

Papers on Parliament No. 22

February 1994

Views of Parliamentary Democracy

Published and Printed by the Department of the Senate
Parliament House, Canberra
ISSN 1031-976X

Papers on Parliament is edited and managed by the Research Section,
Department of the Senate.

All inquiries should be made to:

The Director of Research
Procedure Office
Senate Department
Parliament House
CANBERRA ACT 2600

Telephone: (06) 277 3057

The Department of the Senate acknowledges the assistance of
the Department of the Parliamentary Reporting Staff.

ISSN 1031-976X

Cover design: Conroy + Donovan, Canberra

Papers on Parliament No.22

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

Contributors to this issue

Ferdinand Mount, Editor of *The Times Literary Supplement*.

Kathy Martin Sullivan MP, Member of House of Representatives for Moncrieff.

Professor Michael Crommelin, Zelman Cowen Professor of Law, Dean of the Law School, University of Melbourne.

Professor Geoffrey Brennan, Director, Research School of Social Sciences, Australian National University.

Contents

Parliament and the Governance of Modern Nations	1
--	---

Ferdinand Mount

Women in Parliament — Yes! But What's It Really Like?	15
--	----

Kathy Martin Sullivan MP

Mabo — The Decision and the Debate	31
---	----

Professor Michael Crommelin

Australian Parliamentary Democracy One Cheer for the Status Quo	45
--	----

Professor Geoffrey Brennan

Parliament and the Governance of Modern Nations

Ferdinand Mount

I should start by confessing that I am here under false pretences. I can make no claims to being a qualified constitutional lawyer, let alone to being a professor of public administration. What little I know, I have learnt from scratching around the edges of British politics for a period that is now frighteningly close to thirty years: from outside as a parliamentary columnist and leader-writer; and from more or less inside as a party official, a think-tanker and temporary civil servant. The best I can offer is one eyewitness's account of how the British are governed in the second half of the twentieth century, in the hope of identifying some of the nagging problems and even one or two of the answers and, finally, very tentatively, enquiring what, if any, relevance there may be to your own situation here in Australia.

This is not an easy task to carry out, since so much of our constitutional history has been written by people who wish to smooth things over, who wish to emphasise the continuity of our institutions at the expense of the substantial and often violent change which has taken place. Theorists of our present constitutional arrangements are in cahoots with this. They too are unashamed of resorting to what A.V.Dicey and Sir Ivor Jennings both call 'useful fictions' to disguise the violence of the change.

What Dicey and Jennings fail to describe is the *thinning* of the system. Not only do we see the gradual whittling away of the rights and privileges of outside institutions — whether local, professional or clerical — by the claims of the central government, we also see the simplification and streamlining of the group of central institutions. Parliament, originally seen as an external check on royal power (indeed, it first met outside the boundaries of the royal palace) becomes internalised. 'Parliament-and-the-King', so to speak, becomes 'Parliament-in-the-King' and then, finally, after the struggles of the seventeenth century, 'the King-in-Parliament'. And then, over the succeeding two centuries, the House of Commons itself becomes a monolithic power, as the House of Lords drops down to become an assistant, subordinate chamber.

In recent decades, it is true, certain restive stirrings have been noticed. Lawyers like Lord Scarman have become discontented with the total subordination of the courts to parliament. In his 1974 Hamlyn lectures, *English Law: The New Dimension*, Scarman harks back, somewhat wistfully, to the days when judges were not so compliant, such as the declaration of Chief Justice Coke in *Doctor Bonham's Case* (1610) that 'the common

law will control Acts of Parliament, and sometimes adjudge them to be utterly void'. Scarman records too the verdict of Sir Frederick Pollock that 'the omnipotence of Parliament was not the orthodox theory of English law, if orthodox at all, in Holt's time'.

From the point of view of public debate, these strands in English constitutional history are now almost forgotten. Coke, after all, is now remembered in the orthodox history as a defender of the rights of Parliament against the Crown, not of the rights of the judiciary against Parliament. Scarman, of course, has an ulterior motive for reminding us of them. The gleam in his eye is for a new constitutional system of checks and balances: 'I would hope that a supreme court of the United Kingdom would be established (we already have its embryo in the judicial committees of the House of Lords and the Privy Council) with powers to invalidate legislation that was unconstitutional and to restrain anyone — citizen, government or even Parliament itself — from acting unconstitutionally'.

And even the most complacent glorifiers of the *status quo* have been unable to disguise their disquiet about the growing power of the Prime Minister. As far back as the 1860s, we find Bagehot declaring that 'we have in Britain an elective first magistrate as truly as the Americans have an elective first magistrate'. Morley, in his life of Walpole, twenty years later, asserts that the Prime Minister's power is 'not inferior to that of a dictator, provided that the House of Commons will stand by him'. Laski deduced from the political dramas of 1931 that 'our government had become an executive dictatorship tempered by the fear of parliamentary revolt'. So you will see that Lord Hailsham's view, expressed in his 1978 Dimpleby Lecture, that we were suffering from the perils of 'elective dictatorship' has quite a long ancestry.

My friend Professor Kenneth Minogue of the London School of Economics, who is not unknown to many of you in these parts, believes that on the whole there is nothing much wrong with our present constitutional arrangements and, indeed, that more perils are involved in the present mania for devising fresh arrangements than in leaving the *status quo* alone, adjusting it now and then to meet this or that inconvenience. In particular, he believes that this fear of an elective dictatorship is misplaced; to him the idea is a contradiction in terms: dictators do not get properly elected or, if they do, they then make damn sure they do not get unelected.

I am not sure quite how accurate this is as modern history; surely dictators do sometimes get legitimately elected only to start dictating later on. Be that as it may, we should surely get down to cases, and for us the most recent spectacular case which gave rise to the accusation of elective dictatorship has been the poll tax, or community charge as it was officially known.

As it happened, I did briefly sit in on the Cabinet discussions on the reform of local government finance back in the early 1980s. The option of a poll tax — that is, a flat rate local tax to be paid by every single adult in a locality — was ruled out instantly. Its defects were so obvious as to be scarcely worth debating: if everyone was to pay such a tax, then it would have to be set at too low a level to make a worthwhile contribution to the town hall treasury, and even then there would have to be dozens of concessions and exemptions: for students, the elderly, the unemployed, the sick, the mad, nuns and monks, and so on. There was no example in our history of such a universal flat-rate tax being workable. Worse still, high-spending loony left authorities would be quite happy to set high poll tax rates and watch the government take most of the blame.

Now all these points were made to the Prime Minister, Mrs Thatcher, over and over again, by officials and ministers in small meetings, in Cabinet committee and in Cabinet itself, not least by the then Chancellor, Nigel Lawson — and the opposition of a chancellor to a new tax normally is and ought to be enough to scupper it. But Mrs Thatcher persisted, largely for reasons which dated many years back, when as Ted Heath's spokesman on these matters she had been saddled with a pledge to abolish the domestic rates. Ironically, at the time, as the daughter of an alderman, she was rightly sceptical of the wisdom of abolishing such an ancient and easily collectible tax. But she had to go on record with the pledge, and she was damn well going to fulfil it, whatever the wimps and faint-hearts said.

And she did. The result was catastrophic. The Government's popularity — and her own with it — sank to near zero. Anti-poll-tax riots disrupted the sleepest of our cities. Local government revenue was ruined for a generation thus necessitating huge increases in both financial contributions and legal control from Whitehall and helping to pump up the Budget deficit to its present alarming height. Mrs Thatcher never recovered and was defenestrated. Without the poll tax, she might well have clung onto the leadership and perhaps even won the general election.

Now the defenders of the *status quo* say: well, there you are, you see, in the end, the system worked: both she and the hated tax were thrown out. Public opinion acted as an external pressure. Just as effective as any finicky separation of powers.

But this seems to me a grotesquely low expectation to have of a constitutional system. Do we really not need to worry about the prime minister's power to ram through a foolish law in defiance of public and parliamentary opinion, simply because that law will be reversed five years later, after, in this case, having undermined the civil peace and destroyed a large part of the tax base — not to mention, disposed of a prime minister who was perhaps the most successful domestic reformer since Sir Robert Peel? Surely we want to do better than that.

Since we are paying for all these elaborate pieces of deliberative apparatus — the Cabinet and the Cabinet Office, two Houses of Parliament and all their flock of select committees — do not we want them to perform part at least of the work of scrutiny, criticism and amendment which has been allotted to them? If we are to restore that thicker texture of political decision which has been thinned out over the past century, we need to look at what parliaments can do and what they cannot, what they used to do effectively and where they have lapsed into relative impotence.

As remonstrators, for example, the modern members of parliament equal if not surpass any of their predecessors; backed by the inflammatory power of the modern media, strengthened by the ammunition provided by the new array of select committees (now covering virtually the whole range of departmental activities), they have a variety of opportunities to ventilate the grievances of their constituents and those of other people and interests; they can put an oral question, hand in a written one, demand an adjournment debate, weave the rehearsal of the grievance in a speech (although there the competition of 600 members of parliament trying to catch the Speaker's eye is keen), they can buttonhole ministers in the lobby, or write to him at the ministry, or suborn one of the minister's quiverful of junior ministers or the parliamentary private secretary.

Meanwhile, back at the ministry, the civil servants know that to deal promptly and effectively with any problem rising out of parliament is the shortest way to the minister's ear; if they keep a minister out of Commons' scrapes, the minister will be all the readier to listen to their advice on policy. Thus what might be called the 'machinery of remonstrance' is pretty well greased these days, and this is not to be undervalued. Remonstrance was, after all, one of parliament's earliest functions. It is one that continues to give life and spirit to the Commons of today, and it constitutes a useful avenue of justice to supplement the regular courts and tribunals. If Parliament has declined, it is not in this respect.

When we turn to the scrutiny of legislation, the picture is quite different and a good deal more discouraging. The principle that the government of the day has the right to use its majority to get its business through without impediment has made a mockery of all the subtle machinery of the committee and report stages of bills. Only a somewhat shamefaced conspiracy between the front benches and the parliamentary press lobby prevent the scandalous spectacle of committee proceedings being more fully brought home to us: the ministers wearily reading out their briefs, the opposition spokesmen trotting out the same old amendments purely for the purposes of party rhetoric and without any serious hope of improving the bill, the government backbenchers — pressed people present merely to make up the government's majority — reading the newspapers or answering their letters; it requires only a few top hats, brocade waistcoats and cigars to complete a tableau of almost Regency sloth.

Occasionally, the government whips do make a mistake and nominate to a committee on a bill a couple of unreliable backbenchers who, out of boredom, spite or, now and then, a genuine desire to improve the bill, vote with the opposition to pass an unwelcome amendment: however, nine times out of ten, the government will insist on the amendment being reversed at the report stage.

Nor, except on uncontroversial matters, do amendments passed by the House of Lords suffer a happier fate, no matter how exhaustive and expert the debate in the upper house may have been. Once again, the Government will steamroller the bill back into its original shape. Even when acting within the constraints of the 1911 and 1949 Parliament Acts and the 'Salisbury Rules' (the convention by which the upper house restrains itself from wrecking bills which the country has, by implication, approved at a previous general election) the Lords now know that the Commons will automatically overturn its verdict. The War Crimes Bill of 1990 was not a money bill, nor had the question come up at the preceding general election, and yet the Commons was outraged by the Lords' rejection of the bill, and Mrs Thatcher did not hesitate to reintroduce it; nor did Mr Major, when he became Prime Minister, despite the fact that he had originally voted against the bill. No incident could more clearly demonstrate the Commons' view of the unchallengeability of its wisdom.

Oppositions may use the weapon of delay, either for purposes of party advantage or because they genuinely believe the bill is a bad bill. But here, too, the government has become increasingly impatient of opposition. The most ludicrous episode in this particular erosion of tolerance was the decision of the Major Government to impose a 'guillotine' on discussion of the Dangerous Dogs Bills; in fact, they forced the Commons to take all the stages in a single evening, 10 June 1991.

There is clearly an ever-increasing tendency for government to resort to the guillotine. It is sometimes said that there is a vestigial safeguard in the existence of the custom that the government does not guillotine bills of 'a constitutional character'. This custom seems one recently more honoured in the breach than the observance: the Callaghan government attempted, unsuccessfully, to guillotine the Scotland and Wales Bill 1976 (the only occasion since World War Two when a guillotine motion was lost) and, undeterred and unashamed, tried again with the similar bill the following year and had better luck. Other bills of an important rule-making or constitutional character which have been guillotined in recent years include the British Nationality Bill of 1981 and the Local Government Bill of 1985 (which abolished the Greater London Council and the six metropolitan counties) and, most spectacularly, the bill which passed into our law the Single European Act of 1986 as the European Communities (Amendment) Act 1986.

There *have* been occasions on which the Commons has, by luck more than calculation, happened to intervene at a decisive moment. On the Falklands, for example, it was the savaging of the Foreign Office Minister, Mr Nicholas Ridley, by the 'Falkland Islands lobby' on the back benches which deterred the British Government from pursuing the idea of a lease-back solution to the dispute with Argentina over the sovereignty of the islands. Then, later, it was the bellicose indignation with which the Commons received the news of the Argentine invasion which helped to cause the sending of the task force. More significantly, the defection of so many Conservative members of parliament in the vote of 8 May 1940 on the Norwegian fiasco did tip the balance and bring about the resignation of Neville Chamberlain and the accession of Churchill.

But these are rare exceptions in which members of parliament, with the wind of public opinion filling their sails, have had the chance to intervene at a decisive moment. They are not typical of the usual place of parliament in the scheme of British decision making, which is retrospective and compliant. What then do we want parliament to do, what do we want it to be like? There is one school of thought which wants parliament to be, in Crossman's phrase, 'the battering ram of social change'. The executive would be, as Laski put it, merely 'a committee of the legislature'.

Far from these ideas being sinister and foreign in their origin, they had a homely ancestor in Bagehot's view that the Cabinet was in substance only 'a committee of the party majority', which had delegated to it, for greater convenience, the day-to-day exercise of the power that had been entrusted to it by the electorate. The Cripps-Attlee-Laski reading was merely the logical culmination of the denial of the separation of powers. In a unitary state of this kind, the general will must flow unimpeded through both the legislature and the executive, unchecked, unbalanced, unchallenged.

The philosophy behind this approach appears to be a kind of vulgar-Rousseauism. What matters is to ascertain the General Will, and then to implement it with no 'ifs' and 'buts'.

