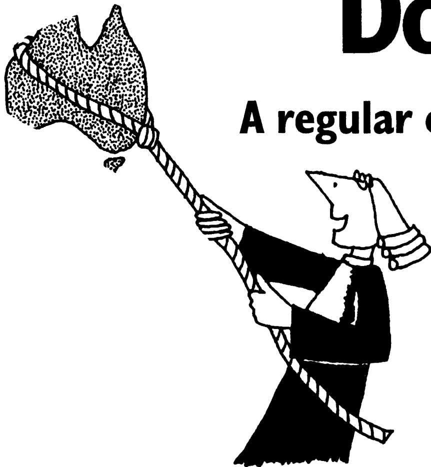
DownUnderAllOver

A regular column of developments around the country



Federal Developments

Hindmarsh Island Case: April Fool?

With interesting timing the High Court brought down *Kartinyeri v The Commonwealth* [1998] HCA 22 (the Hindmarsh Island Case) on 1 April 1998. The native title debate was raging in the Federal Parliament and there was an unusual degree of attention paid to this decision. Unfortunately the judgments didn't warrant such a degree of attention — while the majority verdict was numerically strong there was no unifying ratio to the case and it was Kirby J in lone dissent who wrote the most comprehensive, and in some ways the most compelling, judgment.

As everyone is no doubt aware, the Court decided that the *Hindmarsh Island Bridge Act* 1997 was a valid exercise of power under s.51(xxvi) of the Constitution (the race power). Section 51(xxvi) provides the Commonwealth with the power to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'.

The reasoning of Brennan CJ and McHugh J was simple — the Parliament had the power to pass legislation protecting Aboriginal and Torres Strait Islander heritage, and so it had the power to undo that legislation, whether in part or altogether. They didn't begin to delve into the murkier issues of adverse discrimination and its legitimacy or constitutionality. It seems a very great pity that Brennan CJ will leave the Court without giving us the benefit of his wisdom on s.51(xxvi). As the Court becomes dominated by Howard Government appointees, the loss of Brennan's voice will be felt more acutely. The replacement Chief Justice, Gleeson CJ, while also a Catholic, is said not to have the concomitant commitment to social justice that Brennan CJ sometimes displayed.

Gaudron J's judgment is unusually hard to follow. She clearly longs to take a stand with Kirby J but feels compelled by the conceptual straightforwardness of Brennan CJ and McHugh J's conclusion. While she found the legislation under scrutiny valid she makes it clear there would be other situations where she would find adversely discriminatory legislation unconstitutional.

Gummow and Hayne JJ give a sparse judgment finding the legislation valid. They comment that s.51(xxvi) can be used to the detriment of a particular race, although there are two glimmers of hopethey

ho they offer Indigenous people. They recognise there could be cases of 'manifest abuse' which the Court would find unconstitutional.

They also recognise that the legislation under scrutiny in the case created statutory rights rather than common law rights. If Howard gets his way with native title the distinction could become important as the question of common law rights being extinguished will undoubtedly come before the Court.

Kirby J's judgment is worth reading. He takes what is an undeniably difficult position and makes it the only compelling one. His powerful reflection on when legislation would be classified as a 'manifest abuse' of the race power is instructive. He points out that central legislative mechanisms in apartheid South Africa and Nazi Germany could have been seen as legitimate under a 'manifest abuse' test. Since the line must be drawn somewhere, he suggests the Court would be better off taking a clear principled stand than allowing themselves to be embroiled in the highly politicised question of when legislation is *too* racist.

The prospect of the High Court adjudicating the constitutionality of the *Native Title Act* if it is amended by Howard is not attractive. While Kirby and Gaudron JJ could probably be relied on to resist the argument that the Federal Government is entitled to extinguish common law rights under the race power, the views of the other judges are less reliable. In fact it is fairly clear which way Callinan J would go (I believe his view can be found in his submission to the Senate Legal and Constitutional Affairs Committee considering the Bridge Act... or was it an advice to Senator Heron, the Minister for Aboriginal Affairs? I can't quite remember ...must check sometime). Gleeson CJ, while not a 'capital C conservative', seems unlikely to go out on a limb for indigenous interests.

