenhouse', the Australian Government has perhaps

brought on the end of the cycle somewhat—certainly there has been an eerie silence since the success of the Australian stand at Kyoto.

The Government's resolution has been admirable. But has it been enough?

The disappointing feature of the domestic part of the global argument leading to Kyoto is that victory—if it is not simply a passing truce—was achieved by something like intransigence, rather than reason and fact. The Government was perfectly right to insist that Australia's economy would be greatly damaged by the limitation measures proposed (often selfishly) by other nations.

But it almost entirely overlooked the other arguments—arguments which have been well-put in the past in these pages. It would have been entirely sensible for the Government to point out that 'official' greenhouse science has moved in the last decade, that the 'new' greenhouse science affords a more-than-legitimate basis for considerable scepticism, and that the precautionary principle (as usually interpreted) is hardly a satisfactory basis for public policy.

It neglected, in short, what Walter Bagehot, 130 years ago, called the educative function of government—and in doing so made its job just that much harder.

It also neglected to ask, loudly and persistently, why so many environmentalists and their followers insist that the destruction of economic growth is the solution to most alleged environmental problems. A deep hatred for our society and its economic institutions lies beneath much environmental activism—and it would help reasoned environmental debate in Australia if this were better understood.

Perhaps the next time around—nuclear power? genetically-engineered crops?—we can all do better. Anything that induces rational scepticism will help.

IP A

From the Executive Director

MIKE NAHAN

The Myth of Declining Government

ALMOST any discussion of public policy nowadays seems to begin and end with the same idea: the state is in retreat and this retreat has gone too far.

The idea is gaining a particularly strong foothold in the Australian tax debate and with support from an extremely unlikely source—the Business Council of Australia (BCA).

As Mr Fergus Ryan, Chairman of the BCA's Tax Taskforce, said last year in a speech launching the BCA campaign for tax reform:

Today we are facing difficulties in the provision of some of the basic elements of what I would call the good society. Government funding is directly dependent upon the ability of the taxation system to raise adequate revenue ... the crisis faced by Australia is that our present taxation system is increasingly unable to deliver that revenue.

The idea, however, is based on myth.¹

The tax system has many failings, but growth is not one of them. Despite a number of much-heralded tax cuts, total tax receipts are now higher than ever and are expected to remain so for the foreseeable future. Total tax receipts reached 31.8% of GDP in 1997—the highest level in history and some 4.6% of GDP (or about \$24 billion) above the level which prevailed in the early 1980s.



Tax revenue did fall off during the early 1990s, but this was neither unexpected nor the start of a long-term trend. Tax receipts declined because we went through our worst recession in 50 years and because the Commonwealth trimmed tax rates in an effort to stimulate the economy. Since 1993–94, the tax take has, because of tax hikes and economic growth, grown rapidly and, according to government forward estimates, is expected to remain buoyant.

But aren't globalization and international tax competition undermining the current tax base? The honest answer is: not yet.

Moreover, governments do not need major tax reform to change the tax take, as they currently have considerable discretion to raise or lower the tax take as they choose.

The idea that government spending on basics is declining is also a myth.

Despite significant savings achieved in some areas, overall government spending has continued to trend upward over most of the 1990s. In 1997, government spending stood at 36.1% of GDP, which was about 1 percentage point above the level of spending which took place in 1987—the comparable year in the previous cycle.

The composition of spending has changed significantly over the last decade. State spending has declined to the lowest level since 1975. Administrative costs have been

cut in all governments along with staffing levels and subsidies to government business enterprises. Interest payment are down, as is spending on defence.

But these cuts have been more than neutralized by increased Commonwealth spending on health, education and welfare.

Own-purpose Commonwealth outlays reached a post-war high of 20.8% of GDP in 1996, which was over 4% of GDP larger than the outcome for 1980. Likewise, spending on social services (health, education, welfare, police and public housing) has reached an all-time high of 23% of GDP—which is some 4 percentage points of GDP higher than the level achieved in 1987.

The Howard Government has put in place policies which are expected, with the help of solid economic growth, to reduce government spending, over the next four years. But even if this forecast is achieved—which history indicates is doubtful—overall spending will remain above the level achieved during the previous cycle of the 1980s.

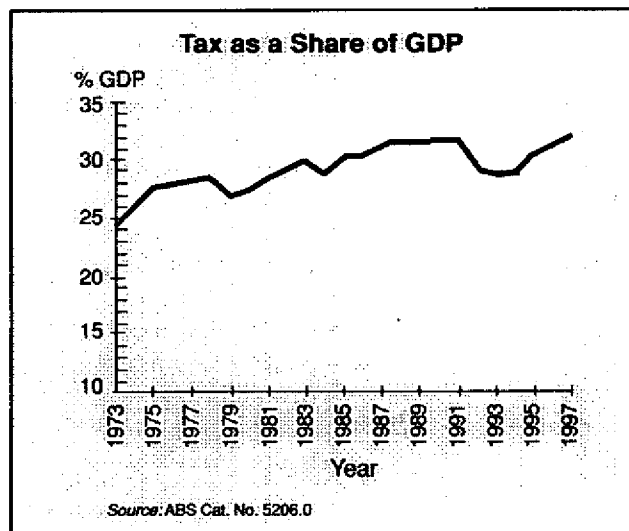
The idea that 'a good society' necessarily means even bigger government is also a myth.

Although the optimum size of government is not known with precision, there is enough research to say, with confidence, that the public sector has gone beyond the point of positive return in Australia. For example, extensive research undertaken at the World Bank has found the optimal size of government to be around 30% of GDP—compared to Australia's 36%. After 30% of GDP, the cost imposed by higher taxes tends to exceed the benefits generated by the additional government spending. Of course, a more efficient tax system may delay the onset of diminishing returns but it cannot hope to avoid it altogether.

The real question is: why is the big end of town pleading the case for big government and higher taxes? All one can say is that they are not doing their shareholders, taxpayers and the cause of tax reform any favours by pushing myths rather than dealing with reality.

NOTE

- 1 This is explored in greater detail in a recent IPA Backgrounder by Clive Crook entitled *The Visible Hand: Big government is still in charge.*



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Nursing Home Policy: Who Pays?

GARY JOHNS

The Coalition's backdown on the Accommodation Bond for nursing homes will have perverse long-term consequences, according to former Labor minister Gary Johns.

THE public thrashing of the Coalition on its introduction of the Accommodation Bond policy for nursing home residents demonstrates once again just how tough it is to have people pay for something they once got for nothing. The Government buckled under to self-interest and switched to an accommodation charge. This charge, although to some extent satisfying the equity criterion that the user should pay, leaves the sector well short of funds for upgrading the capital needs of many nursing homes. In some States, up to 37 per cent of homes will fail to reach the government standard for certification because of lack of capital.

Perversely, the Labor solution—to fund the shortfall from the Commonwealth Budget—and the demands of those who screamed loudest against the bonds, will not only perpetuate the inequity in the system, but will cause a shift of beds into the hands of private-sector providers, who will pick up capacity from the charitable institutions and smaller operators who needed the capital injection that the bonds were to furnish. In other words, it will accentuate a shift from a universal service model to a two-tier market model, which is, presumably, precisely what they did not want.

The essential difference between the bond and the charge is this: that the bond enabled the proprietor to use the stream of income from a sizeable deposit from day one, rather than from the much lower figure, and available at a slower rate, from the charge. The interim charge has been set at \$12 per day or up to \$4380 per annum (half that amount for assisted residents). This is unlikely to provide sufficient funds to borrow against for upgrades. Charges may well rise to a maximum of \$10,000 per annum as of March 1998, but even this amount may not be sufficient, if the mechanism is the slow drip, rather than the quick capital injection.

There seems to be little dispute over

the need for funds; the vexed question is, who pays? Economist Dr Bob Gregory reported to the previous government on the need to inject \$125m annually into the sector in order to overcome the worst of the problems:

- 40 per cent of nursing home residents share their bedroom with four or more people;
- 13 per cent of homes do not meet fire regulations;
- 11 per cent of homes do not meet health regulations.

Gregory recommended against the imposition of a bond for nursing-home residents (despite such bonds being in place for hostel residents), on the grounds that residents are generally too frail or incompetent to make decisions about their future. Such a recommendation is understandable on emotional grounds. But if need becomes the primary concern, the policy is in fact even more applicable to homes than to hostels.

Many hostel residents may return to their family home, while almost no nursing-home residents return home. As one manager confided to me recently, in his twelve years in managing an aged care facility only two people had moved from a nursing home to a hostel. Further, residents in a nursing home generally stay for less than three years, and that period is declining. In short, the residents of nursing homes need a good facility in which to spend their last months—it becomes their home, and a very expensive one at that.

Residential aged care costs the taxpayer nearly \$3 billion per year, provid-

ing care for 130,000 people, and allowing for the provision for an extra 2,500 per year to meet the needs of an ageing population. The number of very old people, those over 80 who are most in need of high-level care, is expected to increase by 49 per cent between 1991 and 2001.

The Labor government introduced accommodation bonds for hostels as a means of raising funds for capital improvement. The Coalition policy was merely to extend the policy. That policy has now foundered on the rock of self-interest, in this case a powerful alliance of the aged—with their desire to escape the consequences of the increasing gap between the ability to generate an income and the propensity to generate costs to the wider community—and their children, awaiting and expecting their inheritance.

The Coalition was unable to withstand the combination of this core Liberal constituency and those who would always argue that equity lies in public subsidy. The retreat on the nursing-home bond has also now been extended to hostel care, where the option of the annual payment has been added to the bond.

A variety of mechanisms is being developed to assist people in making the



payment, including the repayment of loans from the user's estate. The government has also moved to exempt rental income from the family home from pension tests where that income is used to meet the annual payment. There is a guarantee that there will be no forced sale of the family home in order to enter nursing home care.

In the longer-term policy context, all this is perverse. The policy of universal provision of services at no cost to the consumer has been well and truly overturned in recent years. We have seen, for instance, the means-testing of benefits like the age pension, and the levying of charges such as the Higher Education Contribution Scheme; not to mention Labor's two (unsuccessful) attempts to introduce a co-payment for Medicare services. If the principle of partial contribution for a future benefit, such as higher education, is acceptable, it must be unassailable with a consumed benefit where the beneficiaries, in this case the nursing-home residents, will have no further personal use for their assets.

The extent of the subsidy by the non-user taxpayer to the user taxpayer should be minimized, especially where users have the means available to pay for their stay. A former Commonwealth Treasurer was once said to have remarked, 'hot bath, cold draft', as the solution to the cost of aged care. Those who advocate the greatest degree of taxpayer support for aged care accuse government of this sort of callousness. But in fact they are doing no more than arguing for the preservation of the family home as an inheritance, which is hardly a just cause.



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The 'R' Files

ALAN MORAN

The Sot Weed Offensive

THE NEW PURITANISM

The US tobacco companies and the US Government are on the verge of agreeing a US\$308 billion 'compensation' regime under which the companies will pay additional sums from their future profits to the US Government. The money will allegedly be earmarked to repay the cost of treating sick smokers. The irony that the payment of the additional sums involves the continuation of the harmful activity has not been lost on many commentators. Nor has the prospect of a new tax gravy train been overlooked in Australia—the South Australian Government is only the first State to react by dispatching its head of taxation to the US.

Many see anti-smoking crusades as a new puritanism. Whereas the liberty to smoke became a defining freedom in the 1960s, by the late 1980s smoke-free offices had become almost universal. These developments have overwhelmingly reflected the changing preferences of the leading cadres of the baby-boomer generation: mostly smokers in the 1960s, they assaulted the citadels of repression; but the vast majority having ceased smoking, and, maintaining an ascendancy over newer generations (many more of whom smoke), they subsequently pushed the pendulum back. And like the puritans of the seventeenth century, they are not content with practising and preaching purity: they have taken up the instruments of coercion.

In this generational shift of opinion, tobacco phobia has taken on many new dimensions. Prominent lawyer, economist and one-time candidate for the US Supreme Court, Robert Bork, observed, 'A few years back hardly anyone claimed to be seriously troubled by tobacco smoke. Now an entire class of the morally superior claim to be able to detect, and be offended by, tobacco smoke several offices away from their own'.¹

The issue of smoking encapsulates a variety of issues. These include:



- the question of whether sellers are pressing harmful goods onto uninformed buyers;
- the issue of whether governments have a role in preventing those effects, even if consumers are adequately informed about them;
- whether the harmful effects are paid for or incurred by those not party to the consumption.

GOVERNMENT OVERRIDE OF INDIVIDUAL PREFERENCES

Should government have a right to prevent citizens from harming themselves, even when they are fully informed and insured of the risk? In other words, does government have a right to override the individual's preferences and risk profiles? Basically, the answer is that they do not. There are matters on which we support government's overriding individual preferences: compulsory wearing of seat belts and crash helmets are cases in point. But such actions are arguably in place because the distress of accidents to individuals is also shared by others—especially those who may be associated with them.

Similarly, the case in favour of permitting smoking cigarettes can be argued to apply equally to legalizing narcotic use. In all likelihood, tobacco smoking is as addictive as heroin. That said, vast numbers of people, a majority of over 45-year-olds, have ceased smoking. There are, moreover, differences between tobacco and other drugs (including alcohol). Cigarette smoking does not diminish the individual's ca-

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capacity to engage in any cognitive activity. Both alcohol and narcotics clearly do. Most societies have learned successfully to incorporate alcohol into their social structures, but it is not clear that they would quickly absorb the effects of new such substances. Indeed, alcohol has had pernicious effects on those communities which had no previous exposure to it.

COSTS AND BENEFITS OF SMOKING

One feature of tobacco consumption in Australia, compared with the USA, is the level of taxation. In Australia, taxes on tobacco presently comprise 62 per cent of the final sales price. In the US, taxation is 19–43 per cent of price, depending on the State in which it is purchased. If the average US tax is 31 per cent (and it is clearly less than this as a result of out-of-state purchases and higher rates of smoking in the lower-taxed States), the proposed additional tax of \$US12 billion per annum (\$US308 billion over 25 years) still leaves US tax rates lower than Australian. In fact, if the US agreement is consummated, average US tax rates would be 57 per cent.

Work for the Tobacco Institute by ACIL² has sought to calculate the costs and benefits of smoking, and to determine whether the nation as a whole is better or worse off as a result of smoking being both legal and taxed at its present rates.

The ACIL study addresses two economic dimensions of smoking: the overall national benefit, and the question of whether smokers are subsidized for the additional health costs their consumption generates. It estimates the national benefits of smoking at \$10 billion in 1995–96, and further that smokers pay in taxation some \$3.2 billion more than the extra costs they incur.

Most commentators on smoking neglect the benefits smokers obtain from the product and estimate only the costs. This is akin to arguing that the consumption of fish offers no benefits and that were it to be banned we would make savings in the reduced social costs. Such costs would include the relatively dangerous activities of fishermen causing greater-than-average loss of life and increased surveillance of the seas. For example, Collins and Lapsley's³ estimated costs of tobacco to society are \$18 billion when revalued to a 1995–96 basis. But these costs are fully accounted for in the price that purchasers willingly pay

for the product, and on top of that price consumers obtain a surplus of \$6.6 billion. This represents the amount that consumers value their consumption of cigarettes in excess of their next choice of purchase.⁴

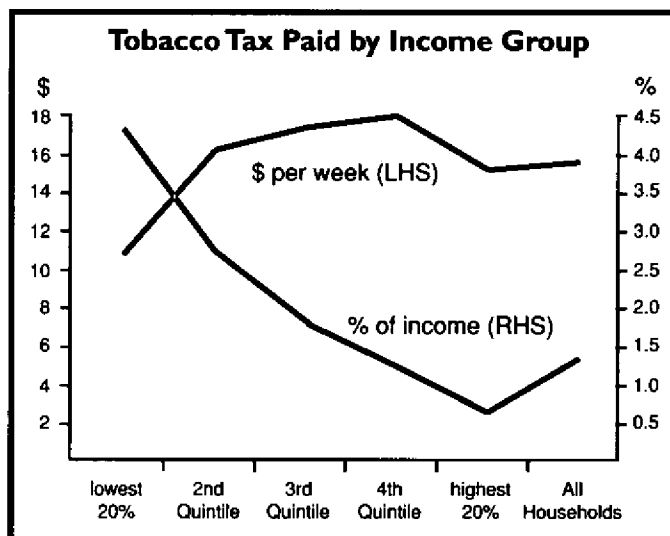
Nor can it be claimed that the smoker fails to pay her way in the largely nationalized health system. The tax on cigarettes, at \$4.2 billion, is offset by additional costs of smokers as a burden on the health system. These costs are estimated by Collins and Lapsley at \$462 million, while revenue that might be collected from other goods and services if tobacco were not available is \$508 million. Hence, the net annual subsidy from smokers to non-smokers is \$3.2 billion.

