precise definitions of who is an insider, what is an illegal insider trade and the penalties to be incurred, and only when the conduct complained of is illegal in both countries. Mr Lynch said that there had been cases where the Swiss authorities had been asked by the SEC for help on insider trading and they had agreed on the basis that the conduct complained of was a breach of both countries' insider trading laws. While this showed that there were differences in principle at the practical level, he said that those differences were being resolved and the systems of securities legislation were actually converging at a rapid rate.

The Australian Government has restrained the NCSC from reaching a bilateral agreement with the SEC under which the agencies would have been obliged to help each other to the limits of their existing powers on request and seek legislation enabling them to use their 'compulsory' powers to subpoena witnesses and documents on each other's behalf. The Commonwealth feared that such a binding agreement would compromise national sovereignty and should in any case be made between governments, not statutory agencies (*AFR*, 21 November 1988). In the US, on the other hand, an Act giving the SEC powers to provide assistance to other supervisory authorities in their US investigations of suspected infringements of foreign security laws was signed by President Reagan in December (*AFR*, 3 January 1989).

The possibility of co-operating on insider trading investigations has been raised by the chairman and chief executive of the New York Stock Exchange, Mr John Phelan Jnr. At a press conference in Sydney, Mr Phelan said that the communications between the New York Stock Exchange and other exchanges in the United States and other markets around the world made the detection of insider trading more feasible today than it was in the past (*AFR*, 22 November 1988). On the other hand, he conceded that, worldwide, it is very difficult to detect because everyone has a different definition. Mr Phelan commented that he believed that the automated trading system at the Australian Stock Exchange would help in detecting insider trading. However, he said that no matter how much technology one had, there was still a need for people involved in insider trading to confess and implicate others.

The effectiveness of the Australian system of securities regulation in dealing with insider trading will be revealed by the outcome of the cases being conducted by the NCSC.

* * *

the australian constitution

Arthur: You don't vote for kings.
Old woman: Well, how do you become king, then?
Arthur: The Lady of the Lake, her arm clad in the purest shimmering samite, held aloft Excalibur from the bosom of the water signifying by Divine Providence that I, Arthur, was to carry Excalibur . . . *that* is why I am your King.
Dennis: Listen, strange women lying in ponds distributing swords is no basis for a system of government. Supreme executive power derives from a mandate from the masses not from some farcical aquatic ceremony.

Monty Python and the Holy Grail
(Mønti Pythøn ik den Hølie Gräilen)

In the wake of the rejection of the four referendum proposals put forward by the federal Government in September 1988 (see [1988] *Reform* 183–6), the final Report of the Constitutional Commission was tabled in federal Parliament on 20 October 1988. The Commission consisted of Sir Maurice Byers (Chairman), Professor Enid Campbell, Hon Sir Rupert Hamer, Hon EG Whitlam and Professor Leslie Zines.The Report does not take into account the results of the referendums. Despite the apparently unfavourable climate for constitutional reform, the Report deserves careful consideration by the electors of Australia. Each of the Commission's rec-

ommendations is supported by detailed consideration of the competing arguments and the constitutional provisions of other countries.

elections. The Commission recommended that certain principles relating to democratic rights should be embodied in the Constitution.

- The laws prescribing qualifications of electors for federal and State Parliaments and legislatures of Territories should provide for enfranchisement of every Australian citizen who has attained the age of 18 years. The laws should be able to make entitlement to vote dependant on compliance with reasonable conditions as to residence or enrolment for voting. They should also be able to provide for the disqualification of persons who are incapable of understanding the nature and significance of enrolment and voting by reason of unsoundness of mind or who are in prison. Although the Commission acknowledged that an offender, once punished under the law, should not incur the additional penalty of loss of the franchise, it said that it could not be assumed that that view would be generally shared and legislatures should therefore be able to make such laws in relation to prisoners as they saw fit.

- Each elector shall vote only once. The principle of one vote one value for federal, State and Territory elections should be included in the Constitution. This would require the number of enrolled electors in electoral divisions not to vary by more than 10% above or below the relevant quota prescribed for that division or, in the absence of an applicable law or where the State electoral divisions do not comply with the prescribed quota, the State should be one electorate and the method of choosing members of a House of a legislature should be as nearly as practicable the same as the method for choosing senators.

