clamour for removal of the monopoly. It could only be repelled if solicitors 'are able to demonstrate superior professional skill, independent advice and reasonable charges'. A member of the Council of the Law Society, Mr Anthony Holland, said that if solicitors offered cut-price work, they would have to 'cut corners'. It would then be left to solicitors who had not cut corners to 'pick up the pieces'.

- A major series of items in the English *Economist* in September 1983 presents a detailed examination of English justice. Anyone interested in reading an economic analysis of the legal profession should examine these items. For example, the *Economist* (3 September 1983) concludes that 'despite the growth of legal aid, the law is still an expensive luxury'. It asks 'What can be done to bring justice within the reach of all?' It suggests that 'huge improvements in efficiency' will be introduced by electronic adjuncts to lawyerly work, including litigation. Ominously, it concludes that 'conveyancing is mainly an administrative job', hinting that computers will soon gobble it up. Yet, in Australia, conveyancing is 50% of the fee income of lawyers and therefore vitally important for the viability of a profession. Will it last?

constitutional waters

Perhaps the letterheads had better be changed back to 'Australian Government'.

Professor P H Lane, *SMH*, 2 July 1983

dam case. On 1 July 1983, the seven Justices of the High Court of Australia handed down their decision in one of the most important cases brought before the Australian Federal supreme court since the establishment of the Australian Commonwealth in 1901. In closely reasoned decisions venturing over 300 pages, the judges by a majority of 4-3 upheld the constitutional power of the Commonwealth to prohibit the building of the Gordon-below-Franklin Dam in Tasmania. If built, the dam would have resulted in the flooding of a major section of Tasmania's south-west, which is included in a listing under the UNESCO World Heritage Convention, to which Australia is a party. The Chief Justice of Australia, Sir Harry Gibbs, was at pains to stress that the decision of the court was purely concerned with legal questions and was not addressed to the desirability or otherwise of the building of the dam or preservation of the site. However, this protestation, and the inherently political role of the High Court in the Australian Federation, did not prevent numerous commentators, scholarly and otherwise, from delving into the policy issues determined by the court.

- Professor Pat Lane of the Sydney Law School (*SMH*, 2 July 1983) referred to the fact that the issue of the Federal authority under the 'external affairs' power in the Australian Constitution had been around for a long time – indeed for 41 years since Justice H V Evatt had hinted at the enormous charter which the power provided to increase the functions and responsibilities of the central government. Yet, according to Lane, it was not until the early 1970s that Federal Ministers went 'tripping abroad signing Labour Conventions' and then came back home to use these as a means to 'get into general labour areas where the States normally rule'. The decision of the High Court in May 1982 in *Koowarta* (1982) 56 ALJR 625 showed a 4-3 majority in favour of the validity of the use of the external affairs power to proscribe racial discrimination in the States. Although the court composition had changed since that decision, Professor Lane was not surprised with the outcome. 'Where do the States stand now? Conventions on labour relations, local development, forest preservation, dams – not to

mention sheep', mourned Professor Lane.

- An academic colleague, Professor Leslie Zines of the ANU, speaking at the Australian Legal Convention on 5 July 1983, expressed 'great scepticism' at the statement that the Australian States 'will now wither away as independent units of the federation'. 'Governing by treaty, I suspect, is not as easy as it sounds – and as was shown in this case, the need for the law to comply with the agreement can be a very considerable factor'. Professor Zines pointed out that statements that the Federal system was doomed when Federal authorities took over taxation after 1942 had been proved false. We were still a long way from Alfred Deakin's 1902 prediction that the States would become the mere 'chariot wheels' of the Commonwealth. On the contrary, Professor Zines concluded 'Australia has been one of the most Federal countries in the world. This is due, I believe, more to social and political forces within the country ... rather than High Court decisions'. So much for the judges!

modern world. Newspaper editorials were generally favourable. The Adelaide *Advertiser* (12 July 1983) reported the comments of the Prime Minister, Mr Hawke, that the decision would help make the Constitution 'more appropriate for modern Australia':

> There has been some concern expressed that the judges of the High Court, rather than the Australian people and their elected parliamentary representatives, seem able, in effect, to bring about change through interpretation of the Constitution in the light of what they regard as changing national circumstances. Yet this is a trend that is not only unavoidable but also desirable. It prevents our being bound irrevocably by the, in part, dead letter of the founding fathers, who can have had little perception of the complexities of the modern world.