IMPACT OF TOBACCO TAXES

It is also seldom pointed out that tobacco taxes are regressive, that they impact on poorer households more than on richer households. Indeed, they are regressive in the most literal sense in that the actual tax paid as a privilege to be allowed to smoke is higher for the poorest one-fifth of Australian income earners than for the richest one-fifth.

Taxes on cigarettes comprise 62 per cent of the final product price, equivalent to a Wholesale Sales Tax equivalence of 339 per cent.⁵ The average Australian household pays 1.3 per cent of its income, \$9.36 per week, on tobacco taxes. The richest one-fifth of households actually pay slightly less than the average, and this amounts to only 0.6 per cent of their income. The poorest households pay \$6.48 per week, but this amounts to a 4.3 per cent share of their income.

There are many reasons for this profile of usage, among them the fact that smoking is more prevalent in younger age-groups, who tend to be poorer as well as more convinced of their immortality! Whatever the reasons, the taxation structure impacts particularly harshly on the less well-off and the fact that this is overlooked by those purporting to be their champions is odd.



CONCLUDING COMMENTS

While the evidence of the harmful effects of tobacco is unquestionable, those effects are confined to the smokers themselves.⁶ Surveys have shown that smokers are well aware of the risks they take. The very high taxation on the consumption of tobacco is difficult to reconcile with normal taxation principles of equity and efficiency.

NOTES

- 1 Bork, R.H., 'Victims in the war on tobacco: smokers', 'Review', page 10, *Australian Financial Review*, 3 October 1997.
- 2 *Smoking Costs & Benefits for Australia*, ACIL Australia, March 1994 and updated October 1997.
- 3 Collins, D.J., and Lapsley, H.M., *The Social Costs of Drug Abuse in Australia in 1988 and 1992*, National Drug Strategy Monograph Series No 30, AGPS, 1996.
- 4 More controversially, ACIL also estimates a 'producer surplus' of \$310 million. The existence of such a surplus relies on an assumption that there are certain highly specific assets or skills used in the domestic production of cigarettes.
- 5 The 'luxury' rate of WST is 32 per cent. The only other goods paying over 100 per cent are distilled spirits, 253 per cent and petrol, 130 per cent.
- 6 The impact of 'passive smoking' by non-smokers has been demonstrated to be trivial (see Luik J., *Smokescreen*, IPA, July 1996.)

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The World Wide Web is chock-a-block with pretty pictures—and some not so pretty ones. There is animation, movie clips, music and, coming soon to a site far from you, virtual-reality scenarios in which you may participate in a fake life. But I adhere to the greatest vice (to use Robert Heinlein's word) known to humanity: reading.

Providing the written word is where the Internet is truly in its element, through email, newsgroups and the Web. Pictures take time to download. Music even more. Movies take forever. But text just snaps up on the screen, instantly ready for whatever word junkie happens to summon it.

In this issue we look at one source of text: the magazine. Some of these are the so-called 'e-zines' (for electronic magazine), while some reproduce copy from the magazine that appears on the news-stand.

Appears? Well, if the avid reader happens to be North American, yes. Otherwise old greedy-eyes has had to go to some difficulty arranging a foreign subscription—until, that is, the advent of the Internet.

SALON

Salon Magazine is an e-zine. It is also updated daily, just the thing for those of us who would rather read than eat. The production values are superb—the look is that of a magazine of which to be proud. Best of all, it features excellent writers, both as regular columnists and as feature producers. The articles focus on intelligent comment on matters of topical interest—often of a little

less interest to Australians in view of the North American concern.

Two of the most fascinating columnists are Camille Paglia, about whom little needs to be said, and David Horowitz. Now Mr Horowitz is an interesting chap. As a man deeply concerned with politics and justice, like quite a few of his contemporaries he began public life in the sixties as a left-wing extremist (editor of *Ramparts* magazine, anti-war demonstrator/leader) and, remaining concerned but not blind, evolved towards the right. While another of this type, P.J. O'Rourke, writes with humour, a clear awareness of his own fallibility and sometimes a touching vulnerability, Horowitz seems to me still to know what's right. That what he used to know was right is not the same as what he now knows to be right seems, at least in his *Salon* columns, to trouble him little.

Perhaps that's why O'Rourke seems to be somewhat of a libertarian while Horowitz appears to be a conservative (in the American sense). Or perhaps I've misjudged the man. Nonetheless, his arguments are fascinating, sometimes infuriating and always fresh. Try his 1 December column on the Black Panthers, for example. For *Salon*, go to:

<http://www.salonmagazine.com/>

CODEX

We move now from a daily e-zine to a quarterly, from the United States to Australia. R.J. Stove, frequent writer on matters political and musical, has launched *Codex*, subtitled 'Australia's Internet Journal of Ideas'. This contains none of the random collection of blatherings pretending to be literature that so frequently appear on the Internet, but is a carefully and formally prepared journal, complete with ISSN number.

This magazine is brand new: the first issue is for October to December 1997. It chiefly serves to gather articles from around the

world and reproduce them for Australian readers. But there is, of course, original material—in the first issue two papers on the Monarchy. One is by poet and lawyer Hal Colebatch, while the other is by R.J. Stove himself. Taken from the Parisian maga-

codex
Australia's Internet Journal of Ideas
ISSN 1028-084X

June 1, October - December 1997

Australia	The United States	The Minority	The Arts	Book Reviews	Addresses of Original Sources
Quarterly about CODEX	Creating a new for Martin Ryan	Franklin's account of French imperialism	Can it ever be Done?	Bookmarked in music: Bookends and Connections: Lyrics	Phases of Clark Kent: Phillip Adams: The End of the Road: Bernard

Welcome to Codex!

You are now getting your first glimpse of Codex, a new quarterly magazine for Internet users with adult brains.

zine *Le Spectacle du Monde* is an interview with the great cellist, Mstislav Rostropovitch, revealing his thoughts on his exile from his native Russia; from *The Adelaide Review*, an article in which Max Teichmann soundly abuses the thinking of the writers of *The Retreat from Tolerance* (edited by Phillip Adams), for soundly abusing the thinking of the people with whom they disagree. And, of course, several other articles including a piece that applies the 'ban it just in case' strategy of the environmental movement to violent action videos.

All are well written. All are interesting. If you sense that I disagree with some, you will be right. The general tenor is more socially conservative than appeals to my taste. But that won't stop me from going back, if only to read R.J. Stove's vigorous and colourful prose. Go to:

<http://www.acay.com.au/~rjstove/codex/codex.html>

It is good to see the Internet maturing as a commercial medium: *Codex* is not free. Subscription details are available at the site—the cost is \$30.00 per year.

SALON
MAGAZINE | Editor: Margaret


IN ENGLISH, ITALIAN

CENTRA Politics: Pleasure addicts: How superstition has U.S. on steroids

LIST Why computers are making it impossible to use libraries

MYTHS A holiday lament: No one wants my booty eggplant

NEWS The "miracle baby" you didn't



ITALIAN affair

CAN FOUR DAYS OF PASSION BRING A BROKEN HEART?

REVIEWS | NEWSLETTER | CONTACTS | TREATS | TABLE TALK

Discontinued due to cost for the planet

THE 1997 NEW YEAR'S RESOLUTIONS

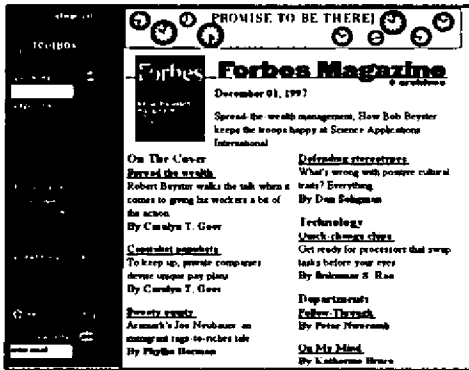
HOLIDAY GIFT GUIDE | HARRY POTTER AND THE CHAMBER OF SECRETS



File View Go Bookmarks Options Directory Window Help

FORBES

Back overseas. Steve Forbes was one of the Republican front-runners for President of the United States. Unfortu-



nately the party chose a chap whose name eludes me at the moment ... Oh that's right, Bob Dole!

When not running for President, Steve Forbes has a publishing empire of which *Forbes* magazine is a part. A very good part. You can read it at:

<http://www.forbes.com>

The emphasis is on business and investment, but there is plenty of more philosophical and commentary material. There are back issues to 1996. I would suggest you look for any of the columns by Dinesh D'Souza. The cover story on crypto-libertarians in the 8 September 1997 issue appealed to me as someone who annoys all with whom I correspond in email by my use of PGP (Pretty Good Privacy) validation. Then there is 'Why recycling is garbage' by Dan Seligman (17 November 1997), giving ten good reasons not to recycle; and 'The report that nobody reads' by Christine Hill, which critically—and contrarily—reviews the 2000-page UN report on global warming. The layout is rather more busy and Internet-like than *Salon*, but, gee, what a weekly!

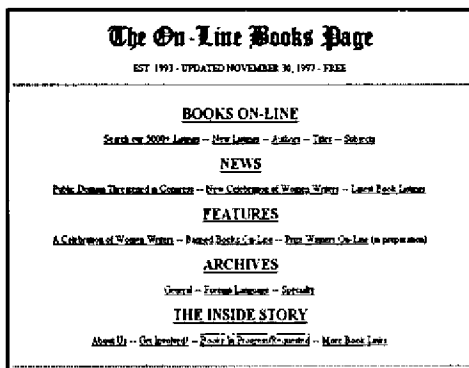
ON-LINE BOOKS

A couple of issues ago, I mentioned Project Gutenberg, which has so far made available some thousand books for free download. Well, there is a site that can go one up ... or perhaps 4,000 up. The Online Books Page has links to 5,000 books, all free. Many of them are from Project Gutenberg, but most are from various universities. The site is well indexed by author and title, making it very easy to find what you are after. Look at:

<http://www.cs.cmu.edu/books.html>

At the same site is a discussion on the various books that have been banned at different times by different countries. A mention of the controversial book *E for Ecstasy* brought me right back to Australia.

Yes, the Federal Government's Office of Film and Literature Classification maintains its own site. Not only does this list the criteria upon which the Office makes its classification decisions, but it lists the classifications of works it has considered since the most recent censorship laws were passed in 1996. A query facility is provided, but largely unexplained. If you want to use it, may I suggest you insert a country name into the appropriate box, or you will get nothing. And the classification codes that should be entered are 'cat 1', 'cat 2', 'un' (for unrestricted) and 'rc' (for refused classification).



Older classifications are available online as well, but require a subscription of A\$380 per year. So much for freedom of information. It occurs to me that the irrefutable presumption at common law that 'ignorance of the law is no

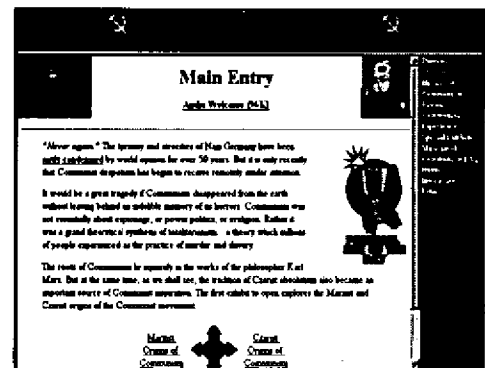
excuse' is rather unjust when the cost of dispelling ignorance is a fortnight's grocery bill for my family. After all, I can download *E for Ecstasy* in just a moment but, despite the caution at On-Line Books, I can't be certain whether in doing so I will be breaking Australian law. Go to:

<http://www.oflc.gov.au/index.html>

MUSEUM OF COMMUNISM

Bryan Caplan is a Professor of Economics at George Mason University. But on the side he maintains an electronic Museum of Communism at:

<http://www.gmu.edu/departments/economics/bcaplan/museum/musframe.html>



Since Communist regimes continue to exist wherever governments don't resile from the forthright mowing down of their citizens, this is well worth a look.

A SHORTCUT

All these sites may be accessed from links on my own web page. Go to:

<http://www.ozemail.com.au/~scdawson>

and from there you can reach any of the above. If any of the addresses listed here don't work, try the link from my page, which I'll endeavour to keep up to date. If that still doesn't work, email me on scdawson@iname.com. And, please, email me if you have, or know of, an Internet resource of interest to *IPA Review* readers.

Reading File...Done

IPA

Letter from London

JOHN NURICK

Opposition from the Left?

The Blair Government's welfare reforms are a dilemma for the Tories

EIGHT months after the election, the Blair Government's moves to reform the welfare state are presenting the Conservative opposition with its first real test. It's not that there hasn't been plenty to oppose, or even that the Tories haven't drawn blood. But it is taking the Conservative Party a long time to recover from the election defeat.

John Major refused to stay on as caretaker leader after the election while the party conducted its post-mortem. He seems to have felt, quite reasonably, that after the way the party had treated him over the years he owed it nothing. The result was, however, that the new Government was given a free run until the surviving Tory MPs chose William Hague as their leader in June—just before Parliament rose for the long summer recess.

Choosing Mr Hague rather than his principal rival Ken Clarke itself delayed the start of effective opposition. Clarke is older, more experienced and more relaxed, and would from the start have been a credible alternative prime minister. He was the clear favourite of Conservative voters and activists.

The choice of the much younger and less experienced Hague was presented as a positive decision in favour of a new generation, but other factors were more important. It is a commonplace that Mr Major was chosen and survived as leader because every other candidate was unacceptable to an important faction of the party, and there is something of the same logic behind the choice of Mr Hague.

Because he was chosen by the surviving Tory MPs against the wishes of the majority of the party faithful, he had to spend time and effort tending his grassroots—another distraction



from the business of opposition. The Labour landslide left the vast majority of Conservative branches with no MP and therefore no say in the party leadership. Even before the election, many branch officials felt intensely frustrated by their lack of communication with the leadership. Mr Hague promised party members a referendum to confirm his leadership, and organizational reforms to give them a direct vote in future leadership elections. The result of the referendum—a third-world affair with only one name on the ballot—was not announced until the party conference in October.

It was therefore only when Parliament settled down for the autumn session that Mr Hague and his team could settle down to being an opposition, their morale boosted by successful piecemeal exploitation of some of the Government's vulnerable points.

Ironically, given the Tories' reputation for 'sleaze' in their last years in government and Labour's avowals of probity, most of these have concerned party funding, conflicts of interest, and the financial affairs of ministers. Equally ironically, given Labour's pre-election promises of openness and its reputation for skilful control of the media, the Government's own attempts at news management caused it at least as much damage as the Tories.

By the time the Government began to unveil welfare reform proposals last autumn, therefore, its honeymoon had come to a decisive end. The first step was implementation of measures an-

nounced by the Conservative government affecting payments to single parents. Next, Labour proposed tightening the criteria for payment of disability benefits, the cost of which has risen seemingly inexorably ever since the present system was introduced. A great deal of the cost is due to payment of 'incapacity benefit', which is meant for people too seriously disabled to work at all (others get the 'jobseeker's allowance', at a lower rate). This is claimed by 2.4 million people; the number of claimants has more than doubled in the last fifteen years—during which the health of the population has if anything improved slightly, so there is no doubt that reform is badly needed.

The welfare lobby and unreconstructed Old Labour supporters (including many Labour MPs) are aghast at these 'benefit cuts'—and all too well aware that Mr Blair and his treasurer Gordon Brown are serious about controlling public spending and reforming the welfare system. Partly because the Government's presentational skills again proved wanting, the public don't like them either.

This, of course, is the test for Mr Hague and his colleagues. Should they seek political advantage from the unpopularity of Labour's proposals by opposing them tooth and nail, or should they look to the long-term interest of the citizen and the taxpayer and give their support—though not uncritical support—to Mr Blair?

The Tories are being pulled both ways. In his speech to the party conference last October, Mr Hague took care to sound constructive, saying: 'Conservatives believe that welfare dependency breeds despair and misery. If despite everything, the Government can break this cycle of despair they will get our unswerving support and they will deserve it.'

In December, however, after the proposals to tighten the disability benefits system were announced, the pro-Conservative *Daily Telegraph* reported him as 'saying that the Conservatives would side with Labour Left-wingers in voting against any move to cut welfare for the handicapped'. Chris Patten—

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the last governor of Hong Kong and a possible future challenger to Mr Hague—warned publicly against opportunism, saying it was in everybody's interests that the welfare state should be reformed.

In Canberra, of course, the Liberals practised constructive opposition by supporting the Hawke–Keating reforms throughout the '80s. Some people feel that this weakened their electoral appeal. At Westminster, ever since Mr Blair as opposition leader started moving Labour towards the centre there has been a strong faction in the Conservative party stressing the need to maintain 'clear blue water' between the parties. Until the 1997 election, this was interpreted as requiring the Tories to move to the right, becoming a firmly right-of-centre nationalist party (and, crazily, vacating the centre, where the mass of votes are, to Labour).

