

10th Annual Hawke Lecture CONSENSUS AND DISSENT IN AUSTRALIA



Delivered by The Hon Justice Michael Kirby AC CMG

Wednesday 10 October 2007
Adelaide Town Hall

About the Hawke Centre

Website: www.hawkecentre.unisa.edu.au

The Bob Hawke Prime Ministerial Centre is a dynamic University of South Australia initiative to establish an internationally recognised public learning/visitor and research facility serving young people, national and international scholars and local and global audiences.

Named after Bob Hawke, a third generation South Australian, one of the 20th century's most notable Prime Ministers (1983-1991) and a great conciliator nationally and abroad, the Hawke Centre was established by Memorandum of Understanding in 1997. UniSA has developed the Centre believing that that Bob Hawke's contribution should be properly recognised through a national facility, not as a memorial, but in a way that helps young Australians and furthers his legacy of valuing a cohesive and fair Australia.

The Hawke Building housing the Centre's public facilities, including the Kerry Packer Civic Gallery, Bradley Forum, and Hawke Library will be formally opened the day after this Lecture is delivered, 11 October 2007.

Broadly, the Hawke Centre aims to challenge Australians to consider ideas and develop solutions for Australia and the world, leading towards more sustainable societies, within a democratic framework. It is supported by a fine group of national patrons, and especially, international patron Nelson Mandela.

The Annual Hawke Lecture is the premier national event on the public calendar of the University of South Australia, delivered under the auspices of the Bob Hawke Prime Ministerial Centre. There are relatively few moments when we have the time to consider the larger issues of life, including the future of our nation and our world and how we can shape it. The University of South Australia offers the Annual Hawke Lecture in this spirit, as an opportunity to listen to the views of someone whose experience of human affairs is notable, and whose concerns about our world are truly worthy of consideration.

*While the views presented by speakers within the Hawke Centre public program are their own and are not necessarily those of either the University of South Australia or The Hawke Centre, they are presented in the interest of open debate and discussion in the community and reflect our themes of: **strengthening our democracy – valuing our cultural diversity – and building our future.***

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CONSENSUS AND DISSENT IN AUSTRALIA

SUMMARY

In his *Boyer Lectures* in 1979, Bob Hawke espoused the importance of seeking consensus as a means of resolving many of the nation's economic, industrial and social conflicts. When in 1983 he became Prime Minister of Australia, he endeavoured to put consensus into action, as in the industrial Accord of that year. Michael Kirby explores the interface of consensus and dissent in contemporary Australia. In politics, securing consensus is often now essential because of the comparative decline in electoral support for the major political parties. However, in independent courts and tribunals, decision-makers are expected to express their own individual conclusions. Moreover, even in other decisions, some differences may be so fundamental that opponents will not struggle to reach consensus. A democratic society needs both consensus and dissent. Knowing when each is appropriate is the challenge. One matter upon which a new national consensus should be sought, according to the author, is the expression of a national statute of fundamental rights. If this could be agreed, it would be a major achievement for the idea of consensus – placing the most important basic human rights into a special category and affording a role for courts to consider such rights whilst not invalidating enacted laws.

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BOB HAWKE'S LEGACY

Look up, my people,
The dawn is breaking,
The world is waking,
To a bright new day,
When none defame us,
Nor colour shame us,
Nor sneer dismay.**

This lecture marks a decade of Hawke Lectures. What began as a concept of the University of South Australia¹ has done more than pay tribute to the legacy of Robert James Lee Hawke. It has also served to stimulate debate about the issues important for the future of our nation and the world.

In a free and confident democracy we should constantly discuss such issues. Bob Hawke was a very successful politician. However, he was much more than that. He offered high intelligence and intellectual ability to all that he did. He played a part, happily continuing, in a wide range of national and international engagements. This lecture series reaches beyond purely partisan concerns. Of course, some people of *all* political shades see everything - even a grocery list - through the prism of party politics. Particularly so at election times. I reject that view of the world. The Hawke Lectures promote debate and serious reflection, beyond party politics. Otherwise the Governor, judges and public officials could have not be here.

Party politics are important. But they are not everything. I live and work in a world where party political loyalties are not important, as such. Philosophies, values and ideas are critical. We all know that these do not always obey party alignments. They overlap and intersect. Even at election times, the world goes on. The big issues crowd in on us. So I leave partisan interpretations to others. I cannot join them in those games.

** *Song of Hope* by Kath Walker (Oodgeroo of the Noonoccal).

¹ See R Hawke, "A Confident Australia", *Inaugural Hawke Lecture*, delivered 12 May 1998.

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I am proud to be the tenth person to give this lecture. It was another Kirby, Sir Richard Kirby², with whom Bob Hawke was to have legendary battles in the Conciliation and Arbitration Commission³, where I was also to appear as a barrister⁴. My first judicial appointment was as a Deputy President of that Commission⁵. I was welcomed in December 1974 as Sir Richard's "son" - such are the conventional expectations of lineage in the law. As it happened, I was not a relative of Sir Richard Kirby, having (as I do) a perfectly good father of my own. Sir Richard told me that he did not mind being called my father - he drew the line at being called my grandfather.

It was the Hawke government that appointed me to the Federal Court of Australia in 1983. That post came a year before my appointment as President of the New South Wales Court of Appeal. I have endeavoured to serve the law and the people of Australia faithfully under five federal governments since 1974 - three Labor and two Coalition. That service is continuing, though as it is said in *The Book*: the end is nigh.

