

# AUSTRALIA – HOW ARE YOU GOING, MATE, WITHOUT A BILL OF RIGHTS? *or* RIGHTING THE CONSTITUTION

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## I. INTRODUCTORY

Since the beginning of 1990, and ending as recently as August 1993, the Australian High Court has handed down an amazing group of judgments. Each of the twelve cases involved is directly and overtly concerned with rights. In short, each case draws on rights concepts or uses “rights talk”. These twelve decisions are the subject of my address today.

What I hope to show is that the High Court has taken a quantum leap, although its springboard is deeply rooted in the past of its own and British jurisprudence, and that it has begun talking in a way it has not regularly done before about the protection of rights. It is rejuvenating the traditional doctrine of the rule of law by applying it not only to rights *against* the state – the traditional view of civil and political rights – but also to *claims upon* the state – which some theorists<sup>1</sup> think are non-rights and only programmatic in their nature. It has begun to extend the concept of the rule of law into the area of substantive, as distinct from formal, equality. Finally, it has elevated certain rights principles into the status of a new and potent common law of the Constitution. In only two of the twelve cases reviewed below (*Polyukhovich* and *Leeth*) was the applicant not successful, and even in those cases important rights principles were established.

The twelve cases reviewed are:

### 1. Power–curbing or modified rule of law cases

- Bropho v Western Australia* (1990) 171 CLR 1 (“*Bropho*”)
- Mabo v Queensland [No 2]* (1992) 175 CLR 1 (“*Mabo*”)
- Australian Capital Television Pty Ltd v The Commonwealth [No 2]* (1992) 66 ALJR 695 (“*Ad Bans*”)
- Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658 (“*Nationwide*”)
- Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (“*Lim*”)
- Polyukhovich v The Commonwealth* (1990) 172 CLR 501 (“*Polyukhovich*”).

### 2. Individual rights–protecting cases

- Dietrich v The Queen* (1993) 67 ALJR 1 (“*Dietrich*”)
- Cheatle v The Commonwealth* (unreported, August 1993) (“*Cheatle*”)
- Plenty v Dillon* (1990) 171 CLR 635 (“*Plenty*”)
- Secretary, Department of Health and Community Services v JMB and JWB* (1992) 175 CLR 218 (“*Marion’s case*”)
- Leeth v The Commonwealth* (1992) 174 CLR 455 (“*Leeth*”)
- Waters v Public Transport Corporation* (1991) 173 CLR 349 (“*Waters*”).

<sup>1</sup> For example, Cranston M, *What Are Human Rights?*, Bodley, 1973, ch 8; Kamenka E, “The Anatomy of an Idea” in Kamenka (ed) *Human Rights*, Edward Arnold, 1978; Vierdag EW, “The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights”, (1978) IX *Netherlands Yearbook of International Law* 69.

## II. THE POWER-CURBING AND RIGHTS-ORIENTED EMPHASES

The twelve cases seem on analysis to fall into two distinct and – fortuitously – equally sized groups, as shown in the table above. The decisions in the first group seem to be based primarily on curbing the power of the state. The other six cases are more specifically and explicitly concerned with protecting the rights of individuals. Among the six power-curbing decisions are two relating to the Aboriginal people and two relating to free speech. Among the six decisions relating to the rights of individuals, two relate to the concept of a fair trial (*Dietrich* and *Cheatle*), two to the concepts of equality and discrimination (*Leeth* and *Waters*), and one to a person suffering mental disability (*Marion*). So one can see that the High Court is moving into the tradition of the United States Supreme Court of becoming in a sense a protector of the minorities in, and disadvantaged members of, the community. That is a natural – and of course very welcome – development. As protection of the rights of the majority in the community becomes increasingly effective, what remains is to ensure that those protections are extended to individuals and groups on the fringes of the society – those with a minority right to protect or a status of disadvantage that needs to be confined rather than disregarded or exacerbated.

I recognise that my characterisation of the twelve cases may itself be disputable, because in some cases, eg *Lim*, the focus may be almost equally on the plight of the detainees and the curbing of the power of the Commonwealth; or in *Mabo* the recognition of the rights of Aboriginal people may seem almost as prominent as the central finding, which was that, as against the various governments, Aboriginal people could assert a limited form of claim to land rights. Equally, the opposite comment may be made of *Leeth*, where the emphasis on the power to punish prisoners based on administrative convenience was almost as strong as that on the rights of prisoners. However, I offer the characterisations as my sense of the approach and outcome of the cases.

In the following sections, the twelve cases will be reviewed, concentrating first on these two bases for decision as used by the various members of the Court in explaining their reasons for judgment, and later on more complex aspects. A feature of the cases is that four were unanimous, and that only two had as many as three Justices in dissent. So the High Court as a body is involved in all this, and not just a solitary dissident, as has sometimes been the case in the past. This fact seems to suggest that what is being discussed is a major and long-term shift in the orientation of the Court, not just a passing whim.

Because of the length of the cases – involving in all close to 1000 pages of print – I will not attempt to discuss each case individually. Instead, I will try to encapsulate the main emerging thrusts. The first of these relates to the six cases which have as a central concern the curbing of the power of government. Two of these (*Bropho* and *Mabo*) relate to the rights of indigenous peoples, two to freedom of speech (*Ad Bans* and *Nationwide*). What is particularly interesting about all the six cases is that rights talk, if that can be distinguished from discussion of excess of power or legality, is beginning to emerge as a mode of discourse, particularly on the central issues; that “implications” with rights-bearing content are being identified and applied even to the point of striking down otherwise valid legislation; and that in the process of curbing the relevant power, some members of the Court are willing to look behind the express provisions of the

Constitution to the substantive (or convention-based), rather than the formal, locus of the power.

The second group of six cases contains decisions in which, even if the curbing of executive power was involved (a main focus of the first group of cases), the primary concern seemed to be with the rights of the individual. In this area, the Justices seem considerably more prepared to talk in specific rights terms, although not as often as one might expect given the thrust of the argument; and they appear to rely more on common law tradition than on the kinds of Constitutional implication used as the basis for many of the decisions in the first group. Two of the cases involve the right to a fair trial. Two more are concerned with personal rights related to uninterrupted enjoyment of property and the right to bodily integrity; and the final two with substantive equality and the interpretation of discrimination law.