Since then, Mr Blair has neatly used the momentum of victory to occupy large areas of the centre right that Conservatives thought of as their birthright. All but the most stupid Tories can now see that there are not many votes in being clear, bluely to the right of Mr Blair. The alternatives are therefore constructive opposition, supporting the sensible reforms while making the best of Labour's many mistakes—or a historic shift of position that would leave the Tories as an irresponsible populist opposition occupying rather the same position as Labor currently does in Canberra, though with less chance of an early return to power.

It is a good sign that the Tories did not try to make capital out of the embarrassment of Home Secretary Jack Straw, who is vehemently opposed to drugs and in favour of holding parents responsible for children's misdeeds—and whose teenage son is alleged to have dealt in cannabis. Perhaps it is also a good sign that Mr Hague and his shadow social security minister Simon Burns have been keeping their heads down on welfare reform, letting the Labour left and disability action groups make the running. On the other hand, one of the few things that can so far be said with confidence about Mr Hague's political principles is that they seem flexible.

John Nurick is a freelance editor and consultant based in the South of England. From 1985 to 1990 he was editorial director of the Australian Institute for Public Policy, and he later edited newsletters reporting on the UK parliament and the European Union institutions.

IPA

The Pyrrhonist

BRIAN TUCKER

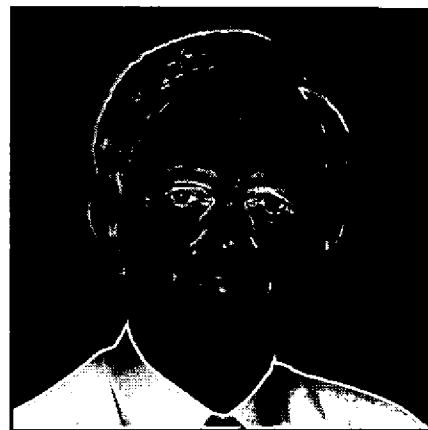
Environmental stewardship for the future—but how far into the future?

IN a recent analysis of the idea of 'sustainable development' (*IPA Review*, 49/3, March 1997), I noted that the definition of this term is generally given as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. The possible mutual inconsistency of the two parts of this definition was discussed, but the absence of a useful time frame for 'future generations' was not. This same problem arises whenever we are reminded of 'our obligation to the future' or 'our stewardship of the environment for future generations', both well-used phrases in the lexicon of modern environmental politics and sociology.

More specifically, in discussions of aspects of the United Nations Framework Convention on Climate Change—which forms the basis of the current international preoccupation with negotiating agreed Greenhouse gas emission reductions—the somewhat inflated phrase 'intergenerational equity' is often used—generally without thinking about what it really means. Some idea of the conceptual time frame can, however, be gathered from the usual benchmark of double (present) levels of Greenhouse gas concentrations in the atmosphere, which will occur some 100–150 years hence.

What can we say about the total welfare of people who will be living then?

Over the intervening period, components of welfare and perceptions of what gives quality to life will probably change; but it is likely that, in broad measure, total welfare will be greater than today and that benefits will continue to be derived from the biophysical environment. There may be twice as many people on Earth then and, because most of this population increase



will occur in nations currently described as 'developing' or 'poor', most of the inhabitants of Earth will continue to strive for an improved standard of living.

This must happen at the expense of the environment, since exploitation of it has always been the basis of human development and there is little indication that this will change. It is therefore probable, even inevitable, that there will be some degree of continuing environmental degradation and the proportion of total welfare derived from the environment in the future will be less than today—even if we continue to be more efficient in our methods of exploitation.

It is sometimes argued that development doesn't necessarily mean reduced environmental appeal, with Switzerland being cited as an example. But industrial development forced by rapid population increase was never Switzerland's problem, and the decline in forest cover and industrial expansion in many places provide overwhelming evidence to the contrary.

It is against this background of inevitability that we have to consider the value of acting now in a way that could cause severe disruption to human welfare for little effect on a problem with a time scale of many centuries.

It is a characteristic of human behaviour that once some benefit has been gained there is a reluctance to relinquish it. This suggests that, whatever moral arguments are applied, in developed nations the standard of living, as measured for example by their Gross

National Product, will probably continue to increase. It would certainly be surprising if it were allowed to decrease, and politically unique if this were to be voluntary in any country.

But Greenhouse gas emission restrictions must amount to a limitation in environmental exploitation and industrial development. Therefore it is likely that the main burden of any such limitation policies in favour of future generations, one way or another, will fall over time on the poorer developing nations whose gas emissions would otherwise greatly exceed those of developed nations within a few decades. The developing countries realise this—hence their adamant refusal to be tied to the type of commitment most recently proposed at Kyoto.

This conflict between *intra-generational equity* and *intergenerational equity* may seem fairly obvious, but is rarely recognized in what passes for environmental debate. Indeed, having to make painful trade-offs between desirable but irreconcilable objectives is precisely what true believers of all stripes are temperamentally incapable of doing. Put crudely, it raises the question: who have the greater rights, the poor of today who are clearly needy, or future generations whose needs may be less—or at least different and not able to be anticipated from present day values? If we are to compare the two and aim at a maximization of social welfare in terms of the exploitation of those resources of which we are currently aware, it is therefore clearly necessary to decide the future time period that should be taken into account. And there's the rub.

Such difficulties inherent in being stewards for the future and in long-term forward planning can be illustrated in one specific example.

Perhaps the most dramatic alarm generated by concerns about global warming has been the prospect of a rise in sea-level. It is this, more than any other perceived threat, that recently caused the heads of the Pacific Island states to try to persuade Prime Minister John Howard to change Australian Government policy to one of urgent and major reduction of Greenhouse gas emissions—regardless of the social and economic impact on Australia.

The real scare, however, arose not from scientific estimates of a sea-level rise from notional global warming causing thermal expansion of the oceans, but rather when alarmists on the periphery of the science declared that

such warming will also cause a meltdown of the polar ice caps and lead to a *rapid* sea-level rise of 5 metres or more.

On 4 November 1997, an authoritative summary of prospective sea level rise was outlined in a position statement from the Antarctic Co-operative Research Centre in Hobart, which specializes in sea and ice studies in the Antarctic and high latitudes of the Southern Oceans.

A part of this says: 'Over the next hundred years, and perhaps the next two hundred years, it is probable that greater snowfall on Antarctica will outweigh the increased loss of grounded ice caused by increasing temperatures of the surrounding ocean. Whatever the rise in sea level associated with thermal expansion of the ocean (current models suggest something of the order of 20 or 30 centimetres over the next century), calculations suggest that the net gain of Antarctic ice will reduce that rise by a few centimetres.' It goes on to talk of what might happen in *five hundred to one thousand years* when there may be a change to a net loss of Antarctic ice, but adds that such a process will probably stop after a few thousand years when 'the overall loss of ice from Antarctica has contributed perhaps 3 or 4 metres to sea level, and when most of the ice in direct contact with the ocean has disappeared.'

Although significant uncertainties exist in the climate models on which the global warming used in this research is based, the statement is important for two reasons. First, it gives the lie to alarmists whose now-discredited opinions on sea-level rise have led to such anxiety among Pacific Island inhabitants—and others in similar geographical situations—for themselves and for their children. Second, it raises the question of whether or not it makes sense to presume that we can plan effectively for five hundred to one thousand years into the future. This, in turn, naturally leads to thoughts of quality of life and total welfare in our historical past.

Could the Normans invading England in 1066 have been capable of usefully planning for our times, nine hundred-odd years later? Could Genghis Khan and the Mongol hordes a few hundred years later? Could the Ming Dynasty, which 500 years ago led China into several centuries of isolationism? And the pace of change is argued to be faster now than ever before. On the scale of even a hundred years, the char-

acteristics of future lifestyles appear to be largely indeterminate.

A recent OECD report (*The World in 2020: Towards a New Global Age, 1997*) indicates that living standards in some parts of the world could rise by 270 per cent in only the next 25 years. But it recognizes that the level of Greenhouse gas emissions is likely to rise sharply for both their high-growth and low-growth scenarios '... despite hoped-for international action to curb such emissions'. This realistic view suggests that some forward planning will be required so as to cope with rapid economic and social dislocation caused by any emission reductions that may be forced upon the natural development of economies, and, in the longer term, to assist in adapting to any climate change that may occur.

It is therefore not only rhetorical but practical to ask: how far ahead is it sensible to plan? A thousand years seems silly, and even 100 years is of doubtful value. It would surely be far less wasteful and more realistic to focus on the less distant and more discernible environmental problems which we will need significant resources to combat.

Dr Brian Tucker is a Senior Fellow of the IPA and Director of its Environment Unit

IPA

COMING SOON!

(February 1998)

"Betraying the Victims"

by Ron Brunton

(Director of the IPA's
Indigenous Issues Unit)

A searching examination of
"Bringing Them Home",
the report of the inquiry into
the 'Stolen Generations'

\$10.00 plus postage

REVIEW

FEBRUARY 1998

Friction Points in the Ten-Point Plan

JOHN FORBES

THE *Native Title Amendment Bill 1997* gives legislative substance to the Prime Minister's Ten-Point Plan to stabilize land law following the High Court's *Wik* decision—a windfall which Noel Pearson admits he did not expect.

This article outlines the areas of disagreement between the Government and the Senate over the legislation, which is designed to rectify matters arising not only from the High Court's decision that native title was not necessarily extinguished by the grant of pastoral leasehold, but also from the perceived inadequacies in the Keating Government's *Native Title Act*—not least, from the legislated 'right to negotiate'.

It is said that if judges make unsuitable laws, Parliaments can change them. But if the High Court discovers a new property right, then it constitutionally locks the Government into either implementation or compensation. And if the Court creates a right which can plausibly be connected with the *Racial Discrimination Act*, it is extraordinarily difficult for Parliament to act.

There is broad agreement about the first of the Ten Points: the need to validate rights granted over pastoral leases between 1994 (when the NTA began) and December 1996 (when *Wik* arrived), without following the special 'right to negotiate' in the *Native Title Act*. The Keating Government believed that *Wik* would confirm the widespread belief that pastoral leasehold extinguished native title, and even the litigious land councils took no legal action against these dealings.

THE PRIMARY PRODUCTION EXTENSION

The *Native Title Amendment Bill* would make the RTN harder to secure (see below) as well as reducing its area of influence. The *Wik* decision raised doubts about the rights of pastoralists to diversify operations without running the gauntlet of the RTN, which is effectively an automatic injunction free from the usual duty to compensate the party enjoined if the claim fails. Few pastoralists can afford the inducements to 'go away' which mining companies may contemplate.

The Bill would allow 'RTN-free' changes from grazing to cotton farming, grape-growing or other forms of primary production, with government-guaranteed compensation to any native title holder affected. Point 5 of the Ten-Point Plan declares: 'All primary production activities' ... would be allowed on pastoral leases (i.e., the



Courtesy of the Ebes Collection

RTN would be completely removed) ... 'provided [that] the dominant land use remains primary production'. The Bill adopts a definition of 'primary production' from the Income Tax Act which includes cultivation, the raising of animals, fishing, forestry, horticulture, and 'farm-stay tourism'. The Senate prefers a more restrictive definition, and hence greater scope for the RTN.

THE EXCLUSIVE POSSESSION LIST

The High Court can always change what appears to be its mind in *Wik*, but the current consensus is that a land grant which entails exclusive possession extinguishes native title. Point 2 of the Plan would confirm that 'exclusive tenures such as freehold, residential, commercial and many agricultural leases and existing public works have extinguished native title'. The Bill lists numerous titles which, according to the States, confer exclusive possession. Queensland estimates that if the list is fully accepted, about 1500 of its pastoral leases will remain open to native title claims.

Insofar as the list is accurate it changes nothing. But to the extent of any inaccuracy, it ▶

Note: for the sake of brevity, the Native Title Act is here referred to as 'the NTA' and the Native Title Amendment Bill as 'the Bill', the Government's 'Ten-Point Plan' is referred to as 'the Plan', the Racial Discrimination Act is referred to as 'the RDA', and the special 'right to negotiate' in the NTA is referred to as 'the RTN'.



Dr John Forbes is Reader in Law at the University of Queensland.

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'The Bill lists numerous titles which, according to the States, confer exclusive possession. Queensland estimates that if the list is fully accepted, about 1500 of its pastoral leases will remain open to native title claims.'

'The Government argues that the list covers less than 8 per cent of Australia's land, and that in theory 79 per cent of the country remains open to native title claims.'

may affect native title, in which case compensation is payable. Supporters of the Bill complain that the list is too conservative and that leaseholders in the Western Division of NSW have been incorrectly omitted. Critics say that despite the compensation clause it is racially discriminatory. ('Discrimination' is usefully ambiguous here, shading off from legal assertion to political abuse: 'Moral infirmity and international disgrace' is one recent elaboration.) The Senate will allow freeholds and some other titles to be confirmed, but to what extent is not yet clear. The Government argues that the list covers less than 8 per cent of Australia's land, and that in theory 79 per cent of the country remains open to native title claims. In deference to the Wik decision it omits pastoral leaseholds.

MINING AND THE RIGHT TO NEGOTIATE

Under the existing NTA, registered native title claimants (often prematurely and tendentiously called 'traditional owners') may claim the RTN at every stage of a mining development. Typically, there are two: first, an application for an exploration licence; and, second, a request for a production lease. There may, however, be a third and even a fourth stage, namely a 'retention lease' until mining becomes an economic proposition, and/or changes to conditions when a lease is renewed.

Point 7 of the Plan envisages that 'for mining on vacant Crown land, there would be

a higher registration test that satisfies Commonwealth conditions for claimants seeking the right to negotiate, so that mining companies would only need to negotiate with claimants whose cases are strong. There would be only one right to negotiate per project and the right to negotiate procedures would be streamlined'. Further, on other 'non-exclusive tenures ... the RTN would continue to apply unless and until a state-based regime acceptable to the Commonwealth is put in place. This regime must give native title holders procedural rights at least equivalent to those of others, with an interest in the land.' Thus the RTN might give way to the normal rights to object and claim compensation under the State Mining Acts.

The Senate has, however, accepted the Aborigines' claim that the RTN is sacrosanct (see next section).

A STRICTER THRESHOLD TEST

The Bill would exclude the RTN from 'primary production' on pastoral leases, from titles on the exclusive-possession list, from offshore waters and certain infrastructure items. It would also reduce the RTN's impact on mining projects.

In other respects the RTN would be harder to acquire. It is agreed that it is absurdly easy to secure at present but how—and to what extent—the qualifying test should be tightened are matters in dispute. Point 9 of the

The Government's Ten-Point Plan*

1: Validate certain acts between 1 January 1994 and 23 December 1996

PROBLEM: Under the current Act

The validity of acts or grants over pastoral and other lease land between passage of the Native Title Act and the Wik decision will remain in doubt. This means that grants of leases, permits, minerals exploration licences and other acts could be contested in lengthy and expensive court cases. In Queensland alone, some 850 mining tenures might be jeopardized.

SOLUTION: Under the Government's Bill

Legislation will guarantee the validity of any acts or grants made over non-vacant Crown land between passage of the *Native Title Act* and the *Wik* decision.

2: Confirmation of common law status of native title

PROBLEM: under the current Act

People across the country are being dragged into the courts on case-by-case, tenure-by-tenure, legal cases. Claims over land covered by many leases might have to be tested in Court, without any real prospect that Aboriginal people would gain native

title rights, given the High Court's decision that grants of exclusive possession completely extinguish native title. Despite the clear position under the common law, claims could continue to be made over any titles, as well as over vital community facilities such as schools, hospitals, roads and railways.

SOLUTION: Under the Government's Bill

States and Territories will be able to confirm the High Court's decision that exclusive tenures such as freehold, residential, commercial and many agricultural leases and existing public works have extinguished native title, and claims for native title will not be able to be made over them.

3: Protect essential services

PROBLEM: under the current Act

The *Native Title Act* gets in the way of the provision of essential services such as new water pipelines, telecommunications, roads, sewerage and drains to all citizens.

SOLUTION: Under the Government's Bill

Essential government-type services to the public could be provided without extinguishing native title.

Plan refers to this problem very briefly: 'There would be a higher registration test to gain the right to negotiate'. The Bill provides that the Registrar shall not register a claim unless there is prima facie evidence 'that at least one member of the ... claimant group currently has or previously had a traditional physical connection with the area covered by the application'.

It is important to note that:

- Only one person need show the vital connection;
- The phrase 'has or previously had' is a compromise—farmers insist that they were promised an unequivocal 'current physical connection';
- A claim which fails the new test could continue at common law; the test does not decide who may claim but merely who enjoys the RTN;
- The RTN is not part of the *Mabo* dispensation; it is a special procedure created by Mr Keating's NTA and its removal would extinguish no native title.

