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Meagher, Mabo, and Patrick White's Tea-cosy

Twenty Years On

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***Battlelines, Roddy's Folly, and Antonin Scalia's
Jurisprudence***

Valuable though the proceedings of this conference are, they are unlikely to find their way into the popular press. Things were not always so. Twenty years ago, the proceedings of the Samuel Griffith Society were to be found splashed across the front page of the *Sydney Morning Herald*, under the headline, "The republican debate: wigs v tea-cosies".¹

The front-page report was accompanied by two photographs: one of R P Meagher, QC, wearing a horsehair wig; the other of the Nobel Laureate, Patrick White, wearing headgear that might have been mistaken for a tea-cosy. The report informed readers that, in a description of prominent republicans, Meagher told the conference in Melbourne:

There was Patrick White who could be coaxed out of his mansion, an old curmudgeon with a tea-cosy on his head, and persuaded to denounce, in a fusillade of rather

verbless sentences, the social system which had always cocooned him in immense wealth.²

This was followed up with a letter to the editor from Professor Ivan Shearer, which informed readers:

Justice Meagher is the author of many witticisms, but not the one about Patrick White with which you credit him. When your reporter heard His Honour, in a speech made in Melbourne earlier this year, refer to Patrick White as a ‘curmudgeon with a tea-cosy on his head’, he failed to detect the quotation marks in the speaker’s voice.

For it is a reference to Barry Humphries’s lines on the death of Patrick White, published in *Neglected Poems and Other Creatures* (1991). This ‘threnody’ begins:

‘In a Federation bungalow beside Centennial Park, With its joggers in the daytime, perverts and muggers after dark, Lived a famous author hostesses pretend that they have read; A querulous curmudgeon with a tea-cosy on his head.’³

In 1992, Roddy Meagher, then a Judge of Appeal of the Supreme Court of New South Wales, had been invited to launch the first volume of *Upholding the Australian Constitution*, which contained the proceedings of the inaugural conference of the Samuel Griffith Society, held in 1991. Meagher’s address is published in the 1993 volume of *Upholding the Australian Constitution*. Thus, it seems timely to reflect on what has happened since the remarks were published twenty years ago.

In 2002, Murray Gleeson, then Chief Justice of the High Court of Australia, addressed the Society’s tenth Conference Dinner on the abolition of appeals to the Privy Council.⁴ Roddy Meagher sat next to me at that dinner, but I cannot recall his saying anything memorable. Almost ten years later, he died, in

2011.

Last year, 2012, Tony Abbott launched *Roddy's Folly: R. P. Meagher QC – art lover and lawyer*, my biography of Roddy Meagher, at a cocktail reception held in the Assembly Hall at the Old Sydney Law School,⁵ at which Her Excellency the Governor (then Administrator of the Government of the Commonwealth of Australia) and Justice J D Heydon (then of the High Court) also spoke.

In October 2013, when I arrived back in Sydney from Cambridge, I had some time to kill in Phillip Street, before an appointment at the Crown Solicitor's Office, so I went into the Co-Op Bookshop. As I walked in, I was confronted by a display of three books facing the entrance. In the centre was *Battlelines* by Tony Abbott. On the left was *Roddy's Folly*. And, on the right, was *Antonin Scalia's Jurisprudence: Text and Tradition*, by Ralph Rossum.

In *Roddy's Folly*, I quote Murray Gleeson, who offered the following assessment of my subject:

I think he has been influential in the same kind of way that Justice Scalia has been influential in constitutional law in the United States. That is to say, he has been such an articulate critic of certain kinds of error that what he has said has served as a warning to people who otherwise would have gone too easily and too quickly down a certain judicial path. He has been a powerful restraining influence. I'm not saying that he has persuaded everybody to his point of view, but because he has expressed his point of view so forcefully, sometimes even dramatically, even people who haven't been persuaded that he's correct, have been more cautious than otherwise they would have been.⁶

The Co-Op's book display offered me a moment of serendipitous inspiration, and I think it would be well to consider

the relationship between a few ideas in *Roddy's Folly*, *Battlelines*, and *Antonin Scalia's Jurisprudence*, with a view to arriving at some conclusions about the wigs v tea-cosies debate that graced the front page of the *Sydney Morning Herald* two decades ago.