In the end, the Hindmarsh Island case serves to remind us that it is up to our elected politicians to make legislation and we shouldn't be leaving it to the Court or the Constitution to knock out manifestly offensive legislation.

For a more in depth analysis of the case, see <www.aph.gov.au/library/pubs/rn/> where the Parliamentary Library has put out a Research Note: *A Bridge 2:2:2 Where?*

'Yet another scared public servant'

The Multilateral Agreement on Investment: Legalising the Corporatisation of Democracy

For almost a decade, commentators from the South have forcefully characterised international 'free trade' agreements and other legal structures of globalisation as a concerted effort by developed countries to reshape the international trading system to promote maximum freedom for transnational corporations (TNC). The effect of such transnational economic power on human rights in developing countries has been documented as savage. Local control over hitherto considered 'public' issues such as health, public services and industrial relations has significantly deteriorated, leaving the livelihoods of millions of people throughout the world subject to the vagaries of transnational capital flight. Economic globalisation, from the perspective of many commentators, is the new weapon of economic apartheid – a new era of colonisation.[1]

With the advent of the draft OECD Multilateral Agreement on Investment (MAI), first world commentators have finally begun to mirror these concerns.

Although promoted as an agreement to promote non-discrimination between domestic and foreign investors, the MAI on the whole provides positive discrimination in favour of investors, either explicitly, or implicitly by dealing with subject matter most relevant to large corporate interests.

The MAI can broadly be broken down into five key areas.

First, the MAI repeats the two cornerstone provisions of trade law — that foreign investors should receive no less favourable treatment than domestic investors (non-discrimination principle) and that any favour extended to investors of one state must be extended to all states (most favoured nation principle). Notably, the wording of both principles permits foreign investors to be treated more favourably than domestic investors.

Second, the MAI prohibits government's attaching to a *foreign* investment a range of performance requirements that generally relate to support for local industry, local employment and technological transfer. This provision is novel and a significant aspect of the MAI. It is aimed at ensuring investors have near complete autonomy over investment expenditure, by disabling government policy decisions as to investor behaviour. It is a particularly curious provision, as although a primary argument in support of foreign investment is that it stimulates local employment and technology transfer, the performance requirement rules prohibit state formalisation of such benefits.

Third, the MAI provides a far-reaching and strict framework for protecting *foreign* investment. It prohibits the impairment (not defined) and direct/indirect expropriation (also not defined) of an investment. Expropriation is only permitted for a non-discriminatory purpose in the public interest in accordance with law, and compensation is immediately payable. Although unclear, it is likely that if an investment is impaired, compensation would also be required. The investment protection measures are arguably the most radical aspects of the MAI. They will operate as a brake on the right of government to make an unidentifiable range of laws and policies which may impair or directly/indirectly expropriate an investment, or permit such laws and policies only at the risk of liability for compensation. Under a similar agreement, a Canadian law prohibiting a drug on health grounds has been argued as expropriating a US pharmaceutical corporation.

Fourth, proposed dispute resolution procedures will permit a state or an investor to take another state to an international tribunal. There is no provision for a state to take action against an investor as there are no fetters in the MAI on investor behaviour.

Finally, the MAI strictly curtails the actions of future governments. Although states can provide a list of exemptions to the MAI at the time of signature, these exemptions generally cannot be increased in the future (standstill principle). Similarly, a state can submit a notice to withdraw from the MAI five years after it has become operative, but the withdrawal will only take effect in 15 years. Therefore, once signed, the MAI will lock government's in for the next 20 years.

As a closing comment, it is worthwhile considering the tenor of public debate about the MAI. Much public concern has been directed at the MAI's negative effect on Australia's sovereignty. However, the concept of 'losing sovereignty' to foreign investors seem an inappropriate and limited framework through which to analyse the MAI, as it assumes the prior existence of a 'sovereign' state, independent of private economic interests. Government agendas are always already compromised by big business, a symbiotic relationship magnified by globalisation.