The Senate has nevertheless altered the Bill to allow registration of claims based on 'spiritual' connections. The Senate has accepted the argument that a physical test alone (even when it covers past events) would be unfair to would-be claimants allegedly displaced from the areas claimed. No account seems to have been taken of voluntary migrations to mis-

sions, cattle stations or towns, or of the public interest in reasonably certain laws.

It is a prime object of the Bill to moderate 'ambit' claims and all parties agree with this in principle. But the Senate's amendment holds wide the very gate which the Bill seeks to close. The merits of 'spiritual' claims will be very hard to scrutinize. It will be intriguing to watch them being handled by Federal Court judges free from the rules of evidence, anxious to be among the enlightened, and beset by 'experts' attuned to the native title cause.

In theory, the RTN is merely procedural but in practice it may be worth much more than any native title that lies behind it. Consider the Century zinc mine in Queensland: after five years' delay, claimants who will never have to prove native title secured benefits worth \$90 million from the company and the State government. In December 1997, it was reported that a group seeking to shut down Queensland's Ernest Henry mine demanded \$120 million by way of 'compensation'. Even relatively small projects can yield handsome returns without proof: in July 1997, a gold mine at Tenterfield (NSW) paid \$1.3 million to be rid of a native title claim. Numerous 'payoffs' are covered by confidentiality clauses or deft accounting practices.

How literally are we to take the claims of mystical attachment to land which have been at the forefront of the land rights movement for years? There is nothing mystical about ►

'It is a prime object of the Bill to moderate 'ambit' claims' and all parties agree with this in principle. But the Senate's amendment holds wide the very gate which the Bill seeks to close.'

'It will be intriguing to watch ['spiritual' claims] being handled by Federal Court judges free from the rules of evidence, anxious to be among the enlightened, and beset by 'experts' attuned to the native title cause.'

4: Streamline the "right to negotiate"

PROBLEM: under the current Act

The right to negotiate is a statutory procedural right (created by the Labor Government and not available to other Australian titleholders) under the existing Native Title Act for mining and for some compulsory acquisitions. It is not a common-law native title right. When the current Act was passed, it was not envisaged that the right to negotiate would apply over pastoral lease land and other leases (as it does since the *Wik* decision). Therefore native title claimants have greater procedural rights than the pastoral leaseholder does.

SOLUTION: Under the Government's Bill

State-based regimes may replace the right to negotiate over leased land, but only if they give native title holders the same procedural rights that pastoral leaseholders have for mining, and that freeholders have for compulsory acquisitions.

5: Native title and pastoral leases

PROBLEM: under the current Act

Pastoralists across the country do not know what their rights are and how best they can manage their properties into the future. They also do not know

if they can validly do things that are otherwise legal under their leases or government permits (such as building dams, or putting up a shearing shed or a machinery shed). Normal government action like case-by-case lease upgrades or issuing permits for particular activities (growing a crop for instance) on pastoral leases could only be done with the agreement of the native title holders or by acquiring and extinguishing any native title.

SOLUTION: Under the Government's Bill

Even if native title exists, State Governments would be able to permit all primary production activities on pastoral leases including farmstay tourism and incidental activities, provided the dominant land use remains primary production. If such rights are granted by government over a pastoral lease, native title will be suppressed (but not extinguished) on the relevant area for the term of the permit. Native title holders will be entitled to full compensation for any impact on their native title rights.

6: Statutory access rights

PROBLEM: under the current Act

There is no mechanism under the current Act for protecting registered native title claimants existing access to pastoral lease land. ►►

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'... to opponents of the Bill, the winding back of the RTN is self-evident 'discrimination'. Did the judges in *Mabo* 'discriminate', then, when they gave no such right?'

the RTN: it is an addendum to *Mabo* and a potent bargaining counter when seeking benefits more negotiable than the High Court's *Mabo* title. The RTN issue is not a struggle between the forces of good and evil; it is a political contest about hoped-for redistributions of material benefits.

Critics say that native title claimants should have no greater rights than those of an established freeholder or leaseholder facing compulsory acquisition. But to opponents of the Bill, the winding back of the RTN is self-evident 'discrimination'. Did the judges in *Mabo* 'discriminate', then, when they gave no such right?

A SUNSET CLAUSE?

Point 9 of the Plan proposes that any further title claims be lodged within 6 years. If the Bill became law in 1998 this time limit would expire about 12 years after the *Mabo* decision.

Opponents of the 'sunset clause' simply assert that it is unfair. They have not yet explained why it is unfair to allow native title claimants 12 years when most litigants have to pursue their alleged rights within six years or three.

NO RULES OF EVIDENCE?

Section 82 of the NTA states that the Federal Court must 'take account of the cultural and customary concerns of Aboriginal peoples' and 'is not bound by ... rules of evidence'. In a

clause based on Point 9 of the Plan, the Government would restore the rules of evidence 'unless the Court otherwise orders'. A finer example of a 'Clayton's amendment' would be difficult to find. There are Federal Court judges who would readily give themselves a dispensation. Yet the Senate balks at this most timid reform.

Far too little attention is being paid to a vital practical question: whatever native title turns out to be, what sort of evidence will be enough to prove it, and what are the realistic prospects of resisting claims, particularly of the spiritual variety? Self-serving hearsay upon hearsay as to 'customs and traditions' will be supported by sympathetic anthropologists glossing that hearsay, and very few colleagues will question their constructions. Aborigines are the *sine qua non* of Australian anthropology, and that would foster a symbiotic relationship even if politics, peer group pressures or career prospects did not intrude.

The unreliability of self-serving hearsay and the reluctance of anthropologists to question native title claims are noted by trial judges in *Mabo* and the recent Canadian case of *Delgamuukw* while higher courts turn a blind eye. But under the fleecy clouds of theory there is a plain fact: native titles, when not 'negotiated', will depend on trial judges' findings on issues of 'credit' and fact. It will be more fashionable to find for claimants than against them.

SOLUTION: Under the Government's Bill Where registered claimants show that they had at the time of the *Wik* decision physical access to pastoral lease land, their continued access will be legislatively confirmed until the native title claim is determined. This would not affect existing access rights under State or Territory legislation.

7: Future mining activity

PROBLEM: under the current Act The mining and resource industries lack security for existing projects and new projects are being delayed. Under the current Native Title Act, native title holders and registered claimants have a right to negotiate for both mining and exploration over both vacant and reserved Crown land and leasehold land. Mining projects are subject to a double right to negotiate with native title holders or registered claimants—both at the exploration and mining stages. The current Native Title Act also affects mining industry infrastructure small-scale and/or short-term operations, such as opal and gem mining and alluvial gold and tin mining—often at the cost of their viability.

There is no effective screening test for claims, so unmeritorious claims remain on the Register and

thus attract the right to negotiate. Governments and mining and resource companies must deal with any and all registered native title claimants, even those making unsustainable ambit claims. There is currently no guarantee of legally-certain agreements about native title, as an alternative to the right to negotiate or expensive and time-consuming litigation and tribunal processes.

SOLUTION: Under the Government's Bill For mining on vacant Crown land, there would be a higher registration test that satisfies Commonwealth conditions for claimants seeking the right to negotiate, so that mining companies would only need to negotiate with claimants whose cases are strong. There would be only one right to negotiate per project and the right to negotiate procedures would be streamlined. For mining on other non-exclusive tenures (such as current or former leasehold land and national parks), the right to negotiate would continue to apply unless and until a State-based regime acceptable to the Commonwealth is put in place. This regime must give native title holders procedural rights at least equivalent to those of others, with an interest in the land (e.g., the holder of the lease).

Once a trial judge 'finds the facts' the die is usually cast; and it is notoriously harder to appeal 'the facts' than rulings on points of law. Canadian judges (now distinctly *à la mode* in the High Court) have just decided to make their native title theory workable by a specially 'understanding' approach to claimants' evidence. The NTA as it stands will encourage local imitators. In view of their romantic and tactical advantages, native title claimants need no dispensation from the rules of evidence. The Government should adhere to its amendment, minus any discretion to waive those rules.

This free-wheeling approach to evidence offers strangely little to *non-claimant* parties. A group calling itself the Yorta Yorta are claiming rich lands astride the NSW-Victoria border. In October 1997, their opponents tried to demonstrate that non-Aborigines have ties to the land which the Yorta insist are uniquely theirs. But the trial judge, a former Northern Territory land rights commissioner, declined to hear that evidence.

WHY THE FEDERAL COURT?

Why have the States so tamely accepted the Federal Court's monopoly of native title cases?



Courtesy of Herald and Weekly Times

Native title is common law, not a law of the Commonwealth. It is an important aspect of land law, a perennial concern of State courts. Most of the land involved is State land. The proper venues for these cases are the respective Supreme Courts, our historic courts of general jurisdiction.

The Federal Court, born about 20 years ago, has a patchwork civil jurisdiction based on federal statutes. The broad and discretionary nature of many of them encourages judicial activism. The judges of the Supreme Courts were appointed by many different governments under professional scrutiny in metropolitan legal centres. Most of the present

'Native title is common law, not a law of the Commonwealth. It is an important aspect of land law, a perennial concern of State courts. Most of the land involved is State land. The proper venues for these cases are the respective Supreme Courts, our historic courts of general jurisdiction.'

8: Management of water resources and airspace

PROBLEM: under the current Act

The capacity of governments to regulate and manage water and airspace is not clear.

SOLUTION: Under the Government's Bill

The ability of governments to regulate and manage surface and subsurface water, aquatic resources and airspace would be put beyond doubt.

9: Better manage native title claims

PROBLEM: under the current Act

As at 6/1/98 there were 699 native title claims, many overlapping and often involving substantial numbers of respondents. There is no real acceptance test for claims and no proper registration test for access to the right to negotiate. Native title processes are separate from State and Territory land management systems leading to unnecessary delays and confusion.

There is no sunset clause for claims under the Native Title Act.

SOLUTION: Under the Government's Bill

For new and existing native title claims, there would be a higher registration test to gain the right

to negotiate, handling of claims would be streamlined and the States would be encouraged to manage claims within their own systems.

A sunset clause of six years within which new claims under the Native Title Act would have to be made would be introduced.

10: Agreements

PROBLEM: under the current Act

Agreements about native title are legally uncertain, and are thus not always a viable alternative to expensive and time-consuming litigation.

Miners, governments and others who negotiated in good faith with native title claimants could find their agreement worthless and give them no certainty. Regional or large-scale agreements to deal sensibly with native title, land management and other issues in a particular area are very difficult to achieve.

SOLUTION: Under the Government's Bill

Legal certainty would be guaranteed for voluntary agreements about native title, thus providing genuine incentive to follow this sensible approach.

** Text as supplied by the office of Senator Nick Minchin, Special Minister of State, January 1998*

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'The RDA is not a constitutional law but an ordinary statute which can be repealed or amended by a later Act, unless the later Act states otherwise.'

Federal Court positions were created remotely in Canberra by governments of one political persuasion. Federal judges sit on tribunals such as the Northern Territory land rights commission, which has seldom if ever rejected a claim. Special tribunals develop their own culture akin to the cause that created them. Certain judges who would relish the limelight of native title cases ignore the conventions against politicking and publicity-seeking.

SUBJECTING THE BILL TO THE RDA

A potent mixture of fashion, politics and emotion have made the RDA a quasi-religious substitute for broader faiths of old. Opponents of the Bill see both sacrilege and legal invalidity in its alleged inconsistency with the RDA. They do not reveal how any legislation dealing with indelibly race-based title can avoid every race-based nuance. Yet for every possible extinguishment of native title, compensation is guaranteed; and with respect to the RTN, the Bill simply winds back a 'special measure' in the NTA (not in *Mabo* itself). Neither the RDA nor the treaty which gave Canberra the power to pass that Act requires special measures, let alone their indefinite continuance.

The RDA is not a constitutional law but an ordinary statute which can be repealed or amended by a later Act, unless the later Act states otherwise. Knowing (but not publicizing) this fact, the native title lobby wants the Bill branded 'subject to the RDA' so as to exclude the normal rule.

THE 'HINDMARSH PROPOSITION'

Soon it will be put to the High Court that legislation based on the 'race power' (Constitution s. 51 (xxvi)) is valid only if it benefits the race in question. We'll call this 'the Hindmarsh Proposition'. The immediate target is not the Bill, but an amendment to the 'heritage' laws which inspired the Hindmarsh Island bridge saga. A special Act was passed to let the bridge proceed without another expensive meditation on 'secret women's business'. But custodians of that 'business' claim that the law is detrimental to Aborigines and hence unconstitutional. If the Hindmarsh Proposition performs well at this outing it will be re-run, if need be, in a root-and-branch attack on the 'Wik Bill'.

Whatever the High Court says in 1998, it is clear that the race power was included in the Constitution to enable legislation for or

against relevant groups. For example—though modern sensibilities shrink at the thought—it was meant to control unwanted immigration. But since then, according to the Hindmarsh Proposition, the power has somehow withered so as to support only 'beneficial' measures, at least where Aborigines are concerned.

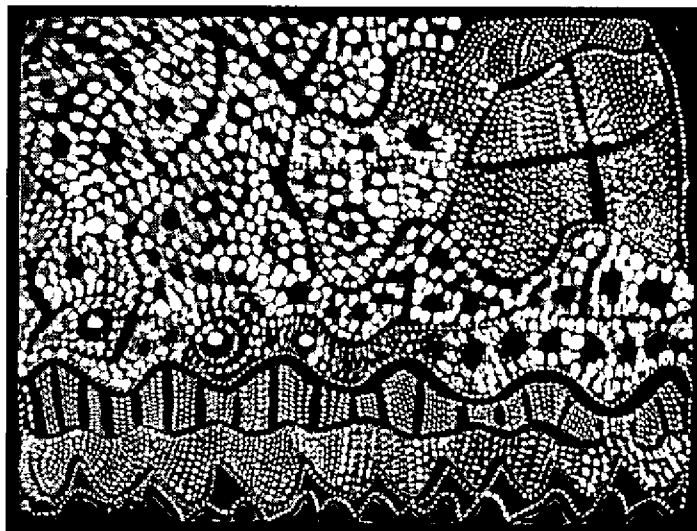
The Propositionists hope that the High Court will amend the Constitution accordingly, although as recently as the 1980s—long after the Constitution was regularly and democratically amended to include Aborigines in the race power—Chief Justice Gibbs, Justices Stephen and Wilson (of the 'stolen children' report) and Justice Deane (an emotive member of the *Mabo* majority) acknowledged that the race power is not limited to the creation of race-based benefits. In 1983, the present Chief Justice said that benefits are now the 'primary' (but impliedly not the only) purpose of the race power because the Parliament which passed the RDA in 1975 presumably meant to limit the power to benefits only. But ordinary legislation cannot amend the Constitution and one Parliament cannot bind another. The judicial opinions summarized above were delivered several years after the RDA arrived.

Another argument for the Hindmarsh Proposition relies on what Australians are supposed to have meant or felt when the 1967 referendum extended the race power to Aborigines. But nothing like the Hindmarsh Proposition was put to the people then, and the Government rejected a proposal to ask electors to limit the power to 'advantageous' laws in future. The then Attorney-General advised that the race power be retained to deal with any future problems with immigrants. In dealing with the proposals actually placed before them, electors can scarcely have foreseen all that would be built upon them in years to come. The 1967 referendum is best seen as a 'motherhood' motion for equality

'Whatever the High Court says in 1998, it is clear that the race power was included in the Constitution to enable legislation for or against relevant groups.'

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Johnny Warrangkula Tjupurula, 1973, 'Kalipimpimpa Tjikarri'

and 'fair goes' for Aborigines. Those worthy sentiments do not imply that Aborigines must always have what they want and never receive anything which they (or the more vocal of them) do not desire.

Acceptance of the Hindmarsh Proposition would require a *Mabo*-style intuition of 'community values' against the plain words of the constitutional text. Would the race power then be special (i.e., beneficial) for one race but still 'plenary' towards others? Other races were not involved in the 1967 referendum and they are not concerned in the Hindmarsh Case or in the Ten-Point Plan debate. Mind you, Australia was not an issue in the Murray Island case but that did not deter the Court from applying *obiter dicta* of breathtaking scope to a different race and the whole of Australia.

The High Court is a more likely source of constitutional amendments than the democratic process of referendum laid down in the Constitution itself. If the Court wishes to embrace the Hindmarsh Proposition it will do so for reasons good or bad, knowing that there is no appeal and that any legislative response would be glacially slow and politically invidious. Still, any judgement for the Hindmarsh Proposition will need careful trimming. It would not endear the Court to any government or to public opinion if it were made impossible to scale down any law ever passed for Aborigines, or to reduce any race-based right the High Court sees fit to recognize in future. Judicial footwork in the Hindmarsh case could rival Fred Astaire's.

