Australian Adam Smith Club
(Melbourne)

President: Michael Warby, Editor: Regina Bron, P.O. Box 950, Hawthorn, 3122

You never miss the water till the well runs dry.
Rowland Howard (1876)

Alan Cornell
on
Melbourne's Water Supply

The Adam Smith Club will host a dinner meeting on Monday the 25th of May 2009, at the Curry Club Cafe, 396 Bridge Road, Richmond.

Alan Cornell was appointed Chairman of Yarra Valley Water Limited in June 1997, until his retirement in mid 2008. He is a practising lawyer specialising in commercial and company law and is currently Special Counsel at Gadens Lawyers.

As well as being admitted as a solicitor in the Supreme Court of Victoria, Alan is admitted as a barrister and solicitor in the High Court of Australia and in the Supreme Courts of New South Wales, the Australian Capital Territory and Western Australia. In 1991 he was admitted as a solicitor of the Supreme Court of England and Wales.

Alan has also served as President of the Law Council of Australia, as President of the Law Institute of Victoria, as a Council Member of the International Bar Association Victoria, as an inaugural director of United Energy Limited (1994-95) and is currently a Director of Océ Australia Ltd, Opera Australia Capital Fund Ltd, ICI Holdings (Australia) Pty Ltd, ICI South Pacific Holdings Pty Ltd and Chairman of Aqua Guardian Group.

Before retiring from the Yarra Valley Water, Alan Cornell created a stir by publically suggesting that dams should be considered for Melbourne, and that the ban on new dams was ridiculous and should be revisited. "If a precious resource is going straight into the sea, pure water out of the sky, why wouldn't you attempt to capture it?" he said.

Attendance is open to both members and non-members. Those desiring to attend should complete the attached slip and return it to the Club no later than Friday the 22nd of May 2009. Tickets will not be sent. Those attending should arrive at 6:30pm for dinner at 7:00pm. The cost is $40.00 per head for members and $45.00 per head for non-members (see next page for explanation of arrangements and for electronic booking details).

Enquiries to Ms Regina Bron, tel. 9859 8277 (AH) or mob. 0412 006 786 (BH)
or email asmith@economic-justice.org

detach and return

The Secretary,
Australian Adam Smith Club (Melbourne),
PO Box 950, Hawthorn, Victoria 3122.

Please reserve ..... place(s) at $40.00 dollars per member and .....place(s) at $45.00 per non-member for the May 25th meeting of the Australian Adam Smith Club. I enclose the amount of $..... in payment for the same.

NAME (please print): .....
ADDRESS: .....
.....
SIGNATURE: ..... TEL: .....

LAISSEZ FAIRE ON THE WEB

This newsletter has an address on the web: ***http://www.adamsmithclub.org/laissez.htm***. The Club's web site can be found at ***http://www.adamsmithclub.org/***.

ELECTRONIC PAYMENTS

By popular demand, the AASC now offers electronic booking and payment to dinner meetings. Bookings can be made by emailing the number of members and non-members attending to asmith@economic-justice.org; a reply email from the club will then be sent with a link to PayPal where the payment can be made by Mastercard, Visa, AMEX, Diners or PayPal Account. Bookings made after Friday 3rd of April will not be accepted online. FEES - a $2 card fee will apply for the transaction.

POWER TO THE PEOPLE, NOT THE PARTIES

The major parties in the Australian electoral system, at first glance, might not appear to have much in common. But the two major parties do have a common interest in keeping other parties that might threaten their stranglehold on the structures of power out of parliament. However it's the Labor Party that's most active in shutting out the electoral minnows.

Take for example South Australia's Attorney-General Michael Atkinson. The Labor minister introduced a bill this April to ban all electoral advertising in public places – no posters on billboards or telegraph poles. "Opponents of the bill say it will bolster the position of the major parties, who have time in parliament to build a profile and receive media coverage during electoral campaigns, while single issue parties struggle for a voice," the *Australian Financial Review* (1 May 2009) reports.

The bill also proposes to increase the minimum number of people required to register a political party from 150 to 500, and to require them to register at least six months before the issuing of an electoral writ, rather than the current position of the day before.