### III. COMMENTARY ON THE CASES

The survey of the selected twelve decisions delivered by the High Court since the beginning of 1990, the detail of which is not contained in this paper, has revealed that rights issues are currently occupying a considerable amount of its time; that some very important issues are emerging; that the Court has hardly yet formulated a clear or consistent approach to those issues; but that, in rights terms, the progress is extremely encouraging. In what follows, I will attempt to draw out from this wealth of material some comments and conclusions about how Australia is faring, even although it has no Bill of Rights in either legislated or constitutionally enshrined form. To do this, I have identified three particular areas for examination. The first, and more formal area, relates to the kind of language the various members of the Court use when discussing the issues. The second and third areas are more substantive: they relate respectively to the sources from which the rights-related findings have been derived and to the developing trend towards using rights concepts when interpreting the Constitution itself, and also statutes.

#### **1. The language used**

It will be recalled that the twelve cases reviewed have been divided into two groups – the first, those in which the main thrust appears to have been curbing the power of the executive; the second, those in which the focus was on protecting the rights of individuals. What emerges from the division is that, with some exceptions, the judgments in the first group do not use “rights talk”, but rather are phrased in terms of the power of the Executive and the Parliament; and in terms of the way in which the Constitution limits that power, with the judicial power being invoked at this point in some of the cases. One has the feeling that it is almost irrelevant that the outcome in the first group is the protection of the rights of an individual, group or interest. This is a manifestation of the phenomenon to which Dworkin referred in his famous lecture on the rule of law,<sup>2</sup> where he noted that judges in the British, as distinct from United States tradition draw on the “rule-book” conception, in which “formal” language is used, negative concepts

2 Dworkin R, “Judges and the Rule of Law”, *Maccabaeen Lecture in Jurisprudence*, December 1977.

such as limiting the power of the Executive or Parliament are employed, and much reference is made to history. By every means, they try to avoid the criticism that they are engaged in a form of value-based law-making by adopting what Dworkin terms the “rights-based” conception of the rule of law.

In terms of the twelve cases analysed, the rejuvenating rule of law doctrine can be said to have been applied in five cases,<sup>3</sup> and the concept of substantive (rights-based) equality in three of those and one further case.<sup>4</sup> It will be noted that these cases are on either side of the divide between the power-curbing and the rights-protecting cases, and that in some cases both conceptions were used. An encouraging feature of the use of the rights-based conception on both sides of the divide is that the rejuvenating doctrine appears to have been applied at a basic level, suggesting that it will continue to be used when the distinction between the power-curbing and rights-oriented approaches has been superseded, as I hope it will.

However, the Justices who were prepared to describe what they were doing more openly – or was it simply more in terms of the framework of justice within which their value judgments are based? – give the show away. Compare, for example the reasons for judgment of the majority Justices in *Polyukhovic* with those of the dissenting minority. The majority talk about the limits of the external affairs power of the Parliament (although even here, Brennan J manages to wring out a rights-related concept).<sup>5</sup> In relation to the power of the Parliament to enact retrospective legislation, they say this is possible for a sovereign Parliament.<sup>6</sup> The minority, however, discuss retrospectivity as a means of limiting power that is sourced in “a fundamental notion of justice and fairness”,<sup>7</sup> and assert that retrospectively declaring an act a crime is “a travesty of justice”.<sup>8</sup> Admittedly, this is only borderline “rights talk”, but it is going to the heart of all rights, the achievement of justice in a particular case.

Similarly, one could compare the approach of the minority in *Nation-wide*,<sup>9</sup> or the solo performance of McHugh J in *Ad Bans*.<sup>10</sup>

In *Bropho*, although there was a very definite concern with the rights of Aborigines, the thrust of all the judgments was towards restricting the traditional interpretation that statutes do not bind the Crown unless the binding is explicit. There was no reference to rights of the citizen, although of course they were the strong undercurrent in the case. *Mabo* stands in sharp contrast to all these cases. Here, the basic decision was to overthrow a long-standing assumption about the consequences of the basis on which the Crown had occupied Australia. It could have been done on the basis of the international law as expounded by Blackstone and perhaps wrongly applied by Blackburn J in *Milirrpum*,<sup>11</sup> and been a quite low key finding. Not so. All the judgments, except that of Dawson J, were clear in their assertion of rights for the Aboriginal people, and in their recounting of the

3 *Bropho, Mabo, Dietrich* (in the first group); and *Marion and Leeth* in the second group.

4 *Mabo, Dietrich* (first group); *Leeth and Waters* (second group).

5 (1991) 172 CLR at 528.

6 *R v Kidman* (1915) 20 CLR 425.

7 (1991) 172 CLR at 688–9.

8 (1991) 172 CLR at 704–5.

9 (1992) 66 ALJR at 688, 663.

10 (1992) 66 ALJR at 743.

11 *Milirrpum v Nabalco Pty Ltd and the Commonwealth* [1972–73] ALR 65.

tragedies, injustices, cruelties and dispossessions of the past. The leading judgment of Brennan J emphasised the “unjust and discriminatory doctrine”<sup>12</sup> of land rights applied to the Aboriginal people, and Deane and Gaudron JJ held (although the rest of the Court did not agree) that those rights “may be enforced by legal action and ... found proceedings for compensatory damages,”<sup>13</sup> and Toohey J took a similar view.<sup>14</sup> If the sequence of the cases in this group of six had commenced with *Mabo*, one might have wondered whether the public reaction to it had daunted the High Court – but it did not. It came about in the middle, in May 1991.

The contrast is marked between the first group of cases and the second, where the focus is much more on the rights of the individual or group. In four of the cases, most or all of the Justices explicitly referred to rights. *Dietrich* is a good example. Here, it would have been quite easy for the decisions to have been couched in terms of the way the lower courts had handled his need for representation, along the lines of the decision in *McInnis*.<sup>15</sup> Instead, all the majority Justices spoke of the *right* to a fair trial.<sup>16</sup> It was only the dissenting minority, Brennan and Dawson JJ, who couched their decision in terms of the need for the reviewing court to be sure that the trial was fair.<sup>17</sup>

In only two of the individual-rights-related cases was the “rights talk” confined to a minority. These were *Leeth* and *Waters*. The majority in *Leeth* saw the question of ensuring like periods of imprisonment for all Commonwealth prisoners as an option which the Executive could choose, or set aside in preference for the administratively simpler (and possibly greater prisoner dissatisfaction, although I would doubt that) method of leaving the whole process to the States.<sup>18</sup> The minority Justices wrote powerfully about the doctrine of equality before the law, which entails also equal administration of the law.<sup>19</sup> In *Waters*, the issue was how to interpret some relatively obscure provisions in the Victorian Equal Opportunity Act. The majority Justices took the view that what was at issue was a matter of statutory construction,<sup>20</sup> but Mason CJ and Gaudron J went to the purpose of the statute in determining what “reasonable” meant in the context of indirect discrimination, and also in seeing the meaning of indirect discrimination as covering more than the particular instance of it covered by s 17(5).<sup>21</sup>

The foregoing analysis appears to show that the High Court is not yet altogether clear whether, in rights-related cases, it will make explicit the rights at the heart of its findings; or whether it will continue, where practicable, to couch those findings in terms of the scope of powers, using

12 (1992) 175 CLR at 58.