If the Proposition does prevail, new questions will arise. In cases involving complex legislation who will decide whether the benefits outweigh the detriments? If a law that overrides 'secret business' at Hindmarsh Island saves further embarrassment to the Aboriginal cause, is it really detrimental? Will immediate gratification be the test or will it be recognized that good medicine is not always tasty?

As a 'fall-back' defence the government would argue that the 'Wik Bill' must be read as part of the whole NTA, and that on balance the amended Act is still beneficial. The Court could conceivably have it both ways—amend the race power in the abstract while holding that the Hindmarsh law and whatever remains of the Ten-Point Plan are not on balance detrimental.

OTHER MATTERS

The Bill does not seek to abolish *Mabo*. It accepts that when native title is impaired, compensation is payable; and on that basis *Mabo* itself accepts that governments may extinguish native title. If passed intact (and left intact by the High Court) the Bill would reduce uncertainty. But the Government is at



Mike Bowers/The Age. Reproduced with permission

the mercy of the Senate and can no more confidently predict the High Court's decrees, let alone their unintended consequences, than any other observer.

The economic consequences of the Bill are unpredictable at this stage. In the 1996–97 financial year, mineral resources amounted to 34 per cent of our total export revenue and contributed \$12 billion to the economy in purchases from local companies. Moderation of the RTN should reduce losses due to long delays and 'settlements' worth more than any native title behind them. An immediate negative would be the heavy cost to taxpayers of yet another appeal from the Parliament to the judges.

On 7 January 1998, the mining industry, citing a report by leading accountants, claimed that since December 1993 native title has cost Australia \$30 billion in mining revenue and investment opportunities lost. Official figures show that mineral exploration in Queensland fell almost 20 per cent last year. But there are counter-claims that mining expanded in the last four years, and that any setbacks have more to do with falling commodity prices than with native title. At the same time, the mining industry would hardly bother to oppose aspects of the NTA so strongly as it does if it did not believe that it is causing it loss and damage.

Charity encourages a belief that the judges in *Mabo* and *Wik* had no notion of the expense and social strife that their decrees would engender. By November 1997, one member of the *Wik* majority (Kirby J) had decided that the High Court should give more thought to economics, particularly the 'very ▷

'On 7 January 1998, the mining industry, citing a report by leading accountants, claimed that since December 1993 native title has cost Australia \$30 billion in mining revenue and investment opportunities lost.'

'Many native titles are likely to fall well short of ownership, and inalienability is a peculiar disadvantage. How can unsaleable rights of (as yet) unknown content sensibly be valued?'

large economic consequences' of decisions such as *Mabo* and *Wik*.

The necessity to claim compensation against governments rather than private interests may see the bluff of claimants called more often and more resolutely. Court-awarded compensation will not include such perquisites as private 'royalties' or shares of income or profits for passive 'traditional owners'; but until we have a much clearer notion of what native title really means it is futile to guess at the compensation to which the Bill might give rise. It suits native title interests to pluck figures from the air and use them *in terrorem*. Many native titles are likely to fall well short of ownership, and inalienability is a peculiar disadvantage. How can unsaleable rights of (as yet) unknown content sensibly be valued?

It is reported that Chief Justice Brennan will sit on the Hindmarsh Case before he retires in May. Landmark judgements take time to write and so it is unusual for High Court judges to hear major cases just before retirement. No-one seems to have suggested that in

deference to the law of apprehended bias he should leave the case to others. (His son is a high-profile exponent of native title and of the Hindmarsh Proposition in particular.)

If the Court embraces the Hindmarsh Proposition, the Government could hold a referendum at the next election to abolish the race power outright. Zealous anti-racists might find it difficult to insist that Australia enter the twenty-first century with any such power in its Constitution.

Will the native title movement, in which so much money and emotion is now invested, long survive in an Australia moving away from the Anglo-Celtic culture on whose moral sense it plays? How many claimants of native title would really prefer alienable 'compensation'? Our legal definition of 'Aborigine' is distinctly wider than Canada's. As groups holding native titles pullulate, the value of title 'shares' (or trust funds in lieu thereof) will steadily diminish. Then disputes over native title not yet exchanged for some better sort of property will be internecine rather than inter-racial.

IPA

The Missing Point in the Ten-Point Plan

RON BRUNTON

'By failing to acknowledge a fundamental injustice in the concept of native title, Howard has denied himself a legitimate opportunity to take the higher moral ground over his opponents.'

JOHN Howard is wrong. *Wik* and native title are moral issues, although the pastors, politicians, and poseurs who have berated him over his Ten-Point Plan have not got it right either.

By failing to acknowledge a fundamental injustice in the concept of native title, Howard has denied himself a legitimate opportunity to take the higher moral ground over his opponents. For native title is a racist title. This is not, as is sometimes argued, because Australians who are not Aborigines or Torres Strait Islanders cannot claim native title. It is because no rational non-Aboriginal person would want to have their property under such title, which precludes them from transacting in their land or owning it as an individual. (And, as an independent-minded Aborigine recently remarked to me, don't hold your breath waiting for the Dodsons and other prominent and well-off Aborigines to clamour for the

right to convert their alienable freehold property into native title.)

Native title, as it has developed in Anglo-American legal thought, as formulated by the majority of High Court judges, and as codified in Australian legislation (with a partial exception to be discussed below), involves the paternalistic and discriminatory assumption that Aborigines should not have the same kind of freedom to deal with their property that other Australian citizens take for granted. To argue, as supporters of the High Court's *Mabo* decision do, that the decision involves a recognition of 'the full humanity of Aborigines'—to use the words of Professor Raimond Gaita—offers an interesting insight into their constricted view either of humanity, or of Aborigines.

Five of the six judges who formed the majority in the *Mabo* case stated that the 'rights and privileges conferred by native title

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are otherwise inalienable to persons who are not members of the indigenous people to whom alienation is permitted by the traditional laws and customs'. Justice Toohey, the only member of the High Court who had had extensive experience with Aboriginal land claims—as a former Aboriginal Land Commissioner—stated that it was open to debate whether or not native title was generally inalienable.

Justice Brennan, supported by Justices Mason and McHugh, argued that the only circumstances under which native title could be held by outsiders were if there were 'pre-existing laws' which allowed 'the alienation of interests in land to strangers'. Justices Deane and Gaudron stated that while 'the existence of any rule restricting alienation outside the native system has been subjected to some scholarly questioning and criticism', in their view 'the rule must be accepted as firmly established'.

But in other aspects of their respective decisions the same judges were willing to adopt arguments that appear to be inconsistent with the assumptions on which their statements about inalienability were made. They quite properly allowed that changes could occur in the traditional laws and customs which gave rise to native title, provided that the general nature of the connection between the people and the land had been retained. Given the manifold ways in which even the most traditionalist and remote Aborigines are inextricably linked to the non-Aboriginal economy and society, it is reasonable to ask why they did not allow for comparable changes regarding the alienation of interests to be recognized. One striking measure of the extent to which this linkage has taken place was recently revealed in the results of the 1996 Census, which showed that 64 per cent of Aboriginal and Torres Strait Islander couple families involved unions between indigenous and non-indigenous partners.

Perhaps even more importantly, the judges explicitly stated their readiness to move away from 'long acceptance of legal propositions'—in the words of Justices Deane and Gaudron—where these propositions were associated with, or perpetuated, injustice. The legal propositions relating to the inalienability of native title date from judgements in the nineteenth and early twentieth century, times when the intellectual and moral capacities of 'natives' were believed to be inferior to those of Europeans. The fact that the judges do not appear to have seen any need to move away from legal propositions based on such derogatory assumptions suggests, at the very least, either an indifference to the relationship between economic and other forms of

freedom or an utter ignorance of such a relationship.

The Keating Government's *Native Title Act 1993* did at least recognize that there was a problem, and provided for native title-holders to surrender their rights and interests to a government in exchange for freehold rights in land. But it seems that virtually no thought was given to how such a surrender might be facilitated: whether it would require unanimous agreement among adult native title-holders, and court determinations about the interests of minors; the way in which freehold rights obtained could be assigned so that they were held by individuals rather than trusts or corporations; and so on. Of course, attention to such matters could have threatened the interests of land councils and those Aborigines whose influence and power depend on maintaining a collectivist orientation to Aboriginal issues even though such an orientation is at variance with the traditional values they claim to endorse.

John Howard's Ten-Point Plan, and the 'Wik' amendments to the *Native Title Act*, do not advance these matters any further. The missing point is the one which covers the desirability of providing strong incentives for native title-holders to become the owners of alienable freehold land as individuals. This would have allowed the Prime Minister to explain why Australians should be so concerned that large parts of the country might eventually be held under native title, and to do so in a way that would help to weaken the ultimately destructive mystique that surrounds native title, as well as the unwarranted charges of racism that opponents have directed against his government. It would also have strengthened his case for changes to the right-to-negotiate provisions of the *Native Title Act*, because the Prime Minister could have explained that when Aborigines had transactable rights over land, they would have fewer incentives to seek benefits through substitute rights which hinge on their ability to threaten expensive delays to development projects.

The introduction of the missing point could signal the start of a morally-defensible approach to Aboriginal issues that was consistent with the principles of individual freedom to which the Howard Government is supposedly committed, and which is far more likely to serve the economic, social and political interests of the great majority of Aborigines and other Australians. The only losers would be the well-to-do beneficiaries of the 'Aboriginal industry'.

IPA

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Native Title: Six Questions for Labor

GARY JOHNS

THE *Native Title Amendment Bill 1997* will return to the Senate early in the new parliamentary year. Most media and academic opinion—and many churchmen—are against the Government, while at the same time claiming to fear the prospect of a double-dissolution election based on what they have chosen to label the 'race issue'.

There is a built-in assumption that the only way to avoid such an election is for the Prime Minister to compromise his Bill, to accept as many of the Senate amendments as would be necessary to get it through.

There is of course another way—the Labor Party can drop its objections to the Bill and allow it to pass. Kim Beazley could sell this as a magnanimous gesture to save the country from the divisiveness of a 'race' election, while vowing to amend the legislation should he win. That may not entirely kill the debate, but if the Government then pursued the Opposition on the matter during a subsequent election, it would substantiate the allegation that it wanted a race-based election, and it would be penalized electorally.

Beazley has, however, already revealed the weakness in the Labor position on Native Title by making such a prominent feature of the issue at the recent ALP National Conference. Presumably the aim has been to use the weight of Conference to lock in caucus members.

Queensland Labor leader Peter Beattie was right when he said that Labor was wearing its heart on its sleeve on this one. Labor has some questions to answer, not to the editorialists, but to the electorate.

1. Does Labor believe, as does former leader Paul Keating, that the Native Title Act 1993 does not have to be amended as a consequence of the High Court's judgement in Wik?

Beazley has stated that Labor would have been confronted by the need to amend the Act had it remained in government.

But it does not appear to want to face the changes necessitated by the *Wik* decision. That judgement introduced the concept of coexistence by deciding that native title could coexist with some forms of leasehold title. This new law required a legislative response to confirm the extent of native title rights on different types of lease.

Labor's view in office was that past valid freehold and leasehold grants extinguished native title. Labor not only said this when it introduced its legislation, and it not only assumed the High Court would confirm this view in *Wik*: it prayed for that outcome. When Labor spokesman Daryl Melham recently announced that he had always believed that coexistence would occur on pastoral leases, it served only to confirm that no-one else on the Labor side did.

The Act was based on the assumption that native title would exist principally on vacant Crown land, where there was no significant grant of private rights. The assumption was that the rights of native title holders in relation to such vacant Crown land could be significant, and could be equated to ownership of the land. Acting on these assumptions, the Act provided native title holders with the same protection and the same procedural rights as freeholders, as well as special rights to negotiate in relation to mining and some compulsory acquisitions.

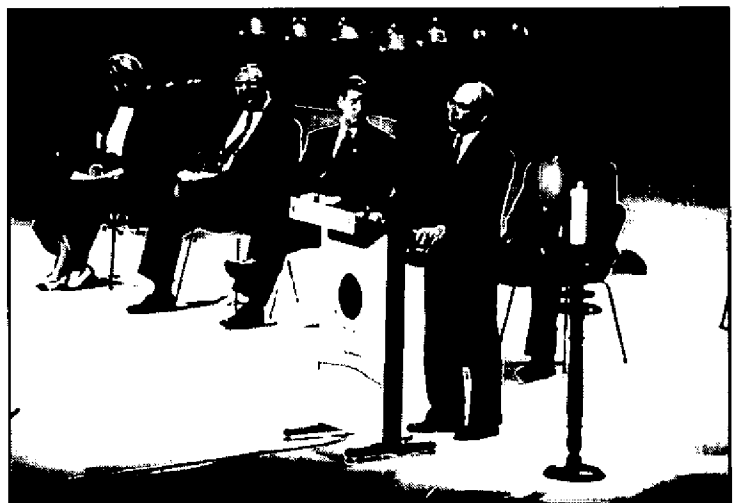
Wik contradicted these assumptions. At one end of the spectrum, native title could approach the rights of full ownership, but at the other end be no more than an entitlement

There is a built-in assumption that the only way to avoid such an election is for the Prime Minister to compromise his Bill, to accept as many of the Senate amendments as would be necessary to get it through.

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Courtesy of Herald and Weekly Times

to come onto the land for ceremonial purposes. Native title on pastoral leases is nearer the latter, so the Bill had to put in place a régime which recognized that native title is, in these circumstances, a coexisting and subordinate right.

Labor's assertion that native title was a fundamental legal property right belies the High Court's view in *Wik*, that this is a bundle of rights that vary considerably, depending on where and under what circumstances they survive. Labor accepts coexistence, but it does not want to accept that the underlying assumptions that relate to Crown land cannot always apply where there are other interests.

2. Should the recipients of a benefit be able to determine the extent of that benefit?

Labor argued that its Act was the result of a deal to give indigenous people, as far as possible what they desired—for instance, the validation of past acts of the grant of land in return for the Land Fund, and the right to negotiate (RTN). This deal was struck so that the whole of the Act could be held to be of net benefit to indigenous people, and arguably safe from constitutional challenge.

In Senate hearings on the constitutionality of the *Wik* Bill, Senator Bolkus had many witnesses agree with his assertion that the only sure way to avoid a challenge was if the Bill was unambiguously beneficial. Further, it was suggested that the standard that the High Court should use in the determination of 'benefit' was 'indigenous consent'. How such consent could ever be gauged is unclear.

In trying to undermine Howard's Bill, which is based on the race power of the Constitution (s.51 (xxvi)), Labor's assumptions—that the High Court will rule that the Commonwealth can legislate only in favour of Aborigines, and that a measure of that concept is Aboriginal consent (or at least agreement)—are seriously flawed.

Even if the Court accepted the 'benefit' line, if a deal by one government is seen as too generous or inappropriate then surely the next government has the right and duty, within a very wide discretion, to change it. The High Court has already determined that some elements of the Act contain adverse provisions, but still upheld it. The Court might apply a test along the lines, 'Could the Parliament reasonably consider the law to be for the benefit of Aboriginal people?'. This does not require the court to weigh up every provision, but rather to see if the Parliament considered the matter properly.

Beazley has now realized that the Court is not likely to decide in the forthcoming Hindmarsh Island case that legislation must be for the benefit of Aboriginal people or that Parliament is not competent to decide this,

which is why he is now arguing his stance regardless of the High Court. The question is why?

3. Should rights be available to one race and not others?

Labor has argued that the RTN provisions of the Act were a special measure and applied to one race alone. The Bill allows for the RTN to be retained in relation to mining developments where native title may be equivalent to full ownership—for instance on vacant Crown land. But where rights are only coexisting rights, procedural rights for native title holders equivalent to those held by the other coexisting tenants are provided. This is an essential difference, rights based on title, not on race.

Beazley argued that the full RTN should be maintained, noting that Western Australian freehold and agricultural leasehold entail a veto over other forms of economic activity. Is Labor arguing that native title claimants should have RTN powers almost equivalent to freeholders in Western Australia, the strongest such powers in the country?

Such a stance is directly contrary to the *Wik* decision, which suggests rather a continuum of rights, with native title diminishing as it confronts more powerful title. The power of native title in relation to other land holders has to be weighed—not just asserted. Gareth Evans has effectively thrown in the towel on this one, by hoping that the RTN is a matter of common law entitlement, preferring to leave it to the courts to decide.

4. Should one industry bear the burden of providing an economic base for Aborigines?

Labor was passionate about native title holders being given the RTN over mining operations. The rationale, according to Evans, was that the RTN amounted to a 'legitimate' form of economic empowerment. The very use of the term 'legitimate'—suggesting rhetoric rather than reason—calls into question the truth of this rationale. Why should the mining industry bear the burden of the economic empowerment of indigenous people? This is cargo-cult mentality at its worst.