Throughout his life, Bob Hawke was famously driven by a desire to resolve conflict and, where possible, to reach consensus in responding to problems and challenges⁶. He did this in a variety of arenas and across an array of topics, both in this country and abroad. He did so as a student; scholar; union official; advocate; diplomat; parliamentarian and, ultimately, as Prime Minister⁷. In government, Bob Hawke strove to achieve a unique consensus; consensus in institutions and consensus in advancing a free, fair, and just democracy.

² See B d'Alpuget, *Mediator: A biography of Sir Richard Kirby*, (1977) at 156-161, 237-242, 247-255.

³ See B d'Alpuget, *Robert J Hawke: A biography*, (1982) at 81-124. See also R Hawke, "The Life of Work of Sir Richard Kirby - What does it tell us for the issues of today", *20th Kirby Lecture*, 20 April 1999.

⁴ See M Kirby, "The Centenary of Australian Industrial Conciliation and Arbitration", (2004) 78 *Australian Law Journal* 785 at 786-787.

⁵ Note *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; M Kirby, "The Centenary of Australian Industrial Conciliation and Arbitration", (2004) 78 *Australian Law Journal* 785 at 786.

⁶ See J Pemberton & G Davis, "The Rhetoric of Consensus", Paper presented to the Australasian Political Studies Association Conference, (1985), *APSA Conference Proceedings*, vol 2 at 693.

⁷ See generally B d'Alpuget, *Robert J Hawke: A biography*, (1982); M Kirby, "The Centenary of Australian Industrial Conciliation and Arbitration", (2004) 78 *Australian Law Journal* 785 at 787; P Keller, "The Cabinet" in C Jennett & G Davis, *Hawke and Australian Public Policy*, (1990) 16 at 23-25; P Kelly, "People's PM, but no party pin-up", *The Australian*, 5 March 2003.

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The most vivid example of Bob Hawke's approach to consensus was the industrial relations Accord⁸. In it he endeavoured to involve all the key stakeholders, including the unions and employers, in resolving the challenges then facing the Australian economy. In his address to the National Economic Summit, following the 1983 federal election, he explained his approach⁹:

“If a genuine consensus is to emerge it must mean an understanding on the part of all sections of the Australian community of the constraints they will be called upon to accept and the contribution they will be called upon to make to the process of national reconciliation, national recovery and national reconstruction. It will mean a recognition and acceptance of restraint by all sections of the community. It must mean a recognition, a sense of realism, of what can be achieved in the near future. We must all understand that there can be no miracle cures, no overnight solutions. It calls for sustained concerted national effort”.

In a similar context, he famously declared:

“I think it is just stupid economics for a government to approach economic management from a strand of thinking regarding unions as enemies”.

In his highly successful *Boyer Lectures* in 1979, appropriately titled *The Resolution of Conflict*¹⁰, Bob Hawke explained the principles that underlay his concept of consensus in Australian society. They were principles that probably encapsulated the experiences he had gained from his life to that time - most especially as an industrial advocate for the ACTU - working towards the compromises and settlements that resolved industrial conflict, got workers back to work, kept the wheels of industry turning and profits rolling in.

⁸ *Statement of Accord by the Australian Labor Party and the Australian Council of Trade Unions regarding Economic Policy*, February 1983. See C Jennett & R Stewart (eds), *Hawke and Australian Public Policy: Consensus and Restructuring*, (1990) at 2.

⁹ Cited in J Pemberton & G Davis, “The Rhetoric of Consensus”, Paper presented to the Australasian Political Studies Association Conference, (1985), *APSA Conference Proceedings*, vol 2 at 693.

¹⁰ See B d'Alpuget, *Robert J Hawke: A biography*, (1982) at 390; J Pemberton & G Davis, “The Rhetoric of Consensus”, Paper presented to the Australasian Political Studies Association Conference, (1985), *APSA Conference Proceedings*, vol 2 at 690.

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He spoke of creating a "greater degree of positive co-operation" to meet the economic, social, constitutional and international challenges facing Australia. He said: "[c]o-operation can only be the product of understanding; confrontation and conflict are the inevitable and disastrous alternatives"¹¹. He went on to state¹²:

"We need much more tolerance of attitudes genuinely held by groups or generations perceived to be out of kilter with our traditional mores.

...

[N]o-one should assume he or his group is the sole repository of wisdom and rectitude. In most instances there is some real ground for the adoption by people of positions which to others seem unjustified or preposterous. And in most people there is, I believe, ultimately a desire for harmony rather than conflict – to understand this is to take the first step in the resolution of the conflict which is in fact diminishing our community."

For Bob Hawke, this was not mere rhetoric. His words were written in September 1979, in the midst of a few tumultuous weeks in Bob Hawke's life¹³. The ACTU Congress, over which he had presided, featured a most passionate debate over uranium mining. He reached the decision to nominate as a candidate for the seat of Wills for the 1980 federal election. Tragically, the death of his mother, Edith, who had nourished his talents and instilled in him a belief in his capacity to change the country for the better, all happened at this time¹⁴. The sincerity of his yearning for the resolution of tensions and conflict by rational engagement, debate and discussion cannot be doubted.