13 (1992) 175 CLR at 113 and 119.

14 (1992) 175 CLR at 216.

15 *McInnis v The Queen* (1979) 143 CLR 575.

16 (1992) 67 ALJR at 3,9,23,36 and 39.

17 (1992) 67 ALJR at 31.

18 (1992) 174 CLR at 466,467,471.

19 See *Leeth* (1992) 174 CLR at 486–7, and compare, for example, Article 26 of the International Covenant on Civil and Political Rights, which provides that all are entitled “without any discrimination to the equal protection of the law”. With respect, the author considers this provision applies to the *administration* of the law and thus both to the head sentence *and also* to the length of time actually in prison for prisoners sentenced by a court for the same offence and with the same head sentence.

20 For example, Dawson and Toohey JJ at (1991) 173 CLR at 394.

21 (1991) 173 CLR at 394.

the traditional subject matter, connection and relevance, and purpose-related tests.<sup>22</sup> What does, however, emerge is that there is greater preparedness to acknowledge rights where individuals are more obviously concerned, and less where the issues are related to restraint of the power of government.

My comment – and one that might well elicit a sympathetic response from our Chairman today<sup>23</sup> – would be that, for too long, discussion of the rule of law, insofar as it on the one hand relates to the curbing of arbitrary power (Dicey's first principle), and on the other to the rights of individuals that lie beyond the unwritten (or in our case written) constitution (Dicey's third principle), have been kept separate. One is in fact the obverse of the other: to curb power gives rights, to give rights curbs power. And the object of both principles is the promotion of justice for, and the rights of, the individual. That object should be clarified, and made specific, as each particular case is decided. In passing, but necessarily the subject of another paper, it might be asked whether, at least for the current High Court, rights-related factors (albeit sometimes related to power-curbing) are a new, and perhaps the primary, factor in limiting legislative and executive power. This is the kind of issue that was clearly raised in *Ad Bans*.<sup>24</sup>

In the next sections of the paper, I shall discuss where the Justices sourced the rights to which they so eloquently made reference, and shall also note the accompanying trend towards rights-based interpretation of the Constitution and of statutory provisions. A new era in the perception of our legal system, and in particular of the Constitution itself, appears to be dawning.

## 2. The sources of the rights

The Justices appear, in the cases discussed, to have identified three sources for the rights they have applied. The most dramatic of these sources is “implications” of the Constitution or what, as I shall suggest, might preferably be termed “the common law of the Constitution”. The two other sources are the common law and convention. Let me take them in turn.

### *i. Implications, or the common law of the Constitution*

The judgments, in both the power-curbing and the rights-protecting groups of cases, are sprinkled with references to implications about rights and freedoms. For example, the *Dietrich* and *Leeth* cases contain many references to a right to a fair trial, the *Ad Bans* and *Nationwide* cases to a freedom of communication. The question arises: where did these basic or fundamental implications come from? Deane J suggests in *Nationwide* that they come from “the doctrines of government upon which the Constitution as a whole is structured” (emphasis supplied).<sup>25</sup> Brennan J, in the same case, basing his view closely on the *Engineers*' case,<sup>26</sup> and quoting it, said:

22 For a discussion of these methods of scrutiny see Zines L, “Characterisation of Commonwealth Laws” in Lee HP and Winterton G (eds), *Australian Constitutional Perspectives*, Law Book Co, 1992.

23 The Right Hon Sir Robin Cooke, President, Court of Appeal of New Zealand.

24 See particularly the judgment of Mason CJ (1992) 66 ALJR at 704; but contrast this with Brennan J at 703–4.

25 (1992) 66 ALJR at 678.

26 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, *with knowledge of the combined fabric of the common law*, and the statute law which preceded it, and then *lucet ipsa per se*.<sup>27</sup> (Emphasis added.)

The three Justices are seeking to locate their guiding principles within the legal tradition on which the formation of the Constitution was based. Such a location is consistent with the use of legal tradition in the common law system. It is inevitable when, as Deane and Toohey JJ point out, the Constitution itself does not provide sufficient details to prescribe a formal separation of powers, a system of representative government or of responsible government. The implications – the common law of the Constitution – fill out, to adapt what Brennan J so aptly said in *Mabo*, the skeleton which gives our constitutional law its shape.<sup>28</sup> It is, indeed, precisely these frameworks that the founders – and the people – a century ago intended be established.

What leads me to suggest that the term “common law of the Constitution” might be preferable to the term “implications” is itself related to that legal, governmental and political tradition. The suggestion is made first, because in the majority judgment in the *Engineers’* case, Knox CJ, Isaacs, Rich and Starke JJ referred in those terms to “the common law of the Constitution”.<sup>29</sup> Second, the phrase seems preferable to “implication” because it points to the genuine source of the principles – or “doctrines”<sup>30</sup> – used by the Justices. Third, it is appropriate because it links into the concept of the common law as customary law evolved through a combination of judicial decision and the practice of the operators of the political system as embodied in conventions – and from where better could this line of determinations come? Finally, the phrase is preferable because it is firmly expressive of the often forgotten third meaning of the rule of law enunciated by Dicey.

The first two of the four points just mentioned emerge from the earlier discussion. The reference to the third meaning of the rule of law as enunciated by Dicey is to a meaning that is often disregarded by students and others because of its somewhat opaque and puzzling character, and may need a little elaboration. It is easy enough to accept the first meaning Dicey gives to the rule of law – the absolute supremacy or predominance of regular law, meaning in particular the absence of prerogative and arbitrary power. So also is it easy to agree with the second meaning – equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts of law although, as pointed out by Mason CJ and Gaudron J in *Waters*, that meaning needs to be filled out with concepts of substantive equality.<sup>31</sup> The third, more elusive meaning of the rule of law is, suggested Dicey, that:

27 (1992) 66 ALJR at 667, quoting *Engineers’* case 28 CLR at 152.