In short, the people have failed the test of referenda. But the High Court continues to come up with the solutions. Under the banner 'A Federal Victory', the *Canberra Times* (2 July 1983) paid tribute to the political run for money given by Tasmanians to the Commonwealth. But the leader writer concluded:

> The decision is not a mandate for Commonwealth interference with States and their legitimate powers, but represents a recognition that there are some things which are matters for all Australians and not simply people of one State. As the opinion polls and, to some extent, the election results make clear, many Australians, a majority everywhere perhaps except in Tasmania, wanted the result which came out. Now, however, the result is available, that nationhood will be strengthened by the process of conciliation which is in train. It is not a time for crowing over the Tasmanians but for bringing them back into the system.

In like mood was the *Sydney Morning Herald* (2 July 1983):

> The Dam Case will be closely scrutinised for its apparent broad endorsement of the Commonwealth's use of the corporations power under the Constitution as another basis for validity of the laws and regulations it introduced to stop the dam. It would probably be premature to see this as another door opening wide for the greater exercise of Commonwealth power ... But it raises tantalising questions such as whether this means that the present court would endorse the use of the corporations power to validate an assertion of Federal power in, say, the industrial relations field.

This was the point picked up also by David Solomon in his front page story for the *Australian Financial Review* (4 July 1983). According to him, the High Court's decision has 'opened the way' for further explorations of Commonwealth power in relation to corporations and special laws for people of Aboriginal or other race in Australia. The majority, he declared, had endorsed the huge panoply of powers which the Federal Government tried to tap in order to stop the Tasmanian dam construction. The leading article in the *Australian Financial Review* (4 July 1983) declared that the decision was the most important 'change to the balance of power within the Australian Federation' since the uniform tax decision of 1942:

> States' rights in the traditional sense of Australian politics must now be considered dead. There are virtually no rights left to the States beyond the right to exist as separate political entities. The functions of the States in the future must be seen as primarily concerned with regional administration. How long the State Governments, once they see their powers being sharply reduced in traditional areas, will stay outside local government cannot be foretold.

federal invasion. In a quick response to the High Court decision, the Queensland Government decided to set up a constitutional committee to 'fight the use of the Federal Government's new-found international treaties power'. The State Premier, Mr Bjelke-Petersen, said that the committee would be headed by the (then) State Attorney-General, Mr Sam Doumany. Mr Doumany had a few bitter things to say as reported in the *Australian* (5 July 1983):

> Local people have lost the prerogative to make decisions. As well, statutory authorities will be laid bare to Commonwealth interference. We hope we can find legislation to impede the new treaty power or at least minimise its effect. There is nothing sacred about the High Court and it is not just the judicial system that makes laws. The legislative arm takes precedence and the people take precedence through referendum.

On television, Mr Doumany even suggested that, as has happened in some States of the United States, State authorities might in some circumstances refuse to follow the High Court decisions. As a result of a Cabinet split, not these remarks, Mr Doumany in September 1983 resigned his commission as Attorney-General for Queensland.

Still the comments continue. A 'victory for common sense' declared the *Age* (4 July 1983). A 'heavy blow to State sovereignty' declared the *Australian* (2 July 1983). Writing in the *Bulletin* (12 July 1983) the law correspondent commented:

> The judges, faced with an increasingly political role, are placed in a dilemma. On the one hand, the prospect of resolving real political issues and exercising power in its most creative way must be extremely attractive. On the other hand, the risks of error are vastly increased ... The court which exercises its power to make political decisions which become unpopular runs the grave risk of losing its credibility. That we need the judges to do that is a commentary on the miserable nature of our public life. We have lost faith in politicians whom we regard generally as crooks. We turn to the judges because the judiciary is the only public institution held generally in high regard. We trust the judges. I only fear that, in their more political role, they could prejudice that trust.

further blow. A further blow to some perceptions of 'State rights' came in the decision of the High Court in early August 1983 by a vote of 4-2 holding that a tax levied on the Victorian Gas and Fuel Corporation and Esso-BHP since 1981 was an 'excise duty' which only the Commonwealth could validly collect under the Australian Constitution. State Premier John Cain immediately declared that the decision held 'horrendous implications' for the State budget. Mr Cain said on 8 August 1983 that the Australian Constitution was 'a wretched document in this day and age'. He urged consideration of a special Premiers' Conference on Federal/State financial relations in Australia, a call which was supported by the NSW Finance Minister, Mr T Sheahan. Mr Sheahan also expressed concern about the impact of the High Court decision on the finances of the State of New South Wales.

Immediately following these calls, the Federal Attorney-General, Senator Gareth Evans, in an address at the New South Wales Institute of Technology, said:

> Australia is the only federation in the world where State and Local Governments are prohibited from raising taxes on goods, including ordinary sales taxes. The irrationality of this situation has long been recognised on all sides of politics.