In the Boyer Lectures, in 1979, Bob Hawke spelt out his vision of how Australia could best evolve and move forward as a free and prosperous nation in a rapidly changing world. It was a kind of public manifesto. Our central institutions - Parliaments, courts and industrial tribunals - secured a kind of resolution, a type of consensus. However, they often did this by adversarial techniques of

¹¹ R Hawke, *The Resolution of Conflict*, (1979) ("Hawke, *Boyer Lectures*") at 43.

¹² Hawke, *Boyer Lectures* at 48-49.

¹³ B d'Alpuget, *Robert J Hawke: A biography*, (1982) at 390.

¹⁴ See B d'Alpuget, *Robert J Hawke: A biography*, (1982) at 383-392; N Blewett, "Robert James Lee Hawke", in M Grattan (ed), *Australian Prime Ministers*, (2000) 380 at 382.

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confrontation, partisan divisions, conflict and tension. Bob Hawke quested for a different medium - a means of promoting genuine agreements without the conflict, stress and disruption. Was this realistic? Was it desirable?

Today, almost 30 years on, much has changed. Of course, much has also stayed the same. Contrary to the recommendations contained within his *Boyer Lectures*, State governments remain in place in Australia and all of our Federal Ministers are still appointed from members of the Federal Parliament¹⁵. None is appointed from outside as Bob Hawke favoured. Nevertheless, the core ideas contained in the lectures, now thirty years old, are well worth revisiting.

I want to explore the idea of community consensus. When is it appropriate to seek agreement or compromise? When should we stand up and robustly disagree? When is dissent a proper response? Some contemporary Australian writers have criticised what they see as a diminution of open public debate about legislation, policy, issues and values in this country¹⁶. Other commentators contest this interpretation¹⁷. But is consensus, in practice, merely an attempt of those with power to cloak their use of power in the garments of agreement so that those who express opposite points of view are drowned out, shamed or intimidated from voicing criticism or seeking to rock the consensus boat? Is this what Bob Hawke *really* had in mind by talking of consensus?

THE IMPORTANCE OF CONSENSUS

Living in society, it is natural that we should strive to reach consensus with our neighbours. We might call it different things – compromise; conformity; bipartisanship; even cooperative federalism. We must recognise that reaching consensus with others is, in many cases, a critical tool in building and developing the institutions of society.

Of course, consensus does not always mean full agreement. Often, it will mean no more than majority compromise. Majoritarian consensus is pressed on

¹⁵ cf Hawke, *Boyer Lectures* at 11-20, 22-31.

¹⁶ See eg C Hamilton and S Maddison (eds), *Silence in Dissent* (Allen & Unwin, 2007); D Marr, "His master's voice" in (2007) 26 *Quarterly Essays*, 1.

¹⁷ John Hartigan, "Loosen curbs on our liberty", *Weekend Australian*, 8 September 2007, 27.

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us all the time, and for good reason. In the next few weeks we will embark on a debate to choose the next federal government. By this process, we hold each Federal Parliament and Government accountable to the people of this nation. Despite the issues that divide us in the election there will be consensus over many things as the contenders narrow the targets and concentrate on the issues for popular choice which they hope will secure them the winning edge. The new Parliament, once elected, will choose the new Government. It will do so by majority, not by consensus.

In courts too, whenever there are important divisions, we act by majority. The recent important decision in the High Court, striking down as invalid a 2006 Amending Act which disqualified *all* sentenced prisoners from voting in the coming elections was reached by majority, not consensus. Four Justices (Chief Justice Gleeson and Justices Gummow, Crennan and myself) held that disqualifying prisoners serving less than three years imprisonment was constitutionally invalid. Justices Hayne and Heydon dissented. There was consensus in the orders favoured by the Chief Justice and by Justices Gummow, Crennan and myself. But there the Court's consensus ran out. The democratic rule of the majority then had to be invoked. The majority opinion prevailed. As was their right and duty, the dissenting judges explained the reasons why they differed and why the difference was important.

In recent times, in successive federal elections, the primary vote for each of the *major* Australian political parties has actually declined. Over the past five elections¹⁸, a greater number of Australians (on average almost one in every five voters) now casts their first vote for independents or one of the *minor* parties. Accordingly, well over 50% (in some cases over 60%¹⁹) of voters in Australia have cast their first preference for a party different from the one which is chosen to form the government.

In 1990 when the Hawke Labor Government was re-elected, the Australian Labor Party received 39.4% of the primary vote. Likewise, the Coalition Government was re-elected in 1998 after the Coalition Parties received a

¹⁸ See S Bennett, "The decline in support for Australian Major Parties and the prospect of Minority Government", (1999), *Research Paper No 10 Department of the Parliamentary Library*, Australian Electoral Commission Statistics.

¹⁹ See B Stone, "The Western Australian election of 10 February 2001: more a case of protracted suicide than of assassination", (2001) *Australian Parliamentary Review*, Autumn 2001 at 26-33.

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combined 39.5% of the primary vote. In February 2002, preferences allowed Premier Mike Rann to form a minority government in South Australia after the ALP received 36.3% of the first-preference vote. Similarly, the Western Australia State election only a year earlier delivered a new Gallop Government although the Labor Party received 37.2% of the primary vote, an increase of only 1.4% on the vote that resulted in its defeat in the 1996 election. As pointed out at the time, that vote was, in turn, an increase of only 0.15% on its performance when the Lawrence Government was defeated in 1993. These developments represent a significant change in the degree of consensus about government expressed in the major political parties in Australia from what existed in the mid-twentieth century.