28 (1992) 175 CLR at 45.

29 (1920) 175 CLR 45 at 145. The full (and lengthy) sentence refers to “an interpretation [sought by the applicants] of the Constitution ... which is not ... referable to any recognized principle of the common law of the Constitution” and which cannot be rebutted “by an intention ... equally not referable to any common law constitutional principle”.

30 Deane J in *Nationwide* (1992) 66 ALJR at 678.

31 Though the extension of this meaning to exclude any kind of separate administrative law may not be so acceptable. In the author’s view, this latter point is not central to Dicey’s view. See Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, London, 1939 (9th ed).

... the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are [sic] *not the source but the consequence of the rights of individuals*, as defined and enforced by the courts; that, in short, the principles of private law have been with us by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus *the constitution is the result of the ordinary law of the land*.<sup>32</sup> (Emphases supplied.)

What our High Court has been doing in all the recent cases I have described has been to dig deeply into the rule of law doctrine and to apply Dicey's third principle to the particular situations that have come before it. The Court has, in the first group, been considering a challenge to the exercise of a legislative or executive power, and has found *common law* values to supply the basis for their decisions. Our Constitution does not, as Dicey so accurately perceives, provide an ample source for the rights of individuals; but it is, as noted above, based firmly in the British constitutional and common law tradition in which, as he suggests, "the constitution is the result of the ordinary law of the land". So those traditions are, with appropriate legal reasoning, coming to be applied by the Court when the challenge to a particular law or practice is based not on the formal or traditional question of purposive or subject matter characterisation,<sup>33</sup> or federal principle,<sup>34</sup> but on the very doctrines or principles that have, as Dicey said, been enunciated by the courts and the Parliament over the centuries as the fundamental rights of individuals.<sup>35</sup>

But there is more. In traditional common law doctrine – and indeed as a common law rule – the decisions of the courts give way to law made by the Parliament (see also section (ii) below). With this new common law of *the Constitution*, the common law *prevails over* legislation of either the Commonwealth or a State, in a situation in which it applies. This is because our Constitution is not a new populist instrument, as is that of the United States, but in essence establishes a framework institution designed to incorporate the British system of representative and responsible government in a federal entity. Hence the Court has in a sense Constitutionalised certain elements in the common law – those fundamental principles or doctrines of which several of the Judges have spoken in *Ad Bans*, *Nation-wide*, *Leeth*, *Polyukhovic*, *Lim*, *Dietrich* and so on.

May I suggest a metaphor. It is that of a stage. On it, centre stage, and standing like an apparently impregnable fortress, is the written and largely unchangeable Constitution. Behind that, forming the backdrop in the shadow of which the action takes place, are the fundamental common law principles, developed over the centuries and now enshrined in the British (unwritten or customary) constitution and, by derivation (or implication), in Australia's Commonwealth Constitution. In front stage are the actors in

32 Ibid, p 203.

33 Zines L, "Characterisation of Commonwealth Laws", op cit fn 22.

34 For limitations on Commonwealth power, see eg *State Banking* case (1947) 74 CLR 31, *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 per Gibbs CJ at 205–7, Mason J at 215–21, Brennan J at 235–6, Deane J at 244–8, Dawson J at 258–62. For possible limitations on State power, see *The Commonwealth v Cigamatic Pty Ltd* (1962) 108 CLR 372 per Dixon CJ at 376–8. Generally, see Zines L, *The High Court and the Constitution*, Butterworths, 1992 (3rd ed) at 276–88 and, in relation to s 106, at 288–94.

35 For a fascinating and erudite exposition of the development and continued application of the fundamental principles of the rule of law as against the "rule of men", see Toohey J, "A Government of Laws, and Not of Men?", *Conference on Constitutional Change in the 1990s*, Darwin, 5 October 1992, now reproduced in (1993) 4 *Public Law Review* 158, at 159–70.



the Constitutional play – today's and yesterday's Parliamentary, political and executive leaders. The judges are the off-stage prompters who follow the play as it proceeds, and occasionally step in to provide authoritative text. The backdrop of basic common law principles is, and I suggest increasingly will be, applied by the judicial prompters to the Constitution as part of the common law of the Constitution (or, if you prefer the current judicial terminology, as implied principles of the Constitution). They will, as we expect of the judiciary, be applied circumspectly, but firmly when suitable cases come forward. The front stage players, who form the conventions, are also being noticed by the judges. I will come to them later – see section (iii) below – as another of the sources of rights talk in cases before the High Court.

ii. *The common law as a second source of rights*

The common law itself is, our review of cases shows, increasingly being invoked in a traditional way, but with a strengthening emphasis on its rights-content. Five of the cases have drawn on the common law in the ordinary process of reaching a decision. Two of the cases which curb the power of the executive – *Mabo* and *Nationwide* – are involved, and three that focus on the rights of individuals – *Dietrich*, *Plenty* and *Marion*. Because *Mabo* is a case that does not involve any Constitutional provision, the issue was how the Court would view the claims of Australia's indigenous peoples<sup>36</sup> to rights over land. The principles of the rule of law were to the fore. The Court delved into the common law as applied in other relevant countries in North America and Africa, and into the position in international law. It concluded that what was involved was a recurrent and discriminatory exercise of paramount power.<sup>37</sup> Further, Brennan J, fully aware that what was being decided would alter the common law as hitherto perceived, said:

It must be acknowledged that, to state the common law in this way involves the overruling of cases which have held to the contrary. To maintain the authority of those cases would destroy the equality of all Australian citizens before the law. *The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius* and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interest in land.<sup>38</sup> (Emphasis supplied)

What is significant is that the change to the existing common law rule was made in the interests of the more fundamental principles of equality and justice, and that international human rights standards were specifically referred to.<sup>39</sup> In *Nationwide*, the point was again made by Deane and

<sup>36</sup> In *Mabo*, it was the Meriam people of the Torres Strait Islands, and in pending litigation there will be exploration of the rights of members of the Aboriginal people.

<sup>37</sup> (1992) 175 CLR at 58.

<sup>38</sup> (1992) 175 CLR at 57–8.