Senator Evans suggested that the way to solve the problem was to support a forthcoming referendum which will, if passed, make it possible for the Federal Parliament to confer legislative power on State Parliaments on matters which are presently within the ex-

clusive competence of the Federal Parliament:

> The proposed amendment would also make it easier for the States, if they so wished, to confer some of their own powers on the Commonwealth : for example to enable a single national system of family law to be enacted. This proposal has the unanimous support of the Constitutional Convention in Adelaide and the Pipeline case shows how its passage would be of immediate practical use.

Senator Evans said that the Federal Labor Government was committed to a 'major review' of the Australian Constitution by 1988.

new referenda. On 23 August 1983 Senator Evans announced the endorsement by Federal Labor Caucus of a Cabinet decision to put a proposal for five referendum questions to the Australian people early in 1984. One of the key provisions to be proposed is for a four-year term for Federal Parliament in place of the present three-year term. The earlier proposal, advanced in the first days of the government by Senator Evans, for a fixed term Federal Parliament, has been dropped. Senator Evans said that despite widespread community support, the fixed term parliaments proposal had failed to attract substantial cross-party support essential for the success of constitutional referenda in Australia. The other proposals to be put to the people include:

- interchange of Federal powers with the States;
- provision for advisory opinions by the High Court of Australia;
- removal of outmoded provisions in the Federal Constitution concerning interim arrangements included in 1901 when the federation was being established.

A great deal of attention will be paid to the success of this new effort at constitutional reform, especially in the light of the dismal record of Australian constitutional referenda to date.

Earlier in the year Senator Evans returned from Britain to announce that 'the way had been cleared' to end remaining constitutional links between Australia and Britain. The British Government has agreed to enact legislation to be called the Australia Act as soon as the necessary 'request and consent' legislation has been passed by Federal and State Parliaments in Australia. One item which has been omitted from the proposed legislation relates to advice to the Queen on matters such as the appointment of State Governors and the award of Imperial honours. Senator Evans said that these items had been dropped because of the difficulty of finding a new system by which the States could approach the Queen, satisfactory to all involved, including the Federal Government. Successive Federal Governments of different political persuasions have insisted on Federal predominance in such matters.

Senator Evans specifically denied that the proposed legislation was 'creeping republicanism'. He stressed that the position of the Queen as Queen of Australia would remain quite unchanged and that the Governor-General would remain the Queen's representative in Canberra, with the Governors of the States as her representatives in the States. Somewhat ungallantly, Senator Evans was reported in the *Canberra Times* (24 June 1983) as denouncing suggested republicanism as 'a dreadful load of codswallop'. Also typically vivid was the comment of Queensland Premier Bjelke-Petersen. In a telex to the Prime Minister he said that Queensland would not agree to having its State's rights altered on the appointment of Governors and the advice on honours. He asked Senator Evans to 'keep his nose out of Queensland's business'.

rights bill. Addressing the Legal Convention in Brisbane, Senator Evans (*SMH,* 8 July 1983) announced his intention to introduce a Bill of Rights for Australia before the end of the year. He said that it was intended that the Bill should lie on the table of Parliament for public comment and would not be debated

until the Autumn session of 1984. Senator Evans said that the Bill of Rights would implement Australia's international obligations under the International Covenant on Civil and Political Rights. It would be based on the external affairs power under the Constitution 'as upheld by the High Court in the Koowarta case in 1982 and the recent Tasmanian Dam case'.

As to the design of the Rights legislation, Senator Evans speculated on various options:

- use of advisory commissions such as the Human Rights Commission;
- court powers of injunction and judicial enforcement;
- civil damages actions in the court and redrafting of contracts inconsistent with the Rights.

He then offered this hint:

> The kind of Bill of Rights which is likely to gain most ready acceptance, and which would arouse least fears from both within and outside the legal profession about the capacity and appropriateness of the judiciary to handle it, would be one where the guarantees laid down had effect only as 'rules of construction'.

The guarantees spelt out in this way would be used to override or modify other laws to the extent of their inconsistency. Senator Evans stressed that all governments in Australia would have a role to play in protecting human rights. He said that State laws would be necessary to 'reinforce or complement' Commonwealth action. But he asserted the importance of Federal leadership:

> It is important for the Commonwealth – both as the national government and as Australia's international face – to be the standard bearer in human rights matters. But it is neither necessary nor desirable for the Commonwealth to try to cover the whole field itself.