Of course, in Australia, the distribution of preferences in an election is one way by which a kind of consensus is reached for a particular party or parties to govern. Thus, in the 1998 and 2001 federal elections, no fewer than 185 seats, in aggregate, in the House of Representatives required the distribution of preferences to determine their outcome²⁰. Although the final choice may not therefore be everyone's first choice, in this country, our elected representatives, when invited to form a government, necessarily govern for all Australians. They all say that this is what they do. Often it is what they attempt to do. The necessity to face the electors again at regular (and relatively short) intervals means that parties in government in this country frequently attempt to achieve the objectives important to them and their core supporters. Yet they also keep in mind the consensus that they need to forge with minor parties and independents. This is where political consensus over broad directions, principles (philosophies if you will) become very important. Without such support in today's Australia, neither of the major political groupings can win the Treasury benches.

In a sense, our political system forces elected representatives to accept compromises and to work to discover the middle ground across a range of policy areas. Political consensus and bipartisanship are thus natural to a parliamentary democracy such as ours.

Obviously, consensus will not always deliver *perfect* policies. Its object, we are reassured, is to produce *acceptable* policies, and laws and programmes that are *tolerable*, ie not unduly upsetting to the ever-changing majorities in the community that reflect their views in the ballot box every three or four years.

²⁰ See G Newman, "The role of preferences in the 2001 Election", (2002) *Research Note No 39 Parliamentary Library of Australia*.

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CONSENSUS & DISSENT IN THE HIGH COURT

The same is not true of Australia's independent courts, particularly the High Court. Under the Constitution, each judge is independent. Each has an equal voice. This is said to be "all but universally recognised as a necessary feature of the rule of law"²¹. Judges are expected to be indifferent to political influence and expediency. Their independence necessarily includes, "independence of one another"²². Judicial independence is not provided for the benefit or protection of judges or lawyers as persons. It is there as an institutional protection of the people. It guarantees to every citizen (and also to non-citizens) access to an independent judiciary and legal profession as "the bulwark of a free and democratic society"²³.

As the final appellate court in this country, disagreement is as inevitable as it is common²⁴. Our Constitution is often obscure. Statutory and constitutional language is often unclear. Development of the common law is far from an exact science. Special leave to appeal is rarely granted unless there is a reasonably arguable point in a case. This is why it is misleading to look simply at the rates of dissent and agreement amongst the Justices of the High Court²⁵. The surprising feature of the decisions of the present High Court is not that there are differences but (as commentators have suggested) that there are not *more* differing voices than mine amongst the other Justices given the major questions and inherent disputability of the issues commonly presented for the Court's decision²⁶.

²¹ See *Independent Jamaica Council for Human Rights (1998) Ltd & Ors v Marshall-Burnett* [2005] UKPC 3 at [12].

²² A M Gleeson, "The Right to an Independent Judiciary", Paper presented at the 14th Commonwealth Law Conference, London, September 2005. See also A Lynch, "The Intelligence of a Future Day: The Vindication of Constitutional Dissent in the High Court of Australia – 1981-2003", (2007) 29 *Sydney Law Review* 195 at 196.

²³ See M Kirby, "Independence of the Legal Profession: Global and Regional Challenges", (2005) 26 *Australian Bar Review* 133 at 133-137.

²⁴ See M Kirby, *Hamlyn Lectures*, (2004) at 78-83.

²⁵ See, for example, A Lynch & G Williams, "The High Court on Constitutional Law: The 2006 Statistics", (2007) 30 *UNSW Law Journal* 188; M Kirby, "Judicial Dissent", (2005) 12 *James Cook University* 4 at 7.

²⁶ A Lynch and G Williams, "The High Court on Constitutional law: The 2006 Statistics" (2007) 30 *UNSW Law Journal* 188 at 201: "... 2006 saw the Court produce what we would regard as a solid percentage of unanimous opinions. To the extent that a single dissenting voice as regular as Justice

Footnote continues

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Judges may agree in the final result but disagree in the method and reasoning by which we arrive there²⁷. Or they may disagree as to the final result even though they mainly agree in the reasons of the other judges. On such matters, statistics disguise the nuances in the reasons of the judges, which is the way in which the law develops²⁸. What is true of the High Court, in this respect, is also true of the other courts in Australia.

A dissenting opinion is described as an appeal to the future²⁹. In the United States, it can now be seen that the dissents of Justices Curtis and McLean in *Scott v Samford*³⁰ (on slavery); of the first Justice Harlan in *Plessy v Ferguson*³¹ (on racial segregation); of Justices Roberts, Murphy and Jackson in *Korematsu v United States*³² (on wartime Japanese internment); and of Justices Black and Douglas in *Dennis v United States*³³ (on anti-communist measures) *redeemed* the serious errors of constitutional decision-making in the majority opinions in those cases. The dissentients offered a beacon to a later, more enlightened, time when the errors of the majority would be acknowledged and corrected.

There have been many powerful judicial dissents in Australia³⁴ and in the United Kingdom³⁵, that have subsequently been adopted when new court

Kirby's further inhibits the opportunities for unanimity, it might not be such a bad thing. Indeed, there are several arguments to suggest it may be strongly desirable. However, some may regret that disagreement with the approach to legal problems of the majority of the Court is found so often in the decisions of the same judge'.

²⁷ See, for example, the Court's recent decision in *Australian Competition and Consumer Commission v Baxter* [2007] HCA 38 at [132].