It seems to me that a more productive analysis of the MAI is to consider the complex relationship between political power, government, big business and transnational capitalism, and the impact of that relationship on the possibilities of substantive democracy. As commentators like Anne Orford have noted, the MAI's radical limitations on governments' legislative and policy options expands the public space for TNCs and other foreign investors whilst denying local peoples the capacity to make democratic decisions over their social economy, free of the threat to pay compensation.[2] This results in the extraordinary situation that democratic governments will have to pay foreign investors for the privilege of making the decisions for which they were elected. As 'democracy' increasingly shifts from a sphere of decision-making to a sphere of 'management of international trade', possibilities for creating a vibrant, substantive democratic system fade.

International investment does require regulation. But what needs to be regulated is the increasingly expanding power of TNCs. The MAI's focus on the rights of TNCs, without one suggestion of their legal responsibilities to the communities they so deeply affect, is a recipe for increasing political and economic dislocation, where the corporate giants continue to dispossess communities worldwide.

References

1. See for example Chakravarthti Raghavan, *Recolonisation: GATT, the Uruguay Round and the Third World*, Zed Books, 1990.
2. Orford, Anne, 'Locating the International: Military and Monetary Interventions after the Cold War', (1997) 38(2) *Harvard International Law Journal* 443.

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ACT

Restorative justice: reintegrative shaming experiment

The Canberra police are currently experimenting with Diversionary Conferences. These conferences are designed to employ principles of restorative justice in resolving the offence and repairing the harm that it has caused. They involve bringing together in a meeting everyone most affected by an offence — the offender, the victim and the friends and supporters of both parties. The meeting is conducted by a trained police officer whose role is to focus discussion on condemning the act, without condemning the character of the actor. The officer asks the offenders to explain what happened and how they have felt since committing the offence. The victims then explain directly to the offenders the consequences of the offence. Offenders usually experience remorse for their actions and are then given the opportunity to be reconnected, or 'reintegrated' into the community of those they care most about by carrying out undertakings jointly agreed by all those attending the Conference. These undertakings can be anything which the whole group agrees to be just and appropriate for the circumstances of the victims and the offenders.

ANU researchers are carrying out an evaluation of the Canberra Conferencing program (known as the Reintegrative Shaming Experiment, RISE)

comparing its effectiveness with normal court processing on key outcome criteria including reoffending patterns, victim satisfaction, perceptions of procedural justice by both victims and offenders, and relative cost. The ANU researchers set out to evaluate the effectiveness of Conferences employing the principles of restorative justice outlined above. The research examines only certain categories of offences and offenders.

The Conferencing program is being conducted by police beyond those cases coming into RISE. In March, there was a good deal of publicity in Canberra about a 12-year-old boy who wore a T-shirt bearing the words 'I am a thief' in a local shopping centre as an outcome of a Diversionary Conference. The 'T-shirt case' was not part of the evaluation study. Only those cases sent to the experiment by the police can be evaluated. Unfortunately, nothing can be learned scientifically from what happened in this Conference or afterwards because the police did not send this one to the study. Plainly an outcome such as wearing a T-shirt in a public place bearing a stigmatising label is contrary to the principles of restorative justice and in fact, if it turned out that conferences were arriving at stigmatising outcomes routinely (something that is unlikely because the police are as concerned as we are about this sort of outcome), ethically we would be required to stop the RISE study completely.