Meagher, *Mabo* and the Constitution

Meagher's address to the Samuel Griffith Society also attracted more serious attention in the popular press. Sir Ronald Wilson, former Justice of the High Court, President of the Human Rights and Equal Opportunity Commission, and co-author of *Bringing Them Home*, the 1997 report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, was master of ceremonies at the presentation of the 1992 Human Rights Medal and Awards at Sydney's Powerhouse Museum. The Melbourne *Age* carried the following report of the ceremony in Sydney:

Sir Ronald Wilson . . . emotionally defended the judges in Sydney last week when awarding the human rights medal to the surviving Mabo plaintiffs and their lawyer.

Sir Ronald was reacting to a speech by Mr Justice Meagher . . . which slammed the Mabo judgment and accused the judges of making up the law.

'I want to say something in their defence because the judges can't defend themselves', Sir Ronald said. Mr Justice Meagher's claim was untrue, he said. The courts had always developed the common law over time, building on established legal principles adapted to contemporary values. And that's just what the judges did in Mabo.⁷

Let us revisit three of the paragraphs from the address in which Meagher accused the judges of making up the law, and which elicited this emotional defence on their behalf. The first concerns *Mabo's* case,⁸ and the High Court's approach to its role

in declaring the common law of Australia. Meagher said of Sir Gerard Brennan's judgment in *Mabo*:

His Honour said there were two ways of approaching the question of whether the natives in question owned the land in question. One way was to apply the existing legal authorities. One would be pardoned for thinking that a lawyer would find such a course attractive, particularly if it was his duty to apply the law. But his Honour spurned such a course and thought it more palatable to invent a new law. Why? Because, he said, it was required by two imperatives: 'the expectations of the international community' and 'the contemporary values of the Australian people'. This is all a mite curious. As for 'the international community', who are they? How does one discover their 'expectations'? Their views were not handed down by Moses and the prophets, nor does his Honour seem to be referring to the prominent international lawyers. And even if one could locate such a body and discover its views, why should its views take precedence over those of the 'Existing authorities' which in fact lay down the law? In this struggle between the 'existing authorities' and the 'Expectations of the international community', one has the uneasy feeling that all which is meant by the latter term is the overseas members of the chattering classes, Miss Sontag, Mr Chomsky, the unspeakable Pilger and the like. And in determining the 'contemporary values of the Australian people' where does one go? Not to the past Justices of the High Court, not to the judges of the lower courts, not to the States of Australia, not to the people on referendum, but, again, one feels, to one's very own chattering classes, who have thus ceased to be a mere nuisance and have become translated into a source of law.⁹

Secondly, Meagher also addressed the Court's approach to its role as interpreter of the Constitution of Australia and the implication of rights in that document in the *Australian Capital Television* case.¹⁰ After surveying the so-called Mason Court's approach, he concluded:

None of this has anything to do with what our founding fathers intended, but that apparently does not matter. None of it has much to do with interpreting the written document which is our constitution, but that apparently does not matter either. Armed with this anarchy, and fortified by the right to disregard all decided cases which Sir Gerard Brennan perceived in *Mabo*, the High Court gives the appearance, perhaps, of swinging violently between extreme positions – now (as in *Mabo*) abolishing rights we always had; now (as in *Australian Capital Television Pty Limited v Commonwealth of Australia*) protecting rights we never had; punishing the people for rejecting a bill of rights by inflicting up to seven new bills of rights on us like it or not; with the prospect of being guided in their endeavours by the siren song of the chattering classes.¹¹

Finally, there was a paragraph directed toward the Chief Justice of the High Court of Australia, Sir Anthony Mason, himself. In a famous speech, Sir Anthony discussed another famous speech by Sir Owen Dixon, and explained why he felt justified in departing from Sir Owen's approach to legal reasoning.¹² Meagher remained faithful to Sir Owen, as did the Samuel Griffith Society, and he told the Society:

But now the current Chief Justice has suggested 'that legal reasoning should not be pursued so far, and that decisions must take into account "fundamental values".'¹³

He then went on to summarise the problems that Professor Cooray identified in Sir Anthony's approach, in a paper contained in the volume that Meagher was launching.¹⁴ It seems that these remarks cost Meagher his long and valued friendship with Mason.