The Attorney-General's observation provoked the *Australian* (12 July 1983) to offer its advice that a 'Bill of Rights is for the people to decide':

> It is difficult to imagine an issue more likely to divide Australians than the Federal Government's proposed enactment of a Bill of Rights. If Mr Hawke and Senator Evans achieve their objective, our political system, as well as our legal system, will be fundamentally changed. An enforceable code setting out the basic human rights of the citizen has many apparent attractions ... The most powerful argument against a Bill of Rights is that it takes the power to decide on vital questions out of the hands of the people's elected representatives in Parliament and gives that power to judges who are appointed by politicians but are not answerable, as politicians are, to any electorate.

A number of enlightening examples from recent US constitutional history were then quoted. However, the editorialists may not have read the 'fine print' of the Attorney-General's proposal concerning the limited scope of the planned Bill of Rights. Two other comments are worth recording here:

- A Canadian judge at the Brisbane Legal Convention, Justice Bertha Wilson of the Canadian Supreme Court, pointed out that enshrining civil and political rights in formal Bills of Rights inevitably made judges 'more political'. Canada has recently adopted a Charter of Rights now being interpreted by the Canadian judiciary. Justice Wilson pointed to the 'curious position' of non-elected officials making important decisions but not being subject to removal if their decisions were unpopular. Furthermore they would have to rely on other branches of government to enforce their decisions.

- In a paper written by Mr Nick O'Neill, Lecturer in Law at the NSW Institute of Technology, titled 'An Australian Bill of Rights – How Will it Fare in the Hands of the Judges?', the author concludes that the fear of Bills of Rights in the hands of the Australian judiciary is exaggerated. Claims O'Neill : 'For those who fear Bills of Rights, fear not! The judges brought up in the Anglo-Australian tradition will see that their

provisions are not interpreted broadly. For those who think the Australian Bill of Rights will be a panacea, prepare to be disappointed ... The judges are likely to take a much narrower and less imaginative view of the scope of the Bill and the circumstances to which it applies than their counterparts in the United States of America'.

We will surely hear more of this debate.

liberty's toboggan

In civil liberties, we are on the toboggan – privilege against self-incrimination, right to trial by jury, freedom of expression are all under attack. Personal privacy is becoming more and more difficult to preserve.

Justice L K Murphy, Address to National Press Club, 17 August 1983

crimes commission. Readers of these pages will know of the ongoing debate about the establishment in Australia of a National Crimes Commission. See [1982] *Reform* 101; [1982] *Reform* 141; [1983] *Reform* 119. A National Crimes Commission Act 1982 was passed by the last Australian Parliament during the Fraser Government. But it was not proclaimed to commence when the election was held in March 1983. Only the proposed Chairman (Sir Edward Williams) had been announced. But following the election it was indicated that the new Labor Government intended to review the proposed Commission. The Prime Minister said that Sir Edward would not now be called upon to head the Commission. Instead, Federal Attorney-General Evans issued a discussion paper, *'A National Crimes Commission?'* (June 1983). On 28-29 July 1983, he summoned a national conference in the Senate Chamber of Parliament House, Canberra, to advise on whether a Crimes Commission should be established and if so what model it should follow.

Before the conference convened, an orchestra of editorial comments urged the delegates on. Take these illustrations:

- 'Arguments about States' rights are all very well, but what the Federal Government is faced with is a serious problem that crosses State boundaries and affects the well-being of the country as a whole. What is needed is an organisation with the means to pursue criminals involved in organised crime to the ends of the Commonwealth, and beyond, if necessary' (the *Age*, 29 July 1983).

- 'Vitally interested observers of Canberra's National Crimes Commission conference this week must be those who stand to lose most by the establishment of an effective national approach to organised crime ... The Hawke Government is committed to some sort of Crimes Commission. Some of the States are not so enthusiastic. The argument is about combining an effective fight against sophisticated criminality with a guarantee that this will not diminish a citizen's cherished right to justice under the law' (Melbourne *Herald*, 29 July 1983).

But not everybody was so convinced. In an address in mid June 1983 to the Australian National University Law Society, the Special Prosecutor appointed to investigate tax avoidance, Mr Roger Gyles QC, questioned the effectiveness of a National Crimes Commission. He declared that no such Commission could 'possibly work until it has the active and genuine co-operation of police forces'. Unless and until such co-operation was promised, Mr Gyles said, 'little will be produced' (*Canberra Times*, 20 June 1983).

Thus the scene was set. The Senate Chamber was filled with representatives of State Governments, the judiciary, the legal profession, police forces. At the table were the two Federal Ministers most closely involved : Attorney-General Gareth Evans and Mr Kim Beazley (Special Minister of State).

The Prime Minister entered the Chamber, the 'other place', to deliver the call. His address to