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Northern Territory

Constitutional Conventions: (I) the First Peoples

An Indigenous National Constitutional Convention comprising ATSIC Board of Commissioners, the Chairpersons of ATSIC's 35 Regional Councils and other representatives from a broad range of Indigenous organisations was held in March 1998. Representatives from the Northern Territory contributed to the formulation of resolutions calling for:

- An amendment to the Preamble that reflects Indigenous original occupancy of Australia and the continued importance of Indigenous culture.
- The repeal of s.25 of the Constitution which could allow a State to exclude persons from the right to vote on racial grounds.
- The clarification of s.51(xxvi) to ensure that Commonwealth power must only be exercised for the benefit of Aboriginal and Torres Strait Islander peoples.
- The creation of a *Bill of Rights* that includes Indigenous collective rights such as the right to self-determination and specific rights to land and natural resources, environmental security and intellectual property.
- All political parties to support Indigenous candidates for pre-selection in safe seats.
- Consideration to be given to the creation of Indigenous dedicated seats in Commonwealth, State and Territory Parliaments.

These resolutions and others developed at the Convention reflect the view of the delegates that the Constitution ought reflect the aspirations of *all* Australians. The resolution of the *Republican* Convention recommending a Preamble (of no legal significance) that acknowledges original Indigenous occupancy was viewed as a significant start. However, much remains to be done. Further Indigenous Constitutional Conventions are planned over the next five years.

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Constitutional Conventions: (2) Northern Territory Style

The NT Government has announced its intention to take the steps necessary to result in the NT become the seventh State of the Commonwealth by 2001. The first step is the Constitutional Convention sitting in March/April 1998. The task of the convention is to draft the new State constitution. The Convention has proved controversial for a number of reasons:

- Delegates were not popularly elected. Over half of the 53 delegates were selected by organisations nominated by the Government with the balance appointed directly by the Government. Business groups were allocated nine delegates compared to the two for the Local Government Association and one Trade Union delegate. Aboriginal organisations were not consulted about representation — the Government allocated four places to ATSIC and two to Land Councils.
- Convention outcomes will simply be passed on to the Northern Territory Parliament. The Chief Minister made it clear that the parliament (ie the CLP Government) reserves the right to have the final word on the draft constitution.

The Commonwealth Constitution provides that new States may be admitted by the Parliament on such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit (s.121). The NT Government will probably be prepared to accept something less than 12 senators as a condition of statehood. More problematic are the conditions that the Commonwealth Parliament (especially the Senate) could impose in relation to remaining areas of Commonwealth responsibility such as the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* and the administration of National Parks at Kakadu and Uluru. A NT bi-partisan parliamentary committee addressed the issue by entrenching the *Land Rights Act* along with other protections of cultural rights in a draft constitution for the new State. The NT Government appears to have rejected this approach. The draft constitution presented to the Convention by Cabinet Minister Denis Bourke makes no reference to Aboriginal peoples other than in the Preamble. ● **MF**

Queensland

Power, perks and payrises

Queensland politics continues to be as chaotic as ever as the next State election approaches.

In February, the Borbidge Government lost three ministers. Family Services Minister Kev Lingard was sacked due to expense account irregularities. Howard Hobbs (Resources) and Trevor Perrett (Primary Industries) both resigned in response to claims that they were spending public funds on travel with personal staff members with whom they were having sexual relationships. The 'sex and expenses' affair prompted former Queensland Auditor-General, Barrie Rollason, to state that Borbidge Government ministers had an 'abysmal ignorance' of the State's financial accountability laws and that he feared that the lessons of the Fitzgerald Inquiry had not been learnt.

Shortly after the ministerial departures, Labor Opposition leader, Peter Beattie turned down a $13,000 pay rise stating that it was important that the community understood that many politicians worked to improve the State and not to make money. Beattie was criticised by the Government for grandstanding as he had previously agreed to the pay rise.

Substantial electricity shortages in March provided the Government with some most unwanted bad publicity. This prompted State Treasurer and Liberal Party leader, Joan Sheldon to question whether there might have been a bit of sabotage in the electrical unions. Sheldon ultimately apologised to power workers for her unsubstantiated assertion.