<sup>39</sup> The possibility of greater use of international human rights standards is, for space reasons, not dealt with in this article. There are interesting discussions in *Mabo*, *Polyukhovic*, *Marion* and *Leeth*; by Kirby P in *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 and, in more extended form, in "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms", (1988) 62 *Australian Law Journal* 514. See also Doyle JJ and Wells BC, "How Far can the Common Law go towards Protecting Human Rights?", an as yet unpublished paper given to the conference on Bills of Rights held under the auspices of the Centre for International and Public Law, Australian National University, 9 July 1992, at 62–5. The paper is expected to be published around April 1994.

Toohy JJ, in connection with freedom of speech, when they emphasised the fundamental rights and principles recognised by the common law at the time of formation of the Commonwealth.<sup>40</sup>

In the individual rights cases, the same situation applies. In *Dietrich*, Mason CJ and McHugh J went so far as to suggest that, in referring to the common law right to a fair trial, “it is convenient, and not unduly misleading, to refer to *an accused’s positive right to a fair trial*” (emphasis supplied).<sup>41</sup> In *Plenty*, the abiding concept of the rule of law as part of the common law was emphasised strongly by the Court, which also quoted the well known passage from the Lord Denning in *Southam v Smout*.<sup>42</sup> Likewise, in *Marion* the majority referred to “a fundamental right to personal inviolability existing in the common law”.<sup>43</sup>

There is, however, a difficulty with the common law protection of rights. The difficulty arises from the nature of the common law: the rights it embodies, although often expressed in general terms, are nonetheless almost always phrased negatively. That is, its method is, through drawing on recognised “freedoms” of the individual – those that are left after legislatively imposed limitations have been applied, for example the laws relating to defamation or criminal offences to protect the individual from actions that offend the relevant “freedom”. A consequence of all this is that the remedies it has given tend to be negative in approach, to operate only in residual areas, and characteristically to protect individuals from rights-destroying actions of government and its agencies. That is not necessarily much help if some positive remedy is required. As Brennan J so aptly observed in connection with the “right” to freedom of speech in *Nationwide*:

... at common law there is no *right* [sic] to free discussion of government (*Attorney-General v Guardian Newspapers* (No 2) [1990] 1 AC 109 at 283). Freedoms or immunities recognised by the common law are, generally speaking, liable to impairment or abrogation by legislation.<sup>44</sup>

It seems to me that there are actually two distinct issues involved in this statement. The first is whether, if there is contrary legislation, a common law right exists. To this, Brennan J correctly answers that there is no “right”. The second issue is whether there is a basic right to freedom of speech recognised in the common law. It seems to me that there is, even although it may not be a strong one – may be abrogated by legislation – and that this is the kind of right to which Dicey is referring in his third principle.

Another reason why the common law rights tend to be negative in their application is that, while it is relatively easy to restrain someone from doing something, it is much more difficult to require a positive action, particularly if resources are involved. This position is understandable – and probably acceptable – in a world in which the main functions of government were perceived as relating to law, order and defence, and in which the rule of law required legal justification for all government action: all that was necessary was to restrain governments from illegality in the interests of

40 (1992) 66 ALJR at 678.

41 (1993) 67 ALJR at 3.

42 (1991) 171 CLR at 653.

43 (1992) 175 CLR at 253–4.

44 (1992) 66 ALJR at 669.

fundamental freedoms. But today's world is different. And we find the High Court already in a quiet way moving, in response, toward findings requiring positive action by government. In short, the Court is moving beyond the traditional "negative" approach to freedoms, towards enforcing freedoms of a more positive kind. This trend is exemplified by *Dietrich* on the one hand, where the decision about representation creates the potential for considerable expenditure of resources if a fair trial is to be achieved. It is interesting that this right, although found in the traditional "civil liberties area", is becoming nevertheless the subject of "positive" rather than "negative" interpretation. In the non-traditional area of rights – of "collective" economic social and cultural rights – consider *Mabo*. Here, three Justices actively contemplated the need to pay compensation for past wrongs of an economic, social and cultural kind, and the others (except for Dawson J) clearly perceived a need for executive action to remedy past wrongs. In the process, the Court is discovering those fundamental rights which Dicey so presciently identified as underlying the Constitution itself.

*Marion* lies somewhere between *Dietrich* and *Mabo*. A traditional "negative right" reaction would likely have been to refuse the guardians (or parents) authority to undertake the non-therapeutic action, and certainly not to authorise state expenditure on her behalf for that purpose. Yet the majority determined that a court does have legal power to authorise what would amount to considerable expenditure in medical terms in order to improve the quality of life of an unfortunate child. More importantly perhaps, in this context, Brennan J (although in dissent) suggests the need, in the interests of rights, to be willing to require the expenditure of public resources.<sup>45</sup> The decision seems to go beyond the traditional "negative" functions of law, order and defence, or of negative restraining action related to common law freedoms.

It may be objected that this new common law of the Constitution gives the courts too much scope – that they can disregard the provisions of the Constitution in a way they could not if the doctrine of "implication", with its presumed link to specific clauses in the Constitution, was accepted as the proper description. I disagree. It seems to me that "implication" is a looser concept, and less necessarily linked to common law tradition, than is the concept of a common law of the Constitution. Further, and as discussed below in section (iii), "implication" does not accurately describe the process of modification of the Constitution through convention, or practice, that has so clearly been part of the process. "Common law of the Constitution" captures this aspect, in the sense that it is "constitutionalising" the practice of the Constitution. Practice is at the very heart of "common" or "customary" law.<sup>46</sup> The link between interpretation of the Constitution and tradition was beautifully stated by Harlan J of the Supreme Court of the United States when expounding the use of the substantive due process doctrine:

<sup>45</sup> (1992) 175 CLR at 275–6.

<sup>46</sup> See also, for a reference to the related concept of presumptions, the discussion in Doyle and Wells above, fn 39. See also Pearce DC and Geddes RS, *Statutory Interpretation in Australia*, Butterworths, 1988 (3rd ed) at 97, where they refer to the presumptions in statutory interpretation as being in effect a "common law Bill of Rights". It was one of these, of course, that was revised in *Bropho*.