These remarks attracted the attention of the popular press because they were controversial and colourfully expressed. They are, in many ways, of a piece with the writings of Justice Scalia. So I should like to consider them in the context of Scalia's jurisprudence, and then a specific remark that Scalia made about the place of aspirational language in the Constitution, which, I believe, might shed some light both on Tony Abbott's approach in *Battlelines*, and the infamous wigs v tea-cosies debate.

Antonin Scalia's Jurisprudence

Justice Antonin Scalia is the senior Associate Justice of the Supreme Court of the United States, having been appointed in 1986, on the nomination of President Ronald Reagan. Like Roddy Meagher, he is famously conservative in his approach to the law. Also, like Meagher, he is a member of the Roman Catholic Church, and was educated by the Jesuits (although he is of Italian ancestry, rather than Irish ancestry as Meagher is).

Scalia's jurisprudence has been concerned primarily with the correct way for the Supreme Court to interpret both the Constitution and Acts passed by Congress. He is a "textualist" and an "originalist". When interpreting a document, he maintains, what matters is the meaning of the text. The meaning of the text is the meaning that the words originally had when they were written down. However, this meaning is not what those drafting the document *intended* the document to have, but the meaning that the settled text of the document *actually* had for a readership at the time it was drafted. If a reader at the time would have understood the meaning of the text in a way that was

different from the meaning that those drafting the text intended the text to have, then what matters is the meaning that it actually had for a contemporary reader. When the document being interpreted is the Constitution, this means that Scalia rejects the idea of the “Living Constitution”, according to which the Justices of the Supreme Court are charged with responsibility for determining what current circumstances require of constitutional arrangements, rather than determining the demands that the constitutional arrangements impose on current legislators and current citizens’ lives. When the document is a piece of legislation, it means that the Court should not be concerned with trying to piece together from the legislative history what the legislators were intending to achieve when they passed the legislation, but rather they must be concerned with what the text of the statute ended up saying, irrespective of whether or not the statute actually reflects the intention of those who voted for it in Congress.

When Gleeson points to the similarity between Meagher and Scalia, he is not so much concerned with their shared jurisprudence as much as their shared style of writing and speaking. It is the forcefulness – sometimes verging on irreverence – that has commanded attention, even from those who profoundly disagree with them. This forthright style is evidenced, for example, by Scalia’s comments to the Senate Judiciary Committee about the doctrine of the “Living Constitution”, when he told the Senators that the Constitution is not a “bring-along-with-me statute” that nine justices are free to fill with “whatever context the current times seem to require”.¹⁵ (One dreads to think what Meagher might have said had he faced a Confirmation hearing.)

Meagher’s major contribution to jurisprudence concerned equity, not constitutional law. In this respect, he is famous for his formulation of the fusion fallacy.¹⁶ In this area, he did move

into public law, because he was concerned with the jurisdiction, and how the law could be changed by Parliament or the courts. Meagher was adamant that a judge could not usurp the power of the legislature to fuse the principles of equity and the common law to form a single body of law: only the legislature could do that. When interpreting an Act of Parliament that fused the administration of two distinct bodies of law by a single court, Meagher displayed a “terrier-like tenacity” when insisting that a court was obliged to interpret the meaning that the text had at the time that the Act was passed, not to interpret the effect of the Act according to some notion of what meaning would best suit current circumstances.¹⁷ If the jurisprudence of the law is to change in favour of a fusion of legal and equitable principles, this can only be achieved by an Act of Parliament.