According to Atkinson, "the two changes to the Electoral Act do nothing to entrench government or to impede genuine minor parties. That a candidate can festoon thousands of telegraph poles with his or her beak tells voters nothing of value."

What are "genuine minor parties?" Take for example the Democratic Labor Party (DLP). The DLP once held the balance of power in the Senate. It has been around for decades. The DLP has parliamentary representation in the Victorian Legislative Council, with its elected representative Peter Kavannah taking an active role in such contentious issues as leading the opposition to the recent legislation to legalise abortion in Victoria.

But in Western Australia, which has similar legislation, the DLP could not register as a party. Three DLP candidates, instead, ran as independents in the last State election. Surely the DLP is a "genuine party." But there is no love lost between the ALP and the DLP, and the ALP would be quite happy to see its legislation assist in the DLP's demise as a political force along with other irritating minor parties.

The South Australian legislation pushes Australia further towards becoming a ballotocracy rather than a democracy. We elect a government that holds unfettered power until someone – usually the government – decides to holds an election, unless the term limit is reached – which it often isn't. A constitutional change in Victoria, for example, requires only a simple majority of both houses. The government is an elected dictatorship. At a Federal level, the power to call a referendum is in the hands of the parliament – effectively, the party in power. This blatant attempt to make the electoral system less representative is nothing but a power grab by the executive.

We, the people, have no control over the government between elections. What is required to restore democracy is the power to hold a binding referendum following an initiative from the citizens of the State. This would put power back in the hands of the people. *JRB*

VENUE ARRANGEMENTS

For the Curry Club Cafe, drink is not included in the price. You may bring your own drinks (no corkage will be charged) or purchase from the restaurant which is fully licensed. A room has been reserved for the dinner meeting. We hope these arrangements do not cause inconvenience and we welcome your feedback.

Laissez Faire

Newsletter of the Australian Adam Smith Club (Melbourne), No 91, May 2009

THE CONSTITUTION IS DEAD; SO WHAT NOW?

Interest in, and knowledge of, their country's Constitution, amongst Australians, even amongst the politically aware, is typically not great. Unlike Americans, who tend to regard their Constitution with reverence and as being central to the very concept of their nation itself, Australians generally regard their Constitution as remote, and of being of little if any practical consequence in their daily lives.

In broad terms, a country's constitution comprises the generally accepted laws, principles and practices, whereby political policy is determined and political disputes resolved without recourse to violence. Typically (but not always) it is embodied in a document. This is the case in Australia. Reference, in the Australian context to "the Constitution" without further qualification is a reference to such document, which began life in 1901 as part of an Act of the British parliament. As drafted, it combined two separate constitutional concepts; firstly Westminster-style responsible government, whereby government Ministers are drawn from, and are responsible to, a democratically elected legislature, and are thus representative of the people. Secondly, in emulation of the American example, it set up a system of checks and balances, such as a delegation of specific powers, federalism, a bicameral legislature, a separation of powers between executive, legislature and judiciary, and judicial review, whereby it was sought to strictly define and limit the government that the Constitution thereby created. Essentially the Constitution was a compact between the 6 former Australian colonies, which formulated and determined the terms and the purposes for which they were combining.

There is an inherent potential for conflict in the 2 constitutional concepts embraced by the Australian Constitution. Indeed the powers that be within the 6 former colonies probably realized this at the time of entering into the agreement to federate. They envisaged however that the application of the Common Law and of the constitutional conventions and principles that had characterized the British (and to a certain extent the American) experience during the later C19 would continue and be able adequately to resolve such conflicts as might arise. The major purposes for which the former colonies had combined were to effect and facilitate the traditional governmental roles of common defence, common nationality and common market. They were aware of the potential threat to freedom and to the individual that an unrestrained democracy posed but considered that the limitations contained within the Constitution were such as would be adequate to protect them. Such constitutional limitations on government power, sometimes referred to as constitutionalism, were the Classical Liberal defence to any abuse.