²⁸ Judges may also change their minds: see A M Gleeson, "The Constitutional Decisions of the Founding Fathers", Inaugural Annual Lecture, University of Notre Dame School of Law (Sydney), 27 March 2007.

²⁹ See M Kirby, "Judicial Dissent", (2005) 12 *James Cook University* 4 at 6.

³⁰ 19 How (60 US) 393 (1857).

³¹ 163 US 537 at 552 (1896). See Brennan, 37 *Hastings Law Journal* 427 at 431 (1986).

³² 323 US 214 (1944).

³³ 341 US 494 (1951).

³⁴ See, for example, *Federated Engine Drivers' and Firemen's Association v Broken Hill Pty Co* (1913) 16 CLR 245 at 273-275; *Federated Municipal etc Employees v Melbourne Corporation* (1919) 26 CLR 508 at 526 per Isaacs J; *Chester v Waverley Corporation* (1939) 62 CLR 1 at 14 per Evatt J. See also K Hayne, "Owen Dixon", in T Blackshield, M Coper and G Williams (eds), *The Oxford*

Footnote continues

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majorities replace old majorities of different persuasions. For example, the dissenting reasons of Justice Gaudron regarding the constitutional corporations power in *Re Pacific Coal*³⁶ emerged as the critical strand of reasoning of the majority of the High Court in the decision in the *Work Choices* case,³⁷ a case that changed the constitutional basis for industrial relations law that had existed in Australia for more than a century. In my view (and I believe that of Mary Gaudron) her reasons were quoted out of context and for a different purpose. However, this is the way the law sometimes develops and changes.

All those battles that Bob Hawke fought in the Arbitration Commission and the courts over the meaning of s 51(xxxv) of the Constitution - battles concerning every word of that paragraph ('conciliation', 'arbitration', 'prevention', 'settlement', 'industrial', 'disputes', 'extending beyond ... one State') - all of them now appear like ghostly galleons of a bygone age. The noble aspiration of settling such disputes before an independent arbitrator committed to a "fair go for all" has largely disappeared. A major social change in Australia in the machinery of achieving consensus in industrial disputes has been upheld. The change was endorsed by a new majority, not by consensus. I dissented as, for different reasons, did Justice Callinan.

I hope that some of my own dissents on other issues, such as in *Al-Kateb v Godwin*³⁸; *Re Aird*; *Ex parte Alpert*³⁹; *Combet v The Commonwealth*⁴⁰ and

Companion to the High Court of Australia, (2001) 218 at 220; A Lynch, "The Intelligence of a Future Day: The Vindication of Constitutional Dissent in the High Court of Australia – 1981-2003", (2007) 29 *Sydney Law Review* 195.

³⁵ See, for example, the well-known dissent of Lord Atkin in the war-time decision of the House of Lords in *Liversidge v Anderson* [1942] AC 206 at 244 (HL). See also G Carney, "Lord Atkin: His Queensland Origins and Legacy" in Queensland, *Supreme Court History Program Yearbook 2005*, 33 at 54. For details of other important dissents in the United Kingdom see J Alder, "Dissents in Courts of Last Resort: Tragic Choices?", (2000) 20 *Oxford Journal of Legal Studies* 221 at 231.

³⁶ *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 [83].

³⁷ See *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 86-87 [177]-[178]; cf at 144 [486]-[489].

³⁸ (2004) 219 CLR 562.

³⁹ (2004) 220 CLR 308.

⁴⁰ (2004) 224 CLR 494 at 614 [289]-[290]; G Lindell, "the *Combet* Case and the Appropriation of Taxpayers' Funds for Political Advertising - An Error of Fundamental Principles?" (2008) 66 *Aust Journal Public Admin* 307.

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*Thomas v Mowbray*⁴¹, for example, will one day enjoy the same happy fate. Such dissenting opinions reflect significantly different views about the meaning of liberty; the character and purpose of our basic institutions; the role of international law in our legal system; the maintenance of a limited role for the armed forces in civilian government; the use of the judiciary in controlling the executive; and the accountability of the executive to Parliament.

In the law, as in life, disagreement can only be properly understood by someone when they know the reasons for the dissent. Sometimes, the issues are not easily simplified. Fundamental values and notions about our society may be at stake. In many cases, judicial dissent is critical to the honesty, transparency and good health of the institution concerned⁴².

Dissent is sometimes addressed to fundamental notions about the role and limits of government and economic power. Sometimes it concerns issues that are deeply felt and incontestably important to the long term health of society, such as respect for human rights. In such cases, at least in the independent courts, there is a limit to the extent to which the judges should struggle for consensus and compromise. Occasionally progress is only attained by candid disclosure of differences; by planting the seed of new ideas; and waiting patiently to see if these eventually take root.

ADAPTABILITY & CHANGE WITHIN CONSENSUS

This is why, in my view, reliance upon consensus in Australia must not be exaggerated. There are many things about which there is no consensus. For example, Africa, along with many parts of the developed world, is yet to reach a consensus about dealing with HIV/AIDS. We should not go along with wrong-headed, ignorant policies when millions of people are dying and are neglected as a result.

As another example, fifty years after the Wolfenden report in England (and thirty years after Don Dunstan in South Australia began our national process to remove the criminal laws against homosexual men) most of the countries of the Commonwealth of Nations retain the old British laws that target and punish gay

⁴¹ [2007] HCA 33.

