PERCEPTIONS OF BIAS

On 5th February the Ngarrindjeri Aboriginal people went to the High Court in Canberra. They had challenged the constitutional validity of a federal law that allows a bridge to be built between Hindmarsh Island and the South Australian mainland. Aboriginal women say that it would violate their spiritual beliefs associated with the island, the subject of a confidential report that was leaked to the media by then opposition member, now defence minister, Ian McLachlan in 1995.

The case is significant. The Court will be asked to find that the Commonwealth's constitutional power to make laws for Aboriginal people can be used only to benefit them, not to impair or diminish their rights. If so, it would be argued that the Wik bill, rejected by the Senate and likely to trigger a double dissolution, would have a detrimental effect on Aboriginal entitlements to make Mabo-style land rights claims under the Commonwealth's Native Title Act. Battle lines have been drawn - the NSW government and the Commonwealth's Human Rights and Equal Opportunity Commission arguing that the Hindmarsh Bridge Act violates Australia's international human rights obligations; the South Australian, W.A. and the Northern Territory governments supporting the Commonwealth.

The case did not proceed on that day. The preliminary argument was about an even more serious justice issue: the perceived integrity and impartiality of the High Court itself.

Lawyers for the Aboriginal plaintiffs moved, with the cautious respect of which only lawyers are capable, to ask one of the justices, recently-appointed Queensland QC Ian Callinan, to disqualify himself. A reasonable person, they argued, might in the circumstances reasonably apprehend that his consideration of the case might be affected by bias.

Usually, judges who have professionally advised those involved, directly or indirectly, before they joined the bench in cases before them, announce the

fact and disqualify themselves from those cases. Former Victorian QC and recent High Court appointee Justice Haynes did, in a case involving the Western Mining Corporation last year. But Justice Callinan considered the arguments overnight, and then decided he should sit. He had previously expressed strong views on the scope of the Commonwealth's power to make laws under the 'race' provisions in the Constitution; had advised the Commonwealth government on Hindmarsh Bridge issues, and had also advised his personal friend and strong advocate of the Hindmarsh Act, Mr McLachlan, who was the perceived de facto, if not de jure, proponent of that legislation. His decision was a surprise, even to the Commonwealth, who had expected Callinan to disqualify himself.

Ngarrindjeri lawyers were then left to consider a further, unprecedented challenge to his decision, to the full bench of the High Court. There are no formal procedures for such an appeal: typically, the decision is left to the individual judge. They are unlikely to invite further delay by doing so.

Judges of the High Court - in fact all judicial officers - are expected to act in what some would say is an unrealistically 'impartial' way. Of course, since judges are human beings and social animals, they do have views. The discipline of the law is designed to structure hearing, argument and decision-making processes to minimise the risk that those views might disadvantage or privilege one party over another.

During the 1960s and 1970s the 'conservative' opinions of the majority of the High Court and its decisions, particularly on issues of taxation, trade and commerce, the relative balance of State and Commonwealth powers and individual rights and freedoms, were a source of some anguish to 'progressive' lawyers. They did not accept then, as 'conservative' lawyers do not now, that the High Court merely discovers and pronounces upon existing law. The function of the Common Law doctrine of precedent (following the reasoning in earlier, similar cases by superior courts in a hierarchy), and the development of the law through the application of rules to new factual, political and social circumstances, is to promote the law's orderly development. If the 'new' legal outcome is unacceptable then the people, through their Parliamentary representatives, can change it for the future.

That, after all, was the reason for the Commonwealth's enacting the Native Title Act: to manage the social and economic effects of the High Court's decision in Mabo, in 1992.

During the 1990s the High Court made a series of constitutional interpretations that 'found' unwritten Common Law and democratic rights - to legal representation in serious criminal cases, access to the courts, freedom of political speech, procedural fairness based on Australia's international human rights treaties - implicit in the prosaic words of our States-rights focused, 98-year-old Constitution. 'Progressives' welcomed them, but conservative political leaders and some lawyers mounted an increasingly bitter attack upon the institution and its incumbents, accusing them of 'judicial activism'. Indeed, Callinan's appointment was controversial, assumed by some to be meant to put a capital 'C' conservative on the bench and stop the rot.

The argument that judges' views do, but should not, play a part in the law's development was being run, simultaneously, a few hundred meters away in the old Commonwealth House of Representative, where the Constitutional Convention was in full roar. The Convention was debating a new constitutional preamble, as it decided on what form of a republican government should be put to a referendum for the people to adopt or reject.

The words of the proposed Preamble were not what inflamed the debate - and it was fiery - but the very notion that the Australian people should, by expressing their values, democratic aspirations and most precious rights, enable the High Court to take them into account in interpreting the Constitution and statutes. A vigorous critic of the High Court's recent direction, government-appointed delegate Professor Greg Craven, told the Convention that such a preamble would not only give the High Court greater opportunities to 'find' rights not expressed in the Constitution and 'make' law, but - since the Preamble was the 'lymph gland' of the Constitution - would create a kind of bill of rights, by stealth. Surprised members of a working group reported that Professor Craven had launched a personal diatribe at eminent constitutional lawyer, formerly one of the advocates in the Mabo

case, Ron Castan QC, accusing Castan of improperly influencing the group's recommendations to achieve such an end.

Australian law has never been completely codified. One can never anticipate all future circumstances in which a law has to be applied or interpreted. Even 'codes', as many European justice systems prefer, leave interpretative authority to courts.

Our Australian Constitution is partly unwritten, too. It provides, for instance, that all executive power lies in the Governor General. This is subject to an unwritten convention that it will be exercised only on the advice of his Ministers, who are accountable to the people through Parliament, as the Governor General is not. Even that convention turned out to be ambiguous: its most contentious exercise was in the use of the unwritten 'reserve powers' by Governor General Sir John Kerr, in 1975, to dismiss the elected Whitlam government when the Senate blocked Supply. The thrust of the republican cause had its origins in the damage then done to the perceived impartiality, and lack of accountability, of the Governor General. The present Prime Minister has in his turn accused the present incumbent, Sir William Dean, of political partiality in speaking publicly of the need for Aboriginal reconciliation.

In principle, courts are impartial arbiters of fact and deciders and interpreters of the law. In practice, the law recognises that humanity and fallibility of judges, and that they do 'make' law. If the latter is to be limited, then this should not be sought to be achieved through the appointment of judges holding perceived views (anyway, judges tend to change their attitudes considerably once they shift to the other side of the Bar table.) Judges themselves could express their conventions formally, and perhaps they should.

It is unfortunate that the latest High Court appointee did not follow the unwritten judicial convention that where there is even a scintilla of the possibility of an apprehension of bias - not actual prejudice or prejudgment, which was never alleged - then, in the interests of trust in the justice system, he should stand aside: voluntarily, honourably, and blamelessly.

His decision may have done more harm to respect for the High Court than the last 30 years of both conservative and progressive 'activism'. It may, in fact, have achieved more for the cause of codification of official powers and discretions, and the constitutional protection of citizens' rights in relation to the institutions of their government, than all the political grandstanding on the floor of the old House of Representatives.