The similarity with Scalia’s approach to the institutions that should be responsible for the development of new theories of justice is apparent in the following passage from Rossum’s study:

According to Scalia, the role of the Court is not to articulate a theory of justice and discover new rights based on that theory but to ensure that the majority does not contract the sphere of rights traditionally protected. If new theories of justice are to be articulated and if the sphere of protected rights is to be expanded, such expansion should be done by the will of the majority, not the Court.¹⁸

Meagher was committed to the old idea of the sovereignty of Parliament, and the conviction that democracy requires questions concerning political values, social values, fundamental values, or any values other than those legal values enshrined in the common law, to be resolved by the legislature and not the judiciary, because only the legislature has a democratic mandate.¹⁹

The similarity with Scalia could not be clearer. Concerning the interpretation of statutes, Scalia told Senator Kennedy at his Confirmation hearing:

The more specific Congress can be, the more democratic the judgment is, because if Congress is not specific, the judgment is made by the courts, and the courts are not democratic institutions.²⁰

And concerning the interpretation of the Constitution, Scalia wrote:

A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect ‘current values.’ Elections take care of that quite well. The purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to be required for a constitutional amendment before those particular values can be cast aside.²¹

The great threat, Meagher believes, is the “chattering classes” at home and abroad. His concern about the effect of the expectations of “the overseas members of the chattering classes” on the Courts resonates with Scalia’s admonition that the Court cannot

look over the heads of the crowd, and pick out its friends . . . The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.²²

Finally, I should like to identify an area where I am not

aware of a direct parallel, but in which I believe Meagher would have agreed with Scalia. In *A Matter of Interpretation*, Scalia responds to a criticism by L H Tribe,²³ who rejects Scalia's "textualism" in favour of what he called an "aspirational" theory of constitutional interpretation. In responding to the idea that the Constitution should be understood in terms of the American people's aspirations, Scalia writes as follows:

If you want aspirations, you can read the Declaration of Independence, with its pronouncements that 'all men are created equal' with 'unalienable Rights' that include 'Life, Liberty, and the Pursuit of Happiness.' Or you can read the French Declaration of the Rights of Man . . . There is no such philosophizing in our Constitution, which, unlike the Declaration of Independence and the Declaration of the Rights of Man, is a practical and pragmatic charter of government.²⁴

In this passage, Scalia is contrasting the Constitution of the United States with the Declaration of Independence. His purpose is to point out that, whereas the Declaration is properly understood as a statement of aspirations, the Constitution is properly understood as a practical and pragmatic charter of government. As we all know, the Constitution of Australia was modelled on that of the United States. In many important respects, the pragmatics of Australian government drew on the approach that had been successfully adopted in America. But it is not only in certain details that there is a similarity between the American and Australian constitutions. There is a more profound similarity in the fact that both documents are practical and pragmatic charters of government. Neither contains a statement of the nation's aspirations.

Although we are well aware of the similarities, we are also

well aware of the most striking difference: the absence of a bill of rights in Australia. The collection, *Don't Leave Us with the Bill*, edited by Julian Leaser and Ryan Haddrick, leaves us in no doubt that this difference is likely to endure for some time, as it is inconceivable that Australia will adopt a statutory or constitutional bill of rights in the foreseeable future.²⁵ However, we are less well aware of another difference. The United States has not only a Bill of Rights, but also a Declaration of Independence. So, we can say that, in the United States, there is a constitutional document that prevents the federal legislature from encroaching on certain fundamental rights of its citizens, but this is not so in Australia. And we can also say that, in the United States, there is a constitutional document that sets out the aspirations of the American nation, but this is not so in Australia. It does not follow that, just because Australia is better off without a bill of rights, Australia is also better off without a statement of national aspirations.

Tony Abbott and Australia's National Aspirations

That Australia lacks an equivalent of the Declaration of Independence looks like a serious problem. It means that we have no statement of national aspirations. That does not mean that Australia is a nation lacking in aspirations. But it does mean that we cannot point to a constitutional document that articulates the aspirations that we share as a nation. In his three books, *The Minimal Monarchy*, *How to Win the Constitutional War*, and *Battlelines*, Tony Abbott has addressed this issue, and provides one way of understanding the Australian experience of national aspirations.