⁴² See C Sunstein, *Why Societies Need Dissent*, (2003).

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men. In this, they enforce one of the least lovely relics of the British Empire. There may be a consensus throughout Africa to retain those laws. But such laws are plain wrong and seriously unjust. We should not go along with them in silence because of the prevailing consensus. Sometimes a consensus needs to change.

The Mason Court was the period when Chief Justice Mason led the High Court of Australia. It largely coincided with the Hawke Government in the 1980s and 1990s. If Australians had not lived for more than a decade under the Mason Court, they could be forgiven for thinking that Australian law was unbending and unchanging, like the laws of the Medes and Persians. That the laws of Australia were impervious to modernisation: incapable of responding to new human, social and scientific insights.

That had been the earlier consensus in the law and in the High Court. It was the law that I grew up with. It was unequal and unjust in the way it dealt with Aboriginal and other indigenous Australians. With women's legal entitlements. With Asian and other 'non-White' immigrants. With gays and other sexual minorities. With prisoners and people accused of crimes. With free speech and criticisms of the powers that be.

Some of the changes to the ways in which law in Australia responded to these issues came about by public consensus: by alteration in political views and by laws enacted by Parliaments, federal and State. Some were fostered by media discussion. Other changes only gathered place when the independent courts broke the spell of the existing consensus and injected a new dynamic. In the case of women's equality, this came about, in part, because of international treaties. But let us not forget that it was given impetus in Australia by the Equal Pay Decisions of the now often despised industrial tribunals⁴³. The same can also be said of Aboriginal rights. It was a hard-fought case in the Arbitration Commission that secured the first breakthrough in equal pay entitlements for Aboriginal stockmen in this country⁴⁴. It was not individual bargaining or workplace agreements that secured that change. Independent decisions by industrial

⁴³ *Re National Wage Case* (1967) 118 CAR 655 at 660; *Equal Pay Case* (1969) 127 CAR 1142; *National Wage Case and Equal Pay Cases* (1972) 147 CAR 172.

⁴⁴ *Re Cattle Station Industry (Northern Territory) Award* (1966) 113 CAR 651; *Pastoral Industry Award* (1967) 121 CAR 454 at 457-458. See also *NSW v The Commonwealth (WorkChoices Case)* (2006) 81 ALJR 34 at 151 [524].

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tribunals in cases brought by unions shattered the old consensus. They stimulated the building of a new consensus - one wiser and more just. Indeed, many such decisions were won by Bob Hawke as industrial advocate.

See plain the promise,
Dark freedom-lover!
Night's nearly over,
And though long the climb,
New rights will greet us,
New mateship meet us,
And joy complete us
In our new Dream Time.

I often ask myself whether the *Mabo* decision in 1992⁴⁵, or the *Wik* decision in 1996⁴⁶ upholding the equal entitlement of indigenous Australians to legal recognition of their interests in land, would be decided by the High Court the same way today? Would the same basic right to legal counsel for unrepresented indigent accused facing a major criminal trial, upheld by the Mason Court in the *Dietrich* case (also in 1992⁴⁷) have happened today? Would it have occurred but for Justice Lionel Murphy's famous dissent that shattered the complacent legal consensus of the past in his reasons in *McInnis v The Queen*⁴⁸. Would the Court's insistence upon properly recorded confessions to police stated in *McKinney v The Queen*⁴⁹ in 1991 have occurred today? Would the perception that our constitutional democracy necessitates limitations on legislative interference in freedom of the press⁵⁰ have come without the Mason Court? Would we have broken the past false claims of the 'sovereignty' of Parliament and recognised the

⁴⁵ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

⁴⁶ (1996) 187 CLR 1.

⁴⁷ *Dietrich v The Queen* (1992) 177 CLR 292.

⁴⁸ (1979) 143 CLR 575 at 586-591.

⁴⁹ (1991) 171 CLR 478.

⁵⁰ See eg *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

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constitutional protection of free speech without Justice Murphy's dissent in *Buck v Bavone*⁵¹? It was Lionel Murphy who suggested that the terms and very character of the Australian Constitution implied rights to free expression essential to making our democracy work?

These constitutional and other achievements were only notched up because a few lawyers and judges - at first in the minority - questioned the legal consensus⁵²? Despite occasional decisions like the recent prisoners' voting case, the answer to all of these questions of whether such cases would be answered the same way today seems to be: probably not. Yet who can doubt that these rulings of the Mason High Court on native title, or basic rights to legal representation, on guarantees of secure confessions to police and on the free speech were correctly decided? In retrospect, who can doubt that Australia is a juster, more equal, freer place because of these decisions of the Mason High Court?

Australian citizens and Australian lawyers who know of these decisions of the Mason Court therefore know that law does not inevitably have to be unjust, out of date and unequal. It does not have to sustain unquestioningly the power of the past. Law can be modern, human rights-respecting, equal in its treatment of minorities and attentive to the rights to equality of all individuals. For us in Australia, the Mason Court, with judges appointed both by the Fraser Government and the Hawke Governments, showed that law can be reconciled with justice; a new legal consensus can be built. Law does not belong to the few but to all the people.

A FRESH CONSENSUS ON FUNDAMENTAL RIGHTS

The right to disagree or to dissent from the majority view in courts when things seem wrong or unjust is therefore one of the most important freedoms that exist in a democracy. About fundamental rights, agreement through consensus should not be forced. On such questions, our institutions need strong concurrences but also sometimes strong dissenting voices. Australian society should value its dissenting citizens. We should cherish our own Rosa Parks and Dietrich Bonhoeffers, our own Aleksandr Solzhenitsyns. But do we do so?