- Section 25 of the Constitution should be repealed. That section provides that persons of a particular race resident in a State shall not be counted for the purpose of providing the number of members of the House of Representatives if by the law of the State persons of that race are disqualified from voting at the State elections. Although the section is based on a section of the US Constitution intended to encourage the States to enfranchise the emancipated blacks after the Civil War by reducing the federal representation of the States which failed to do so and thus has a benign purpose (not, as some have thought, a purpose of permitting apartheid), the Commission concluded that it is no longer appropriate to have a constitutional provision which contemplates the disqualification of members of a race from voting.

- The Constitution should include a specific provision for electors to have standing to sue for an appropriate legal remedy where their rights under the proposed sections on qualifications of electors have been infringed.

composition of federal parliament. At present, the size of the House of Representatives and the size of the Senate are linked. The ratio between the numbers of members of the House and the number of senators must be, as nearly as practicable, 2:1. While acknowledging the failure of the 1967 referendum to break the nexus between the size of the two Houses, the Commission considered that there was no necessary relationship between the size of the House of Representatives and the size of the Senate and recommended that the nexus be broken. The role and function of the two houses are different. The members of the House of Representatives are elected on the basis of population and are required to perform constituency work in their own electorates. As the population increases, the size of electorates increases and the workload of

members becomes heavier. An increase in the size of the House may therefore be considered desirable. On the other hand, the Senate is elected on the basis of equal representation of States rather than on the basis of population. The Commission addressed concerns about the size of Parliament by recommending that the number of people represented by a member of the House of Representatives shall be not fewer than 100 000, subject to the existing guarantee that each Original State shall have at least 5 members and subject to Territories being entitled to a representative in the House when its population exceeds 50 000. The Commission also recommended that electors of a Territory that is not entitled to be represented in Parliament should be entitled to vote at an election of Senators or Members of the House for a Territory on the mainland of Australia. The Commission recommended that the number of senators should be fixed at 12 for Original States. In the case of new States and Territories, there should be an entitlement to one senator for every two members who can be elected to the House provided that new States, the Australian Capital Territory and the Northern Territory should be entitled to representation by at least two, but no more than 12, senators.

terms of federal parliament and relationship between the houses. The Commission makes several interconnected recommendations in relation to terms of federal Parliament and the powers of the House of Representatives and the Senate. It recommended that the maximum term of the House of Representatives should be four years. However, unlike the proposal which was defeated at the referendum in September, the Commission recommended that the House should not be dissolved within three years of its first meeting after a general election unless the House has passed a resolution expressing a lack of confidence in the Government and no government can be formed from the existing House. Senators for States would hold their places for two terms of the House of Representatives (except in the event of a double dissolution) and Senators for Territories would hold their places for one term of the House. The polling day for election of Senators and election of Members of the House should be the same day. In view of the fixed minimum term of three years for the Parliament, the Commission also recommended that if, within the first three years of a Parliament, the Senate rejects or fails to pass a money Bill within 30 days of its transmission from the House, the Bill must be presented for the Royal assent. If the Senate rejects or fails to pass such a Bill in the fourth year of a Parliament, a double dissolution would be permitted. The Commission recommended that double dissolution of Parliament following the second rejection of a Bill, other than a money Bill, by the Senate should only be permitted in the fourth year of the term of the House of Representatives. Where a proposed law is presented to a joint sitting of Parliament following a double dissolution, the law should be taken to have been duly passed by both Houses of the Parliament only where it has been affirmed by a special majority of members at the joint sitting. The special majority would consist of an absolute majority of the total number of members of both Houses and at least half of the total number of Senators and Members chosen for or in a particular State, in at least half of the States. The special majority requirement is recommended to address the possible concern which may arise in relation to the position of the less populous States which are more strongly represented in the Senate than in the House if the nexus between the size of the two Houses is broken.

executive government. The Commission made a number of recommendations in relation to the executive branch of the Commonwealth.

- The power of the Sovereign to disallow acts of the federal Parliament should be abolished as should the power of the Governor General to reserve Bills passed by the Parliament for the Sovereign's personal assent.