The Constitution's failure to provide an account of Australia's aspirations as a nation is not lost on Abbott, and he is aware that this has affected how others have conceived of the Constitution. In *The Minimal Monarchy*, he notes:

Malcolm Turnbull described the Australian Constitution as a 'rule book for a colony'. Sir Isaac Isaacs described it as the 'birth certificate of a nation'.²⁶

Abbott's own take on the situation is as follows:

Although Federation did not, in fact, mark complete and final legal independence, it marked our beginning as [an] organised national entity. Before 1901, Australia was a geographical entity, a state of mind perhaps, certainly a goal most eagerly sought – but it was not an extant national entity. In that sense, 1901 is every bit the milestone to Australians that 1776 is to Americans, and Federation is as important to us as the Declaration of Independence is to them.²⁷

Federation, he says, is as important for Australians as the Declaration of Independence is for Americans. This is not because Federation marks Australia's independence from Britain, in the way that the Declaration of Independence marks America's independence from Britain. The sense in which they are similarly important lies elsewhere.

How are we to understand Australia's national aspirations, at the time of Federation, if they are not articulated in a constitutional document analogous to the Declaration of Independence? Abbott believes that Australians did have national aspirations. They lay in Australians' sense of being British:

In those days, there was no contradiction between being 'British' and being 'Australian'. For Australians, 'Britishness' did not mean wearing bowler hats to work or speaking with fruity accents. It meant participation in a supra-national association with common bonds, a

common language, and the common law system – the finest and fairest yet evolved.²⁸

According to Abbott, when Australians saw themselves as “British”, they were not primarily making a statement about their racial origins, their (Anglican) religion, or their cultural practices. Rather, they were making a statement about their values; values that found expression in the English language, English law, and English history. And it was the centrality of these values to “Britishness”, he believes, that enabled Australians to distinguish the British Empire from earlier empires:

In the eyes of most Australians, the British Empire was unlike any that had gone before. The Empires of the Assyrians, the Romans and even the Greeks had been built on conquest and exploitation but the bits of red on the world’s map were linked by shared values as much as by shared interests.²⁹

If Abbott is right, that what mattered to Australians about being part of the British Empire was that it incorporated them into an organisation of shared values, it also enables him to explain why being British continued to matter to Australians, even if they were disappointed, at times, by the decisions and actions of the Parliament at Westminster, the Whitehall bureaucracy, 10 Downing Street, the Privy Council, the British Army, or the Royal Navy:

few Australians felt any instinctive hostility to Britain itself. If the British were wrong, it was because they’d failed to match the ideals which Britons and Australians had in common.³⁰

The point is that, if “Britishness” is a matter of shared values, then any British institution (or individual) could fail to

realize the values to which British people aspired. Few of us ever achieve all that we aspire to, but that does not (or ought not to) diminish our aspirations.

As we know, the Commonwealth of Nations was the successor to the legal entity that was the British Empire. However, in *Battlelines*, Abbott also speaks of an “anglosphere” which might be understood as the successor to the group of nations (including the United States) that shares British values, a grouping which goes back at least to Churchill’s four-volume *History of the English-Speaking Peoples*:

The absence of tribalism is one of the key characteristics of English-speaking cultures. The bonds between the countries of the anglosphere arise from patterns of thinking originally shaped by Shakespeare and the King James Bible, constantly reinforced by reading each other’s books, watching the same movies and consuming the same international magazines. It’s a solidarity based on ideas in common and even mutually shared differences of opinion rather than on race, religion or economic self-interest.³¹

With this understanding of “Britishness”, or the “anglosphere”, we are well placed to appreciate why Abbott would not perceive the need for a formal statement of aspirations in 1901. The Preamble to the Constitution begins:

Whereas the people . . . humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established . . .³²

The Australian people agreed to unite under the Crown. The Crown was the symbol of “Britishness”. “Britishness” was an expression of the shared values to which British people aspired, and exemplified by the English language, law, and

history. So, on Abbott's analysis, there was an implicit acknowledgement of the aspirations of the Australian people: they aspired to live according to their shared values of "Britishness".

Federation was an act, not a document. The importance of an act is liable to fade over time in a way that the importance of a document is not. So, perhaps, it should not be surprising that Americans are more immediately aware of the aspirations contained in the Declaration of Independence than Australians are immediately aware of the aspirations that inspired their forebears in the act of Federation. Abbott is right that Federation is every bit as important to Australians as the Declaration of Independence is to Americans. And he is right that its importance does not lie in its declaration of Australian independence, but in its expression of Australian aspirations.