⁵¹ (1976) 135 CLR 110 at 135.

⁵² See also *Roach v Electoral Commissioner* [2007] HCA 43.

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In my opinion, Australians generally tend to be ambivalent about such people. On the one hand our convict origins (in most of the States) make us all too willing to strike down tall poppies of orthodoxy and to object to people who get too big for their boots. Occasionally, in the safety of a distant retrospective, we may be persuaded to honour stirrers and troublemakers who challenged the orthodoxies. Generally, however, this only happens when these heroes have are safely dead.

Occasionally we rejoice in the unconventional. We say we like a larrikin. Bob Hawke's early life, for example, became a source for endless legends. The fact that he felt deeply about some issues touched Australians because we did too - as when he responded with unconventional generosity after the America's Cup win and, even more so, after the events at Tiananmen Square in 1989. Yet for all that, Australia is often quite a conventional society. In all probability a majority of us did not agree with Justice Lionel Murphy's aphorism, that Mr Neal, the Aboriginal activist, was entitled to be an agitator⁵³. Many, perhaps most, thought he should be locked up.

Sitting in the High Court I see disparities and injustices from time to time. They do not become more acceptable because of the passage of years or even because many, perhaps most, fellow citizens never think about them, are not told about them by our media, are not concerned about them or are indifferent to injustice and basic inequality. I know from my own life that inequality hurts. You can rise high in Australia. You can hold great offices. But if your human dignity is not respected and if you are treated unequally by the law, it is hurtful to you and your family and friends. It is wrong. If that is the product of consensus in Australia it needs to be changed. In a country of the "fair go all round", injustice and inequality need to be cured.

In the long run in Australia, most wrongs will probably be cured. Of course, in the long run all of us are dead. Sometimes change requires a bit of stimulation. In a society such as ours, that stimulation can come, from the three year electoral cycle and from parliamentary debates. It can come from media discussion and civil society agitation. But it can also occasionally come from court decisions. Courts are sitting all the time. Ever day, they are deciding big and small cases

⁵³ *Neal v The Queen* (1982) 149 CLR 305 at 317.

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according to law and justice. Courts cannot cure all wrongs. But the Mason Court in Australia showed that they can cure some. And with new legal implements, they could cure others.

The time has come in Australia to strive for a new consensus on the rights and freedoms that belong to all Australians. Truly, this is a subject worthy of an attempted national consensus - an agreement about fundamentals that we place above politics.

For well over two centuries, the United States of America has had a constitutionally entrenched bill of rights. Other countries have also moved, many in recent times, to guarantee the protection of human rights by incorporating basic rights in their national constitutions⁵⁴ and local law⁵⁵. Sometimes they have done this by requiring the use of international human rights law when interpreting the provisions of local law⁵⁶. Sometimes they have done it by enacting a statute of rights to forge a new consensus on such things. The *Human Rights Act 1998* of the United Kingdom is a case in point. It has now been in operation for seven years. The last decade has seen similar laws enacted in Australia both in Victoria and the Australian Capital Territory. An equivalent law is now under consideration in Western Australia. In the light of all these developments⁵⁷, it is surprising that Australians have not yet reached, or even really attempted, a consensus on a national statute of rights. For many, this is a bridge too far. For them, this is a subject for dissent and not consensus.

⁵⁴ As in Austria, Italy, Portugal, South Africa, Namibia, Japan, Germany and Hungary among others: see Italian Constitution 1947, Art 10; Portuguese Constitution, Art 8(1); Constitution of South Africa, ss 39(1), 231-233; Constitution of Namibia, Art 144; Constitution of Japan 1946, Art 98(2); The Basic Law of the Federal Republic of Germany, Art 25; Constitution of the Republic of Hungary, Art 7(1).

⁵⁵ Countries in addition to the United States include Canada, Germany, The Netherlands, Italy, Portugal, South Africa and Japan.

⁵⁶ See, for example, *R v A* [2001] 2 WLR 1546; *R (on the application of Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929; *Mathew v The State (Trinidad & Tobago)* [2004] 3 WLR 812, [13].

⁵⁷ One of the first acts of the new Timor-L'este Parliament was to endorse the Universal Declaration of Human Rights and to apply to join the United Nations: H Koh, "International Law as Part of our Law" (2004) 98 *American Journal of International Law* 43, 44 fn 4.

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I understand the resistance in some circles to adopting a statute of basic rights. I was raised in a legal culture strongly resistant to such notions. I am not disrespectful to elected parliaments. I spend most of my professional life striving to give effect to the purposes of their legislation. For me, the words of Parliament are always the starting point to resolving any legal problem⁵⁸.

I respect, and uphold, the powers and privileges of Parliament⁵⁹. I certainly do not advocate a statute of rights in Australia because it would gain us credit overseas or secure more attention to our judicial opinions⁶⁰. I agree, that these are irrelevancies⁶¹. Nor is the fact that Australia is now the only advanced western country without such laws alone enough to persuade me to adopt them. Our national decision in 1951, refusing to ban the Australian Communist Party and to take away the civil rights of communists was out of step with decisions taken in other countries at the time⁶². Yet it was right.