- There should be no alteration of the Constitution which would affect the position of the Queen as head of State of Australia.

- The office of Prime Minister should be specifically recognised in the Constitution.

- The Governor-General should not be able to dismiss a Prime Minister unless the House of Representatives resolves that it does not have confidence in the Government, although the Governor-General would have a discretion, to be exercised in accordance with the principles of responsible Government, in selecting the person to hold the office of Prime Minister. Sir Rupert Hamer dissented from this recommendation. He considered that the four 'reserve powers' in reliance upon which the Governor-General could act without, or contrary to, ministerial advice, namely the appointment of the Prime Minister, the dismissal of the Prime Minister, dissolution of the House of Representatives and a double dissolution, should not be excluded in the way proposed by the majority of the Commission.

- The Constitution should provide for the appointment of Assistant Ministers.

- The membership of the Federal Executive Council should be limited to the Prime Minister, Ministers and Assistant Ministers of State for the Commonwealth for the time being. At present, Ministers who have been sworn in as executive councillors continue to be members of the Council even when they have ceased to hold ministerial office although once that has happened, they are no longer summoned to attend meetings.

- The Constitution should be altered to make it clear that most of the powers vested in the Governor-General are exercisable only on ministerial advice.

- The Governor-General should be able to appoint deputies without having to be authorised to do so by the Sovereign. The power of the Sovereign to exercise control over the Governor-General as regards the powers and functions assigned to deputies should also be removed from the Constitution.

judicial system. The Commission rejected any alteration to the Constitution to provide for the integration of the court systems of the Commonwealth and the States. It considered that there should be one Parliament and one Government politically responsible for the establishment, maintenance, organisation and jurisdiction of, and appointments to, a court. It concluded that the conflict of jurisdiction difficulties that can still arise do not in themselves warrant a change of the magnitude that would result from the establishment of an integrated national court structure. It also thought it desirable to wait to examine the effectiveness of the legislation relating to the cross-vesting of jurisdiction. In relation to cross-vesting, the Commission recommended that a specific power permitting State and Territory legislatures with the consent of the federal Parliament to confer State and Territory jurisdiction respectively on the federal courts be enacted. This was because, although there is no problem with federal legislation vesting federal jurisdiction in the State courts (this is permitted by s77(iii) of the Constitution) there is no express provision giving the States power to confer State jurisdiction on federal courts. The Commission considered that, in view of the technical legal arguments giving rise to doubt as to the validity of the cross-vesting scheme, there should be a constitutional amendment to remove the uncertainty.

removal of judges. The Commission recommended a constitutional provision for a Judicial Tribunal to determine whether facts established by it are capable of amounting to proved misbehaviour or incapacity warranting removal of a judge. The Tribunal would consist of persons who are judges of a federal court (other than the High Court) or of the

Supreme Court of a State or of a Territory. An address to the Governor-General in Council by both Houses of Parliament asking for removal of a judge on the ground of proved misbehaviour or incapacity would not be able to be made unless the Judicial Tribunal had reported that the facts were capable of amounting to misbehaviour or incapacity warranting removal and the address of each House was made no later than the next session after the report of the Tribunal. The Commission recommended that the procedure for removal of federal judges should have a parallel at State level so that the judge of a superior court of a State or self-governing Territory would not be removed except after a finding by the Judicial Tribunal and a request by the Parliament.