The *realpolitik* of the RTN, of course, is that, in conjunction with an easy test for registration, it places a very large lever in the hands of indigenous claimants. With the flimsiest of evidence, claimants can lift the cost to miners of compliance, and can extract rent in the form of royalties, jobs and training from what would otherwise be for them unproductive land. This Robin Hood mentality perhaps more than anything else shows the flaw in Labor's thinking. Why should special rights attach to a title held by one race and be used essentially against one industry? The answer ►

'In trying to undermine Howard's Bill, which is based on the race power of the Constitution, Labor's assumptions—that the High Court will rule that the Commonwealth can legislate only in favour of Aborigines, and that a measure of that concept is Aboriginal consent (or at least agreement)—are seriously flawed.'

'Why should the mining industry bear the burden of the economic empowerment of indigenous people? This is cargo-cult mentality at its worst.'

'With the flimsiest of evidence, claimants can lift the cost to miners of compliance, and can extract rent in the form of royalties, jobs and training from what would otherwise be for them unproductive land.'

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FEBRUARY 1998

'The RTN remains a statutory right, not a common-law right, and its power derives from the nature of the title, not the race of the recipient.'

'There are elements in the Howard Bill that could well do with further scrutiny when the matter comes before the Senate, especially the conditions under which the States would establish their regimes for managing the process and the integrity of those procedures that allow for ministerial discretion. But neither of these is sufficient reason to deny the Bill its passage.'



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probably lies in the legal reasoning behind the typical negligence action. In those cases the emphasis is not so much on the apportionment of blame, but in chasing the best source of revenue.

The RTN remains a statutory right, not a common-law right, and its power derives from the nature of the title, not the race of the recipient. It should be judged against the rights of other users of the land, which have always allowed for mining developments to create benefits for all through the Crown ownership of minerals and the levying of royalties on behalf of taxpayers. To allow one group to take their slice is a risky action, to do so with abandon as is the case with the current registration test is asking for trouble.

5. Should beliefs be a part of the registration test of native title claims?

The registration test for claims was always a worry for Labor, which in government was fast coming to the conclusion that the test was too loose. For instance, when the ATSI Social Justice Commissioner Mick Dodson claimed that the test was too tight after the Native Title Tribunal rejected the Waanyi claim (later restored), the Labor Government held the line.

The registration test is much firmer in the Bill, and access to various procedures such as the RTN flow from it. It is a condition of the proposed test that at least one of the claim group has or had a traditional physical connection with the claimed area. The Bill also does not allow spiritual matters to prevent the use of the 'expedited procedure' for developments, and also attempts to restore the rules of evidence in claims proceedings, which also means that spiritual evidence would be subject to tighter scrutiny.

Do these things amount to an attack on the religious beliefs of indigenous people? No, rather it is a recognition that in a culture with only an oral history tradition, the deliberate fabrication of belief is a real possibility, and must be subject to close scrutiny. In the Hindmarsh Island Inquiry, for example, the Royal Commission found that beliefs had been fabricated for the purpose of stopping the bridge.

None of this suggests that belief cannot be used as evidence to reinforce claims of physical connection, but to make it a decisive element would bring the claims process into disrepute.



John French/The Age. Reproduced with permission

6. Why should the time allowed to make native title claims be unlimited?

In the original negotiations over the 1993 Act, there was a very strong practical argument put to the Labor Caucus that to impose a time limit on claims would create a large number of bogus claims. Gareth Evans is still using this argument five years later.

The sunset clause in the Bill will not prevent common-law native title claims being made, it only prevents the making of native title determination applications after the expiry of the clause. The vast experience of the last five years suggests that land is so important to indigenous people they will not hesitate to make their applications as soon as possible.

Limiting the time for claims in all other areas of the law is common practice. In the case of indigenous land claims, it has a much more powerful role. It will signal the end of a phase of readjustment in people's thinking about land rights, and allow a new phase to begin where indigenous people no longer regard themselves as mendicants, but as citizens with a stake in the nation.

There are elements in the Howard Bill that could well do with further scrutiny when the matter comes before the Senate, especially the conditions under which the States would establish their regimes for managing the process and the integrity of those procedures that allow for ministerial discretion. But neither of these is sufficient reason to deny the Bill its passage, and until Labor answers the above questions to the satisfaction of the widest possible constituency, it stands accused—just as did Hewson's Liberals in 1993—of dealing itself out of the debate.

Kim Beazley's promise to call all sides together on 'Day 1' of his new government only arises because of Labor's failure to address these questions.

IPA

Constitutional Debates

THE Institute of Public Affairs has so far largely preserved a discreet silence on the subject of 'the republic', with one conspicuous exception: back in 1993, we organized one of the few public debates then to have taken place, between Geoffrey Blainey and Malcolm Turnbull.

We have otherwise avoided the issue for two reasons.

The first is a simple one. Like the Prime Minister, and many other Australians, we do not regard the issue as one deserving of its priority in the present public agenda. The 'republic', if or when it comes, will do nothing to make us freer, happier or more prosperous—as far as anyone can see. Depending on the option eventually chosen, it will probably not even make us better-governed.

The second is less simple: the IPA is not the voice of one person, and the range of views held on the subject within the Institute, its Board and senior staff, are many and diverse. By the time we arrived at a corporate view, Eva Cox would probably be nearing the end of her first presidential term.

Our decision to enter the debate has been prompted entirely by the proceedings of the Constitutional Convention—still, in fact, in progress as we went to the printers.

Many of the contributions during the first four or five days of the Convention exhibited no more than a distillation of every current chattering-class, post-modern, transient fad imaginable. That is perhaps understandable. What is less so, and less forgivable, is that relatively few speakers showed much sign of having taken the trouble to acquire a constitutional habit of thought—a habit of thinking not only in terms of decades or centuries, but also of thinking in terms of the general rules which alone can cover the many unforeseeable particular future cases. Too many speakers could see no further than yesterday—or perhaps 1975.

Perhaps not surprisingly, the more thoughtful speakers tended to be at the 'conservative' end of the spectrum; not surprisingly because the knowledge that all constitutional change involves unforeseeable—and perhaps regrettable—consequences comes more naturally to those who are conservative about constitutions, or, perhaps, tends to make them so.

In this issue of the IPA Review, therefore, and in future issues, we will be hoping to give some prominence in a non-partisan way to some of the more thoughtful contributions to the debate—both from the Convention itself, and from other sources.

We start with a speech made at the Constitutional Convention on 3 February by the Commonwealth Treasurer, Peter Costello. Mr Costello's position can be described as severely moderate: change, he believes, is necessary, but as little change as possible. Incidentally, he canvasses all the important arguments in a realistic and measured fashion.

This speech is supplemented by a characteristically quirky and acute piece by Terry McCrann, who adds what might be a useful twist to the arguments about the hypothetical presidential election—a twist which, incidentally, would work well with the 'McGarvie model'.

We hope in future issues to canvass the case for the popularly-elected president, as well as the case for no change.

One last, closing, thought. Constitutions are as much about culture as about the law. One very good place to start understanding this is Les Murray's essay on the republic, recently republished by Duffy and Snellgrove in the collection *A Working Forest*. Required reading—and almost enough to make one think that Shelley was right about poets being the unacknowledged legislators of the world.

Tony Rutherford

Choosing the President

PETER COSTELLO

WHEN the delegates met at the Constitutional Conventions of the 1890s, their business was very different from that we are dealing with today. Their business was to federate the colonies into a Commonwealth, and their discussions revolved principally around the various powers to be given to the different levels of government.

The delegates were concerned with federating Crown colonies and, as the preamble to the covering statute records, they agreed 'to unite in one indissoluble federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland'.

The Crown of the United Kingdom, of Great Britain and Ireland was central

to the scheme of Federation. Even a cursory reading of the Australian Constitution will demonstrate that. The Crown or the Queen is mentioned in three sections of the covering Act and in 21 sections of the Constitution itself.

It is also clear that the monarchy was intended to be an absentee monarchy. The powers of the Queen were vested in a Governor-General who was to reside in the country and exercise here the power of the monarch.

The Federation of the Australasian colonies, and the creation of the Commonwealth of Australia formed a new national government—a new nation. It was a new shoot from an old tree. In time, the new shoot would grow to maturity and stand independently and self-sufficiently. It

would for all purposes be free and self-standing, although unquestionably it had derived from the other.

Some of the delegates to this Convention have argued for a Republic as the last step to independence. Some have spoken of it as a decision to 'leave home'. To be frank, I find this line of argument repellent and, needless to say, quite unconvincing. It has never occurred to me that in my lifetime Australia was not an independent nation. I have never seen any evidence of its independence being compromised by its constitutional arrangements. I venture to say that all those who have represented Australia internationally have done so on the basis that its sovereignty lies solely in Australia and is understood to do so by its neighbours in the



Edmund Barton and the first Federal ministry

world community. Without a question.

I can understand the temptation to try gilding the lily to build a stronger argument; but I would not like the public, who will ultimately decide the outcome of our constitutional arrangements, to vote under any misconception. Australia is an independent nation.

It is also argued by some of the proponents for a Republic that if in reality the nation is completely independent, even perhaps a *de facto* republic, then the wording of the Constitution should be changed to match the reality. But to be frank, the words and the reality of our Constitution are at variance in so many areas that if the aim were a matching one—words to reality—we would start on more important places than this.

The Constitution makes no mention of a Cabinet—an obvious feature of our government. It makes no mention of a first or prime Minister—which is an obvious feature of our government. And the words of Commonwealth jurisdiction in many areas are not appropriate to reality—take for one the External Affairs power.

I mention these examples to illustrate the point that the Constitution must be read and understood in accordance with history and convention. This is the case with all great historic literature, especially where we are looking for modern meanings in ancient texts.

It is practically impossible to formulate a comprehensive written manual to apply to the myriad possibilities of human behaviour. Even more so, I believe it practically impossible to write a comprehensive manual to cover circumstances now and circumstances now unthought of, but certain to arise in future decades or centuries.

This is one of the weaknesses of a written constitution. It is not unique to Australia. It is a problem we share with those other countries that have decided to reduce and enshrine their constitution in one written document.

It is sometimes also said that the Constitution is not an inspirational document—a document which states values or ideals. This may be so but for my own part I do not think this is an especial weakness. I am not convinced that the purpose of a constitution is to uplift the soul. In my view, the pur-

pose of a constitution is to set out the basis for responsible and civil government: to allow a society in which language and literature, hope and aspirations that can uplift, will flourish.

People often claim that the United States Constitution performs a function of uplifting its citizens and explaining the nature of US society to them. In fact, its Constitution is quite a dull document. When making this claim, most often, people are referring to the Declaration of Independence, which is quite separate from the US Constitution.

I am also very uncomfortable about including an expression of views of how we see our society in a constitution which is designed to last for decades, if not centuries. These views are inevitably determined by current perspectives. We know the views of today will look dated, by omission or commission, in the future. In my view, a constitution should set the machinery for political debate, not nail itself to political positions.

Our Constitution starts with the historic institution of the monarchy of Great Britain, and adapts that office successfully, by history and conventions, to modern Australia. As adapted and applied, it works—remarkably well. And yet if there were not a substantial disquiet over the institution, a disquiet which is likely to grow rather than recede, we would not be here. It was this disquiet, recognized by the current Government which led it in Opposition to pledge to hold this Convention if elected. This Convention is taking place in fulfilment of that election pledge.

It is quite commonly said that all this argument is about is whether we want an Australian as our Head of State. If that were all we wanted, then one of the options to fix it would be an Australian monarchy. But in truth, the problem is more with the concept of monarchy.

The temper of the times is democratic. We are uncomfortable with an office that

appoints people on hereditary grounds. In our society and in our times, we prefer appointment on the basis of merit.

The system works very well. But a key concept behind it is bruising against reality.

The only active role now left for the monarch to perform is, upon the advice of the Prime Minister, to appoint the Governor-General and, on the advice of the Prime Minister, to dismiss the Governor-General. If this function were to be performed by a Council, then there would be no significant change to the current structure of our institutions. A Governor-General, by convention an Australian, would be appointed to hold executive power subject to the restraints and conventions of the Westminster system of government. The active function of the Crown would be taken over by an Australian or Australians appointed on the basis of service or merit. More importantly, there is every reason to believe that conventions that have been established and adopted under the current arrangements would continue. This is because the office of the Governor-General would continue by whatever name. It is logical to think that the exercise of the power of appointment and dismissal would continue under the same conventions.

A proposal along these lines, now known as the McGarvie model, is one that I would support, without hesitation.

I think I know what our system of government would look like after a generation under this change, and I believe it would be a natural progression of the past and the present. I would support such a Republican model.

I turn now to the question of whether we should go further.

Under our system of constitutional monarchy, the Governor-General holds executive power in name, but exercises it upon the advice of the elected government. In reality, the Governor-General has no substantive executive power. Should we appoint a Head of State with substantive executive power—power currently exercised by the Prime Minister or Ministers of the Crown answerable to the Parliament?

Such a system, of course, would not be a Westminster system of government. What additional purpose would it serve?

The only purpose I can think of would be to separate the Legislature and the Executive, that is, to increase the checks and balances on the exercise of power in our system.

For my own part, I believe that the checks and balances in our system are already extensive. They are certainly more



Political worthies at the 1890 federation conference

than those that apply to the Westminster system of government in Britain. For a start, our Senate has unlimited powers, including the power to reject the supply of money to government. Moreover, on current arrangements, no government is likely to hold a majority in the Senate, which has the ability to defeat any legislation and to bring down a popularly-elected government.

Secondly, Australia has a federal Constitution (unlike Britain) where the States have general powers.

Thirdly, Australia has a judiciary not at all unwilling to strike down government legislation. The High Court is constitutionally entrenched and not accountable to the electoral process.

There is another alternative. This is a President directly elected, but with no substantive executive power, along the lines of the Irish model. I think this works quite well in Ireland. It has the capacity to produce a President with a basis for emotional support, but without a conflict of powers in relation to the elected government. It does not produce a non-politician. In my view any person who wins a contested election is a politician.

The difference in Australia, of course, is a powerful upper House with the power to reject money bills. This means that the role of the Governor-General can never be solely ceremonial. If the Senate did not possess the powers to reject money bills and if it were impossible for the Senate and House of Representatives to deadlock, then an Irish model would be feasible.

But my assessment is that any Section 128 referendum which sought to strip the Senate of its power to reject money bills, to pave the way for an elected 'ceremonial president', would almost certainly face defeat. In the circumstances, those who genuinely wish to resolve the 'republican problem' in their lifetime could not see this as a feasible alternative.

This brings me to the proposal that a President be elected by a two-thirds majority of both Houses of Parliament.

As far as I can gather, the argument in favour of this alternative is that the people, through their elected representatives, get a say in the Head of State. This proposal comes with or without add-ons. The latest add-on is that whilst appointment would take a two-thirds majority of both Houses, dismissal would take a simple major-

ity of one. I leave aside the question of why you would want to entrench an appointment without entrenching the dismissal.

It is said that this method of appointment would prevent politicians from assuming the office of Head of State. This method of appointment may well have prevented the appointment of a Hayden, a Hasluck, a McKell or a Casey to the office of Governor-General, yet I do not believe that any of those persons discharged the office dishonourably. In fact, I think, each proved to be a distinguished appointment.

The two-thirds parliamentary majority has always left me cold. It is not a directly-elected President deriving legitimacy from the vote of the electorate, nor is it directly akin to the current Westminster practice. In effect, a President appointed with a two-thirds majority of both Houses would enjoy a greater mandate than a Prime Minister who needs only a majority of the House of Representatives. My instinct tells me this is a recipe for trouble. It is an attempt at a compromise which would overcome the problems with the institution of the monarchy. But in my opinion it sows the seed for further constitutional trouble. It would not be the end of this matter. It might be the first Republic, but I am not sure it would be the last.

I judge that the disquiet or discomfort about the concept of monarchy to which I have earlier referred will continue to grow; and we should address this, not allow people to use it to build other agendas.

I am much chastened by the Canadian experience. A simple attempt to repatriate the Constitution and institute a Charter of Rights has led to what is now described as 'mega-Constitutional politics', raising questions of secession, distinct cultural rights, sovereignty for indigenous people, and a whole lot of other issues

which have been advanced in a climate of general flux and change.

We heard such arguments yesterday, including an attempt to use this Convention to institute a Bill of Rights. It has always amazed me that those who argue that a Head of State should be subject to general election and popular recall are quite prepared to confer wide-ranging powers on unelected judges who are not subject to dismissal or recall and having no accountability to the electors. To my knowledge, nobody is arguing for the election of judges, notwithstanding the substantial influence over the lives of citizens that they now exercise—an influence in some respects far in excess of any member of Parliament who is subjected to the electoral process on a three-yearly basis.

So I am for change. I would like to see Australia deal with the issue of a Republic, not because of what others think of us but because of what we think of ourselves.