If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.<sup>47</sup>

### iii. Constitutional conventions as a third source of rights

The third source of rights-related findings in this remarkable series of recent decisions by the High Court is the Constitutional convention. By “Constitutional convention” I mean those practices of governments and their agents that have developed, and are generally accepted and followed, in carrying out the business of government that is related to the provisions of the Constitution.<sup>48</sup> Examples are the conventions about the Governor-General acting only on the advice of the Executive Council, and the operation of responsible government, including the Cabinet. The most extensive discussion of the conventions was by Deane and Toohey JJ in *Nationwide*.<sup>49</sup> It is a commonplace that these Constitutional conventions now radically alter, or even negate, the written rules of the Constitution.<sup>50</sup> Yet the formal position of the courts is that they do not enforce, only “recognise”, conventions.<sup>51</sup>

As one would expect, the conventions of the Constitution are used as a source of rights-related decisions in the first group of cases, where what is at issue is the curbing of the power of the executive. These conventions have sometimes been invoked to enable the Court to go behind the legal form to the substantive exerciser of power;<sup>52</sup> sometimes in the process of applying the common law of the Constitution as discussed in the previous section; and sometimes in the way in which a particular law is interpreted as applying. In *Bropho*, for example, the convention that the Crown is no longer the government, and that much of government activity is in the general marketplace, was explicitly used by the Court to overrule the traditional view of the application of statutes to the “Crown”.<sup>53</sup> In *Ad Bans*, the Chief Justice went as far as to say that the Court should be “astute” to pierce the veil of the convention relating to the separation of Parliament from the Executive, and recognise that the legislation under challenge was actually designed to give the Executive wide regulation-making powers:

... according to unspecified criteria ... [by which] the government of the day can decide which course suits it best.<sup>54</sup> All too often attempts to restrict the freedom [of communication] in the name of some imagined necessity have tended to stifle public discussion and criticism of government.<sup>55</sup>

47 In *Poe v Ullman* 367 US 497 (1961) at 542, quoted by O’Connor, Kennedy and Souter JJ (the plurality) in *Planned Parenthood of Southeastern Pennsylvania v Casey* (1992) 60 Law Week 4795 at 4799–800.

48 The “constitutional” conventions have been distinguished from “governmental” conventions (which operate to confirm practice not related to the Constitution itself) by Cooray JM, *Conventions, the Australian Constitution and the Future*, Legal Books, 1979, section 3.5.

49 (1992) 66 ALJR at 678.

50 *Reference re Constitution of Canada* (1981) 125 DLR (3rd) 1.

51 *Ibid.*

52 See, for example, *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342. See also the interesting comment, as long ago as 1913, in *Smith v The Crown* (1913) 17 CLR 356 per Barton ACJ at 362–3.

53 *Bropho* (1990) 171 CLR 1 in the majority judgment at 19.

54 (1992) 66 ALJR at 707.

55 (1992) 66 ALJR at 706.

It is true that the conventions as such have not formed the explicit basis for the decisions. Nevertheless, they were instrumental in leading to a decision that a particular piece of legislation was invalid. One only has to consider the different result that would have occurred had the Constitution been taken literally, ie without recognising the conventions, to see how important they are. In *Ad Bans*, for example, the decision might have been based purely on the formal legislative power and its incidentals, and the legal supremacy of Parliament (note the dissenting judgment of Brennan J), but was in fact based on an understanding of the way the conventions now work to give the executive control of the Parliament. To take up the earlier metaphor, the constitutional conventions might be regarded as the "facts" of, or the established patterns of action in relation to, the Constitution – the stage directions for the front stage players in my earlier analogy, which the Court has in mind when interpreting the Constitution itself.

The *Nationwide* case illustrates a yet further dimension in the use of conventions. Here, the conventions relating to responsible government have become as it were the substance, or doctrines (to use Deane J's words) from which the common law of the Constitution is drawn (the implications). The conventions have been transferred by the judicial prompters from the accepted practice of the front stage actors in the hurly burly and developing play of politics and located in the backdrop of the common law (or practice) of the Constitution. This common law or practice has become, in the hands of the judicial prompters, part of the way the Constitution itself operates, and is seen by them, the ultimate authorities, to have the same cutting edge, eg in declaring legislation invalid, as does the Constitution itself. Thus the conventions or practices of the front stage actors are becoming in some cases the common (or customary) law of the Constitution, and this common law then seems to have superseded the written provisions of the Constitution itself.

This leads me to a final point in developing the analogy of the play. It is that something mysterious is happening on this imaginary stage of ours. It is not only that the backdrop, the fundamental common law rights and principles, are being elevated to Constitutional status in terms of their position in the legal hierarchy, and that the front stage actors are developing conventions that gradually become recognised as affecting or even superseding the written law. The written law of the Constitution itself is also, in parts, beginning to look a great deal less "black letter" and final than it did. In an insightful paper being written by an honours student in her final year at the Faculty,<sup>56</sup> the point is made that important parts of the Constitution have for some time been recognised by the courts as not being in fact enforceable.<sup>57</sup> In the words of Barwick CJ, the terms of s 57 are not generative of a directory or mandatory obligation.<sup>58</sup> Further, other parts of the Constitution have been disregarded in light of the content of the

<sup>56</sup> The paper, *Unconventional Wisdom*, is by Ms Diana Newcombe and was submitted this weekend as the Research Unit in part compliance with the requirement for an honours degree in Law. I am indebted to Ms Newcombe for her careful research and for the discussions that have led to this new set of insights into a written constitution in a common law system.

<sup>57</sup> See, for example, *Cormack v Cope* (1974) 131 CLR 432, esp per Barwick CJ and *Victoria v The Commonwealth* (the PMA case) (1975) 134 CLR 81.

<sup>58</sup> *PMA Case*, (1975) 134 CLR at 119. Another example may be s 5 of the Constitution, which requires the Governor-General to summon a newly elected Parliament within 30 days of the return of the writs. Newcombe, *Unconventional Wisdom*, at 33.

Constitutional conventions.<sup>59</sup> The offstage prompters – the judges – are in effect quietly transforming the written Constitution by referring to the backdrop principles and the front stage conventions, or a combination of both. There is not space here to elaborate upon this theme, but what it means is that, on the one hand, the front stage actors over the past century – the political and executive leaders – are producing, through the development of conventions, not insignificant shifts in the way the provisions of the Constitution operate; and on the other that the High Court is finding it increasingly necessary, now that the formal meanings of the written Constitution have substantially been explored, to go behind those meanings or interpretations to draw from the well of the common law. That well itself, being originally filled from the British tradition, will increasingly be replenished – may one say rejuvenated? – both from the developing principles of the common law in a more equal and democratic society and by the practice of our own players from within our own developing political and executive practice.