advisory jurisdiction. The Constitutional Commission recommended that the High Court not be invested with advisory jurisdiction either generally or in respect of matters of constitutional validity. The Commission acknowledged that the conferring of advisory jurisdiction relating to constitutional questions had wide support, in particular two resolutions of the Australian Constitutional Convention, a Report of the Senate Standing Committee on Constitutional and Legal Affairs and the Constitution Alteration (Advisory Jurisdiction of the High Court) Bill 1983 which was passed by both Houses of the Federal Parliament but not put to a referendum. The Commission regarded the possibility of requesting the High Court's advice before a Bill had been debated on policy grounds and passed by both Houses as raising particular problems. Although it acknowledged that an authoritative opinion on the validity of a Bill would have advantages from the Government's point of view, it would be an undesirable fetter on the political and legislative processes. A member of Parliament who wished to move an amendment could be met with the argument that it would risk upsetting the finding of validity made by the Court. Although advisory opinions for Bills which had passed through the legislative process did not suffer from the same defects, the Commission considered that the case in relation to such Bills was in another sense weaker. A State or the Attorney-General of a State has standing to challenge all, or practically all, federal legislation or executive acts. The Commonwealth probably has similar standing in respect of State laws and executive action in relation to the Constitution. Furthermore, it is not always the case that all possible grounds of constitutional challenge are present to the mind when an Act is passed. The Commission did not accept that the Court could be capable of answering all questions in such a way that constitutional challenges could not arise in the future. However, the Commission recommended one exception to its general recommendation on advisory jurisdiction. It considered that the Governor-General in Council, the Governor in Council of a State or the Administrator in Council of a Territory should be able to refer to the High Court a question of law relating to the manner and form of enacting any proposed law. The sort of difficulty which such an advisory jurisdiction would address is illustrated by the double dissolution of 1974. That double dissolution was granted in respect of the six Bills which it was thought had complied with the procedures laid down in s57. The High Court later held that the procedures had not been complied with in the case of one of those Bills. If that Bill had been the only one relied upon by the Governor-General in dissolving both of the Houses, the Senate would have been wrongly dissolved. A question would be raised as to whether the subsequent election was void. Although the High Court has expressed the view that the validity of the dissolution and therefore the election could not have been challenged, at any rate where the action was brought after a proclamation of dissolution, the Commission considered that a matter should be able to be referred to the High Court for an opinion where otherwise it might be too late to do so.

inter-state commission. Section 101 of the Constitution provides that there shall be an Inter-State Commission with such powers of adjudication and administration as the Par-

liament deems necessary for the execution and maintenance of the provisions of the Constitution relating to trade and commerce and the laws made in relation to the constitutional power. The Constitutional Commission recommended that Parliament should have power to authorise a court to request the Inter-State Commission to enquire into and report on any fact relating to trade and commerce that is relevant to a matter that arises under the Constitution or involves its interpretation. The question whether a statutory provision is valid under the Constitution may depend upon the existence of certain social, economic or technical facts. For example, whether, for the purposes of s92, which provides for trade among the States to be 'absolutely free', a law which burdens or discriminates against inter-state trade is justified in the public interest, or whether it goes beyond what is reasonably appropriate for that purpose, involves an examination of the social problem and the means available for resolving it. The facts which a court must find in determining such cases 'differ from those which are peculiar to the parties to a dispute'. Whatever construction is given to s92, whether as conferring an individual right to trade or as a provision designed to prevent protectionist policies, inquiries into the nature of the particular trade and the purpose and effect of legislative rules and administrative decisions may be necessary. The Court might consider that expert adjudication and inquiry by the Inter-State Commission on some of these questions would be desirable in the circumstances.

new states. Sections 121 and 124 of the Constitution already provide for the admission or establishment of new States. However, the existing provisions are unsatisfactory in a number of respects. For example, there is no explicit reference to the way in which an existing self-governing entity, for example New Zealand, could be admitted to the Commonwealth nor to the position of Territories surrendered to, and accepted by, the Commonwealth under s111 (for example, the Northern Territory and the Australian Capital Territory). The Constitutional Commission therefore recommended that alterations should be made to clarify this matter and that the Constitution should also provide for the number of members of the House of Representatives and the Senate to which a new State would be entitled.

local government. The Commission recommended that a new section be added to the Constitution to require States to provide for the establishment and continuance of local government bodies. The Commission considered that, in view of the wide range of services which local government now provides to the community, it has become an increasingly important part of the structure of government in Australia and has a legitimate right to be recognised and consulted in the allocation of responsibilities and resources within the public sector.

rights and freedoms. The Constitutional Commission recommended that the following rights and freedoms be guaranteed in the federal Constitution against acts done by the legislative, executive or judicial arms of the Commonwealth, States or Territories:

- freedom of conscience and religion
- freedom of thought, belief and opinion
- freedom of expression
- freedom of peaceful assembly
- freedom of association
- freedom of movement
- freedom from discrimination on the ground of race, colour, ethnic origin, sex, marital status or political, religious or ethical belief
- the right not to be subjected to cruel, degrading or inhuman treatment or punishment and not to be subjected to medical or scientific experimentation without consent
- the right to be secure against unreasonable search or seizure
- the right of a person arrested or detained to be informed of the reason, to consult and instruct a lawyer, to have

the lawfulness of the arrest or detention determined without delay and to be released if the detention is not lawful

- the right of a person arrested to be released if not promptly charged, not to make a statement, to be brought without delay before a court or competent tribunal and to be released on reasonable terms and conditions unless there is reasonable cause for the continued detention
- various rights for persons charged with an offence, for example, to be informed without delay and in detail of the nature of the charge, to have the opportunity to prepare a defence, to have legal assistance and to a fair hearing
- exclusion of liability for conviction on account of an act which did not constitute an offence when it occurred.

The Commission also recommended an explicit provision to make it clear that the statement of the new rights and freedoms was not to be taken to restrict existing rights and freedoms. On the other hand, it recommended that the rights and freedoms should be subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, but subject to those limits only. It was vague on just what such a limit actually meant. The Commission did not propose that the rights and freedoms should be limited to natural persons. It argued that to limit the rights and freedoms of corporations may sometimes limit the rights and freedoms of natural persons as well. For example, censorship of newspapers owned by corporations would inhibit the freedom of speech of persons who use the press to ventilate their opinions.

The Commission considered whether there should be a power for the Parliament of the Commonwealth or of a State to override constitutionally guaranteed rights and freedoms by expressly declaring that an Act or part of a Act shall operate notwithstanding a constitutionally entrenched right. A majority of the Commission, Sir Maurice Byers, Sir Rupert Hamer and Mr Whitlam, recommended that there should be no such power. They argued that to include a guarantee of individual rights and freedoms in the Constitution and, at the same time, authorise the Parliaments to enact legislation which negates or derogates from those guarantees whether or not the legislation is justifiable in a free and democratic society is wrong in principle. The majority felt that, where deep public feeling has been aroused, the citizen most needs the protection of an entrenched guarantee against the misconceptions of his or her fellow citizens. The people's representatives are likely to share, or feel overborne by, the errors of the electorate and are likely to remove the entrenched constitutional freedom from those most in need of it. The majority cited the internment of American citizens of Japanese descent even though no ground existed to doubt their loyalty. The minority of the Commission, Professors Campbell and Zines, did not agree that it was pointless to include further guarantees of rights and freedoms in the Constitution and, at the same time, to include an override provision. They argued that incorporation of further guarantees, even with an override clause, would have a significant impact. It would

- operate to modify a good deal of existing law
- introduce needed legal controls over the exercise of statutory discretions which can often result in infraction of civil liberties and
- serve as a reminder to political Executives and Parliaments that the majority of Australian electors have agreed that those exercising Parliamentary legislative powers should be attentive to certain fundamental values.

The minority also was concerned at the prospect of giving courts the last word in deciding a wide range of issues which are sometimes very difficult and which many people regard as issues which cannot always be satisfactorily resolved by methods of adjudication. The minority questioned whether a

court's judgment on whether a limitation of a guaranteed right or freedom constituted a reasonable limitation which was demonstrably justified in a free and democratic society would always and necessarily be 'correct' or superior to that of a Parliament. Also, an override clause could encourage judges to be more vigorous in their scrutiny in view of the legislative safety net beneath them. Finally, the minority was concerned that, once the High Court had ruled on an issue regarding a right or freedom, its interpretation would, in the absence of an override power, stand until such time as it was persuaded to depart from the ruling or until the Constitution was formally altered. The override provision recommended by the minority would not apply to existing guarantees in the Constitution (for example, the guarantee of freedom of religion as against the Commonwealth in s116) or to the provisions recommended to guarantee democratic rights. A declaration that an Act was to have effect notwithstanding its contravention of a right or freedom would have to be renewed, at the latest, three years after it came into force.

The Commission recommended that a person whose rights or freedoms had been infringed should have a specific right to apply to a court of competent jurisdiction for an appropriate remedy.