This vulgar-Rousseauism brings us directly to a plain contradiction, though one which constitutional reformers, certainly those of Mr Benn's colour, are somewhat reluctant to confront. The more democratic (in the vulgar-Rousseauist sense) that you make parliament, the more unhesitatingly and unqualifiedly its votes and arrangement of business give effect to the will of the people, whether declared by implication at a general election or directly through a referendum, the less, inevitably, parliament can be

'parliamentary', in the first general early-nineteenth-century sense given in the *Oxford English Dictionary*: 'slow', 'deliberate', 'courteous' and 'attentive to the wording of commas and sub-clauses' (to the point of pedantry). The whole endless parliamentary process of refraction, revision and consultation can, in this perspective, be seen only as an elitist impediment. If by 'democracy' you mean the instantaneous, immediate, hot-and-strong breath of public opinion — which is what people often do mean — then parliamentary democracy is a contradiction in terms.

But if the intention is to deliver to the electorate steady, consistent and thoughtful government, which pays careful attention not only to the will of the majority, but also to the aspirations, fears and interests of minorities and to the advice and expertise of thoughtful critics, then the more parliamentary — the more indirect, refracted and laborious — the system becomes, the more likely it is to fulfil its function.

If we opt for this definition — a democracy which is genuinely parliamentary, indirect and representative rather than direct and participatory — then we will approach the reform of parliament with a much clearer and more confident sense of what needs to be done. We will want parliament, among other things, to deploy a kind of second-thoughts capability, to correct and improve on the first impulses of public opinion and the first political responses to those impulses. We will want to give members of parliament powers to amend or resist the more overweening or ill-considered interventions of government, however garlanded with mandates from the previous general election.

What devices, old and new, need to be considered as aids to a truly parliamentary democracy? At a rough count, I can discern half a dozen areas in which we might think about revising or reinforcing the vigour of our democracy. And in each of these areas there are a couple of specific proposals which are worth considering.

In this address, I simply want to list those possibilities, without trying to evaluate them individually. And then I shall end by making two general comments which will lead me, greatly daring, to make a further general comment on a related topic close to many of your hearts.

The first relevant area is the system of election to parliament. Here we might wish to consider some system of proportional representation — I will not go into the pros and cons. As it happens, I am lukewarm about proportional representation and rather more enthusiastic about the other leading contender in this area — fixed term parliaments (with some provision for an early dissolution where a government genuinely has lost its majority).

The second area is the procedures of the House of Commons. Here we might wish to establish conventions restricting the use of the guillotine, strengthening the independence of the select committees from the whips, and giving parliament the pro-active power to consider government proposals before they are set in concrete.

Then we need to consider the second chamber. There are a host of suggestions for making the upper house wholly or partly elected, as in the scheme suggested by Lord Home. The House might return to its regional, non-hereditary origins. It might also be more suitable for proportional representation than the Commons, since we might feel

that the sensitive and exact representation of opinion is more important here than the provision of a stable government majority which is so important for the lower house.

Then — the fourth area — we might want to entrench certain statutes or a certain class of statutes, by promoting that they may be amended only by, say, a two-thirds or a three-quarters majority in both houses. The entrenching statute would itself have to be covered by these provisos. Other forms of effective entrenchment might come through European institutions and declarations such as the European Convention on Human Rights.

The fifth area concerns the role of other legislatures, assemblies and codes of law, both superior and subordinate. I mean the whole corpus of European law, on the one hand; and the stabilisation and perhaps the entrenchment of local government institutions and the establishment of Scottish, Welsh and Northern Irish representative bodies within the United Kingdom.

Finally, there is the potential role for the judiciary as constitutional arbiter and protector against overmighty government.

Now the first thing I want to say about this list is that quite a few items on it are already becoming realities. The judges are increasingly losing their inhibitions in reviewing the actions of ministers; cases of judicial review have quadrupled over the past decade. And even the more adventurous applications are quite often entertained; the Home Secretary was found guilty of contempt the other day — something which had never happened before in recorded memory. The significance about Lord Rees-Mogg's unsuccessful application to the courts to declare the Maastricht Treaty unconstitutional was not so much its merit or demerit as the fact that in the old days nobody would have dreamt of taking such a case to the courts.

Then there is the European Community and the irresistible 'incoming tide' of European law, as Lord Denning called it. Superior law, to which the law made in our own parliaments must bow — as was known from the start and has now been clearly demonstrated in the *Factortame* case of the Spanish fisherman. And allied to the European law, there is the European Convention on Human Rights — not part of English or Scottish law yet but already taken carefully into account by our judges who do their best to reconcile their judgments with the convention wherever possible. So much so that Professor Leslie Zines has remarked that 'outsiders such as Australians see Britain in practical terms as having something in the nature of a Bill of Rights that is interpreted and applied by foreigners'. Sooner or later, I believe that we shall incorporate that convention into our law and so repatriate the judging.

The ever-growing influence of the European Community has even stirred the slumberous House of Commons into recognising that it must reorganise its procedures to take a more pro-active part in European law-making rather than condemn itself to an eternity of whingeing at *faits accomplis*.

Will we also see that long delayed reform of the House of Lords? Or some form of assembly for Scotland? Will the European Community finally twist our arm into adopting proportional representation for European elections (it already happens in

Northern Ireland) and thence for Westminster? None of these things is impossible. One or two of them may well come about over the next twenty years.

Defenders of the continuity fiction may retort: 'So what. The British Constitution is always changing — that is just what we mean by a rolling constitutional change. All you are saying is that the thing is still evolving'.

But this misses my point. For a century or more, the constitutional texture has been thinning. Each fresh development was a simplification and a concentration of power. Now each fresh development seems to be recomplicating the system and restoring to it something of that pluralism and distinct separation of powers which so attracted eighteenth century observers such as Voltaire and Montesquieu. It is my impression, too, that a similar desire for effective pluralisation is gaining ground throughout most of Europe, West as well as East.

Without intending a deliberate and systematic program of constitutional reform, we have increasingly felt that lack of the old checks and balances, and we have, almost unconsciously, to reinvent them. It may be that we shall recover some of the old virtues of our constitution almost by accident, rather as we were once said to have conquered and peopled half the world 'in a fit of absence of mind'.

My second general comment is directed more personally at the audience here today. You too may feel like saying, 'So what. Most of these proposals which you are now so timidly debating have been part of the Australian Constitution ever since we can remember. We have an elected second house, and we use proportional representation, both at federal and state level. Our Constitution is bulging with entrenched powers. Being a federation, we are familiar with the constitutional division and separation of powers. To us, this is all elementary stuff. Our constitutional concerns — and we do have some — are of a more advanced and subtle nature'.

Exactly so. I think your constitutional arrangements have not 'run thin'. You are stoutly entrenched and hedged about with protections against arbitrary government. We have only our political traditions and culture to rely on.

And this leads me to my final, rather cheeky point. Constitutional debate usually descends into technical detail, but, in the case of the debate about Australia becoming a republic, the technical difficulties do seem to me, looking at the question from a huge distance and shrouded in fairly dense ignorance, well, they do not seem insuperable. In framing a republic, you might wish to bolt on further safeguards: an entrenched Bill of Rights, a special constitutional court, and so on. You would have the difficulty of evolving conventions or statutes which would ensure that the Governor-General observed the proper restraints of a constitutional monarch. The minimalist position needs some fleshing out.

But the real question is and remains: which do you prefer? Do you find a greater source of pride in your traditions and your extraordinary origins, tragic and heroic at the same time as they were. Or in independence and breaking free of the stiff and dusty old links? Or is becoming a republic not so much a breaking away as a natural stage in the evolutionary process, just as self-government could be viewed as the natural progression from Governor Phillip's declaration that 'there can be no slavery in a free land, and

consequently, no slaves"? Or does uninhibited nationalism carry its own dangers, of overpoliticising the system and hence of corrupting it. Well, all that is obviously none of my business. All an outsider can say is that if you want to make the change you are pretty well placed to do so. We, on the contrary have quite a bit of work to do.

Questioner — I noted your comment about lukewarm support for proportional representation. Those of us in the Australian Capital Territory who experimented with the d'Hondt system can understand your reservation. While you are here, will you be taking the opportunity to have a look at this system of proportional representation as it operates in Tasmania, and as it will shortly operate in the Australian Capital Territory?

Mr Mount — You have struck an area of unrelieved ignorance here. I do not know anything about the systems you are referring to. My lukewarmness does not mean that I go so far as to think that any system of proportional representation may work as well as first-past-the-post in certain political conditions and certain countries and will not work in others. There is a general toing-and-froing of discontented countries. Italy is moving back towards first-past-the-post but there is a growing movement for proportional representation in one form or another in this country. I obviously ought to have a look at the systems you mentioned to see whether they provide encouragement or an awful warning.

Questioner — My question is directed at the British scene. I noticed that there was no mention in your speech about the situation of the republican movement in Britain. Would you care to make a comment?

Mr Mount — The republican movement in Britain had a brief, vigorous and excited flowering last year and then like some sort of desert flower which blooms once every one hundred years went completely quiet again. In my view, it was never nearly as serious as it had been, for example, in the middle of the nineteenth century when republicanism was extremely vigorous for a number of years until Queen Victoria somehow recaptured popularity. It has revivals and witherings.

In the wake of the scandals, tapes and the rest of it, I notice that there is an effort to forget. Indeed, some of the hyenas have now turned back into watchdogs of the monarchy and the vultures are singing like larks in favour of the virtues of the system. As far as we are concerned, for good or ill the question has gone very quiet again and I think it would take some fresh excitement to revive it. It is very different from here, obviously.

Questioner — My question follows in the converse of the previous question. It has long seemed to me that constitutional progress is finding ways of controlling those who rule us. What prospects do you see for improvement along those lines either in Britain or, if you care to venture your arm, here in this country?

Mr Mount — Not terrific. We have had a certain amount of experience with bright ideas which we thought would keep our rulers under our control — or under our control to a greater extent — which have then turned out to be fairly easily evaded. If we want to be optimistic, one or two things are moving in the right direction. For example, openness

in government, while lagging some way behind what you have here, has definitely begun to increase.

It is not simply that more documents are published at an earlier stage; the reform of the Official Secrets Act, removing the penal sanctions for the disclosure of large categories of public documents, has opened debate. The general atmosphere is a little more open. But that is not saying much when you compare it with the almost excessive secrecy of British government, which prevented serious discussion on, and an exchange of, the issues of the day.

Again, the select committees have not fulfilled all of the hopes placed in them. Indeed, the people who thought that they would really carve a swathe through ministerial discretion were obviously relying, rather naively, on the American system, which is within a quite different structure and lends itself to acquiring more power and independence for select committees.

But there are one or two signs. The best, the most optimistic, sign is a general feeling that the whole political process is up for question. When I was younger, that certainly was not the feeling. There was a rather sluggish acceptance of the secrecy, the lack of open discussion and of proper policy planning. We may conceivably be improving a bit, but I would not want to speak too highly on that.

Questioner — Although you have made out a strong case for comprehensive constitutional reform, you have not said anything much about strategies for bringing that reform about. It does seem to me that many nations are now wrestling with issues of major constitutional reform. A few months ago, three major nations had referendums on the same weekend — there were constitutional reform proposals in Russia, Italy and Brazil. I am not necessarily advocating the referendum as a way of doing this, but it does seem to me that we are not thinking hard enough, systematically enough and comparatively enough about the ways in which we might learn from each other in the tasks of implementing major constitutional reforms.

Mr Mount — I quite agree with you. One of the strengths of the status quo is the very large ignorance — among us, at any rate — of how other countries do things; that is, the tips about systems that we could pick up and import into our own. This is so even among people who are interested in these subjects. I have to stress that only a minority of people have this strange enthusiasm for politics and are interested in this subject to any great degree. Even here I think there is a lack of information and research.

But I am not sure that strategies are exactly what we need. We will get improvements only in piecemeal and often unintended ways. For example, judicial review, the questioning by judges of the way governments and ministers exercise their powers, is taking off. Although a couple of acts did make it easier, it is only recently that judges have said to themselves — and people who might apply it to the courts have said — 'Yes, we could challenge this'. Judges have said, 'When I look at it, they have not exercised their powers reasonably'.

So there is a growing consciousness of the potential there. The same could apply even within the House of Commons. As I say, it has begun to agitate the procedure committee very slightly. There is a feeling that 'Perhaps we should get things the other way around

and look at all this European stuff before, and not after, it is set in concrete, and reorganise our timetable'. Often it is something as simple as reorganising a timetable.

Again, with the European Convention on Human Rights, nobody asked the judges to suddenly start taking it into account when making judgments. After all, we signed it donkey's years ago — in about 1950 or 1955 — but we did not pay any attention to it. It has been there all of the time. If we make advances, they will be piecemeal — bit by bit. This is where I differ very strongly with the grand schemes for constitutional reform put forward by some of our policy institutes which do not seem to me to have a hope in hell and always have in them one silly proposal which opponents can seize on and say, 'This is a lot of daffy idiocy'. One has to proceed bit by bit.

Questioner — You mentioned a number of checks on the power of executive government and the legislature. One of the most obvious checks in the system would enable the people directly to either institute legislation or remove existing legislation. Systems which do this exist in most American states and a number of European countries. But in this country they have been treated rather warily and regarded as associated with the fringes of politics, although others have seen them as a way of dealing with the fringe issues — getting them out of the way — and getting on with the main ones. Have systems such as this been considered for implementation in Britain at all? Do you see any scope for this kind of thing in systems such as yours or our own?

Mr Mount — The answer to your question of whether they have been considered is pretty universally no. The answer to your other question of whether there is, or could be, a role for them, I think, is yes. You could almost start this voluntarily. If, say, a local authority took a fancy to doing things this way, it could perfectly well, at every local election, offer a sort of second sheet to the ballot paper in which 'proposition 33' to do this or that could be added. You could have a vote on it, and the council would then feel itself bound to carry it out. It would be interesting to have an experiment of that sort, but I do not think anyone has got around to thinking about that much.

Questioner — I would like to come back to the question of proportional representation (PR). It seems to me that the choice is not so much between a first-past-the-post system or a PR system as such, but whether or not you have a multi-member system. Taking the Australian experience, even though a proportional representation system is in operation for the lower house, because it is a single member constituency it works in a practical way in that only one of the major parties' candidates ever gets elected, with insignificant exceptions; whereas in the Senate, which does effectively constitute a multi-member constituency, a number of minority candidates are always successful.

Following on from that, if one were to have a PR system in the lower house with multi-member constituencies, that would give rise, presumably, to a considerable increase in the number of minority candidates. Obviously, that would lead to a quite different form of government. So it seems to me that the choice is either to carry on in much the same way as far as the lower house is concerned — that is, you have Tweedledum and Tweedledee; two major parties which alternate between terms of office — or to go to what may be represented by, say, the Dutch system or the Italian system with governments of a combination of interests, coalitions, or what have you. Of course, the

downside is that there is much less stability of government. Could you offer any comments on those two alternative systems?

Mr Mount — Yes. Oddly enough, we did have in England between about 1867 and 1885 a sort of multi-member system which had been pleaded for, at the time of the passing of the great reform bill and the first one in 1832, by the poet Winthrop Mackworth Praed. It retained its attractions and was finally instituted in 1867. That produced more minority members, but then politicians — I cannot remember who — abolished it for low political reasons for party advantage. It seemed to work perfectly well.