Finally, a note might be made of the use by the Court of the judicial power as a means of protecting or enforcing rights. There is a whole paper to be written on this newly emphasised theme. Suffice it to observe here that the judicial power was significantly involved in no less than seven of the cases discussed – three in the power-curbing and four in the individual rights categories. In each of these, the judicial power was discussed by at least some of the Justices – all in the case of *Cheatle* – in specifically rights-related terms. In *Nationwide*, *Lim* and *Polyukhovic*, the judicial power was invoked to strike down the relevant legislation although the majority did not find this way in *Polyukhovic*. The question in *Lim* was what power the executive had to detain illegal entrants to Australia under specially designed legislation. McHugh J considered an act of attainder would be unconstitutional as a breach of the separation of judicial from legislative and executive power,<sup>60</sup> and Toohey J mentioned the right to liberty and security of person in the context of the apparent ouster of the jurisdiction of the courts.<sup>61</sup> Thus they saw limitations, in both legislative and judicial heads of power, on what could be done to remove basic freedoms, based on echoes of the rule of law in Dicey's first sense. In *Dietrich*, *Cheatle*, and *Leeth* the question was whether the actions of the Parliament or the Executive encroached on the judicial power; in *Marion*, the question was as to the ambit of the power of the courts – whether parents or welfare authorities could act without authorisation by the court.

Thus the rights-talk currency is being extrapolated from the judicial power, itself expressed totally neutrally in its Constitutional context. That too is a relatively new development, and might well be regarded as another area in which the common law of the Constitution is being drawn upon.

<sup>59</sup> For example, s 2 of the Constitution in favour of s 61, with the executive power of the Commonwealth now seen as “includ[ing] the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law” – per Mason J in *Barton v The Commonwealth* (1974) 131 CLR 477 at 498. See also Lindell G, “Justiciability of Political Questions: Recent Developments”, in Lee HP and Winterton G (eds) *Australian Constitutional Perspectives*, Law Book Co, 1992, at 246.

<sup>60</sup> (1992) 176 CLR at 69–72.

<sup>61</sup> (1992) 176 CLR at 51–2.

The common law, then, seems to extend beyond just the executive, and perhaps the legislative powers, to include the judicial power.

### 3. The rights-based interpretation of the Constitution and statutes

I now come to the third section of the commentary. In it, I propose to examine the greater willingness of the Court to interpret the written legal instruments – the Constitution itself and enactments of the Parliament – in rights-based terms.

#### *i. Rights in the Constitution*

In the course of construing the Constitution itself, there are signs that the Court is going to interpret less formally, and with greater awareness of rights content, the “rights provisions” already contained in the Constitution, eg *Street* and the interpretation of s 117.<sup>62</sup> There are also signs from our twelve cases that, perhaps particularly through the interpretation and application of the judicial power, and the assumption of the separation of powers doctrine, a greater rights element will be implied into what were formerly simple scope-of-power decisions – for example in *Nationwide*, *Lim*, *Dietrich* and *Cheatle*.

While it can probably be stated without any disagreement that at least half a dozen provisions in the Constitution are now recognised as rights-bearing,<sup>63</sup> I have suggested elsewhere that the number might be as high as 24.<sup>64</sup> Be that as it may, ss 80, 116, 117, 51(23A), 51(31) and 92 (“intercourse”) would undoubtedly be recognised as rights-type provisions. The High Court seems to have been willing in the 1980s to give new life to some of them.<sup>65</sup> There is not time to deal with this head in detail, but my point is that a considerably more “rights-oriented” interpretation is being given than hitherto. As examples, one can mention the new doctrine of substantive equality that was used in relation to s 117 in *Street*’s case in 1989,<sup>66</sup> and the wider meaning given in 1983 to “religion”<sup>67</sup> in relation to s 116.<sup>68</sup> A similar trend, not yet fully realised, may be emerging in relation to s 80.<sup>69</sup> Thus in *Cheatle* s 80 of the Constitution that jury findings must be unanimous if the individual right to be presumed innocent – to be given the most careful trial before being found guilty of a criminal offence – is to be upheld. This goes far beyond the literalist interpretations of earlier courts of the s 80 requirement that all Commonwealth criminal offences made indictable by the Parliament are to be tried by a jury.

62 *Street v Queensland Bar Association* (1989) 168 CLR 461.

63 See Bailey PH, *Human Rights: Australia in an International Context*, Butterworths, 1990 at 79.

64 *Ibid*, 79, 84–6 et seq.

65 *Ibid*, Ch 4.

66 *Street v Queensland Bar Association* (1989) 168 CLR 461.

67 *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 25.

68 Strictly not to s 116 itself, in the sense that the case concerned the Victorian pay-roll tax exemption, not s 116; but the discussion was clearly conducted in the context of the meaning of “religion” in s 116.

69 See Bailey PH, *Human Rights: Australia in an International Context*, Butterworths, 1990 at 92–4. See also Hanks P, “Constitutional Guarantees” in Lee HP and Winterton G (eds), *Australian Constitutional Perspectives*, Law Book Co, 1992, esp at 98–100.

## ii. Rights-based interpretation of statutes

The Court seems also to have become increasingly willing to draw on rights principles in the interpretation of statutes. Four of the cases reviewed involve rights-based interpretation of legislation, in some cases by most members of the Court, but in others only by some. The four cases are *Bropho*, *Plenty*, *Marion*, and *Waters*. Here again, the cases span the power-curbing/individual rights divide, once more emphasising the breadth of the Court's approach. In *Bropho*, the Court went behind the statutory provisions, that were indeed ambiguous, and found in favour of the Aboriginal plaintiffs. It found that the Crown in right of Western Australia could not claim immunity from a legally ambiguous statute, given the factual base to which it applied. The power of the Executive was curbed in the interests of equality of all (including the servants of the Crown) before the law.