The Commission also proposed that the right to trial by jury, the guarantee that federal laws for the acquisition of property must provide just terms for acquisition of property and the right of freedom of religion as against the Commonwealth, all of which exist in the Constitution, should be extended largely in the manner proposed in the referendum held on 3 September 1988 which was rejected by the electorate (see [1987] *Reform* 183–6).

distribution of powers. The Commission recommended that the powers of federal Parliament be extended in a number of respects. These include

- a power to make uniform laws with respect to defamation, but not so as to prevent the States from making laws with respect to the publication of defamatory matter in the course of proceedings in their Parliaments or their courts
- a power to make laws with respect to nuclear material, nuclear energy and ionising radiation
- a power to make laws with respect to admiralty and maritime matters
- extension of the power over copyrights, patents, designs and trade marks to cover other products of intellectual activity in industry, science, literature and the arts
- powers over adoption, legitimacy and the determination of parentage, custody and guardianship of children, parental rights and maintenance of children
- a power to make laws with respect to property and financial rights between persons living together as if husband and wife (Sir Rupert Hamer disagreed with this recommendation)
- a 'broadening' of the power to make laws with respect to social welfare payments
- a power to make laws with respect to accident compensation and rehabilitation (Sir Rupert Hamer dissented, considering that overlapping between State schemes and the provision of benefits under various heads of power by the Commonwealth should be dealt with by collaboration between the governments)
- a power to make laws with respect to Aborigines and Torres Strait Islanders, accompanied by the repeal of the power to make laws with respect to the people of any race for whom it is deemed necessary to make special laws.

external affairs. The federal Parliament has power to make laws with respect to external affairs. This power has been interpreted

so that federal Parliament has power to make laws to implement the obligations of the Commonwealth under a treaty to which Australia is a party. The majority of the Commission recommended that no alteration be made to this power. It argued that, in the absence of the external affairs power, unless Australia were to withdraw from active participation in many fields of international negotiation, it would be necessary to seek the agreement of the States to the ratification and implementation of treaties. The majority saw this as, in some cases, slow and cumbersome and in other cases wholly impracticable. In some circumstances, it could permit one or more States to determine, in effect, the policy for Australia. On the other hand, Sir Rupert Hamer considered that the existence of an unlimited power in the federal Parliament to enact legislation for the implementation of treaties and other international agreements on matters otherwise beyond its legislative competence was unacceptable and made a mockery of the careful enunciation of federal powers in the Constitution. The Constitutional Commission did, however, recommend that an Australian Treaties Council be established to enable State interests to be discussed and co-ordinated and for recommendations to be made as to how treaties might best be implemented within Australia. A majority of the Commission said that it was unnecessary to provide for an increased role for Parliament in the making of treaties. This would often give non-government supporters in the Senate power to override executive policy supported by the Government and the House of Representatives. If legislation is required, both Houses must pass the legislation before it can become law, subject to the possibility of a double dissolution and joint sitting pursuant to s57 of the Constitution. However, Professor Zines and Sir Rupert Hamer considered that there should be a statutory requirement that the ratification of treaties by Australia should be conditional on either

- the approval of both Houses of Parliament or
- the non-disallowance by either House within a specified period.

trade and commerce. The Constitutional Commission recommended that the federal Parliament's power over trade and commerce should not be limited to inter-State and overseas trade and commerce. It regarded the constitutional distinction between forms of trade as artificial and not suitable to modern times. The federal government has a major responsibility for national and international trade and investment. The fulfilment of this responsibility requires that regard be had to all things that affect the costs of Australian industry. In engaging in the task of national economic management, the constitutional distinctions between forms of trade are, from an economic point of view, often irrelevant. Sir Rupert Hamer disagreed with this recommendation. He considered that the proposed power was too broad and went far beyond what could be thought a justifiable or appropriate transfer of power to the Commonwealth. He argued that the general concern was to secure uniformity of business regulation where that was clearly desirable. He therefore supported the alternative unanimous recommendation of the Commission that, if the general power over trade and commerce recommended by the majority were not adopted, federal Parliament should have power to make laws with respect to

- civil aviation, navigation and shipping and
- the labelling and packaging of, and standards for, goods for sale or hire.