In Britain, of course, its effect would probably not be quite the same. I do not know about Australia, but the effect would be unquestionably to return many more Nationalist members in Wales and Scotland and a few more Liberals in England, but I doubt whether it would lead to the sort of wholesale change in the variety of representation. In a way, I think that makes it quite attractive because it would answer the grievances of those smaller parties which say that they do not get a fair chance because their support is spread too thinly. But I do not think it would lead to the drawbacks of the Italian system and the fragmentation into dozens of parties. It is worth thinking about, but if I had to choose I would stick with first-past-the-post for the lower house and perhaps have a multi-member upper house.

Women in Parliament - Yes! But What's It Really Like?

Kathy Martin Sullivan MP

I understand that, in addition to being the longest serving woman MP in the Australian parliament, one reason that I have been asked to give this address is my unique experience of the Australian parliament, namely being the only woman to have served in both the Senate and the House of Representatives.

When I paused to think about what I might talk about to acknowledge the significance of 1993 being the fiftieth anniversary of the election of the first women to the Australian Senate and the House of Representatives, it came as something of a shock to me to realise that I have been serving in parliament myself for only a little less than half that time.

Therefore, my perspective cannot help but be a somewhat personal view. As I tried to determine as objectively as I could the significance of that personal experience of the past twenty years, I realised two things: firstly, how much has changed in the past two decades; and, secondly, how much remains the same.

Whilst I do not intend today to make this occasion a totally personal indulgence, I am aware that my experience is not wholly unique and that what I have lived through has been shared by many other women in parliament (both within Australia and abroad) and also by women in the world outside political life.

Nevertheless, if I may, I will go back to my beginnings for a couple of minutes.

The May 1974 election set few records with respect to women being elected to the national parliament. Four women — two Labor and two Liberal — were elected to the Senate, and one — Joan Child — to the House of Representatives. Only Joan Child's election was truly newsworthy, she being the first Labor woman elected to that chamber. Of the four women elected to the Senate, Margaret Guilfoyle had been a senator since mid-1970 and there had been more than four women in the Senate simultaneously on previous occasions.

However, the media hype that accompanied the election of five women to the Commonwealth parliament in May 1974 was quite extraordinary.

This was not explained by the numbers elected — as I have already said, no records were being set — but it was an indication of the climate of the time. Dorothy Tangney and Enid Lyons might have been surprised by the hullabaloo. It was almost as though their truly momentous election 31 years earlier had not happened.

Nevertheless, the public commotion was indicative of the public expression of interest — or curiosity — emerging about the 'new' woman and her expectations with respect to her role in the scheme of human endeavour and, even more fundamentally, her assertion of the right to choose her role and not be confined by other's notions of women's biological 'destiny'.

This interest was to become a two-edged sword for many women in public life over the years to follow.

While she herself denied that her objective had ever been to blaze a trail for women, Senator Dame Annabelle Rankin (who had left public life three years before I entered it) was my greatest help. By doing her job as a Queensland senator well, she had shown that women senators could be at least as capable as the men were.

Many Australian people in the early 1970s expected a woman entering public life to fit one of several preconceived stereotypes: not quite 'normal', even 'downright butch'; strident or sexually manipulative; whiz-kid or vacuous; bra-less or firmly corseted, 'hairy-legged' or, if not actually a grandmother, at least having the decency to look like one.

These preconceptions were counterbalanced a little by one of the more endearing Australian traits; namely, a sentimental inclination to support the underdog. Countless were the occasions during my eleven months as a Senate candidate travelling the state of Queensland when men — average blokes — that I met, uttered the words, 'I think women should be given a go'.

Annabelle Rankin's contribution to my career was also frequently and spontaneously expressed, namely, 'Dame Annabelle Rankin was a good member of parliament. If you are as good as she was, you will be okay'.

Thus, feeling as though I was viewed as some extraordinary combination of Dame Annabelle and Norman Gunston, I was propelled into the Australian Senate.

The title of my speech comes from what followed — an experience that I know most women in public life have had. Once elected, many were those who would commence a conversation with me with the question, 'What's it like being a woman in the Senate?'.

When I replied, 'It's really just like being a man in the Senate', they would smile knowingly or impatiently and say, 'Yes, but what's it *really* like?'.

Well, in those days at least, it was really like having a split personality, and continued to be so throughout the 1970s. The contrast between expectations of me by senators on the one hand, and by electors on the other, was stark.

In the Senate itself, it was just like being a male senator. The male senators had long since become used to working with women and had few preconceptions about any of their new colleagues, whether men or women. The workload in the Senate was very heavy, particularly with its committee responsibilities. All that was expected of any senator was that he or she approached the job as part of the team and carried a fair load.

Most likely, the memory of Dame Annabelle Rankin, having been both a Whip of many years standing and a Minister, also meant that the men were used to working not only with women, but with women who were in positions of authority — an experience totally atypical of Australian society in those days.

On the other hand, the electorate was quite a different proposition. Whilst it was not unkind to me — and I never encountered personally any aggressive rejection or challenge (although I was aware that quite a few women were unsure what my significance to them was) — people generally were a little wary. As I travelled the state of Queensland in a different town each day, I was aware of a phenomenon that I termed 'looking for the second head'.

By that I mean that there was a general public expectation that a woman doing something as different as entering the national parliament had to be very different indeed from the average human being. I suspect that this was due in no small measure to the fact that it was, by then, more than three years since Dame Annabelle Rankin had left public life, and that there had been local government elections in early 1973. The elections had two interesting results.

Firstly, there had been quite a dramatic change in the composition of local shire councils which meant that many councillors and chairmen had never previously met Dame Annabelle.

Secondly, and quite coincidentally, there had been a surge in the number of women standing for election to local government in Queensland (indeed, throughout Australia). As people attempted to adjust to the notion of female councillors having the power to affect their lives, along I came — a young, female, blonde, divorcee senator — and really scrambled all their preconceptions about public figures.

The end of that story is that when, like Dame Annabelle, all we 'different' ladies made it clear by our actions that we just wanted to get on with doing the job, the same as any man would have, the second head apparently faded from view. Then we could get down to business as the men realised this and visibly relaxed. Well, most of them did!

By the early 1980s, I was aware that I evoked neither curiosity nor resentment as I travelled the state doing my job. I wondered whether this change meant either that people were more used to women in public life and we were no longer such a curiosity or oddity, or whether the general public was just more used to me. In retrospect, I suspect the explanation was a bit of both.

I believe that the 1980 federal election was a true watershed in Australian politics, and an examination of the statistics of women elected to parliament — both state and national — tend to bear this out. The outstanding aspect, to me, was the fact that three women were elected to the House of Representatives.

On only one previous occasion, and more than thirty years earlier — the brief three years of the 1946-49 parliament — had more than one woman served in the House at a time. In 1980, this event passed without public remark, which was in itself remarkable.

At the time I could not help but think back to the ballyhoo of 1974.

As the eighties progressed, however, I started to become concerned about a complacency on the part of some women with respect to their attitudes towards efforts to further the status of women; in particular, the attitude of young female journalists. Externally, the situation appeared encouraging enough. The number of women in public life was still increasing, though not at nearly the rate of the previous few years. However, time was to show that it had almost plateaued, a fact that many political women were slow to realise.

The activities of the 1970s had their reward in the increasing number of women in public life in the 1980s. The smugness of the mid and late 1980s resulted in the rate of progress being markedly slowed in the 1990s.

Whilst the proportion of present Senate membership that is female appears encouraging, I believe the figures are misleading. If one looks at the proportion of women who represent the major parties — that is, the government and the coalition — the story is rather different.

To go back to the beginning for a few moments. Following the election of Tangney and Lyons in 1943, women appeared to make steady progress at the Commonwealth level.

After the 1946 election, the number of women in the Commonwealth parliament increased from two to four in the Senate, and from one to two in the House of Representatives. In 1949, this rose to a total of five women in the federal parliament — four in the Senate and one in the House of Representatives.

However, when Dame Enid Lyons retired at the 1951 election, it was to be 15 years before another woman was elected to the House of Representatives.

That woman was Kay Brownbill, who served only one term from 1966 to 1969 following the 1966 federal election landslide to the Holt government. In the Senate, the numbers remained at four until the 1955 election when they increased to five and stayed at that level for the next nine years, until the 1964 Senate election. They then steadily dwindled. There were four after the 1964 election, three after the 1967 election, and only two remained after the 1970 election. The 1974 election only brought the Senate numbers back to the level of ten years earlier, but it also saw Joan Child's first election to the House of Representatives.

Joan Child's term lasted only from May 1974 to December 1975. Again, there was a gap in women's representation in the House of Representatives for no clearly discernible reason.

In 1975, six women were elected to the Senate and this number remained static until 1980, when eight women were elected to the Senate and three to the House of Representatives. Early in 1981, the number of women in the Senate increased to ten

when Florence Bjelke-Petersen and Margaret Reid were appointed to fill casual vacancies. Another landmark: double figures in the Senate for the first time.

Following the 1983 election, it appeared that the numbers of women were inexorably increasing. The increase was actually only in the House of Representatives, and it was a very small increase even so. The apparent increase in the Senate since then has been virtually all due to the increasing representation of the Australian Democrats and the independent senators (Nuclear Disarmament or Greens), most of whom are women. To illustrate, the combined number of National, Liberal and ALP female senators following the 1983 election was 12 out of a total of 13 female senators. In the 1984 and 1987 parliaments, these parties' combined totals rose to 13 out of 18, and the 1990 election produced only the status quo — 13 out of a total of 19 female senators.

In 1993, the number of female senators dropped — for the first time since the 1970 election — to 16 senators, only 11 of whom came from the government or the coalition — fewer than the total of a decade earlier.

If it were not for the Democrats and the Greens, the proportion of women in the Senate would actually have declined. As it is, the decline in the female Senate representation from the major parties is a matter that men and women of all political persuasions should view with some concern.

Over those same ten years, the number of ALP female Members of the House of Representatives has fluctuated: it was six after the 1983 election, seven after the 1984 election, eight after 1987, falling back to seven after 1990, then rising again to nine after the 1993 election.

The number of Liberal women in the House of Representatives remained zero until my election in 1984 — the first in fifteen years, the second in thirty-three years and the third from non-Labor Members of the House of Representatives in the eighty-four years of federation.

No additional Liberal women were elected until the 1990 election, when two were added and, following this year's election, there are now four.

Until the 1990 election, no woman Member of the House of Representatives was given a 'safe seat'. All women, except me, won their seat from an opposing party. My seat of Moncrieff was considered on paper to be National Party, and the pundits all wrote off my chances of winning in 1984. Therefore, whilst it was a safe non-Labor seat, it was not a Liberal seat for the taking.

Janice Crosio, the Labor member for Prospect since 1990, is the first woman to have received endorsement for a seat held by her party, and Judy Moylan, the Liberal member for Pearce, followed suit in 1993.

The idea that women should be endorsed for anything other than seats difficult to win has therefore been a deeply rooted one.

All this is not to say that a number of these women have not made their seats safe in the interim — that, in fact, has been closer to the general rule than not.

Perhaps it is the realisation of this that has prompted moves within both the Labor and Liberal parties in recent weeks to press the subject of female parliamentary representation — in Labor's case, there is the beginning of a move towards looking at the feasibility of parity of male and female representation, whilst the Liberal Party has set up a group to devise ways to increase its female representation in parliament — an objective which will be substantially aided by the statement from its parliamentary leader, Dr John Hewson, that he personally would like to see more women in parliament. (The impact of Dr Hewson's public support for the principle should not be underestimated.)

Nevertheless, resistance to effective equality has lingered. When, following the 1987 federal election, Prime Minister Hawke had to go to considerable lengths to ensure that at least three women were elected by Caucus to his ministry, some male politicians still chose to call this tokenism.

When I had occasion to point out to a large group of these men that three women ministers out of a total of thirty, namely ten per cent, was not really tokenism but could probably more fairly be described as power sharing, many were the blank faces I gazed on.

This year's appointment of five women to the opposition front bench — and it would have been six if Senator Bishop had accepted the offer made to her — is a very substantial move forward.

The apparent misconception of the 1980s that the progress of women in parliament was a fixed aspect of the political scene was reinforced by legislative progress. The early and mid-1980s contained some legislative landmarks for women, namely, the Sex Discrimination Act 1984 and the Affirmative Action (Equal Employment Opportunity for Women) Act 1986.

The Sex Discrimination Act did not have substantial public opposition, although it is noteworthy that inclusion of sexual harassment as a discriminatory no-no raised a few worries amongst men and employer organisations in the community. The reasons for this have never been researched and can only be speculated on. (I have my own view naturally, but I shall not indulge myself on that score on this occasion.)

The Affirmative Action Act, however, had a much rougher passage both in parliament and in the public arena. (The parliamentary story is well documented in Ann Millar's book *Trust the Women*.) Apparently, when one moved past the principle of equality to the idea of tackling actual obstacles, nerves — public and private — were touched.

My own behind-the-scenes experience bore out to me that there was a quite deeply felt opposition to this Act, not least because it was generally misunderstood to be introducing positive discrimination and quotas in employment for women, rather than as identifying and eliminating unnecessary obstacles to women's employment and promotion.

Many men were prepared to accept the principle of equality but they reacted vociferously and vehemently to the suggestion that inequality might be pro-actively reversed. Again, no worthwhile research was done on the reasons for their feelings at the

time, which is a great pity. It appears to be an unfortunate fact that feminist academics do not focus on such problems at a time when feminist euphoria is high.

I could advance as many theories as any other feminist, academic or otherwise, as to why this happened, but the theories are purely subjective and have a worth equal only to anything which is subjective, that is, its value extends only so far as the regard the reader or hearer holds for the person proposing the theory.

To resume my story at the point of my own political watershed of 1984, an event which was to greatly influence my approach to women's issues.

My experience when I first entered the House of Representatives was virtually the opposite of what it had been when I first had been elected to the Senate more than ten years earlier. This came as a great surprise to me.

The 1980s electorate seemed to adapt very readily to the notion of a woman as a serious candidate for election in the first place and then as the local member of parliament. However, the House of Representatives was a different kettle of fish altogether.

It took me some time to realise that the men I was working with in the House of Representatives — on both sides of the chamber — considered me to be a total stranger in one sense, but in another and totally negative sense considered themselves to be overly familiar with my views.

I was warned by friends in the House against speaking on subjects to do with women — well-intentioned warnings, I must emphasise — with such statements as, 'The Labor women only ever talk about women's issues. In this place you must represent both men and women, so don't be like them'.

I spent a great deal of time listening to all members of the House of Representatives in the early months of my time in that chamber and was very quickly apprised of the fact that the Labor women talked about a great variety of subjects — as did the Labor and non-Labor men — and not just about women.