Flash forward a hundred years from the era of the Federation movement, and we find the Australian Republican Movement agitating to remove the Crown from the Constitution. By and large, the members of the ARM were happy with the practical and pragmatic charter of government that the Constitution provided for Australia. Or, at least, if they believed that the practical and pragmatic charter could be improved, they did not believe that removing the Crown would improve it. Rather, their aim was to keep the practical and pragmatic charter of government completely intact, so far as possible. So what were they aiming to do, if not alter the practical and pragmatic charter of government?

In *How to Win the Constitutional War*, Abbott claims that the ARM succeeded in two aims. First, they had helped convince the Australian people that the Constitution of Australia works well, and should be kept intact. Secondly, they had succeeded in convincing the Australian people that the Australian Constitution is in need of significant change. In 1997, Abbott

concludes:

The only pressing problem with the Australian Constitution is that about half the Australian people have been persuaded that they should no longer be happy with it . . . ³³

Abbott accepted that many Australians were captured by the republicans' slogan, "Resident for President". His concern was to preserve the Constitution's practical and pragmatic charter of government. However, he believed that this was compatible with satisfying the demand of a "Resident for President". He proposed introducing legislation to declare that the Governor-General was the President of Australia, in addition to her other titles. In this way, we could ensure that Australia had a "president" who was always a "resident" (and an Australian citizen) without in any way altering the practical and pragmatic charter of government contained in the Constitution. He believed that his proposal would bring constitutional theory more perfectly in line with constitutional practice (and meet the mood for a significant public declaration).³⁴

But what was this "significant public declaration" that there was a mood for? It could not have been a declaration concerning the practical and pragmatic charter of Australian government. If it were so, Abbott could not claim to meet the mood without changing the Constitution's practical and pragmatic charter of governance. What Abbott saw was the mood for a significant public declaration of Australia's national aspirations; something that could match the American Declaration of Independence.

This insight is crucial to understanding the reason why advocates of the Australian Republican Movement constantly seemed to be at cross-purposes with advocates of Australians for Constitutional Monarchy. These republicans claimed to be advocating the need for an act that would establish Australia's

national aspirations, whereas the anti-republicans claimed to be advocating the need for preserving the practical and pragmatic charter of government contained in the Constitution (which seemed to satisfy many – if not most – republicans).

That the debaters should have ended up at cross-purposes in this way is hardly surprising. It can be traced back to the fact that the Crown is a central (albeit theoretical) component of the practical and pragmatic charter in a Westminster system of government and that it was also the symbol of “Britishness”, and hence of Australians’ aspirations for their new nation at the time of Federation.

The mood suggested to Abbott that, even if the Crown still fulfils its role in the practical and pragmatic charter of government, it was no longer serving its other role as the symbol of “Britishness”, and hence of Australia’s national aspirations. Even if Australia is still part of the “anglosphere”, no one thought that “Britishness” captured the aspirations of Australians as a nation by the 1990s. If a “Resident for President” could capture the shared aspirations of Australians in a way that “Britishness” once did, Abbott was happy to embrace it, so long as it did not detract from the practical and pragmatic charter of Australian government, and the Crown’s role therein.

Alienation is the price that is paid if citizens feel that they cannot identify with their nation’s aspirations, and Abbott recognises this is no less serious a threat to Australia than that of undermining Australia’s practical and pragmatic charter of government. In *How to Win the Constitutional War*, he writes:

The problem with remaining precisely as we are is that millions of Australians no longer support what should be [the] country’s foundation document. A liberal democracy cannot leave even substantial minorities permanently alienated – hence the need to win the constitutional war,

but not in a way which replaces one disaffected group with another.³⁵

In *The Minimal Monarchy*, Abbott connects this mood with a loss of faith in the monarchy. But this problem is not a phenomenon that is limited to loss of faith in the monarchy. It is a problem that extends to all Australian institutions:

This is the age of irreverence. Church, Parliament, courts and police have lost respect just as fast as the Crown. The challenge, surely, is to make these institutions work – not dump them and start again . . .