The Commission also recommended the broadening of existing constitutional powers to give federal Parliament power to make laws with respect to

- the incorporation, organisation and administration of corporations
- financial, investment and other like markets and services
- industrial relations. (Sir Rupert Hamer disagreed, considering this would confer too broad a power.)

freedom of interstate trade. Section 92 of the Constitution, which provides for freedom of trade among the States, divided the members of the Trade and National Economic Management Advisory Committee to the Constitutional Commission (see [1987] *Reform* 186). After the Advisory Committee published its report, the High Court in *Cole v Whitfield* (1988) 78 ALR 42 unanimously adopted the view that s92 is aimed at preventing the pursuit of policies that have the object or effect of protecting the trade and industries of a State from competition from those of other States (the 'free trade view'). The alternative view, which the Commission refers to as 'the individual right view', was that s92 confers a right on each individual to engage in inter-state trade free from any restraint that is not necessary for the reasonable regulation of that trade or the preservation of an ordered society. The Commission agreed with the desirability of the result in *Cole v Whitfield* and therefore recommended that s92 should not be altered.

excise. The Commission recommended that the States be empowered to levy excise duties or, alternatively, that they be empowered to do so with the consent of both Houses of the Parliament of the Commonwealth. The Commission regarded the current prohibition in s90 preventing States from levying excise duties as unsatisfactory for the following reasons:

- there is considerable uncertainty in the interpretation of the provision and the States cannot be expected to plan their budgets if important taxes remain subject to constitutional doubt
- the States have been forced to impose taxes by technical and devious means since the distinctions drawn in this area have no social or economic justification.

The Commission also considered that the present situation, in which the States are not responsible for the raising of most of the funds they spend, has a serious effect on the accountability and responsibility of State Governments. It acknowledged that permitting States to levy excise duties would not in itself do away with this fiscal imbalance. However, there is a preponderance of expert views that, in the absence of a broad indirect tax power, the States have resorted to other taxes which are regarded as less economically desirable or the effect of which is difficult to monitor. The Commission rejected the recommendation of the majority of the Trade and Economic Management Advisory Committee that State power to impose excise duty should be limited to 'final consumption taxes'. The Commission considered that such a limitation would produce similar differences of opinion among the High Court as to the purpose and scope of the provision as has been evident in the interpretation of the present provision and that the Commonwealth has sufficient constitutional power in relation to many types of taxes, and in other cases sufficient political and economic power, to deal with any difficulties that might arise.

amending the constitution. The Constitutional Commission recommended that State Parliaments as well as the federal Parliament should have power to initiate proposals for alteration of the Constitution. Such proposals would be required to come from Parliaments of not fewer than half the States provided that the State Parliaments concerned represent a majority of Australians overall. The Commission recommended that the proposed alteration should be passed in identical terms by the State Parliaments concerned within a 12 month period. The proposed alteration would then be required to be put to referendum not less than 2 months and not more than 6 months after the requirement was satisfied. The Commission regarded States as having a legitimate interest in proposing alterations to the Constitution which determines how government power is distributed between federal and State Parliaments and governments. It also considered that the existing monopoly by federal Parliament has proved inadequate as a vehicle for producing the constitutional changes which Australia may need for political, social and economic reasons. Notwithstanding this view, a ma-

jority of the Constitutional Commission recommended against provision for the initiation by electors of referendums to alter the Constitution. The Commission unanimously recommended against provision for initiation by electors of referendums with respect to ordinary legislation. The majority, consisting of Sir Maurice Byers, Professor Campbell and Mr Whitlam, rejected the elector's constitutional initiative for the following reasons.

- It would be expected that the elector's initiative would make some progress in the Australian States before its time was seen to have arrived in the federal sphere. Any State Parliament can sponsor the proposal in its own jurisdiction without the expense and hazard of a referendum.

- In our political tradition, good government is associated with responsible government involving regular and free elections at which the electors choose between contending political parties on the basis of alternative and coherent sets of policies on economic, social and political matters. Under the present system of alteration, a proposal to alter the Constitution must be debated in Parliament with due regard for the proposal's consistency with existing and foreshadowed legislation of the government. With the elector's initiative, a proposal may be put forward which, if passed, would undermine a vital part of the government's platform and compromise its authority.