Nevertheless, they did raise the subject of women when it was relevant to a bill being debated. However, so did the male members of parliament.

I found this all a little mystifying. Why had the fact that women had spoken on women remained in the front of male members' minds to the exclusion of all other subjects the women debated, when the same words uttered by men in the House of Representatives apparently had no impact at all?

It was not until we debated the Affirmative Action Bill that the situation became much clearer to me. The debate on the second reading of this Bill covered two days, and many government and opposition members participated. I spoke on the first day. Therefore, the *Daily Hansard* including the transcript of my speech was available on the morning of the second day of the debate.

I was more than a little startled to be approached on the morning of that second day by a number of my male colleagues exclaiming in surprise at the fact that my speech had

dealt with the subject of education. Those colleagues included ones with whom I had served on the Coalition's Education Policy Committee for some years. Despite those years of co-service, they clearly had no idea of anything I had said on the subject of education in that time. One even said to me, 'I am surprised to discover that we share the same views on so many things'. Surprise is not an adequate description for how I felt; shocked would be more like it.

The dawning realisation came to me slowly and painfully: many of my male colleagues had not actually heard what I had said in the previous twelve years, whether in parliament, in the joint party room or in committee meetings. Nevertheless, they all thought they knew what I had said — thoughts which were so far removed from reality as to be grotesque. I was drawn to the painful and unwelcome conclusion that the mere presence of women in the parliament and in the party room is not enough.

It appeared that women MPs can state their views however they like — tactfully or aggressively, sweetly or stridently, obliquely or bluntly — but, if they are expressing views about women, too often a majority of the men in their audience automatically close their ears, believing that they are about to hear fringe, feminist rhetoric which is to be automatically rejected. This realisation, as I said, was a painful one — especially considering the number of years I had spent patiently explaining, I thought, modern women's aspirations.

The experience I have had in the House of Representatives in the intervening six years has led me to a conclusion that I was not quite ready to draw in 1986. It did not occur to me then, and it has only emerged for me following the 1990 and 1993 federal elections. Yet it is not complex.

Most of the men with whom I was serving in the House of Representatives in 1986 had been there for some time.

Losing the election in 1983, after previously suffering a substantial reduction of members in the 1980 election, taken together with making only marginal gains in 1984, meant that the great majority of House of Representatives members of the Coalition had been in parliament for quite a number of years by 1986 — the last substantial influx having been in December 1975 — and their experience of the world outside parliament predated the movement of women into business, into the professions and non-traditional areas of employment.

My male colleagues of the 1980s had an employment experience — and, therefore, opinions of women — which related to an Australian society which no longer existed. It has been only as new members have come into parliament over recent years that attitudes have slowly but surely changed. These attitudes do not depend on age. Chauvinists can be young; the more modern men can be middle-aged. For the great part, my colleagues' views on women's status derive from the experience of the world they knew prior to coming into parliament — in particular, the experience they have had of women as peers in the work force. I believe this goes a long way to explaining the apparently more liberated attitude of male ALP MPs in that, with the electoral fluctuations of the past thirteen years, new Labor members are far more likely to have been elected to parliament than new Liberal or National Party members of parliament.

It is highly relevant that John Hewson's views, to which I have already referred, are those of someone who entered parliament only seven years ago.

As I read Ann Millar's book and what it has to say about the post-suffragette movement and the first women elected to federal parliament, and have become more familiar with the views of Lyons and Tangney, and the views of others outside parliament at the time of their election in 1943, I have had two thoughts in the front of my mind.

The first is how long and difficult the struggle to reach this point has been. That may appear self-evident. However, when you are actually involved in the struggle — as I have been for over thirty years — historical perspectives are something you rarely have time for.

The second is to wonder what Enid Lyons and Dorothy Tangney would have thought of the political events that followed their parliamentary terms, the fluctuations of the 1960s and 1970s and into the 1980s. I wonder whether even they foresaw the time that had yet to elapse before their momentous election to parliament led to that sufficient strengthening of women's position required to provide a secure foundation for the future.

They are sobering thoughts. Too sobering for me to undertake speculation on what lies ahead. I can only hope that the momentary (in history's terms) slip in momentum of a few years ago never happens again.

I am sure I would speak for every woman who has ever served in parliament, as well as for every woman who has struggled outside parliament over the years to achieve at least legal equality with men, when I say that none of us has ever looked for gratitude from future generations of women.

All we would ever hope for was some awareness by those young women that things once-upon-a-time were not as good as they should expect to enjoy in the future, and that the effort that was necessary to create genuine momentum towards a status of equal value for women's and men's views was slow and difficult and must be guarded.

We are yet far from the day when any of it can be taken for granted.

It would be enough for all of us to know that future generations of women will accept responsibility for maintaining the principles for which we have all worked.

Questioner — One of the things that struck me when the notorious 'sweetheart' statement was made was that women on both sides of the House were willing to make quite sophisticated public comments on it. Do you think there is a place for a grouping of women across parties to come together and have a joint position on certain political issues; in other words, to break down that strict party barrier so that when issues come up there is a consensus among women in parliament generally?

Mrs Sullivan — It is a bit hard to break down the barrier once it has been established. However, there have been occasions — not numerous, but they have been there — when we have come together. For example, in the early 1980s, following the 1983 federal election, we orchestrated — we being a couple of Labor women senators, Janine Haines and I — an adjournment debate on the subject of the ratification of the

United Nations Convention on the Elimination of All Forms of Discrimination Against Women. We quite deliberately took advantage of the fact that speakers are called alternately from each side. We stated our bipartisan view that it was important that ratification of this convention go ahead. There was at the time a quite extreme, almost hysterical, campaign being orchestrated in the community in opposition to the convention and our exercise was in response to that. It helped that none of our parties were opposed to it. But we did get together and decide to do that.

I would like to put something on the record right here and now which I have never had the opportunity to do before. I am misquoted quite badly in that Senate debate. It is an interjection that was incorrectly attributed to me and that I was unaware of because it was an interjection. This interjection was used against me in the 1984 election quite badly. I could do nothing about it because I had never corrected the *Hansard*. The reason I had never corrected the *Hansard* is that we never see interjections that are attributed to us. In one of the Labor women's speeches, referring to the women who want to be women, there was a reference to 'the three Ms'. The interjection, which I did not make but which was attributed to me, reads, 'Yes, male, middle-aged and married'. I know who did make it, but I am not about to say who it was. I was sitting near that senator. I welcome the opportunity to correct that.

The remarkable thing about the reaction to that 'sweetheart' comment was the totally prompt and spontaneous reaction to it everywhere. The Speaker ordered a withdrawal, so he determined instantaneously that it was unparliamentary language. I was surprised by that. I was surprised by the spontaneous reaction of dismay on both the government and opposition sides and in the press gallery. As I said earlier today, if that had happened ten years earlier, I think it would have gone over everybody's head. I would have just worn it. It does show that there has been a change in perceptions in the last ten years about what is acceptable. It was interesting that a number of Labor women were prepared to go on the record on the subject, and I appreciated it. Not everybody shared the point of view, of course.

There has been an informal networking amongst a number of us for quite a few years. In those years, I was the only Liberal woman in the House of Representatives. I do not mean to put down my male colleagues. A lot of them were very supportive and very good, but it was difficult in other ways. It was like permanently being in a locker room, with some supportive and nice colleagues also in the locker room. I got a lot of moral support from quite a number of the Labor women. We did not have to say what we were sharing; they knew what it was like. There was a camaraderie there, so it has its effect.

Questioner — I once had the opportunity to be a female councillor in an otherwise all male council in a village and rural district where very few women would take the trouble to get involved in thinking about public affairs. After six years, the men made me vice-chairman. I think that is some evidence of the fact that, if we work with mutual respect and without too much gang warfare leaking into our rhetoric, we can keep our pecking order.

I want to be brief and discipline myself because I do not want my thinking to get in the way of people remembering the wonderful words you have been giving us. I have very much appreciated your attitude and what you have been saying. I want merely now to ask you if you could say a few words about the world that people know during their first

seven years being indelible nearly all their life. We have been allowing what I dare to call national socialism on an international plane to sneer at the important role of motherhood. The psyche that we women can produce during those first years can make such an enormous difference to our ability to share and to manage effectively in a decent way, respectful of each other's dignity — not shouting for our own rights all the time, but caring about our responsibilities.

Mrs Sullivan — Quite right. I attribute everything that I am to not only my mother but also my father. My mother was atypical. She had been educated to the end of high school. Born in 1910, that was very atypical. She was reared by two maiden aunts, one of whom was a school teacher and who in the late nineteenth century had secretly, and certainly against her father's wishes, been educated by the nuns, who are great at doing that sort of thing, to become a teacher. He knew nothing of it until she told him she was leaving home. So in that sense I owe something to the generation before, which was a very strongly female generation.

But I also owe a lot to my father. I will never forget my teens. When I went to school, girls left school at the age of thirteen — at the end of what is now called grade eight, the old scholarship in Queensland. Very few girls went on past there. My sister was four years older than I was. She had done her full high schooling — a very bright girl — and then went on to do pharmacy. I followed. We had to put up with my father being very soundly criticised by his peers, in front of us, for educating his daughters. He had to defend to his male peers why he had educated his daughters. I think it helped that we did not have a brother. The other downside was that my mother had to go to work in 1955 — in the days when it was very unfashionable for mothers to go to work — so that my sister and I could have that education.

So I agree with you about the great importance of women. In my involvement in parliamentary life and with my interests in women in the Third World, I have found to be very true the old story that, if you educate a woman, you educate a nation; and how education, the productivity and the general raising of standards within the society flow on. The point women in Australia are at in the 1990s all goes back to that little slip that the powers that be had when they allowed women to learn how to read and write.

Questioner — What would you say to the suggestion that the Sex Discrimination Act should be a 'sex discrimination against women act'?

Mrs Sullivan — I think it was publicly tenable only because it was not a sex discrimination against women act. We all knew that women were far more affected than men, but there were areas of discrimination against men, and to some extent there still is. Because I am a woman member of parliament, I have heard over the years a great deal about the operation of the Family Law Act.

I had quite an extraordinary experience around about 1980 when I was still a senator. I started getting a lot of letters and personal approaches, mainly from men, out in the public arena about the subject of custody as it was affected by the Family Law Act. When this sort of thing starts to happen quite spontaneously and goes on and on, the normal political experience is that there is something really happening out there. If I was getting it, my colleagues must be getting it too. So I decided to start discussing this with

them, see whether they had any views and then work out some views on what was necessary. When I asked my male colleagues if they were getting a lot of letters and approaches about the effect of the implementation of the Family Law Act on custody, they all looked at me blankly and said, 'No'. I learnt something else. It was not only women who come to women members of parliament, because some women feel uncomfortable with male members of parliament; there are some subjects that men want to discuss only with women and not with their peers. There was, and I think there still is, a degree of unfairness in the matter of custody, but it is a terribly fraught area and I do not want to go into it.

The simple fact was that the blow had to be struck that way. It has had the effect of some more equality for men. One of the important things about that type of legislation is the effect on community attitudes. When you put these principles into legislative form, you are establishing them as the community standard and people start to look through new eyes. I think that has had a flow-on benefit for quite a few men.

Questioner — I missed the beginning of your speech. I am very concerned about women of my age — and I am a 78-year-old great-grandmother — and the non-recognition of all the years that we have been the backbone of society by being unpaid volunteers. I am quite sure that there are a lot of women here today — and men, of course; but the greater majority of the unpaid volunteers are women — who know that the home and community care program and the community visitors program are absolutely dependent on us. We are the backbone of the child-care industry because of our volunteerism. We are very concerned about the budget item; that the government is going to increase our pension age eligibility from 60 to 65 years of age, which we totally oppose. We think it is absolutely outrageous. What are your thoughts on this? We are saying, 'If you are going to make us get a job when we are 60 years old — if we can get a job when there is ten per cent unemployment — then pay us for all the unpaid voluntary work that we do and we will not need a pension'.

Mrs Sullivan — I think that that 60 to 65 years of age decision has been reversed; it is going back to 60 years of age. Am I right? I am not a member of the government so —

Deputy Clerk — No.

Mrs Sullivan — It is not?

Questioner — Not yet, but we are up here lobbying today. We really feel that it is about time.

Mrs Sullivan — You cannot keep a good woman down. I agree with you. I cannot cover all the subjects that you have covered very quickly. But there has been over the years, particularly in recent years, an amount of emphasis in debate in the parliament on the subject of volunteerism — particularly of older women, and the contribution of those women to the community. There was, in the opposition's policy for the last election, an attempt to move towards recognising that in financial terms. I have to say that more and more this is being pressed on the government as the government is called on more and more to pick up the tab to pay for the lack of volunteers as they have steadily declined,

as more women who once were volunteers are now very firmly in the work force and intend to stay there for quite a few years.

Questioner — In all the stages that women have been in the work force I have not been in the paid work force for those many years.

Mrs Sullivan — That is my point.

Questioner — I have been an unpaid volunteer. That is the excuse they make. The other thing is: why is it that you cannot see that we save the Australian economy approximately \$3 billion a year?

Mrs Sullivan — You misunderstood my point. My point is certainly that your generation are the volunteers. That was not the stage at which women were going into the work force in large numbers. Over the years, the number of women volunteers has declined as more women in their forties and fifties have remained in the work force. You will have to take it up with the government. That is all I can say.

Questioner — I will not argue the figures with you because we have young ones right up to great-great-grandmothers.

Mrs Sullivan — I know. When the family allowance was brought in it was the first recognition of the economic contribution of mothering. It was fine to pay child-care workers, but it was not fine to pay the woman who was the mother. Of course, the volunteers — the grandmothers or the aunts — remained totally unrewarded and unrecognised. That is true. The family allowance was the first step, but we have not made any progress in that role since then. You are right.

Questioner — I notice you mentioned that you found it difficult to get men to hear what you were saying when you were talking about women's issues. In general, what strategies have you found to overcome that? I ask you specifically: have you used or given consideration to any of the more radical feminist views on how to get heard?

Mrs Sullivan — I have always held the view that you do not persuade people by shouting in their faces; I think they just get a little deafer. The most important thing to happen is to have more women saying it in parliament. If I can indulge myself once more, I will tell one of my favourite stories. I will never forget the maiden speeches of Fran Bailey and Chris Gallus, the two other Liberal women elected in 1990. The reason I did not enjoy being the only woman was not that my male colleagues were rough on me — I reiterate that a lot of them were good friends — but that I felt like an oddity. It had been so long since I had been the only woman anything; it was well before I was in the Senate. I looked like an oddity by virtue of being the only one there, but at least there were a few on the other side. I used to say over and over again, 'I can hardly wait for the next woman to be elected on our side. I don't care if her views are 180 degrees to the right or to the left of mine or whatever, provided she is there and I am no longer the only one'.