Those that are advocating radical constitutional change are, in my assessment, advocating certain Section 128 defeat. The history of previous Section 128 referendums should give us a realistic focus. The public is very reluctant to change the Constitution and its reluctance grows as the extent of the change grows.

I believe that there is an unease at the centre of our constitutional arrangements, not because they do not work—they work extraordinarily well—but because the symbols which underlie them are running cut of believability, and this gnaws at legitimacy. I am not for change at any price. But I am someone who believes that, in changing, we should secure and safeguard what is best; that by directing change we will get a better outcome than by allowing pressure to build up and explode with consequences far less benign; and that history and convention make such change a feasible and workable constitutional improvement.



Peter Costello is the Federal Treasurer and an appointed delegate to the Constitutional Convention.

I P A

Use the States to Break the Deadlock

TERRY McCRANN

HERE'S a suggestion for breaking the deadlock over the method of electing the president.

Stick with what might be called the Turnbull-Howard model, of the Federal Parliament choosing the president by at least two-thirds majority at a joint sitting. *But* give each State and Territory parliament the right to nominate one candidate, and require the Federal Parliament to choose from that pool.

To my mind, this strikes an attractive mid-point between the Turnbull-Howard model and the alternative direct-election option. For it significantly broadens the range of people or politicians with a say in the process. And in particular it removes it from the exclusive possession of the Federal Parliament—which is the major irritant to the broader community.

To put it another way, it gives real meaning to our federation on both the symbolic and the constitutional levels. It would also, as a side benefit, open the door to including the States in the new republican model, by incorporating them directly in the process. It has been pointed out that, at least in theory, the States could remain constitutional monarchies, even if federally we moved to a republic.

For example, the individual State nominees could serve (in some order) as both deputy to the president and State head of state; and thus also temporarily succeed him if he ceased to be president before his term expired, and only for the remainder of that term. That president could double as his State's head as well, or a second State head could be chosen to replace him.

The problem with the present impasse is that the Turnbull-Howard model looks like providing a—broadly—sensible solution, but one which won't win sufficient public endorsement. The direct-election alternative, on the other hand, might theoretically be 'voter-friendly', but would not be put by the present Prime Minister. Further, it would probably never win sufficient bipartisan support at the sharp end of a referendum.

The most objectionable feature of the Turnbull-Howard model is that the president would be the product of a deal between the prime minister and the leader of the Opposition. This might produce 'good' presidents, as popularly regarded—the Arvi Parbos, the Bill Haydens, the Sharon Firebraces. But even then, at what cost in terms of those backroom deals?

It could also produce 'bad' presidents: we'll let your hack get up this time in return for our hack getting up next time, like many Labor Party preselections.

Certainly, the same outcomes are possible from a 'deal' involving a State nominee. But it would be much harder to achieve—and would be highlighted by rejection of an outstanding candidate from a State outside the deal-making loop.

Consider if Victoria nominated a retired Jeff Kennett, and New South Wales a retired Bob Carr. This would allow a smaller State to nominate, say, a Gus Nossal; and I doubt that the pollie would win that (importantly, at least two-thirds) vote, even from his peers. Perhaps you could even increase that to three-quarters; while the nominees would be chosen by the State parliaments by simple majority.

Obviously this does not guarantee anything. But it does significantly reduce the ability of the Federal politicians to capture *all* the symbolism and politics of our president.

And I might add that it opens similar possibilities in other areas—for example, why not choose High Court judges on the same basis? At the moment there is a phoney consultation with the States, but in practice it is entirely within the gift of the prime minister.

Finally, the convention should reject absolutely any suggestion that the president could be sacked effectively by the prime minister, on the basis of a simple majority in the House of Representatives.

It would be the height of absurdity to have a complex process for selecting the president—whatever the specific method—only to have him sacked by the prime minister, the very first day he walked into his office.

He has to be appointed for a fixed term, with codified powers which do not include sacking the prime minister (opening another big subject, but not an insoluble one) as in 1975. But he must be sackable by due process for high crimes and misdemeanours.



Terry McCrann is one of Australia's leading business journalists and commentators. Reprinted, with kind permission, from the Melbourne Herald Sun, 5 February 1998.

IP A

**THE WAY TO VOTE
TO-DAY.**

Are you in favour of the Proposed
Federal Constitution Bill?

~~YES~~

NO

The Negative Income Tax: An Idea Whose Time Has Gone

MICHAEL JAMES

Combining the welfare and tax systems through a negative income tax has some superficial appeal. But, says Michael James, there are better (though more radical) options to relieve welfare dependency.

THE notion of a guaranteed minimum income, implemented through a negative income tax (NIT), is being discussed in some Australian policy circles. The general idea of a NIT is that the social security and the tax systems would be combined, and welfare benefits replaced by tax credits. But despite its superficial attractions, it is likely to be less effective than other, more radical reform options for moving people out of welfare dependency and into jobs.

The alleged benefits of a NIT are threefold.

First, its supporters claim it would help overcome the poverty trap that discourages people on welfare benefits from taking up paid employment. At present, many people moving from welfare to work face very high effective marginal tax rates as targeted welfare benefits are phased out and tax obligations are incurred. A tax credit would greatly lower that barrier since it would continue to be paid to people as they took up jobs, though it could be withdrawn as wages rose.

Second, a NIT would make it possible to lower or abolish the minimum award wage, and so create more jobs, without requiring previously unemployed people to accept low incomes and without reducing the incomes of existing low-wage earners. In effect, a NIT would subsidize low wages.

Third, a NIT would end the complicated multitude of existing social security benefits, with their different means tests and withdrawal rates, and replace them with a single programme operated through the tax system. This would save administrative costs and help ensure that everyone who qualified for welfare received it.

Yet the scheme has several drawbacks. The first is that it would be expensive and impose a heavy tax burden. The authors of a recent NIT proposal calcu-

late that a revenue-neutral scheme would impose an overall marginal tax rate of around 45 per cent.¹ This burden could be distributed at different rates among low-, middle- and high-income earners; as well, it could be reduced by withholding tax credits from people outside the workforce. It could be further lowered if more people were drawn into paid employment and tax receipts boosted (though it would of course have to rise if, instead, tax credits drew more people into welfare dependency).

But the disincentive effects of such a high rate could not in the end be avoided. For example, the poverty trap faced by the unemployed could be sprung by withdrawing tax credits from them at a low rate as they took up jobs; but this would necessitate higher marginal tax rates further up the income scale. By eroding the incentive to work, save and invest, such rates would slow economic growth and reduce employment opportunities.

The second problem is that the scheme's incentives for attracting people from welfare dependency into jobs may be inadequate. Some people would undoubtedly respond to the higher incomes available from working. But international experience suggests that plenty would not. In New Zealand in the 1990s, welfare dependency has increased even as job opportunities have expanded and unemployment fallen. True, welfare benefits in New Zealand are generous, certainly when compared with Australia's. But the same combination of rising welfare dependency and falling unemployment was found (until recently) also in the US, where state welfare is much less generous. Indeed, President Clinton's 1997 welfare reform, which imposes workfare obligations on able-bodied welfare recipients and a five-year lifetime limit on welfare entitlements, reflects a recognition that many long-term able-bodied welfare recipients can no longer respond to 'incentives' to work or train and have to be

presented with an obligation to do so. So far, the evidence about workfare is encouraging; in the State of Wisconsin, for example, the welfare rolls have been halved since workfare was introduced in 1987.

A third problem with a NIT is its advocates' assumptions that the wages paid by many of the new jobs that a more flexible labour market would create would be unacceptably low, and that no-one presently at work should suffer a loss of income as a result of labour market deregulation. It follows that wages must, if necessary, be subsidized with tax credits. But this opinion overlooks the fact that many low-wage earners live in households that include people earning higher incomes. It also relies on the traditional static measures of income and the distribution of income. These measures ignore 'income mobility', or the fact that people normally move up the income scale during their lifetime.

A recent report from the OECD uses measurement of income mobility in a study of the effects of reforming the labour market by allowing minimum wage levels to fall.² One effect was to reduce unemployment. A second was to increase wage mobility: over five years, two-thirds of the 100 low-paid job starters tracked in each OECD country moved into higher-paid jobs. A third effect was to encourage more education. The policy implications of these findings are quite radical. For example, lowering or abolishing the minimum wage would probably increase static inequality, but lead to a reduction in *lifetime* inequality. However, subsidizing low wages with tax credits could, while reducing static inequality, also weaken the incentives that workers face to become qualified for better-paid jobs. It could also mask any natural increase in market wages by encouraging employers to hold them down in the knowledge that employees' pay would be topped up. ▶

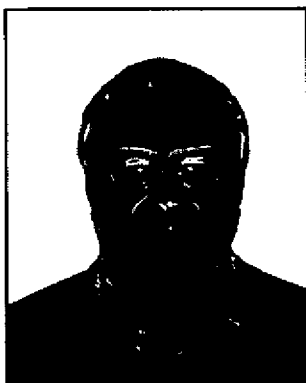
Book Reviews

Finally, a NIT would detract attention from the other ways in which governments can encourage employment. The current proposals are to reform the labour market to generate more jobs, and to create corresponding incentives to work by manipulating present levels of taxation and public spending. But, as noted, disincentives to work are built into present tax levels; they can be shifted around, but not eliminated.

A more promising approach would be to deregulate the labour market and alleviate work disincentives by more radical welfare reforms that reduced the tax burden for everyone. Some aspects of the welfare state, like insurance for disability, sickness, and even unemployment, could be privatized, as retirement income provision has partly been in Australia. The voluntary associations could be given a larger and more independent role in poverty relief. The reduced welfare state would then approximate a safety net, with altogether more manageable incentives to move from it and into employment. A NIT scheme, in contrast, would tend to entrench the present level of welfare spending and its associated tax burden, and could even provide the welfare lobby with a platform for its expansion.

NOTES

- 1 Peter Dawkins, Gillian Beer, Ann Harding, David Johnson & Rosanna Scutella, *Towards a Negative Income Tax System*, Melbourne Institute of Applied Economic & Social Research, November 1997 (a report to the Full Employment Project).
- 2 OECD, *Implementing the OECD Jobs Strategy: Member Countries' Experience*, Paris, 1997; summarized by Alan Kohler, 'Wage dispersion's all the rage', *Australian Financial Review*, 27-28 September 1997.



Michael James is Editor of *Agenda*.

IPA

Real Freedom

Bill Stacey reviews

What It Means to Be a Libertarian

by Charles Murray

Broadway Books, 1997, \$24.95

Looking backwards can distort your vision, but it now seems that a golden age of classical liberal thinking has passed. The great revival of the liberal school of thought blossomed from the 1970s in the fields of philosophy, economics, history and literature. This revival gathered such momentum that it continues to influence politics and a number of important contemporary commentators. It even prompted a massive reaction from idealists of a different hue, looking at new rationales to form the world in the image of their dreams.

Charles Murray's most recent work on libertarianism provides a personal account for the foundations of his liberal beliefs. As such it is refreshingly succinct and readable. It provides a framework within which it is easier to interpret his earlier works—themselves important contributors to the classical liberal revival.

Murray feels that his top-selling, almost universally damned, work about the role of intelligence in social outcomes, *The Bell Curve*, was widely misinterpreted. His current book can be seen as trying to explain that, despite perhaps understandable perceptions, he is no conservative seeing the structure of society as determined by birth, but a libertarian radical who sees individual differences and choice at the core of a dynamic society. Rarely does the institution of government feature in his solutions to social problems.

The author is no idealist about human nature, but he does see people taking responsibility for their own lives and community, rather than government, as a precondition for human happiness. Freedom is 'embedded in the very meaning of being human'. Government takes choices away from individuals and com-

munities and reduces their ability to create satisfying lives.

A crucial part of the argument for limited government is that these generally-acknowledged compromises of personal freedom are not compensated for by delivering the benefits that the state promises. Like Hayek, Murray does not generally attribute ill motives to proponents of intervention. Rather their error is in failing to realize the unintended consequences of policy proposals.

Government solutions in practice are often *ineffectual*, their impact being swamped by broader trends in society, markets, the environment or technology. The actions of government can *displace* individual and community responses to problems. For example, federal financing of local schools caused

"Ultimately [Murray's] vision is founded on ... practical rather than theoretical grounds. This style of the argument will appeal to many who generally see libertarian writing as merely 'fine in theory'..."

them to focus on the provider of funds, allowing capture of the system by organized teachers and removing incentives to serve students and parents. A second-order consequence is the removal of many students to a private school system, removing one element of the glue that bound communities together.

Some reviewers have been critical of Murray—apparently for not proving his case for libertarianism. The judgement is not fair. *What It Means to Be a Libertarian* draws on the conclusions of other studies that are easily referenced, especially through a personalized bibliographical note giving a good idea of how the author's ideas developed.

REVIEW

In contrast to his other writing, this looks for a wider audience. It is a well-written and often convincing argument for being libertarian. The book sets out the ideas at the core of libertarian thought, an image of what a libertarian society would look like, practical proposals for how it would work, and an ultimately optimistic view on why this vision is practical.

There are parts of the book that will not satisfy readers, be they sympathetic

“Australia needs such an articulate proponent of liberty. Our golden age of liberal thought remains ahead.”

or not. Murray claims a ‘moderate’ libertarian position, but it is often difficult to see why he draws the line on removing government involvement. For example, it is argued that a government-funded voucher scheme would be a good start to removing government from education. On the similar issue of social security and income transfers through the tax system, however, Murray rejects the similar proposal for a negative income tax, because he believes that the outcome would be inferior to a system with no government at all.

Reading the book, I gained the impression that Murray’s radicalism increased as he was writing and considering afresh the practical consequences of the largest government programmes. Ultimately his vision is founded on these practical rather than theoretical grounds.

This style of the argument will appeal to many who generally see libertarian writing as merely ‘fine in theory’.

The practical issue is how brute political reality could tolerate a libertarian vision that would remove the spoils of office. Murray identifies a number of constituencies that might find freedom attractive—users of government services who are dissatisfied; users of private sector services and alternatives who are happy; parents of school-age children facing the current education system; people thinking about retirement and knowing that social security won’t work for them; and a ‘socially conservative lower middle class’.

This almost sounds plausible in the US. In Australia, the same constituencies are rarely confronted with libertarian alternatives. Politics here remains focused on the marginal voter and, post-Keating, has eschewed communicating a framework of ideas that might provide coherence to policy. The federal ‘Liberal’ government has shown no ability to promote practical agenda-setting ideas that deliver benefits by removing government. Rather, it has sought to buy off potentially threatening interest groups with populist messages, policy concessions and industry packages.

Presumably, the intentions of these liberals in government are good. Murray proffers some advice:

we who believe in freedom and limited government must remember the essence of what we are about. It is easy to get caught up in the nuts and bolts of our complaints and our objectives. Cut taxes. Elect the right congressional candidate. Defeat the wrong Supreme Court nominee. Repeal a particularly objectionable law. Unless we step outside practical politics from time to time, we lose sight of the intensely idealistic vision that lies behind these specifics.

Good management is rare in office and in any case, is rarely enough to carry the day in elections. Interests often prevail over the ideal of ‘good government’. As Murray persuasively argues, however, happiness cannot come from government, but must come from the exercise of freedom. Surely this is a vision that has some appeal. Australia needs such an articulate proponent of liberty. Our golden age of liberal thought remains ahead.



Bill Stacey is responsible for business strategy in Asia at a major Australian bank and holds degrees in politics and business from UWA and Melbourne University.

Yes, Minister!

Kevin Donnelly reviews

The Future of Schools: Lessons from the Reform of Public Education

by Brian Caldwell and Don Hayward

Falmer Press (UK), 1998, \$31.95

The Future of Schools provides a very important and timely contribution to the debate about the future of public education. It deserves particular praise as it successfully places Victorian events in a global context and succinctly outlines some of the major options for further reform.

Its timeliness is supported by the December 1997 report on the Schools of the Future by the Victorian Auditor-General. That report notes that the Accountability Framework devised for Schools of the Future ‘represents a significant advancement in terms of measuring school performance ...’ and that the Department ‘is to be applauded for its initiative and the progress it has made ...’

As stated in the Preface, the purpose of the book is twofold: first, to tell the story of Victoria’s Schools of the Future and, second, to put forward and explore a number of options for further reform of the school system. As such, the book is unique in that it is able to draw on both the practice and theory of large-scale educational reform.

It begins by outlining ‘the crisis in public education’ across the Western world. Whether it be Britain, New Zealand, America or the different States of Australia, the general consensus is that public education has failed. High rates of illiteracy, the ‘dumbing down’ of the curriculum and the success of Asian nations like Singapore, Japan and Korea in international tests like the Third International Maths and Science Study (TIMSS) are provided as evidence of this failure.

The next two chapters provide Don Hayward’s account of one attempt to provide a more efficient and effective system of public education. As the Shadow Minister for Education and the Minister for Education in the first Kennett Government from October 1992, Don Hayward is in a good posi- ▶

tion to provide an account of what he terms '... my revolution in education in Victoria'.