In *Plenty*, a statute of South Australia was construed so as to prevent entry of a police officer without consent on the land of a humble farmer because the policy of the (ordinary common) law is against such a principle. Principles similar to those used in applying the common law of the Constitution were used in interpreting a statute. The result was, of course, only interpretive – what was applied here was ordinary rather than *Constitutional* common law. The third case was *Marion*, where again a fundamental common law right – to personal inviolability – was applied, by extending the *parens patriae* jurisdiction (power) of the court, to protect a mentally disabled person from surgery without clearance from a court. It would not be difficult to imagine a later case in which a Commonwealth law that infringed that right might be struck down under a Constitutional common law rule to the same effect, based on the judicial power and the *parens patriae* jurisdiction. Finally, there is the case of *Waters*. Here, another basic doctrine was used – that of equality before the law – to interpret a statute of Victoria in a way that gave benefit to a substantial group of physically disabled persons and overturned a more literal interpretation of the Supreme Court. Mason CJ and Gaudron J wrote very clearly of the doctrine of substantive equality, an important development from the older doctrine of formal equality, and again based themselves on purposive interpretation and fundamental principles of equality.<sup>70</sup>

## IV. SO, HOW ARE WE DOING WITHOUT A BILL OF RIGHTS?

The time has come to attempt to answer the opening question, which is whether, with all that is going on in the Parliament and in the High Court, a Bill of Rights is really needed.

In favour of not working towards introduction of a Bill of Rights is in the first place the quantity of rights-based legislation being enacted by the Parliament. Wherever one turns, one finds it. There is anti-discrimination legislation; conservation legislation; environmental legislation; welfare and health legislation; legislation about education and child care; there is legislation that is introducing important new arrangements for the Aborigi-

<sup>70</sup> For an interesting account of the presumptions against alteration of common law doctrines, and against the invasion of common law rights, see Pearce and Geddes, above fn 46, Ch 5, esp at 104,106.



nes and Torres Strait Islanders. And so the list could go on. Further, one can expect continuing decisions by the High Court in which rights talk becomes common; and through which rights and freedoms are protected, drawing on the deep wells of the common law and of the conventions that result from the practice of the actors on the political stage.

But is that enough? In my view, it is not. It would be preferable, as I see it, to give the courts, and indeed the legislators, some clear principles to guide them. As Professor Zines has observed: "One thing is clear. The old complacency about [common law protection of] individual liberty ... has gone".<sup>71</sup> In the Australian context, the introduction of a Constitutional, or even legislated, Bill of Rights may take a substantial time, and the commitment of most if not all political parties. But one should not despair. In a thorough and carefully designed survey undertaken over the past two years by Dr Jo Fletcher of Toronto University, and Dr Brian Galligan of the ANU Research School of Social Sciences, it was found that no less than 72% of the community generally favours a Bill of Rights for Australia.<sup>72</sup> Admittedly, the percentage falls when the questions become precise. Nonetheless, the point is that a Bill consisting of broad principles that would supplement our written constitution, as do the ten American Amendments that make up their Bill of Rights, does seem likely to have a fair chance of success, if properly prepared. The more specific its terms, the weaker, it seems, would be its prospects of success at a referendum.

One of the lessons to be drawn from the current spate of activity by both the Parliament and the High Court is that the traditional common law rights are fairly well protected. Giving some of them constitutional status would of course help both in defining and popularising them, and in curbing the legislature but, absent a traditionally phrased Bill of Rights, they would be likely to continue to be effective. What we need is not an American, or even a European Convention on Human Rights lookalike; but a set of principles that would meet the needs presently being identified in Australia for a fairer and more equal community. No doubt, in the interests of popular support, it might be necessary to add a few provisions that would immediately attract votes, such as perhaps the right to have government without corruption – surely better than the American counterpart of the right to bear arms! Among the central issues should in my view be rights for our indigenous peoples, to lift us beyond the essentially negative findings of the High Court in *Mabo*; and rights for minorities, especially our migrant minorities, if we are to develop a truly multicultural society. Perhaps, too, we should enlarge our horizons and look to some of the "new generation" rights such as a right for all our citizens to a basic minimum standard of living.<sup>73</sup> And finally, could we dare to look beyond the traditional liberal *bête noire* of the state and recognise that rights are essentially a means of preventing the abuse of power: could we, for example, have a Bill of Rights that would

71 Zines L, *Constitutional Change in the Commonwealth*, Cambridge, 1991 at 73. See also, for a description of earlier decisions protecting rights by the High Court, the Supreme Court of Canada (before the Charter), and the New Zealand Court of Appeal, Ch 2, esp at 39–48.

72 Fletcher J and Galligan B, *Australian Rights Project*, Preliminary Findings, Research School of Social Sciences, Australian National University, 1993.

73 Note that, as far back as 1959, the International Commission of Jurists, at its New Delhi Congress, expressed the view that the rule of law is a dynamic concept that should be used to establish rights-related social, economic and cultural conditions: quoted in Toohey J, "A Government of Laws", above fn 35, at 159.

include remedies for those injured by the abuse of power by authorities outside the state, such as large national and multi-national corporations?

An interesting point is made by Professor Jeremy Webber in his analysis of the results of decisions on the Canadian Charter of Rights and Fundamental Freedoms. It is that it is not necessarily desirable to phrase rights provisions in broad terms, since their interpretation must in the last resort be left to the judiciary. While I accept the logic of that argument, it seems to me that four points need to be made, points that would in sum leave me advocating a Bill of Rights containing in the main broadly based provisions. First, for reasons mentioned above, it would be much more difficult for us in Australia to obtain the necessary popular assent to narrowly based provisions. Second, the point about carefully defined provisions makes more sense when one already has a Bill of Rights, and some refinement of general propositions is necessary. In the light of the foregoing analysis of the recent decisions of the High Court, we are probably not in great need of this kind of fine tuning: protection of the basic and traditional rights is good, and probably being steadily improved. What we need is, as suggested above, to think more broadly of the evolving needs of our already egalitarian community and of the importance of enforcing the new generations of rights. Third, our institutions – legislative, executive and judicial – are best left to work out, in mutual interaction, the detailed application of general principles: they do not so much need specifics as broader goals around which new detailing could be worked out of the way the rights should be implemented at the legislative, executive and individual-rights levels. Finally, Bills of Rights are not, in my view, about details and the small vision. They are concerned about matters of the future, of the large perspective, of values and ideals, of the enlargement of the human spirit.

What I very much hope is that the lead given by the High Court will, in a strange double act, be picked up by the actors on the front stage not only by enacting rights-bearing legislation, but in a more comprehensive and forward-looking Constitutional formulation of rights that may itself then guide the High Court in its continuing endeavours to protect and promote the rights of the citizens.