The desirability of an Australian republic is far from clear. What's urgently needed, however, is renewed faith in Australian institutions.³⁶

By the time that he writes *How to Win the Constitutional War*, two years later, Abbott has come up with a proposal for renewing faith in the institution of the Governor-General, by making her the “Resident for President”. However, another twelve years later, he has come to see that the whole republican project is fundamentally flawed. In *Battlelines*, he writes:

The republicans' fundamental problem . . . is that change undramatic enough to succeed is too dull to bother with.³⁷

In 1901, there was nothing incompatible about the Crown serving a role in our practical and pragmatic charter of government and also serving a role as the embodiment of our national aspirations as the symbol of “Britishness”. Abbott does not deny that the Crown is no longer the embodiment of Australians' national aspirations. Furthermore, he acknowledges the need to find a new way to give expression to Australia's national aspirations. However, he sees that the republicans would not succeed in giving expression to Australia's national aspirations in the twenty-first century. The problem is that any

undramatic change to the role of the Crown in the practical and pragmatic charter of government will be too dull to satisfy the mood for an expression of Australia's national aspirations.

Recognition of Australian aspirations

In *The Minimal Monarchy*, Abbott wrote:

There is just one issue on which constitutional argument should turn: what is best for Australia?³⁸

In *Battlelines*, he asks:

What, now, needs to be done to make Australia stronger and truer to its best ideas? How can Australians individually and collectively come closer to being their 'best selves' and what can the Liberal Party do to bring this about?³⁹

So, when we are engaged in deliberation of constitutional matters, we should always be primarily concerned with determining what will be best for Australia. In doing so, we need to recognize that what is best for Australia involves making Australia stronger and truer to its best ideas. And this requires us to ask how the Constitution can help Australians individually and collectively come closer to being their best selves. It would hardly be surprising to find that a statement of Australia's national aspirations might help Australians to come closer to being their best selves, collectively, if not individually.

On 24 August 2013, Tony Abbott told a gathering at the annual Garma Festival of Traditional Culture, held in northeast Arnhem Land:

Indigenous recognition won't be changing our Constitution but completing it.⁴⁰

The Garma Festival takes its name from the Garma ceremony of the Yolngu people; a ceremony aimed at sharing knowledge and culture, and opening people's hearts to the message of the land at Gulkula. The site at Gulkula has profound meaning for Yolngu: set in a stringybark forest, with views to the Gulf of Carpentaria, Gulkula is where the ancestor Ganbulabula brought the *yidaki* (didgeridoo) into being among the Gumatj people. The festival encourages the cultivation of traditional song (*manikay*), dance (*bunggul*), and art and ceremony (*wangga*) on Yolngu lands in northeast Arnhem Land. Song, dance, art, and ceremony are important to the Yolngu not because they are essential for the practical and pragmatic government of the Yolngu, any more than they assert the fundamental rights of the Yolngu. Singing, dancing, making art, and participating in ceremonies are vitally important to the Yolngu because this is how they give expression to their shared Yolngu aspirations. The shared aspirations of the Yolngu are no less important than the practical and pragmatic aspects of their shared and individual lives, or their fundamental rights. So, participating in Yolngu culture is vital to Yolngu men and women being their best selves. And understanding and valuing Yolngu culture is no less important for Australians at large being their best selves. Thus, Abbott might rightly wonder what the Liberal Party can do to bring this about.

What did Abbott mean when he told the Yolngu, "Indigenous recognition won't be changing our Constitution but completing it"? In order to understand this claim, we need to analyse the meaning in two parts: first, what "won't be changing our Constitution" means; and, secondly, what "completing it" means.

When Abbott says that it "won't be changing our Constitution", he means that it will not in any way affect the practical and pragmatic charter of government that is the

Constitution of Australia (*viz.* existence of the Commonwealth and its organs of government, the separation of powers at the federal level, and the relationship between the Commonwealth and the States).

When he says, “but completing it”, he means that it will provide a statement of aspirations to complement the practical and pragmatic charter of government – just as the Declaration of Independence provides the statement of aspirations that underpins the Constitution’s practical and pragmatic charter of government in the United States.

Currently, we lack aspirational language in our constitutional documents. This is partly because, as Abbott shows, the aspirational action of Federating has stood in for a document that contains statements of aspiration; and also because the Constitution’s Preamble contains the aspirational language – “. . . under the Crown of Great Britain and Ireland” – which incorporates Abbott’s aspirational sense of “Britishness”. That we do not currently have a statement of national aspirations is not to say that we ought never to adopt one.