This revolution involved overhauling a highly bureaucratic, centralized system suffering from 'provider capture'. Excessive teacher union demands, the moribund and self-serving nature of the education bureaucracy and the indulgences of the previous Labor Government had all conspired to ensure that students were no longer being properly educated.

The system, as outlined by Hayward, was ripe for change, and drawing on his experience as a senior executive in General Motors he set out a strategy to achieve such change. These chapters centre on the Minister's role in implementing this strategy. The reader is told by Hayward that he was instrumental in overhauling the curriculum, in devolving power to schools, in balancing the education budget, in introducing State-wide assessment and reporting, in introducing new technology to schools and ensuring that the community understood and supported the new initiatives.

The reader is also told that many around the Minister doubted whether such a wide-sweeping and fundamental change process could be successful and that '... the Schools of the Future program was underestimated by everybody except me'.

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Why were education reforms in Victoria introduced so quickly and so comprehensively and have they led to a better system of public education? Part of the explanation, as argued in Chapter Four, is that the environment in Victoria was unique. Nowhere else has there been an alignment of political conditions so necessary for the introduction of such major reform.

In answering the second question,

the results from a number of research projects are presented. The strength of this section of the book is that shortcomings raised by critics of Schools of the Future are presented and an international perspective is taken on research into the effectiveness of educational reform measures similar to those which have occurred in Victoria since 1992.

The Cooperative Research Project, a longitudinal study undertaken by Melbourne University, represents one of the most extensive attempts to evaluate the success of Schools of the Future; Chapter Four describes this project in some detail. Generally speaking, the principals involved in the project endorse the Schools of the Future framework and an overwhelming number state that they do not want to return to the previous system.

The majority of principals also agree that educational outcomes, as reflected in the areas of curriculum, teaching and learning, have improved because of devolving power to schools and introducing guidelines like the Curriculum and Standards Framework. The one shortcoming here, as noted by the authors, is that these results are not based on actual measurement of student performance; rather they are based on opinions and perceptions.

The remainder of the book deals with the substantive point that initiatives like Schools of the Future are a necessary but insufficient condition for lasting school reform. Such is the nature and scope of societal change that further reform is needed if schools are to adjust and cope with the challenges represented by the third millennium.

Whether it be the impact of information-related technology, the arrival of the knowledge-based society or the competitive nature of global financial markets, the argument presented is that schools based on the factory model of delivery are irrelevant and obsolete. The problem then becomes, how do we arrive at an education system capable of meeting such challenges and what will such an education system look like?

Chapter Six addresses these questions. The view of education presented is in line with much of what is currently being written about schools in the third millennium. New technologies will lead to the 'virtual' classroom, traditional subject boundaries will disappear, there will be an increased use of paraprofessionals and schools will become 'learning network organisations'.

The structure and organization of the existing government and non-government school system will also be radically different. Caldwell and Hayward argue that the current distinction between public and private schools should disappear; all schools that receive government funding should be considered 'public'. Unlike the current situation, where schools are funded by

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government, the argument is also put that funding should follow the student.

The belief that education systems should accept the primacy of parent choice and the beneficial effect of the 'market' is strengthened with the proposal that all schools should be able to set fees, thus formalizing a voluntary situation that already exists within government schools.

Drawing on the experience of grant-maintained schools in Britain and charter schools in America, Chapter Six also suggests that Victorian schools are ready to take the next step in achieving greater autonomy and school-based control over management, organization and curriculum.

Of interest here is the point that the current Victorian Minister for Education, Phil Gude, has established three committees that are researching many of the issues raised by Caldwell and Hayward.

Notwithstanding the strengths of *The Future of Schools: Lessons from the Reform of Public Education*, there are a number of criticisms. While accepting that parents and students should have greater freedom to choose what school best serves their needs, the authors argue that there should be a universal curriculum and assessment framework. Such a situation begs the question of what is the value of school choice, if all schools have to adopt the same curriculum and assessment regime imposed from the centre.

Currently, in America there is a good deal of debate about President

Clinton's desire to establish a national curriculum and assessment system and thereby bring coherence and order to what is seen as a diverse and fragmented education system. Some commentators, given the mediocre and politically-correct nature of what is being written, argue that this is a recipe for disaster.

There are also a number of inaccuracies and omissions in the early chapters. Whilst acknowledging the significant structural and financial problems that had to be addressed because of the excesses of the previous Labor Government, it is clear that budget reform continued to be a problem as late as financial year 1995-96. In that year the initial education budget for current outlays fell short of actual outlays by some \$98.9 million, (Victorian Budget paper No. 2, 1996-97, Table 2.4). Most of the overrun occurred in the schools area.

The contribution of the Parliamentary Secretary, Stephen Elder, in the Quality Provision process and the establishment of the KODE schools, also appears to have been underrated.

Throughout the Western world governments of all political persuasions are undertaking significant and far reaching educational reform; often with the same problems raised and the same solutions put forward. The Caldwell/Hayward book provides a valuable contribution to this debate and, as such, it should be widely read.



Dr Kevin Donnelly is Director of Education Strategies, a Melbourne-based consulting group. He is currently undertaking a benchmarking exercise for the Victorian Department of Education comparing science curriculum and teaching against overseas countries involved in the TIMSS study.

IPA

An Overdue Ryan Reader

R.J. Stove reviews

Lines of Fire: Manning Clark & Other Writings

by Peter Ryan

Clarion Editions, 255 pp, \$19.95

It is salutary to group living Australian writers according to how great a loss they would represent if their *oeuvres* disappeared. The spectrum of dispensability ranges from those whose output's consignment to oblivion is a matter of active public obligation (Campion and Keneally), through those whose work's vanishing would not even be noticed save by the most neurotically Stakhanovite graduate students (Janette Turner who?), to, at the other end, those vital to any hopes Australia may have of remaining or becoming civilized. High, perhaps supreme, in this last category is Peter Ryan, whose *Lines of Fire* provides an overdue distillation of his achievement.

Even Peter Craven, that Spice Girl of OzLitCrit, is obliged to concede Ryan's mastery of English: 'Ryan,' he heavy-breathes on the present book's back cover, 'is a born writer and prose an instrument of his will.' Quite true, though such encomia come oddly from Craven; we would not normally place much stock in tributes to Michelangelo's draughtsmanship if they came from Jackson Pollock. A better way to appreciate Mr Ryan's style is to make a rough paraphrase of any of the chapters in this volume, amplify such a paraphrase into a finished essay, and then compare the results with Mr Ryan's original. However dutifully carried out, these will bear the same relation to Mr Ryan's own idiom which a foreign-language crib bears to the literature it purports to render.

Who else but Mr Ryan would think of likening Australia's academic historians to 'a race of birds [which] had determined to have its history written, and then entrusted the task to an egg'? Who else, when lauding the autobiography of indefatigable African traveller Wilfred Thesiger, could say: 'When I reflect upon the endangered species whose disappearance I would regret, Wilfred Thesiger comes somehow to my mind, even before the lions and elephants'?

Should these quotes reduce Mr Ryan to the status of a mere (if elevated)

jokesmith, the inclusion in this anthology of extracts from his 1959 war memoir *Fear Drive My Feet* will be a corrective at once necessary and welcome. Mr Ryan won the Military Medal in 1942, at the ripe old age of 19. It is thus impudent for a reviewer to attempt a dispassionate judgement upon these reminiscences' accounts of life and death in New Guinea, with Japanese forces pursuing his company across the Saruwaged Ranges. But perhaps even a reviewer may be allowed to pause in admiration at the poetry in Mr Ryan's prose:

No more depressing sight can be imagined than this moss forest in the half-light. Damp, green, dim, unreal, it made the journey like a combination of a bad nightmare and a scene from one of Grimm's fairy tales.

Anyone less glory-hungry than Mr Ryan is inconceivable (he clearly cannot forgive General MacArthur's grandstanding). The crisp yet mournful accent of Pascal—even if Mr Ryan him-

"Ryan brought to his post-war life an intellectual toughness which neither foes' malice nor friends' kindness has weakened"

self would reject this comparison with a contemptuous snort—can be heard in his verdict on the combat he endured:

Man is very brave. His patience and endurance are truly wonderful. Perhaps he will learn, one day, that wars and calamities of nature are not the only occasions when such qualities are needed.

There is a Pascalian quality also about his comment on the last days of his friend and master Macmahon Ball: 'The sadness of great years—the hopeless sadness of impending finality—spared him no more than it spares any old man.'

Unlike certain military heroes who resemble scared rabbits after their first steps back in civvy street, Mr Ryan brought to his post-war life an intellectual toughness which neither foes' malice nor friends' kindness has weakened. This virtue, surely, gave exceptional force to his condemnations of Manning ▶

Clark. He was not the first to query Clark the sage: Hal Colebatch, John Carroll, Claudio Veliz and Edward Kynaston had all seen off Clark's pretensions as magus in the early 1980s, while Peter Shrubbs's *Quadrant* essay 'Culture and Stuff' had poked fun at St Manning back in 1978. But then these authors had not published Clark's writing, Mr Ryan had. Just as his former status as Clark confidant sharpened his anguish at having to become Clark's prosecutor, so it envenomed the pens of Clark's remaining groupies. Similar abuse awaited Jeffrey Masson when, having all but become Freud's regent

"Swift, Dr Johnson, Orwell, Housman ... have not simply influenced him; they have now entered, as it were, his DNA"

upon earth, he afterwards told enough hard truths about Freud to be expelled from the holy of Manhattan psychoanalytic holies.

That which Masson had already done for Freud's standing, Mr Ryan did for Clark's. In other words, he ensured that belief in his target's historiographic splendour could henceforth be maintained only by the intellectually impoverished. Since this belief had pretty much been confined to our intellectual paupers all along, there were necessarily limits to what Mr Ryan could effect. Now that he has effected it, these limits can be cited without enfeebling Mr Ryan's own conclusion. Was Clark really worth powder and shot? All right, any hardback-diatribes-manufacturing machine funded by our taxes might be worth powder and shot; but the antics of Stuart Macintyre, not to mention Humphrey McQueen, surely surpass in horror anything in the verbiage of their idol. Not that Macintyre is likely to trouble anyone further after receiving this broadside from Mr Ryan: 'Macintyre called me a coward. It is not an accusation I often face and I cannot, offhand, recall the name of any survivor.'

The depth and range of Mr Ryan's own reading would soon have soured him on Clark's makeshift grandiosity. Swift, Dr Johnson, Orwell, Housman:

these writers appear to move him the most. They have not simply influenced him; they have now entered, as it were, his DNA; amidst the variegated polyphony of his mind they form the ground bass. It was absurd to suppose that a man of such mental vigour would be seduced by Ern Malley's wiles, or by Ern's eulogistic—though equally non-existent—sister Ethel. For sheer wit, Mr Ryan's 1993 squib 'The Unimportance of Being Ernest' takes much beating.

If Ern was the ... atomic warhead, lethally loaded with radioactive literary waste, Ethel was the ballistic missile for its delivery ... One poem had spoken of 'towers of enteric substance,' but [Max] Harris heeded not the warning. It was enteric substance all right, and he trod firmly in the middle of it.

A knowledge of evil never does one's brain any harm, and Mr Ryan realizes only too well how deficient the Macintyres and McQueens of our age are in it. This perception enables him to begin discussing a biography of Himmler by observing: 'Forty-five years on, the name Heinrich Himmler has shed not one shiver of its sinister dread.' Alas, he is here grossly sanguine. Those who somehow survived Hollywood's recent, loathsome travesty of Terence Rattigan's *The Browning Version* will remember that it changed Rattigan's line 'the Himmler of the Lower Fifth'—words which in the original play bear a constant motivic charge—into 'the Hitler of the Lower Fifth.' Presumably the film producer did some market research into the cultural literacy levels of orangutans (or, with a still greater spiritual effort, steeled himself to survey the cultural literacy levels of American pubescents) and there discovered that while the name Hitler inspired in one or two respondents a twinge of groggy recognition, the name Himmler meant nothing, so would need to be expunged. Chalk up another moral triumph for post-Christian education.

Talking of which, maybe even Mr Ryan has never bettered his 1986 onslaught—first published in *The Age*!—on Victoria's pedagogues.

My picture of the average school-teacher is of a person slack-twisted, idle, greedy, feeble, disaffected, subversive, dogmatic and disturbed. (None too bright, either; and, if male, probably bearded as a means of telling the difference) ... So long as teachers permit their leaders to project such a character, they must pardon the public if it thinks them

all like that, particularly in government schools.

Unfortunately Mr Ryan is too much of a gentleman to indicate here the true cause of our educational crisis: the Bolshevizing of our school system, a process which its advocates coyly prefer to describe as 'State Aid'. What conceivable faith can we retain in educational competence—never mind excellence—when sloths, louts, Pelagians and sexual degenerates grow as fat on our taxes in the so-called private sector as they do in the openly public one? Where, domestically, can educational competence now be found, except either in home-study or in the handful of precocious Catholic, fundamentalist Protestant and Orthodox Jewish schools which openly reject State bribes?

As the ability even to ask such questions recedes further and further from the range of permissible or, indeed, imaginable human activities, the example of a Peter Ryan grows ever more welcome. It was he who, in *The National Times*, defined the great religious transformation which overtook his countrymen in his lifetime as the delusion that 'All must now be done by the unfeeling, inefficient and expensive apparatus of government.' And, in the same essay:

I have watched fascinated for 30 years while Australia's lower middle class has converted the state apparatus into a gargantuan pork-barrel, in which their prehensile fingers constantly dip. Their empire they found at home, without the slightest risk of shipwreck, sunstroke or eating by cannibals.



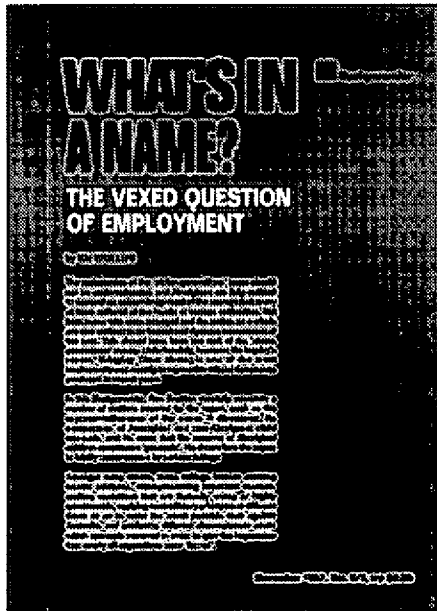
Sydney-based writer, editor and radio broadcaster R.J. Stove was educated, as Osbert Sitwell's *Who's Who* entry almost put it, while on holidays from two NSW schools.

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REVIEW

FEBRUARY 1998

Recent IPA Publications



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In this Backgrounder, Ken Phillips shows that, even under our relatively restrictive legal regime, there are other, non-traditional forms of working relationships available and in use. These concepts have the potential in the long run to revolutionize our notion of employment. IPA Backgrounder, November 1997, \$8.00.

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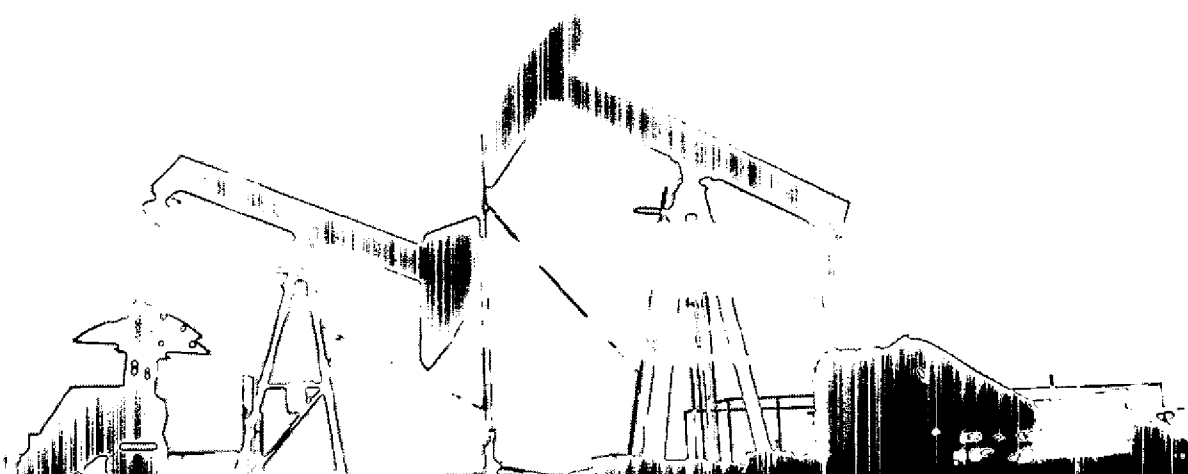
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