Capsicum spray

March also saw certain police sergeants given power to use capsicum spray as part of a 12-month trial. Queensland Council for Civil Liberties Vice-President, Terry O'Gorman, summed the situation up well, saying that the police were 'dazzling' the public with information about the effects of the spray without admitting it could be 'as fatal as a bullet'. ● **JG**

South Australia

Power (I)

South Australians have been fascinated for years by the power struggles in the State Liberal party. There is a long history to this struggle going back to the 1970s but more recently it involved Dean Brown and John Olsen. Brown was elected Premier in 1993 but was later deposed after much backstabbing and backroom deals by the current Premier Olsen. The most remarkable aspect of the coup was that Brown was dumped while Premier rather than in a period of Opposition when coups are more common. Recently, some fascinating aspects of the power struggle have begun to be aired in the courts. In brief, over the last few years the State Labor Opposition benefited from extraordinary leaks of highly sensitive documents including those relating to the contracts for outsourcing the delivery of water in South Australa. The documents were clearly from a highly placed source but naturally Labor always refused to identify them. Eventually the Opposition Leader, Mike Rann, made it known that Olsen had been the source of many leaked documents, implying that Olsen had used the documents as a part of a campaign to destablilise Brown's leadership. Olsen accused Rann of lying about this matter but surprisingly he did so outside the safety of the Parliament. Rann struck back with a writ and the case is now before the court.

Given that Olsen only narrowly won the recent election, it is little wonder that press reports suggest that if Olsen is shown to have leaked the documents and therefore destabilised Brown, he will promptly be replaced by, you guessed it, Brown. Many people were surprised when Brown stayed in politics after being dumped as Premier, but perhaps he knew more than he let on.

Power (2)

A historical perspective provides fascinating insight into current fads in beliefs about the nature of government power and responsiblity. Recently, governments of all persuasions have become besotted with privatising, outsourcing and contracting. Almost any strategy is used to reduce the size and impact of governments. Sadly, the profitable bits are the most vulnerable because they are easiest to sell off. But this also results in lasting antagonism towards the remaining unprofitable public enterprises. In this way the idea of good government itself is undermined.

In South Australia, the Government has gone down this path more than most. First, computing services were outsourced to the giant American company, EDS. Then water delivery was outsourced as was the management of some public hospitals and parts of the public transport system. More recently the government has announced a decision to sell the profitable Electricity Trust of South Australia, the power generation and supply company. What will be next? Perhaps the SA Housing Trust, the public housing authority, or even the public schools? Yet it was not that long ago that a Premier of South Australia used public enterprises and utilities to attract business and therefore employment into the State. That Premier understood the power and the role of government as one of working in sensible partnerships with the private sector rather than simply promoting either the public or private sector. That Premier seems to have had a more sophisticated and balanced view of the nature of the power and responsibilities of governments in contributing to society's common good. Interestingly that Premier, Tom Playford was from the same political party that is currently selling off anything remotely profitable. The Liberals would be wise to sell less and reflect more on the dangers of following fads and ignoring the responsibilities of power. ● **FR**

VICTORIA

Super-Tribunal

A Bill is currently before the Victorian Parliament which will see the introduction of a super-tribunal; the Victorian Civil and Administrative Tribunal (VCAT). The VCAT will subsume most Victorian tribunals and boards, including the Administrative Appeals Tribunal, Residential TenanciesTribunal, Small Claims Tribunal, the Anti-Discrimination Tribunal and the Guardianship and Administration Board.

Whilst efficiency gains may make compelling arguments for amalgamation, the 'reforms' to tribunals go much further than administrative convenience. Changes that allow for the Minister to suspend and investigate tribunal members bode unwell in a State where the independence of the judiciary has received scant regard. The ability to award costs more readily is an undesirable departure from current practice. It will suit lawyers and well-resourced litigants, but as drafted, create uncertainty for public interest litigants and leave unrepresented parties more vulnerable to a punishing costs order.

Ironically, the VCAT has been heralded by the Government as a measure to increase access to justice. This appears to be unlikely. The VCAT will be headed by a Supreme Court judge and, on the whole, is far more court-like than the majority of tribunals it will replace. The Government has also made much of the fact that fee rises have not accompanied the introduction of VCAT. This is principally because the Government has been busy increasing fees in the months prior to the introduction of the Bill. ● **MC and MB**

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