Fran Bailey and Chris Gallus came not trailing the feminist preconceptions that the men had about me. I will never forget their maiden speeches. Everybody goes in to hear a colleague's maiden speech and I went in. As sure as God made little apples, up it came in both of those speeches: child care. I sat there and hugged myself. I was no longer the only one they were hearing it from. I looked around and saw the faces falling as the realisation dawned on a number of my longer-standing colleagues that I was not an oddity; this was coming from more than just me. That was important. I really believe that you have to have the numbers because then you can start to put forward female values and have them taken notice of as a legitimate point of view. That is the great challenge.

Questioner — So it is building up a critical mass.

Mrs Sullivan — Yes. Absolutely.

Questioner — I do not know if you meant to put it this way, but I do not think that raising feminist views is necessarily about shouting.

Mrs Sullivan — No. It was a matter of technique. You were asking me about technique rather than views. I understand that, because there are plenty of very conservative ladies around who can shout.

Questioner — Could you say something about how much you feel you have to sacrifice to a male-dominated patriarchal system working within the parliament? I work in health care. I am a woman relatively isolated in that area in terms of often being the only woman in a meeting with a large number of men. The processes of preselection that you mentioned seem to me to be a very powerful control on what women can say in parliament and how much they can push for a different way of running our political system here in Australia.

Mrs Sullivan — In relation to your second point, that is changing. The importance of the moves in the last few weeks within both the Labor and Liberal parties has been the recognition that there is a deficiency if there are no women there and they are not putting their point of view. Also, there is the recognition that it counts in the ballot box. It has taken a long time for that to dawn. The facts have been there pretty clearly for a long time. I should not say that it has taken a long time to dawn; there has been a lot of lip-service to it. It has taken a long time for a leader to stand up and say, 'I want more women in my parliamentary team'. That really is what we have needed and I have been saying it for years.

As far as the other point is concerned, you have to learn by experience that on occasions men and women communicate very differently; they almost use a very different language. You have to recognise that in men. Of course, you wish that they might recognise it in you too. When you are in the position of being on your own, then up to a point you have to use their language to communicate without compromising yourself. The biggest mistake you can make is to be a pseudo-man because the men hate that. They want to have their cake and eat it too. Many of the men want women to be feminine but they do not want them to talk like women or think like women, when you are on your own. That will change.

The so-called sensitive new age guy is the one whose ear is attuned to realise that, when women give certain priorities in a debate or use language that they think is appropriate to the topic which men may not have been traditionally used to thinking, he can open his mind to it. But we have to open our minds too. We have to accept maleness if we want them to accept femaleness.

Mabo: The Decision and the Debate

Professor Michael Crommelin

The Decision

Eddie Mabo was a member of the Meriam people, the traditional inhabitants of the Murray Islands in Torres Strait. In 1982, Mabo and four other members of the Meriam people commenced proceedings in the High Court seeking declarations of entitlement to the Murray Islands in a number of capacities: as owners, as possessors, as occupiers and as persons entitled to the use and enjoyment of those islands.

A decade later, on 3 June 1992, the High Court handed down judgment in the case: *Mabo v Queensland [No.2]*.¹ It included declarations that the Meriam people were entitled to possession, occupation, use and enjoyment of one of those islands, the island of Mer.

Matters of Principle

In doing so, the High Court rejected the concept adopted in the eighteenth and nineteenth centuries in Australia, and applied as recently as 1971 in the Gove land rights case, *Milirrpum v Nabalco Pty Ltd*,² that at the time of European occupation Australia was *terra nullius*, or land belonging to nobody.

At the same time, the High Court held that the common law of Australia did recognise a concept of native title to land. That decision did not disturb the position of the Crown as sovereign, or the sovereignty of Australian governments in relation to land. Included in that sovereignty was "radical title" to all land in Australia. Radical title is a somewhat ephemeral concept, with feudal origins, acknowledging the status of the Crown as ultimate land holder, but not necessarily carrying within it any beneficial rights in relation to the land.

The High Court was then confronted with the question: How is native title to be established? The answer lay in the relationship of the indigenous inhabitants with the land at the time of assertion of Crown sovereignty. The relevant date for the Murray Islands was 1879, when those islands were annexed to the colony of Queensland. However, for the eastern part of the continent of Australia, the relevant date was much earlier: 1788.

1. (1992) 175 CLR 1.

2. (1971) 17 FLR 141.

Attributes of Native Title

Australian law, by virtue of its English inheritance, recognises a variety of interests in land rather than a single concept of absolute ownership. Many of those interests are familiar. They include the freehold estate or interest in land (estate in fee simple), the leasehold, the less familiar profit à prendre, and the easement. In *Mabo*, the High Court appears to have added native title to the list of interests in land.

Unlike other interests in land, however, native title does not have a fixed content. The rights and obligations conferred by native title depend on the customs and traditions of the holders of that native title. Since it may be anticipated that those customs and traditions will vary considerably from one part of the country to another, so too will the content of native title. In relation to the island of Mer, the plaintiffs were able to establish — but only after very lengthy evidence given in proceedings in the Supreme Court of Queensland — that according to their customs and traditions they were entitled to rights of possession, occupation, use and enjoyment of the land. They were not able, however, to establish ownership in any larger sense.

A peculiar feature of native title is its liability to extinguishment. Native title may be extinguished in various ways: by a loss of connection with the land at any time since European occupation; by surrender of the native title to the relevant government; by appropriation of the land by the relevant government for its own use; and by grant of another title which is inconsistent with the native title.

Problems

Since *Mabo*, debate has raged on the issue of validity of land and resource titles granted by States since 31 October 1975, when the *Racial Discrimination Act 1975* (Cth) came into effect. That Act was passed by the Commonwealth Parliament to implement Australia's international obligations as a party to the International Convention on the Elimination of All Forms of Racial Discrimination.

Section 9 of the *Racial Discrimination Act* makes it unlawful for a person to do an act involving racial discrimination which has the purpose or effect of impairing the enjoyment of any human right or fundamental freedom. Section 10 provides that if any law denies persons of a particular race the enjoyment of a right that is enjoyed by others, then that denial itself is abrogated by the *Racial Discrimination Act*.

In an earlier *Mabo* decision, *Mabo v Queensland [No.1]*,³ the High Court held that a Queensland Act, the *Queensland Coast Islands Declaratory Act 1985*, was inconsistent with section 10 of the Racial Discrimination Act and thus invalid. That legislation purported to declare that the land in the Murray Islands — and, indeed, other islands off the coast of Queensland — was vested in the Queensland government free from all competing interests. The effect of the Act, if valid, would have been to defeat the claim which was then before the High Court in what became *Mabo [No.2]*.

3. (1988) 166 CLR 186.

The concern has been widely expressed that land and resource titles granted since 31 October 1975 may infringe section 9 or section 10 of the Racial Discrimination Act; particularly where such titles, if valid, would extinguish native title. I do not share this concern. My own view is that extinguishment of native title is an attribute of that title rather than the consequence of any racial discrimination. It is true that the *Racial Discrimination Act* precludes a State from wholesale extinguishment of native title without compensation; but, to my mind, extinguishment by virtue of inconsistent grant of a land or resource title is another matter.

Since *Mabo*, questions have also been raised about the validity of land and resource titles granted prior to 31 October 1975. The issue here is whether State governments are bound by a duty to act in the interests of Aboriginal people in dealing with land subject to native title, particularly where that dealing would, if valid, extinguish the native title. In 1984, in *Guerin v The Queen*,⁴ the Supreme Court of Canada held that the government of Canada owed a fiduciary duty to native people to act in their interests in dealings with land involving extinguishment of native title. This issue of fiduciary duty was raised but not resolved in the *Mabo* case.

Again, I think that the concerns are exaggerated. I do not rule out the possibility that the High Court will impose a fiduciary duty on State governments in dealing with land subject to native title. However, I do think that the consequence of breach of that fiduciary duty will usually be damages rather than invalidity of the land or the resource title which caused the extinguishment. Indeed, that was the result in the *Guerin* case.

One consequence of the *Mabo* decision is that the task of establishing native title through litigation is difficult, time consuming and expensive. Another Canadian example makes the point. *Delgamuuk v. British Columbia*⁵ is a consolidation of some 133 separate claims of native title in respect of 58,000 square kilometres of land in the interior of the province of British Columbia. That case commenced in the Supreme Court of British Columbia in 1987. The trial ended in 1990, after 318 days of evidence and 56 days of argument. The judgment was delivered on 8 March 1991. It was, not surprisingly, the subject of immediate appeal. Argument in the British Columbia Court of Appeal occupied a further 34 days. Judgment of the Court of Appeal was delivered on 25 June 1993, and leave has been sought to appeal from that judgment to the Supreme Court of Canada.

Another consequence of the *Mabo* decision, as previously noted, is the vulnerability of native title to extinguishment.

Solutions

In the face of these problems, it is no surprise that the objects of the Native Title Bill proposed by the Commonwealth Government on 2 September 1993 were threefold: firstly, the establishment of a mechanism other than the ordinary court procedures for determining claims to native title; secondly, the validation of past grants of land and resource titles and Acts of government in relation to those titles; and thirdly, the

4. (1984) 13 DLR (4th) 321.

5. Court of Appeal for British Columbia CA 013770, 25 June 1993.

recognition and protection of native title in relation to future dealings of land which may cause the extinguishment of that native title.

The statement issued by the Prime Minister earlier this week indicates in more detail how these objects will be met. The establishment of claims to native title will be possible through either one of two mechanisms: a special Commonwealth tribunal established for the purpose, comprising both a judicial and an administrative arm; or State tribunals. State tribunals will be required to conform with requirements specified in Commonwealth legislation if they are to perform this task. Exactly what those requirements will be remains to be seen. States will be authorised to validate land and resource titles granted at any time in the past and up until 31 December 1993.

However, the integrity of the *Racial Discrimination Act* will be maintained to the greatest possible extent. I think this has been one of the more difficult aspects in the negotiations leading up to the present package of arrangements. The Commonwealth legislation will apparently be cast as a special measure under section 8 of the *Racial Discrimination Act*, rather than as an amendment of section 9 or section 10. Exactly how that will be done, and to what extent it will be possible to achieve all the objects of this package without any amendment of the existing provisions of the *Racial Discrimination Act*, are important matters.

Pastoral leases will extinguish native title: pastoral leases validated pursuant to the authority given to States, and presumably pastoral leases granted in future. Where Aboriginal people acquire a pastoral lease, they will be given the opportunity by the Commonwealth legislation to convert that lease, not into native title — because the grant of the pastoral lease will have extinguished that native title — but presumably into a statutory form of native title. The exact content of that statutory form of native title remains to be seen. Mineral leases will not extinguish native title.

Native title will be afforded some protection by giving the holders of that title an opportunity to negotiate in the future with applicants for land and resource titles over that land. Time limits will be prescribed for those negotiations. This too is a highly contentious aspect of the set of proposals; because under present arrangements in this country, land and resource management is generally a function performed by the States.

The Commonwealth has extensive powers capable of use in this area, but generally the Commonwealth has chosen to exercise those powers rather sparingly. The day-to-day reality is that land and resource management questions are normally resolved by the State level of government. The extent to which the Commonwealth legislation will inhibit the States in performing those tasks is an important feature of the legislation which will require close examination.

Comments

I shall comment on some of the features of the settlement as I see it. I do so, of course, at the risk of not knowing very much about what these proposals will turn out to be when they are fully drafted.

First, there is the distinction between pastoral leases and mineral leases. Pastoral leases will extinguish native title, whereas mineral leases will not. Mineral leases will coexist

with native title. It will be necessary for the holders of the different interests in the land — the mineral leases and the native title — to work out their relationships, including matters of compensation.

I find this distinction between pastoral leases and mineral leases intriguing. The idea of coexistence of interests in land is not at all surprising. One of the more imaginative features of the common law in this country is that it not only presupposes a variety of interests in land, but it also provides extensive opportunities for the coexistence of different interests in the same land. The result that will be achieved in relation to mineral leases and native title, whilst possibly awkward in practice, is not, in any sense, unusual in our legal system. What seems unusual to my mind, given the High Court's decision in the *Mabo* case, is the decision to accord different status to pastoral leases and mineral leases in the terms of the settlement.

So far as extinguishment by inconsistent grant is concerned, the High Court's decision was that extinguishment depended on inconsistency. The basic principle of extinguishment is inconsistency. The High Court went on to say that a freehold grant will extinguish native title because the rights of the holder of a freehold estate in land are so extensive that they leave no room whatsoever for native title, regardless of its content.

There are also suggestions — probably in a majority of the judgments — that a lease, in the strict sense of an interest in land entitling the holder to exclusive possession of that land, will extinguish native title. That position is not as clear as the position in relation to freehold title, but there are strong indicators of that result. What is important about that result is that only the lease in the strict sense of conferring entitlement to exclusive possession necessarily brings about extinguishment. Many things that are called leases are not leases in that strict sense. There is, and has been for many years, a debate about whether mineral leases are leases in that strict sense. Do mineral leases confer a right to exclusive possession of the land?

One cannot resolve that debate by a simple answer, because there are different statutory regimes for mineral leases in each of the Australian jurisdictions. Whatever the answer may be in the Northern Territory or Western Australia, there is no reason why the answer should be the same in South Australia or Victoria. One has to look at each case on its merits. Not all mineral production titles are called 'leases'; but even if that label is employed, one has to look at each case and decide whether it confers a right of exclusive possession on the holder. If it does confer that right, then its grant probably extinguishes native title.

It would appear from the Prime Minister's statement that even in the case of a mineral lease which is genuinely a lease by conferral of exclusive possession on the holder, native title will not be extinguished. One of the things that we will need to know is whether that result is purely prospective or whether that result may have some retrospective force in determining whether or not past grants of mineral leases have extinguished native title.

The other side of the coin is that a pastoral lease need not necessarily be a lease in the strict sense, either. It all depends on what rights are conferred on the holder of that pastoral lease. In some cases it may well be that the holder of a pastoral lease is entitled to exclusive possession of the land, although it is not uncommon for pastoral leases to

include reservations for the benefit of Aboriginal people that allow them access to the land for various purposes. It is by no means clear that all pastoral leases are leases in the sense required to extinguish native title.

The Commonwealth proposal seems to suggest that regardless of whether pastoral leases do satisfy that criterion or not — that is, regardless of whether they do confer a right of exclusive possession on the holder of the pastoral lease — past and future grants of such pastoral leases will have the effect of extinguishing native title. That too is a remarkable feature of the settlement package.

The other point on which I would like to make some comment is the validation of past grants, and the thorny issue of achieving that result without derogating from the integrity of the *Racial Discrimination Act*. Given my view that validation is not as large a problem as many others believe, the task of achieving that result without doing violence to the *Racial Discrimination Act* is less of a challenge for me than it is for others. Those who feel that the extent of invalidity of past grants of land and resource titles is more substantial, require a much more sweeping Commonwealth measure in order to authorise the validation of those grants.