I do not advocate a constitutional Bill of Rights for Australia with an effect that would invalidate inconsistent enacted laws. This is unlikely to be adopted in Australia because changing the Constitution is nearly impossible. In any event, a statute of rights is the way that countries with legal systems closest to our own - New Zealand, Canada and Britain – have recently made their first moves⁶³.

⁵⁸ *Central Bayside General Medical Practice v Commissioner of State Revenue (Vic)* (2006) 228 CLR 168 at 197-198 [84], fn 64.

⁵⁹ See eg *Durham Holdings Pty Ltd v New South Wales* (2000) 205 CLR 399 at 419 [42]; *Sue v Hill* (1999) 199 CLR 462 at 568 [279]; *Re Reid; Ex parte Beinstein* (2001) 182 ALR 473 at 478-479 [23]-[27]; cf Balmforth, "Parliamentary Sovereignty and the *Human Rights Act 1998*" [1998] *Public Law* 572 at 579-580.

⁶⁰ G Robertson, "A Bill of Rights is the real Guardian", unpublished, Sydney, 28 August 2007.

⁶¹ cf A Bolt, "When Rights are Wrong", *Herald Sun*, 5 September 2007, 18; "Blair on Saturday (It's right to write wrongs with a Bill of Rights, right?)", *Daily Telegraph*, 1 September 2007, 29.

⁶² Comparing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 with *Dennis v United States* 341 US 494 (1951) (Supreme Court, United States).

⁶³ A F Mason, Book Review of Conor Gearty, *Can Human Rights Survive?* (Hamlyn Lectures, 2005), CUP, Cambridge, 2006 in (2006) 9 *Constitutional Law and Policy Review* 74.

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In essence, the model that is now before us in Australia, for a statute of rights, is the "softer" or "weaker" model. It was adopted in legislation in New Zealand and also in the *Human Rights Act 1998* (UK). It gives no authority to courts to invalidate Acts of Parliament because judges find them contrary to the stated rights. Essentially, such a law works on two principles only. It encourages courts wherever possible to interpret laws made by Parliament so that they do not breach the stated fundamental rights. And where this technique of interpretation does not bring the law into conformity with such basic rights, it permits courts to draw the disparities to parliamentary and public attention. This is done on the assumption that Parliament will then proceed to address the inconsistencies one way or the other. In effect, it provides a stimulus to the democratic process. It encourages us all to think in terms respectful of the basic rights of one another. It promotes a culture of mutual respect of basic rights. But it leaves the last word to elected parliaments, whilst rendering them and their processes transparent and promoting vigorous public debate on such matters.

One South Australian judge, and a good friend, hearing that I was giving this lecture, wrote to me and expressed surprise, as he put it, that "the great dissenter" was going to give this lecture for "the great consensus builder".

In a sense, my lecture tonight tried to respond to his surprise. It was based on a stereotype. It is a stereotype that is neither fair to Bob Hawke nor to me. In the vast majority of cases, over the years, I have agreed with my judicial colleagues. Bob Hawke, as I have shown, never pressed for consensus as a goal to be achieved at all costs. In his life in industrial relations and in politics, he fought hard for the things that really mattered to him and to those with whom he worked in a common cause. He knew that differences were sometimes inescapable and that, occasionally, the time was not ripe for consensus or the differences too fundamental.

The key to his beliefs is one that I too would accept. It is to strive for consensus on subjects that matter. But to recognise that there are other subjects that will inevitably divide us. The secret of success is to know the difference between the subjects suitable for consensus and those that are not. It is also to recognise the differences in our institutions and the way they reach their decisions on such matters.

So far, we have got by in Australia without collecting and stating the fundamental rights of the individual that we will respect in this nation. We have done so largely because, until quite recently, we were a relatively homogeneous society mostly facing relatively benign challenges. In the future, we will become even more diverse and polyglot than we now are. We will face greater challenges.

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Now is therefore the right time to forge a national consensus about the basic rights that we promise to uphold and that we expect our elected lawmakers to respect.

If we can find this new consensus, Bob Hawke's legacy, and his instruction about the centrality of consensus in truly essential things, will be borne out. We will place basic rights above the partisan squabbles. We will give the courts new powers, but not too many. We will reserve the last word, as we should, to elected parliaments. We will enhance public debates about fundamentals - and the type of society we really want to be. We will distinguish between the proper place of consensus and the proper place of dissent.

I congratulate most warmly the University of South Australia on the opening of the new facilities for the Bob Hawke Prime Ministerial Centre. By honouring our past leaders, we honour ourselves and our nation's history. My partner, Johan van Vloten, and I, as Australian citizens, are proud to be associated with these notable events.

However, buildings ultimately matter less than ideas – much less. Bob Hawke's idea of consensus is one that has influenced the Australian community for thirty years since he first propounded it. The proper subject of a new national consensus is the design of a national statute of rights. It is needed not to diminish our Parliaments but to make them more responsive to the basic wrongs that today are sometimes ignored and neglected. Nothing is beyond our capacity as Australians. The time has come to forge a new consensus on a national statute of rights. It would be a consensus on something that really matters for us all.

To our father's fathers
The pain, the sorrow;
To our children's children
The glad tomorrow.

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THE BOB HAWKE PRIME MINISTERIAL CENTRE
ADELAIDE, 10 OCTOBER 2007
2007 HAWKE LECTURE

CONSENSUS AND DISSENT IN AUSTRALIA

The Hon Justice Michael Kirby AC CMG
High Court of Australia

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