What the Colonial Founding Fathers did not foresee was the fundamental change that would occur in the C20 in the nature and scope of governments. During this period the Constitution became the focus of a struggle between 2 competing ideologies, the constitutionalism of the Classical Liberals, and the concept, which we can call the Social Democrat concept, of the sovereignty of a democratically elected parliament, enabling it to govern as it sees fit, unimpeded by so-called constitutional obstacles designed to preserve the status quo and prevent the achieving of otherwise desirable social and political goals. The most notable proponent of this later view was of course the Australian Labor Party, which saw it as the right of government, indeed its duty, inter alia, to control the economy, prevent unemployment, ensure the value and stability of the currency, develop the nation, and otherwise act as it saw fit to promote the general welfare. Its view of the Constitution is perhaps summed up in the title of the 1957 Chifley Memorial Lecture by Gough Whitlam, subsequently ALP Prime Minister; "The Constitution versus Labor".

The peak of the ideological struggle probably occurred in Australia in 1975 following the dismissal of the Whitlam government. The dismissal prompted the publication of a number of texts including the 1977 published "Change the Rules" edited by Sol Encel & Others. However since then, largely due to a series of High Court decisions, the idea that the Constitution poses a real risk of impediment to any Federal government action is almost fanciful. Constitutionalism has lost the battle. It is said by some that this was inevitable and that it is an inherently flawed concept which deserved to lose. Be that as it may, Social Democracy has triumphed; the Constitution as originally envisaged is no more.

The demise of the Constitution has left many believers in limited government confused and troubled. Some have suggested a concerted campaign to obtain the appointment of more sympathetic judges with the aim of procuring judgments that would revive the Constitution. Others more attuned to legal process suggest that the time and uncertainty involved in such a course make it impractical. More troubling perhaps is the thought that the success of Social Democracy is illusionary or at best transitory, and that it carries within it the seeds of its own demise. There presently exist no effective constraints on the unfettered power of the Federal government. It is able to do what it wants. The legislature no longer controls the purse. Nor with its wholesale delegation of the power to regulate to the government, it is correct to say that the legislature rather than the government makes the law. Yet while every day the government regulates our lives more and more, the very things that it promised to deliver, full employment, no depression, a stable currency, and rising prosperity are seemingly disappearing. Perhaps then what we should do first is insist that the government level with us and provide a more credible explanation of where we are and where we are heading. *DBS*

PROPERTY RIGHTS

Yoram Barzel's penetrating work *Economic Theory of Property Rights* analyses human transactions in terms of economic property rights, defined in terms of who actually controls something; which means individual property rights are inevitable. If something is government-owned, that just means that the property rights rest with whichever officials *actually* control some thing.

Consider how official approval is needed to build houses. This means that control of the attribute "suitable for housing" is shared between the landowner and officials. Obviously, this will not *increase* the number of houses built. On the contrary, it will tend to seriously reduce the number of houses built, as restricting the supply raises the price, increasing the value of existing houses (whose owner's vote), increasing the revenue from such land and from land releases and increasing the funds to political parties and candidates from developers who have to "buy a seat at the table". So officials have a strong interest in restricting housing supply, thereby driving up the price of housing. What the regulation does is change the property rights structure: it lessens the rights of the owner and allocates rights over the owner's land to officials in ways that encourage greater scarcity in housing. The post-war Federal German constitution included a "right to build" to stop arbitrary official control over property. As a result, Germany has entirely avoided the housing bubbles that have plagued other developed countries.

Victorian law also gives officials control over what you can do about trees in your property. Cutting down a tree destroys the regulatory property right officials have over the tree. Clearly, such control will not tend to increase the trees cut down. Indeed, it will have its intended effect of reducing the number of trees cut down. The owner is concerned with risk to their property from fire, the official with justifying the lever of control. So the tendency will be for *less* pruning and cutting down of trees than is prudent to manage bushfire risk.