The more lively issue at the moment is whether the total package of measures which are to be included in the Commonwealth legislation will meet the description of special measures under the *Racial Discrimination Act*. The *Racial Discrimination Act* does provide for measures to be implemented which would otherwise infringe its terms, if such measures are special measures designed to deal with a problem of past racial discrimination or deprivation. 'Catch-up' measures — if I can use a colloquial term — are permitted as special measures.

The trouble with the Commonwealth package — as with any package, at least for this purpose — is that it has plus and minus factors so far as Aboriginal people are concerned. If it is looked at as a whole, it is highly likely that it will be regarded *in toto* as a special measure for the benefit of Aboriginal people. If, however, the different parts of it are disentangled and treated separately, some parts may be more difficult than others to sustain as special measures.

Conclusion

Let me conclude by drawing attention to what I see as the most significant feature of the High Court's decision in the *Mabo* case. In my view, the most important aspect of that case is the recognition by the Court of native title to land. It is the recognition that our legal system provides a place for native title to land: a place carved out by the laws and customs of Aboriginal peoples themselves. This is the first occasion in which our legal system has provided a place for some part of customary Aboriginal law.

It immediately gives rise to the question: will that place be extended? Will the High Court be prepared to accord recognition to any other components of customary Aboriginal law? If so, we may see a basis for what I would hope to be very healthy negotiations not only for reconciliation but also for the development of a system of self-determination. It would be a system which does not threaten in any way the established sovereignty of governments in this country, but provides a diversity and flexibility under which different peoples may live under some different rules.

After all, given that we live in a federal system in this country, we are not unfamiliar with diversity. A great virtue of our federal system is that it allows a measure of diversity in defined areas of governmental action. It may well be that the *Mabo* decision leads the way to another avenue for diversity of particular significance to the indigenous peoples of this country.

Questioner — Professor, I will preface my question by saying that I agree with everything you have said. My question is this: do you think it was necessarily good law to extend the *Mabo* decision to the other parts of Australia when, in fact, it is not absolutely necessary to do so in order to find that the Meriam people had native title?

Professor Crommelin — Yes. That aspect of the decision has been subject to some criticism. My view on that is that it was essential for the High Court to make some statement of principle. The court could not decide the *Mabo* case, in relation even to the tiny island of Mer, without dealing with what seems to me to be the fundamental issue. The fundamental issue was whether the *terra nullius* doctrine would continue to be recognised and applied in this country or, alternatively, whether our legal system would acknowledge a concept of native title to land.

In dealing with that fundamental issue one way or another, the Court had to deal with an issue of generality. That issue has no special application to the island of Mer. Whichever way the Court was going to decide that issue, it had to produce ramifications for the entire land territory of this country.

I do not share the views that some have put that the High Court went beyond what was appropriate in the circumstances of the case. Indeed, I think the High Court tried very hard, in dealing with an issue of immense complexity — as our politicians are now discovering as they try to grapple with it — to set out with some clarity matters of basic principle which would guide the resolution of this issue in the future.

The Court could never tie up all the loose ends. That would be impossible. But the Court did, I think, provide important guidance on such issues as the concept of native title, content, method of establishment and vulnerability to extinguishment.

Questioner — Thank you for so aptly addressing this topical subject. I will ask two questions, basically of fact. Firstly, in your preamble you mentioned that it is not only possible for native title to be extinguished but also for it to be surrendered. Could you tell us if it is possible for such a surrender to be revoked at a later date? One could envisage an inducement being offered and subsequent generations then wishing to revoke that surrender. Secondly, have you been made aware of any attempt to redetermine that which defines an Aboriginal person? There are individuals who may or may not be perceived by the community as being Aboriginal persons.

Professor Crommelin — So long as the surrender is valid in the first place, I see no scope whatsoever for revoking it. There may well be an issue as to the validity of a surrender. Indeed, that was the issue in the *Guerin* case in Canada, to which I referred. There the plaintiffs, the previous holders of the native title, claimed that they had been induced to surrender on terms which were not then reflected in the lease that the

government entered into with the golf club. That is an issue that has been canvassed in the Supreme Court of Canada, but if the surrender is valid in the first place then I do not think it can be revoked.

As far as the second question is concerned, deciding who is and who is not Aboriginal for the purposes of claiming native title to land and for other purposes is a problem that has been around for some time. In the *Mabo* case, Justice Brennan did indicate some support for the approach that the Commonwealth has taken in its legislative definition of 'Aboriginal' in various Commonwealth Acts. That approach involves two components. The first is biological descent, and the second is mutual acceptance. The person must both assert membership of the Aboriginal group and be accepted as a member of that group by the elders or whosoever according to the traditions of that group is authorised to make those decisions. It was not necessary for the court in *Mabo* to explore that issue in any detail, but I do recall that degree of support in Justice Brennan's judgment for that approach.

Questioner — Granting what you have said about the need for the Court to consider the generality of the application of the *Mabo* decision to the mainland of Australia, would you care to express a view as to whether it was justified in pursuing that line in the absence of any representation from either Aboriginals or non-Aboriginals from the mainland of Australia? It appears to me that the Court made that decision and that application in the total absence of any representation from persons greatly affected.

Professor Crommelin — In the *Mabo* decision, the High Court did not purport to decide any particular claim of native title in respect of any land other than the Murray Islands. What it did was declare certain principles; and that is a time-honoured function of the courts in our constitutional system. It is a function that the English courts have been performing for at least four centuries, probably longer, and it is a function which our courts have been performing ever since European occupation of this country and the inheritance of English law.

In the *Mabo* case, I would certainly object if the High Court purported to decide that, in any part of the mainland territory of Australia, a particular claim to native title would or would not succeed. But, of course, it did not do that. Nobody has been affected on the mainland in any way other than by the recognition of the principle. The application of the principle to specific facts, circumstances and particular areas of land is the occasion when those who may or may not be affected by that application will have the opportunity to participate in the proceedings.

Questioner — Of the six or so claims that have been made since the *Mabo* decision and prior to this legislation, perhaps the most interesting is that of the Wik people in the Weipa area on the Cape York Peninsula. Many people have suggested that that particular claim has been framed to get a decision from the High Court on many of the things that were left open in its original decision.

Without asking you to predict what the High Court would say, do you see any possible problems in the way of fiduciary duty and so forth that would come out of the issues that are addressed and that may well be contrary to the current legislation or plans for the

present legislation, or could create further complications to the legislation as it has been planned?

Professor Crommelin — The *Wik* proceedings, as you say, are very interesting proceedings, because they raise a number of matters not resolved by the High Court, including the fiduciary obligation question, in the *Mabo* case. Strategic development of the law through cases is, again, a time-honoured practice, so there is nothing surprising in taking these things in stages.

I understand that following the failure of the claimants in the Gove land rights case in 1971 in the Federal Court, a deliberate decision was made not to proceed on appeal because at that time the prospects were not seen to be good and, conversely, the political prospects for a statutory solution were assessed to be better. These sorts of decisions are constantly being made — and not just here in Australia. What is quite remarkable is how precisely the same issues have occurred in the Province of British Columbia at similar times. When the Gove land rights case was being argued here, *Calder v. the Attorney-General of British Columbia* — which became the leading Canadian case — was in the courts in Vancouver.

But I do not necessarily see a clash between the proposed legislative package and what the High Court may do in the *Wik* case or in any other case. What the High Court did in the *Mabo* case — and what it will do in the *Wik* case, if it proceeds — will be to determine questions of common law and to interpret any relevant statutory provisions. To the extent that any component of the Commonwealth legislative package is inconsistent with the common law as declared by the High Court in the *Mabo* case, provided that the Commonwealth legislation is valid in the constitutional sense, the common law will yield to it. Nothing in the *Mabo* decision is immutable. It is within the capacity of two levels of government, Commonwealth and State, with the relevant constitutional powers distributed between them, to deal with the issue of native title to land howsoever they think fit.

That is complicated a bit by certain international obligations we have but, nevertheless, the legislative branch of government in this country can decide to alter the common law in any respect it thinks appropriate. So, if any part of the package is not consistent with what the High Court might otherwise decide in the *Wik* case, the High Court will have to change its mind and go with the legislation.

Questioner — I would like to make a statement rather than ask a question. A gentleman asked a question earlier about identification and how one determines who is an Aboriginal person. I think that in 1993, the International Year of the World's Indigenous People, it is offensive for non-indigenous Australians to tell us who is an Aboriginal person. I am not saying that you are doing that; I am simply saying that that is something we are quite capable of determining for ourselves.

There are three separate components to identification as an Aboriginal person. The first is being of Aboriginal descent, the second is identification as an Aboriginal person — determining for yourself that you are an Aboriginal person — and the third component is acceptance by the community in which you live. That is a very strong component in this case; it is not just a case of people deciding that they might benefit and therefore coming up and saying that they are Aboriginal.

The last point I would like to make is that native title is not about individuals benefiting, it is about benefits to the community.

Questioner — As I understand it, the *Mabo* decision establishes that where people under native title have a variety of interests in land, if a subsequent grant is inconsistent with a single one of those interests then native title is extinguished in its entirety, thus destroying certain valuable interests without transferring them to any other person. It does this at a time when this is not inconsistent with any other person's rights, and it is therefore unnecessary. It would be conceivably possible, if the decision had been different, that the extinguishing grant could extinguish part of the rights under native title and leave others intact. Is that the case? Ought it to be the case? And, if it ought not to be the case but it is, what can be done about it?

Professor Crommelin — That is not my understanding. My understanding is that inconsistency involves an element of degree, and that there can be situations where one has, to use a shorthand term, partial inconsistency that does not cause extinguishment. I should say that this aspect of the decision has not been explored in any detail by the Court yet, but that is my understanding of what a majority of the Court — particularly Justice Brennan — indicated by inconsistency. I do not think that only the slightest degree of inconsistency necessarily causes extinguishment. How much inconsistency is required to cause extinguishment is a far more difficult question to answer.

Questioner — What about partial extinguishment?

Professor Crommelin — There can be loss of what previously was one of the rights comprised in the native title. To that extent, there can be partial extinguishment; but not extinguishment of the title as a whole, just the loss of some component of it. Again, that is an approach which is not unfamiliar to us with our feudal background of land law.

For example, take the situation between farmers and miners. We have long recognised under our legal system that you can split rights to land into two different titles: the surface title and the mineral or sub-surface title. You can have one person holding the surface title with the farming and grazing rights and another person holding the mineral title. Inevitably, if they both choose to exercise them then at some point there may be some conflict. The common law has to reconcile that conflict and it has developed rules for doing so.

Similarly, you can have a person with the rights to cut timber — and that is an interest in land — another person with the rights to take minerals, and a third person with the grazing rights; and you can have the prospect of some incompatibility or inconsistency amongst them. The common law has, for centuries, sorted out those sorts of problems. My assumption is that unless a legislative regime requires otherwise, the courts will continue to sort those out, with native title as one of the elements involved.

Questioner — If I understood you correctly, native title is not peculiar to *Mabo*, and it is not something that has been introduced by *Mabo*. It has been recognised in Canada, for instance. There is no argument which says that the native title to the Canadian

Indians is going to be the same as the native title to the Australians; nor, indeed, that the native title in Cape York will be the same as the native title in Cape Leeuwin. If there is a spatial difference in native title, is there conceivably a temporal difference as well? Is it likely that native title, as given today, will recognise the effect of 200 years of invasion on the culture of the Aborigines?

The second question is again related to native title. If current freehold title in Australia, for instance, is sometimes subject to mineral leases, and is subject to local government planning controls, is it likely that native title will also be subject to the same sorts of things? Or is it likely to be a title that stands above all the common law things that the millennia have built up in the Westminster system? The third one is almost a trivial one: is it pronounced 'May-bo' or 'Mah-bo'?

Professor Crommelin — I did not meet the named plaintiff. My understanding is that the pronunciation is 'Mah-bo', but I certainly have no sound basis for that understanding. That was perhaps the easiest of the three questions to answer.

So far as the question of content is concerned, I agree with you that content varies from country to country and place to place within Australia; and that is because content is determined by customary law, rather than any fixed common law prescription. Given that, I think it is possible — although this is a matter on which the Court has not provided much guidance so far — that there may be some changes of content with changes of customary law. It seems to me to be a distinct possibility, but it remains to be seen whether or not that will be recognised. I have forgotten the second question, I am sorry.

Questioner — Is it likely that native title will be subject to the same conditions as freehold title?

Professor Crommelin — Native title has to fit within the system. Part of the deal involving recognition made it part of the wider system of law. It has some special features, but those special features do not place it above and beyond other interests. On the contrary, it seems to me that native title is a peculiarly vulnerable form of interest in land because of its liability to extinguishment. The general answer to the second question is that it is part of the wider scheme of things with no special status or overriding effect.

Questioner — Professor, can you clarify some of the negative aspects of distinguishing between a mineral lease and a pastoral lease in extinguishing native title?

Professor Crommelin — I am not sure that there necessarily are negative aspects. I commented on it because it represented an interesting departure from the approach laid down by the High Court on extinguishment. There may be very good, pragmatic reasons for making that distinction. The consequences of that differential treatment are quite important because the area of land under pastoral lease is vastly greater than the area of land under mineral lease. I do not know what the factor of difference is, but I would not be surprised if it were something like 100.

In this country the area of land under mineral lease is tiny and the area of land under pastoral lease is extensive. I have seen the figure of thirty-five per cent used to describe

the area in Western Australia that is under pastoral lease, but I cannot verify that. Despite the fact that Western Australia is known as a mining state, I would be surprised if more than three per cent of the land mass were under mining lease. It is a decision of great practical consequence which raises some interesting legal issues. We will have to wait and see how they are worked out.

Australian Parliamentary Democracy: One Cheer For The Status Quo

Professor Geoffrey Brennan

Everyone is familiar with the quip that, in the relevant hands, the difficult takes a few moments and the impossible a little longer. I am, today, going to attempt the impossible, and if my timing is correct it should take me about 45 minutes. The impossible feat in question is to provide a defence of the *status quo* in our parliamentary institutions — to argue that, contrary to appearances, things in our political institutional life are in tolerable shape. I am going to argue that much of the current criticism of our parliamentary institutions rests on a picture or pictures of democratic political process that are either extremely remote from political practice anywhere or deeply implausible, or both.

I am going to make this argument, though, in the face of strong intuitions to the contrary. In other words, to make my case in a coherent way is, if not exactly impossible, at least a considerable challenge. And I want to start by conceding something to the critics of the *status quo*.