- The elector's initiative would encourage sectionalism. It would allow extremist groups to parade their proposals before the public with an apparent legitimacy they would not otherwise command and could further the cause of a single issue without regard to its wider implications for national welfare or without due consideration for government policy.

- There are sufficient avenues through which the citizen can participate in the processes of representative democracy, for example, joining a political party and working from within to influence its policies and structures.

- The elector's initiative may pose threats to minority rights and interests.

- The formulation of a constitutional alteration is a detailed and complicated task, involving considerable experience and expertise.

A minority of the Commission, Sir Rupert Hamer and Professor Zines, recommended the adoption of an elector's initiative. They said that it would alleviate the feeling of remoteness and impotence with respect to political affairs that is felt by many people in the community. There is a sense that politicians are out of touch with the views of the voters. The minority could see no compelling arguments against giving the Australian electors the opportunity of voting at referendum on whether or not they support a proposal for including elector's initiative in the Constitution. The minority argued that, without some mechanism of this kind, the decision-making process will seem remote to the majority of people, whose experience of politics will be limited to voting at elections and the referendums where politicians set the agenda for debate. The initiative proposed by the minority would have the following features.

- The minimum number of voters required to initiate a referendum should be 5% of voters qualified to vote for the election of members of the House of Representatives and should include 5% of electors from a majority of the States. Petitions should be signed at offices of the Australian Electoral Commission, thus ensuring the authenticity of the signatures.

- A petition would have to be endorsed with the required number of signatures within 12 months of the first signature.

- The Governor-General in Council would be obliged to submit a proposal to the electors not less than 2 months and not more than 6 months after receipt of a petition complying with the constitutional and legislative requirements.

The Commission rejected the idea of a standing convention or commission being charged with the review of the Constitution and having power to initiate proposals for alteration which would be required to be submitted to referendum. The Commission also recommended that referendums of the people continue to be the only means of altering the Constitution except in the case of expended provisions of the Constitution. Such 'expended' provisions would include interim provisions which dealt with specific matters pending the enactment of federal legislation and transitional provisions. In the case of the latter, a majority of the Commission recommended that federal Parliament, with the consent of the Parliaments of all the States, should be able to make laws for the omission of a provision which has ceased to have any operation. However, Sir Maurice Byers had strong reservations about this proposal. A majority of the Commission (Sir Rupert Hamer and Professor Zines dissenting) recommended that a referendum should be passed if it receives an overall majority of votes in favour and a majority of votes in not fewer than half the States.

The future. The report of the Constitutional Commission is detailed and comprehensive. It demonstrates many problems with the workings of the current Constitution. Although the enthusiasm for constitutional reform at the political level may have been dealt a severe blow by the result of the referendum held on 3 September, the report of the Constitutional Commission is an important contribution to the study of Australia's political and legal institutions.

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privacy

> There is only one thing in the world worse than being talked about, and that is not being talked about.
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> Oscar Wilde, *The Picture of Dorian Gray* (1891)

The Privacy Bill 1988 (Cth) was passed by the Senate in December 1988. The aim of the legislation is to protect people from intrusions into their personal privacy by the Government. The legislation follows the ALRC Report *Privacy* (ALRC22).

The Privacy Bill establishes, information privacy principles (IPPs) (based on the principles recommended by the Australian Law Reform Commission) to govern the use of and access to personal information by Commonwealth Departments and agencies. It sets up an Office of Privacy Commissioner, within the Human Rights and Equal Opportunity Commission (HREOC), to act as a watchdog of privacy interests. The Privacy Commissioner is empowered to require government departments and agencies to adhere to the IPPs, and provision is made for the payment of compensation for loss or damage caused by a breach of the IPPs by government department or agencies. Finally, the Privacy Commissioner will investigate alleged misuses of the tax file number system by both government agencies and private sector bodies.

In his second reading speech the Deputy Prime Minister and Attorney-General, Lionel Bowen, said:

> There is no doubt that with the greater range of services being provided, governments are accumulating more personal information about individuals in order to provide those services efficiently and effectively. This, together with the ever-increasing capacity of modern computers to search and process information offers significant potential for invasion of personal privacy by misuse... Internationally there is an increasing trend for Governments to enact privacy legislation. The Council of Europe's Convention on Data