Large areas of Victoria are controlled by the Department of Environment and Water - or, as it should be known as, the Department of Scorched Earth and No Water – as since 1992, large areas under its control have been burnt out in a series of long-lasting, uncontrollable fires. The recent deadly bushfires just occurred in areas people lived, so the destruction was noticed. The officials of the Department have not exercised their property rights in a way that protects people or property. They have, however, done so in ways that conform to various marks of "good intentions" among inner city greens—cutting back burn-offs, not building dams, etc.

If the Victorian National Party wants an electoral strategy, perhaps it might suggest that having folk pandering to inner city green opinion controlling the property and lands of country Victoria is demonstrably a recipe for disaster, and "you own it, you control it" and "country people in charge of country land" might be slogans for success. *MJW*

SOMETHING DIFFERENT

Those old enough to recall the archipelago named the New Hebrides, (before it gained independence as the present-day Vanuatu), might also be aware that it was then what was known as a condominium. By agreement between France and the UK, (the archipeligo's 2 colonial powers), a unique form of administration existed to govern the islands, with the nationals of each colonial power being governed by their own laws and administration. Each colonial power maintained its own infrastructure; courts, prisons, schools and so forth. Whilst the indigenous Melanesian population was left largely to its own resources, foreigners and new arrivals were required to choose which system of government they wished to be subject. Those matters necessarily requiring a joint determination were dealt with by agreement between the two administrations.

Whilst the condominium system was much criticised as cumbersome and inefficient, perhaps its most interesting point was that it worked, functioning as such throughout the colonial period from 1906 to 1980, when independence was achieved. Given that the condominium of the New Hebrides is now no more, those interested in, and amused by, idiosyncratic forms of government might instead wish to consider Baarle, a small town located within the Netherlands. But Baarle is not Dutch, at least not completely. Rather it is largely a Belgian enclave. However within this Belgian enclave there are smaller enclaves that are Dutch and which inhere to the Netherlands. As if to complicate things even further, within these Dutch enclaves there are further enclaves again, which inhere to Belgium.

Baarle is an historical anachronism, a hangover from medieval times when Europe contained innumerable towns and petty states, the government of which was likely to be based more on property rights than geography or ethnicity. Following the demise of the short-lived Kingdom of the United Netherlands, which had united the 2 countries, the boundary between Belgium and the Netherlands was determined by the Treaty of Maastricht in 1843. However it proved impossible to reach agreement about Baarle.

When the Belgian Revolution of 1830 had occurred, the cadastral map of the area had contained at least 20 Belgian enclaves within what was otherwise Dutch territory, mostly lying about 5 kilometres from what subsequently became the frontier. (There was also at least one Dutch enclave within the Belgian border as well as others actually within the Belgian enclaves.) It was decided by the Treaty commissioners to leave 5732 parcels of land, which appeared on the cadastral property map, as the territory of whichever country the possessors professed at the time. Such has remained the position, with the various enclaves appearing on the map like an inland archipelago.

The untidy nature of the map and the bureaucratic problems such situation caused, have, since 1843 led to a number of attempts to eliminate the enclaves. To date, such attempts have failed, largely due to the resistance of the local inhabitants, to whom the situation provides a number of benefits. The boundaries of the various enclaves are such that they can divide streets, leaving one part Dutch and the other Belgian. Even single buildings can straddle a boundary, leaving a part in each country. For tax purposes, liability is deemed to be determined by the location of the front door, which has led, in a number of instances to the owners changing the nationality of the building for tax purposes, by relocating the front door. Posting a letter in a post office located within the Belgian part of town intended for delivery to an address in the Dutch part requires international mail with the letter going first via Brussels and then Amsterdam before being delivered. However by walking a block and posting the letter in a Dutch post office the letter is delivered as local mail. Needless to say, similar such anomalies abound.

The unique ambiance of Baarle has made it a popular tourist destination, thereby providing the inhabitants with a good source of income. For the benefit of visitors, the distinctions between the Dutch and Belgian enclaves are enhanced and clearly marked, and there are distinctive plaques in the respective national colours proclaiming the nationality of each particular part.

For students of politics Baarle presents as an example of something different. In particular, for proponents of the significance of property rights, it provides an ongoing case study of the interaction between property ownership and state sovereignty. *DBS*