Some time ago I saw a television documentary account of a high school class visit to Parliament House. Parliament was not sitting at the time, so the class went down to the House of Representatives and played out being politicians. This involved dividing itself into teams, arraying themselves on the benches, and then proceeding to hurl invective and insult across the Chamber (with the occasional 'the Honourable Member' thrown in for theatrical effect). They worked themselves up into a fair lather — spittle and perspiration mingled in a kind of frenzy of verbal warfare. It was not an elevating spectacle. And I found it deeply disturbing. You might, of course, think that one could not expect much subtlety from uninitiated schoolkids — that one would expect them to focus on the specious and not see through to the real process of deliberation, argument and persuasion that our deliberative assemblies really produce. Of course, what the kids acted out was pretty much what they saw in the media, and the media focuses pretty exclusively on the more theatrical dimensions. However, I thought they *did* act out with a fair degree of accuracy what the TV snippets show. And, far from not seeing beyond this to the subtle essentials of parliamentary process, perhaps, as kids are wont to do, they just told it how they saw it — and, like the fable of the emperor's new clothes, focussed our attention on what is, after all, crucial.

If we were to attempt a defence of parliamentary procedure as we know it, what would we say? It seems entirely clear, after all, that the two central pieces of parliamentary process — parliamentary debate and the parliamentary vote — are exercises in total pointlessness. Take the vote first. Within a tight party system as in Australia, it is almost unheard of for representatives to cross the floor and vote for the other side — even when they are known publicly to oppose their own party's position (as with a notable Western Australian parliamentarian on the *Mabo* legislation recently). If no-one ever crosses the floor — and if there are deals between members so that even absenteeism cannot affect the vote — then parliament is virtually a dictatorship of the majority party, all that bell-ringing and stuff is just a piece of theatre and the vote itself is a pointless ritual. And if this is so of the vote it must be no less true of parliamentary debate. No-one is ever persuaded by anything the other side says or, if they are, it does not make any difference. Indeed, it is not even clear who the audience is really intended to be. Perhaps compelling representatives to speak is just a way of monitoring whether various representatives are keeping up with their briefs. Or perhaps, like so much else in our institutional life, it is a kind of habit borrowed from the House of Commons — where, incidentally, with a much larger assembly, backbenchers (particularly Tory backbenchers), cross the floor fairly routinely and there is always a chance, at least in principle, that the government might be defeated on specific measures. But, in the Australian case, the question as to the *point* of our parliamentary procedures is a fair challenge — and the purely theatrical answer that the school children I mentioned played out seems to me to be an entirely fair answer.

Among academic commentators, for example, there seems to be widespread agreement that most parliamentary systems, and the Australian most notably, fall way short of any ideal of responsible democratic government. And the cause of the inadequacy is also a matter of widespread consensus: the problem is seen to be the party system, and in particular the adversarial *two*-party system, at least where party discipline is iron strong, as in the Australian case. I cannot here, of course, *demonstrate* that consensus, but it may be useful for me to offer a couple of illustrative quotations:

The reality of modern Australian government no longer accords with the traditional theory of responsible government. Disciplined political parties have placed the running of parliament in the hands of the executive. Governments relying on their parliamentary majorities have been able to sidestep responsibility for governmental acts.¹

We argue that parties weaken the already strained notion of representation. We go on to develop the view that liberal democracy is under threat from parties and party government.²

All this establishes the context of what I want to say this afternoon. What I want to do is put before you a more or less coherent picture of what our parliamentary system is, and to contrast that picture with two rival pictures both of which make some claims on our

1. Summers, J., *Parliament and Responsible Government in Australia*; in Woodford, D., Parkin, A. and Summers, J. *Government, Politics and Power in Australia*, Longman Cheshire, Melbourne, 1985, 22.

2. Kukathas, C., Lovell, D., and Maley, W., *The Theory of the Politics: An Australian Perspective*, Longman Cheshire, Melbourne, 1990, 121.

ethical attention but neither of which, I shall want to argue, represent a good basis for thinking about reform. The picture that I shall endorse is not a heroic one. It engenders only 'modified rapture', as W.S. Gilbert put it. That is why there is only one cheer — not two.

But I think it is important to have a coherent picture of what we have, and one that shows the status quo in its best possible light. I do not say this for reasons of natural conservatism, but rather on grounds of a kind of 'intellectual charity'. By this I mean that one should always engage the arguments or propositions or theories one aims to criticise in terms of the *best* defence that can be made of them: that procedure serves to test the strength of your criticism. To focus on your opponent's case at its weakest point may be good politics but it is bad intellectual morality. And I think much the same goes for social arrangements that one finds one dislikes. Moreover, having a clear picture, both of what one has and of conceivable alternatives, is I think an aid to clear thinking, and I advance my remarks this afternoon in that spirit.

So to my three pictures.

The first picture is that of what I shall call parliament as 'forum'. Within this picture, the chief activity of parliament is *discussion*. The discussion in question is conceived as revolving around the attempt to identify the true public interest and the actions that government might take in order to promote the public interest in specific circumstances. The discussion is, in other words, disinterested and deliberative. Just as in an idealised university seminar — say, one on macro-economic policy — individuals come together to debate rival views as to the appropriate specification of policy targets in terms of inflation, unemployment and the like, and the appropriate choice of policy instruments to influence these in the right way, so members of parliament may be conceived as coming together in the same sort of spirit of inquiry. The process of deliberation will, so the story goes, lead to a convergence on a view that is more likely than otherwise to approximate to the truth of the matter.

On this view, parliament is valued to the extent that it provides an institutionalised context — literally a forum — for discussion of the right kind, and a means of translating the outcome of deliberation into policy, law or whatever. Parliamentary procedures, on this view, are to be judged against the criterion of promoting effective deliberation.

Now, certain things are clearly presupposed in drawing this forum picture of parliament — that there *is* a 'true' public interest to be discovered by deliberation; that parliamentarians are disposed to discover it and having discovered it to act to implement it; that they are appropriately equipped for these tasks of discovery and implementation; and that the process of debate on the issues will indeed lead to a convergence to a common mind that does indeed approximate the true public interest. This is an idealistic picture; but the nature of the idealism, centred as it is around the role of democracy in promoting and empowering discussion and deliberation, is clearly one that has considerable intuitive appeal among democratic idealists. It is a picture that in modern times is most naturally associated with the writings of Jurgen Habermas and Bruce Ackerman.³

3. See, for example, Ackerman, B. *Social Justice and the Liberal State*, Yale University Press, New Haven, 1980.

The second picture I want to offer is that of parliament as a 'committee of representatives'. The centre piece of this picture is the parliamentary *vote*. The vision here is that proposals come before an assembly whose members vote to decide which proposals will prevail and which will not. A critical requirement of the assembly is that it be *representative*; that is, that it be a reproduction in miniature of the larger polity. There is no necessary presumption that representatives are impelled by considerations of the public interest. They may simply vote their own perceived personal interest. It is the voting procedure itself that transforms the individual interests of the representatives (and, therefore, of the population at large) into a social decision.

Representation of the relevant type may take either of two forms — associated with the classic notions of delegation and trusteeship. The representatives may, on the one hand, explicitly represent special interest groups and see their role as that of delegates for the special interests they represent. This is essentially a corporatist vision of democracy. Alternatively, they may simply pursue their own interests, in which case it is the contingent fact that the distribution of interests across representatives mirrors the distribution across the represented that provides the democratic justification.

Debate in such a 'representative committee' parliament would not be aimed at convergence to a common view, so much as at providing information on the subject at hand in order that each representative can clarify her own view and vote accordingly. Indeed, debate here is strictly inessential: representatives may, for example, have alternative sources of relevant information, or their vote may already be determined prior to the beginning of any debate. What is essential within this conception is the parliamentary vote itself, because this reveals the balance of views within the parliament and by extension, within the polity.

Before sketching the third picture, I want to emphasise a couple of aspects of the first two pictures. First, let me say that I believe one or other of these pictures underlie most common criticisms of current parliamentary process. One reason I think this is so lies in the fact that both pictures are uncomfortable with the phenomenon of parties. Clearly, on the forum view, political parties would have no proper role since all parliamentarians are equally striving for political truth: disciplined political parties could only interfere in such a process by restricting the ability of parliamentarians to speak their minds. In the 'representative committee' case too, disciplined political parties must impose undesirable limitations since the hope is that all views will be fairly represented: parties can only serve to constrain votes along predetermined party lines. Of course, parties may — will normally — subsume a variety of interests, but the function of parliament specifically in giving those interests *independent* representation would be essentially undermined.

But if both these pictures allow no room for political parties, they are also deeply ambivalent about the role of popular elections. In both cases, the primary function of elections will be to select parliamentarians. Now, on the forum view, we want parliament to be populated by the wisest and the most clear-thinking citizens — persons capable of discerning the truth and devoted to its pursuit. It is hardly self-evident that popular election will provide the best, or even a plausible, way of selecting such persons. Plato thought they ought to be bred and trained from birth. The Chinese used to use a competitive examination in Confucian theology. Perhaps selection by an elected body,

much as the judges of the High Court are selected, would be one way to go. But simple, popular election? It does not sound too promising.

Equally, on the representative committee view, we would want to select so as to approximate as closely as possible the distribution of political opinion in the polity as a whole. We might do this by stratified selection — as in the corporatist model where representatives of salient groups in society are explicitly put together (Franco's Spain would be one example) or by purely random sampling of the population at large (as, more or less, for jury duty). But popular election hardly seems a reliable mechanism for such selection. In any event, my point is not that these two models are necessarily *inconsistent* with popular elections — just that popular elections are nothing more than an *incidental* feature of parliamentary process in these first two views.

Which brings me to my third picture — that of 'parliament as political *prize*'. The basic idea here is that control over the parliament is a prize awarded to the winner of an electoral competition, and it is the process of electoral competition itself rather than the details of parliamentary procedure that is central to the whole democratic process. In particular, attention should be directed to the way in which electoral competition determines political outcomes. Of course, parliament, and parliamentary procedures, may still play some role — perhaps in allowing the continuous public display of the policy platforms of both government and opposition — but such roles are likely to be of a second order of importance. The primary concern is with the question of how the broader electoral process works to constrain policy platforms, both *ex-ante* in terms of electoral promises of rival candidates and *ex-post* in terms of keeping the promises once elected and keeping things running tolerably well in the interim.

The image of political process involved in this third view of parliament is obviously somewhat analogous to that of market process, and it is an image that in recent times has been associated with economists and with the application of economic ideas to politics (that is, with Public Choice theory and 'rational actor' theory more generally). On this view, voters are rather like consumers in a marketplace; they desire policies from the government and they vote for those policy packages that they prefer. Candidates or political parties are analogous to firms: they bid for custom by offering policies in competition with one another. In this way, electoral competition is analogous with market competition: politicians can be construed as offering alternative bids for office (like competitive tenders for a construction job) and the bid that is most preferred by the electorate is successful. The object of political institutions in this setting is to ensure that the citizen voters actually get what they most want — the object is to secure efficiency in the political market.

To the extent that electoral competition simulates market competition, public choice scholars identify three desirable properties that electoral process exhibits:

- it provides citizen-voters with genuine choice;
- it provides politicians with an incentive to modify policy platforms by reference to the preferences of voters, and to fulfil their policy promises when (and if) elected; and
- it provides politicians with information about citizens' preferences.

These three 'desirable' properties tend to go hand-in-hand with a particular view of the essential *problem* of politics. This 'problem' is that politicians are always tempted to exploit political power for their own ends — ends which may be narrowly venal, or more broadly defined in terms of particular (unshared) conceptions of the political good. Citizen-voters are vulnerable to political coercion; and information about citizens' political preferences is scarce and relatively easily manipulated. These three aspects of the problem combine to form a non-idealist, or sceptical, view of politics, political power and its abuse. The problem of politics is seen to be that of delegating power over oneself to an agent or agents that cannot fully be trusted. Accordingly, the role of political institutions is to provide mechanisms which will 'bend politicians' interests to the service of duty'⁴ and attempt to 'make good ministers even of bad men'.⁵ In achieving these ends, electoral competition is crucial because it constrains the ambitions and interests of would-be governors, and constrains them in a direction that reflects citizens' interests — at least in so far as those interests are expressed at the ballot box.

The critical question then for analysis in this 'public choice'/ 'economist' tradition is whether political competition does indeed work as market competition does. There is a huge literature on this subject, much of it concerned with the properties of majority rule as an aggregation device. By this, I mean specifically that a majority can be endlessly reconstituted using different coalitions of interests. The problem can be illustrated by the example of dividing \$100 among three entirely selfish persons; there is clearly no outcome such that we cannot find another which is preferred by a majority. An equal division is defeated by a fifty-fifty split between any two; which is in turn defeated by the appropriate sixty-forty split in which one of the earlier coalition members gets the sixty and the other nothing. And so on and so on. The central political problem in the public choice lexicon is to design institutions that suppress the possibility of this 'majoritarian cycling'. Interestingly, political party is one such institution. Electoral competition between two rival parties under reasonable conditions *will* generate a stable equilibrium at the median of the preferred points of the individual citizen voters. This is clearest in the case where the positions can be arrayed along a single spectrum — say, a left-right ideological one — but also applies under reasonable conditions for the case where voters' preferences can only be arrayed along multiple dimensions. In this sense, political parties, by restricting the process of endless reformulation of coalitions among various interests, aids in the good working of electoral competition.

But parties perform another important role in that competitive process. Effective competition requires both that political rivals be able to both offer credible policy packages, and be able to be held accountable for their delivery. By a credible policy package here, I mean one that candidates can plausibly deliver if they win the election. This is important since it is on the delivery of the promised package that the victor will be judged in future elections. It is, in fact, critical that each candidate offer a program that allows performance in office to be monitored and evaluated.

We now see a further distinction between this view of politics and the 'forum' and 'representative committee'. If candidates are elected to parliament under either of the

4. A.Hamilton, The Federalist Papers, No.72.

5. Lord Bolingbroke, in The Craftsman, 28 February 1730.

alternative models of parliament, it is by no means clear how their performance as parliamentarians can be assessed by the electorate. If the candidate's mandate is simply to deliberate, or to vote, how can electors monitor performance and decide appropriately when the time for re-election comes around? On the 'prize' view of politics, candidates make policy commitments and may be judged by the extent to which their actions fulfil those commitments. And, of course, a candidate can only be so judged if winning the election empowers her to implement that policy package. In other words, the winner of the election must be identified as the government with effective control over the legislative and policy making process. The test is clearly met if the elected candidate is an all-powerful president; but it is also met if the elected candidate is a dominant party. However, the test is not met if the candidates are individual members of parliament who are not held together by party ties. In that case, all that each winning candidate can credibly promise to do is to vote in a certain way in the parliament, without any commitment to bring any particular policy into practice.

On this view, both single presidents and political parties have the potential for credibility. The question naturally arises as to whether there is anything to distinguish between a presidential and a party system. An answer to this question arises from the requirement that political actors must have an eye to the future in order for the electoral constraint to bind appropriately. Presidents must come and go: parties, by contrast, can go on forever. Presidents in their final term of office, or approaching retirement, are effectively released from the electoral constraint and may pursue interests of their own. The same may seem to be true of party leaders in similar situations, but here the continuity of the party will impose the required discipline. Provided that a majority of the party's members of parliament will fight the next election, that majority will still feel electoral constraint and will impose it on the party as a whole through internal voting procedures in the party room. Parties are always susceptible to the electoral threat — even if some individual party members are not. On this count, then, political parties are to be preferred to presidents as potentially credible candidates for office, since parties will fall more fully under the discipline imposed by popular elections.

The view of politics in which parliament is essentially a prize offers, then, a relatively straightforward account of the roles of political parties and elections. These roles are broadly positive in that parties provide the mechanism for credible and long-lived political agents without which electoral competition could not operate effectively. There are, of course, many aspects of the processes of electoral competition that deserve elaboration — and some of them have negative implications. I do not have time to elaborate here on these negative aspects — the dark side of the force, as it were. I can, though, refer interested people to my recent book *Democracy and Decision* (with philosopher Loren Lomasky) in which they play a central role.

Instead, I want to return to the question of *parliamentary process* under the parliament as prize view. Clearly, parliamentary process is to be seen as part of the broader electoral process. This is most clearly seen in connection with parliamentary debate. The relevant audience in parliamentary debate should not be construed as the parliamentary members (as in the forum view) but as the wider citizenry. The role of the opposition is to interrogate the government and offer its alternative views to that wider citizenry as a salient and practically relevant alternative. If the government can rely on making anodyne policy statements without the possibility of retort, the requirement to make public statements would be a diminished one. Of course, it might be possible to imagine

that the role of governmental interrogator be played by a vigorous and independent press corps, but it appeals to economists to give the role of interrogator to those who stand to benefit most directly from any exposure of governmental weakness: the opposition has the right incentives to ask the tough questions.

Moreover, the opposition also plays the role of alternative government. The process of debate, in particular, the role of the opposition in debates, ensures that the public is always informed about the alternative to the present government. That is, the alternative is always conspicuous and salient. Even if it has no real power, the opposition receives considerable prominence under current arrangements so that the ongoing political debate is easily seen as a continuation of electioneering by other means. This is in sharp contrast with the United States presidential system where losing candidates rapidly disappear from sight: there is no alternative president except during popular elections. In the Australian system — and others based on political parties — each party is constantly jockeying for position in the race for the next election, and this constant jockeying process extends the constraining role of electoral competition. The continuing debate between parties in the parliament is, then, aimed not at influencing the votes of members of parliament — which are already committed — but at the general public via the media. If much of what goes on in parliament has an air of theatre and seems more designed to catch attention than to inform — if, in short, it has more of the quality of a TV commercial than of a seminar on social policy — we should not be too surprised. The comic opera of exchanged insults that regularly enlivens the TV news is presumably exactly the sort of thing that will secure the attention of many voters. The overall effect of politicians clamouring for attention may not be particularly elevating — but it is only a cause for rank despair if we mis-identify parliamentary process as *the* central element of democratic political process. If parliament is perceived instead as a not altogether useless piece of popular theatre, with the real political game being mainly played out elsewhere, then serious and intelligent reform efforts can be focused on the relevant 'elsewhere'.

All of this may appear as an unduly cynical view of parliament and the parliamentary process. It need not be so interpreted, and is certainly not offered as such. My central point is that parliamentary activities should be seen in the context of a plausible model of the overall political process in a parliamentary democracy. Only in the context of such a model can the significance of specifically parliamentary activities be assessed and the possibilities for institutional reform examined. I reckon that a necessary test of plausibility in this connection is the capacity to account for the centrality of general electoral processes within parliamentary democracy, including specifically the role of political parties. The parliament as prize model sketched here is, I think, such a plausible model, and one that helps us to see parliamentary practice in an appropriate, and appropriately diminished, light.

The model contains little that is unfamiliar. My object is not to provide a *startling* picture — merely one that accommodates most of what actually goes on. In that sense, it represents a good point of departure for thinking about reform. As a model, it may muster only one cheer. But it is a better basis for thinking about these things than more heroic alternatives, however appealing they might be as notional ideals.

Questioner — I found implicit in your talk a piece of advice. The advice is that those of us who are concerned to make government operate better, to get more deliberative

decision making going, ought not to focus on the floor of parliament, but ought to address ourselves to the place where most decisions are probably made and where consensus is most likely to emerge as a result of deliberation. I suspect that that place is probably in the committees. So for those of us who are trying to get better use of policy information, better deliberative decision making and decisions made in what we have broadly defined as the public interest, should we be focusing on committees rather than politicians in parliament?

Professor Brennan — No, I do not actually think that the committees are a place to look to for this sort of thing that I have in mind. I would see the committee system as being much more a model of the forum than I would of the parliament as prize. As I have indicated, I think there are elements of the forum in parliament, obviously. The problem with ideal types is that they are ideal types. I see the committee process as being a kind of evasion of what I think is the main game in town, which is the determination of policy platforms within parties, within the party room, and the presentation of that to the electorate. So I would not see committees as being the source of salvation of democratic politics.

Questioner — I like to regard government as all the people in parliament, and their freedom to cross the floor as absolutely essential and vital, because if we have not got a government that can change the balance of a decision we have not got a democratic process. Those men are elected still to represent the people of their constituency. Although it is not happening, that is intended to be the motive, and I believe it is still true.

The other point I would like to raise is the terrific injustice done to the general public by the manipulation of the media, who sometimes not only mislead wilfully but also omit very wilfully and skilfully — and now the media include influential academics. I find that taxi drivers are a very reliable mentor.

Professor Brennan — I certainly would not want to deprecate the taxi drivers — or support academics for that matter. I will talk about the first thing that you raised. If you believe in — and I think many people do have this in the back of their minds — a model of politics as a representative committee in which the freedom of people to cross the floor is not just an incidental kind of notional ideal that is never effectuated but something that is a part of standard parliamentary practice — you ought to feel very depressed indeed about parliamentary practice.

I also believe that the freedom to cross the floor is important. But I think it is important much more as a fail-safe device than it is as part of an ongoing democratic procedure. The truth of the matter is that most of the action is done in the party room; that is where policies are thrashed out. Of course, if things went wildly astray, the option as a kind of insurance policy device for parliamentarians of good conscience to cross the floor would be a useful device. It does act as a constraint in that sense.

I do not think the fact that nobody ever crosses the floor — it very rarely happens — should necessarily be construed as a failure of that constraint. It may actually be proof of the fact that it is working fairly well. However, having said that, the idea that the government is representative of all the people and that we ought to have or conceptualise

government as an ideal government in which parties have negligible influence is actually a mistake. As I have tried to argue in this paper, I think it would be inimical to the processes of larger scale electoral competition, which I see as central in the whole panoply of democratic institutions.

Questioner — How would your model of the electoral process of competition between policies which the different parties are putting forward accommodate the tendency in recent politics in Australia for a party which has no policies, or does not want to declare its policies until after the election, to be more successful in practice? Similarly, the Prime Minister does not say things like, 'We were elected to put into place various policies'. He says, 'We were elected to govern', which seems to carry with it the idea that it was elected to make up policies after it got into parliament.

Professor Brennan — I think this goes to the question of the relative weight of promises versus performance in the evaluation of the ruling parties by voters; that is an open question. It may be that voters will say, 'Right, here are rival tenders and we will bid for the one that we like the best'. In this case, it is crucial to put up policy, but it may also be that a substantial part of the evaluation is ex-post: 'These were the guys that were in last time; they built us some very good bridges, so we will let them continue to build bridges'.

I do not think the model of parliament as prize necessarily generates very clear presumptions one way or the other as to whether the better strategy in particular cases is to announce the whole policy platform first or to stand on one's record. Both are in play and, as I said, it does not seem to me that you would have to offer a very well-articulated policy platform in order to get elected. But, of course, if voters are prepared to elect members on the basis of that kind of trust, they will punish them if they do not deliver, and that is a central part of the democratic system.

Questioner — Given that we accept your assertion that parliament is a prize — the evidence for it is overwhelming — could the whole thing be done a lot more cheaply by simply electing sufficient members to form a government and a shadow government and — excuse me for saying so in this place — abolish the Senate completely?

Professor Brennan — I am a great fan of bicameralism actually. I do not want to air too many unpopular views in the one day. I concede that if you were fanatic about electoral competition you might think the Senate was a bad thing, since it does in some sense inhibit the capacity of elected parties to deliver on their promises. But, on the whole, it is part of a sceptical tradition in politics, of which the parliament as prize model is one kind of articulation, that the capacity to constrain the party of the day in a variety of ways is a good thing. The idea that one's own members might cross the floor is one such constraint.

We have actually lucked into a system in which the party composition of the House and the Senate is almost invariably going to be different, and I think that is a great thing. Over the recent past — not the immediate recent past, but over the last 10 or 20 years or so — on the whole, the Senate has been a force for sense and a constraint on the wilder aspirations of governments. My information is that if you compare us with New Zealand we may have moved more slowly but perhaps more surely than it has.

Questioner — I have two questions: one big one and one little one. First, the big one. I have read earlier versions of the model you have put forward. What has kept me on tenterhooks throughout that process is the question of whether your model is intended as a prescriptive one or as a descriptive one. In other words, putting it the other way around, is it simply claiming to be the most apt description of the essential elements of what actually happens in the parliamentary game, or is it put forward as an indication that, if the parliamentary game goes on being played according to those rules, it is the best of all possible worlds? That is the big question: prescriptive or descriptive?

The little question relates to the median voter theorem. For example, if the theorem went on continuously being true for some time, the policies of at least the main parties would be brought so close together that it would leave the voters with no real alternatives; a situation that we think we are closely approaching at the present time. How would you deal with that?

Professor Brennan — They are good questions. In relation to the difference between descriptive and prescriptive, of course all economists believe madly in — in fact value — distinctions. I certainly do not want to give the impression that what we have is the best of all possible worlds. But I do think that any prescriptive model ought to take proper account of what we have and where we are going. I think there is an economist's professional disposition against idealist and reformist moves which take no account of feasibility, in particular, or where we are going.

So I do not want to offer my model as a model of prescription in the sense that it is supposed to show the world as it ought to be. But you are right to push me on this because it is a model which has two elements in it. One is that it is supposed to be a model of a general picture of what we have, but seen in its best possible light.

I am really concerned about this question: what are the central bits of the Australian democratic parliamentary system? If we recognise certain bits as being central, we will focus our reformist energies on those bits and not on sideshows. The sideshows can cause one cynicism.

As I said when I began, I was deeply depressed when I saw these students because it seemed to me that implicitly they were treating our sacred parliamentary institutions with total contempt — and I was suggesting that perhaps they were right to do so. But, when I think of the alternative models in play, the images that drive one's anxieties about that, they involve elements that I would not seek to discard. The main game is as I have described it, and one's reformist activities ought to be focused on that main game; that is, making electoral competition more effective and, in the light of what we have, seeing what other constraints there are or what the worst dangers are and putting fail-safe mechanisms in place.

With regard to the median voter theorem, there is an interesting question here about two kinds of things. Firstly, why do policies diverge at all? There is an explanation for that because in the standard formulation the median voter model assumes that the only thing that motivates parties is a desire to be elected, whereas there is no doubt that parties are also motivated by independent ideological considerations, and there are good reasons why that should be so.

There is a second question and I do not know if this is what you were thinking about. Sometimes when we talk about choice we think it is very important for the electoral processes to generate real choice — that the party positions be different so that individuals can indeed exercise choice. I come to that question with an economist's predisposition, thinking that, if both parties are led, one might say, as if by an invisible hand to coalesce on something which is stable and close to being ideal — that is, if the institutional forces are such that that is how parties are constrained — the fact that there does not appear to be any choice because there is no difference in the tenders that are offered is not necessarily a cause for anxiety. There are rival tenders in a perfectly competitive market and the bottom tenders may all be very close to one another. The fact that the institutional structures have pushed all those tender prices down to the bare minimum may be regarded as being a good feature of the processes and not necessarily an undesirable one.

Questioner — Having regard to what some regard as the clear-cut differences between the Senate and the House of Representatives, would you agree that your three pictures are not exhaustive but there is at least a fourth and possibly a fifth and sixth picture that could well have been drawn? Secondly, having regard to Kate Carnell's view that the Australian Capital Territory Legislative Assembly should operate more collegially, does it follow from your views that you regard that as either not practical or not desirable or as neither practical nor desirable?

Professor Brennan — They are very good questions. There is certainly an abundance of pictures that might be drawn. It is also arguable — although it would take more time — that there are elements of all three pictures in our actual parliamentary institutions and that maybe there is something to be said for those elements — the committee system and so on — where different models are relevant.

But the three pictures that I have sketched are sufficiently different in what they see as being central and in what they require in terms of institutional support — for example, the role of the party system, elections and so on — that I think one could too easily say, 'Yes, we have the best of all possible worlds' because we have a combination of all my three pictures. I do not know whether or not the Senate represents a fourth or a fifth picture and what the essential features of that picture would be. Other pictures might be drawn.

My answer to the question about being more collegial is yes, it might be feasible, but if it were feasible it might not be desirable. Within my frame, which is generally sceptical about the exercise of power, there are common interests that politicians have; often those common interests are at the expense of the citizenry. Just as we defend the adversarial system in the criminal justice system — some people think it is not a good system; I actually think it is a good system on the whole — I think the adversarial system in politics is a good system because I believe in competitive processes, I suppose. That is a general predilection I have; I think that belief is well grounded. When politicians get together and make life comfortable for themselves I think that is the model of the monopoly cartel. We know something about the way in which monopoly cartels operate and whose interests are expended when those cartels are in operation.

Questioner — I wish to draw out some of the subnormative implications of what you said. Most of what you said seems to be defensive of the role of parties in democratic politics. If that is so, do you have any views on the best type of party system, especially in terms of the number of parties? A number of things that you said seem to be in defence of the two-party system. Is that the best, or should there be a three- or four-party system with the possibility of governing coalitions and changes in governing coalitions, or should there be a party system with a larger number of parties?

In turn, that relates to the question about the median voter idea. I think it is well known within that model that in a party system with a large number of parties, the parties can take positions very much away from the median position in terms of carving out niche markets. That can be seen in Australia today. The policies of the Democrats are quite different from the median position of the major parties.

Professor Brennan — That is a good question because it is clear that the logic of the position that I have developed here is that the two-party system is best. When there is a large number of parties, surprisingly very stable coalitions form and cement and accountability is undermined. The three- or four-party case can also be a recipe for instability. There is much to be said for the two-party system and in some ways our institutions ought to be designed to bolster the two-party system, as indeed I believe they are. Our form of electoral process — the single-member electorates and so on — are implicitly or otherwise supportive of the two-party system. I actually think that is a good thing.