We can recognize that Indigenous Australia has not had a good enough deal in the first two centuries after British settlement in Australia. Indeed, we can acknowledge that the deal they received fell very far short of the shared values that Abbott maintains constituted “Britishness” at the time of Federation.* And we can recognize the need to redress this profound deficit in the life of the Australian nation (as well as the separate practical imperative of improving the living conditions of Indigenous Australians).

* It is worth recalling that the symbol of “Britishness”, King George III, issued instructions to Arthur Phillip, in 1787, which included the following passage:

We might also recognize the possibility that redressing this deficit in our national life might be connected with the aspirations of Australia as a nation in the twenty-first century, in the way that the Australian Republican Movement was convinced that a “Resident for President” and reconstituting Australia as a republic was connected with the national aspirations of Australia in the 1990s.

However, even if we accept that recognition of Indigenous Australians, and their relationship with the land, is not only inherently desirable, but fundamental to Australia’s aspirations as a nation in the twenty-first century, it does not follow that recognizing these aspirations necessarily requires a change to the practical and pragmatic charter of government contained in the Constitution of Australia.

Justice Scalia rightly advised Americans that if they wanted aspirations, they should read the Declaration of Independence, not the Constitution. So, too, Australians should not look to their Constitution for a declaration of national aspirations.

You are to endeavour, by every possible means, to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.

Perhaps in this regard, more than any other, the Australian people failed to live up to their shared values of “Britishness”. [The Instructions are reproduced in G B Barton, *History of New South Wales from the Records*, Sydney, Charles Potter, Government Printer, 1889, Vol. I, 481-87.]

However, as Abbott has acknowledged, national aspirations are important. If the mood of even a significant minority of Australians leads them to feel that the aspirations of Australia as a nation are no longer being given adequate expression, then there is a need to address this, lest they become alienated from the Australian nation.

When Abbott says, “Indigenous recognition won’t be changing our Constitution but completing it,” what he is saying is that Indigenous recognition will not alter our practical and pragmatic charter of government, but it will “complete” our Constitution, by providing an expression of Australia’s national aspirations in the twenty-first century; national aspirations that might not have changed all that much since the early twentieth century, but which are in need of renewed expression. Once, the Crown gave expression to Australia’s national aspirations, as the symbol of our shared values of “Britishness”. Now, those shared values demand new expression. That might mean a formal statement of aspirations, such as the American Declaration of Independence. It might mean something else; some act which can give expression to Australia’s aspirations in the next century.

Upholding the Australian Constitution might mean upholding *the* practical and pragmatic charter of Australian government (against those who would change it). It might also mean upholding the Constitution *as* a practical and pragmatic charter of government (against those who would interpret it “aspirationally”). Upholding the Constitution in either of these senses is compatible with acknowledging that aspirations are important and that Australia currently lacks a statement of aspirations. That we have had a perfectly good substitute in the past does not mean that we should not be open to embracing aspirational language now. Nor does it mean that a statement of aspirations would be incompatible with upholding the Constitution. But, in order for an acknowledgement of our

national aspirations to be compatible with upholding the Constitution, that acknowledgement would have to avoid interfering with the practical and pragmatic charter of government contained in the Constitution.

Abbott has reason to back Indigenous reconciliation as a means of reinvigorating the expression of Australia's national aspirations (in addition to the intrinsic significance of recognizing Indigenous Australia) in a way that he could not bring himself to back the republic as a means of reinvigorating the expression of Australia's national aspirations. Because Indigenous reconciliation need not necessarily alter the practical and pragmatic charter of government, it can provide the drama of national aspirations without the dullness of pragmatic arrangements – something the republican cause could never have achieved.

Wigs v Tea-Cosies – Twenty Years On

Why might one suppose that this long excursus into the jurisprudence of Antonin Scalia and Tony Abbott sheds any light on the debate between the wigs and the tea-cosies then or now?

Most obviously, the themes in Roddy Meagher's address range across the republic, Indigenous Australia, fundamental values, and the practical and pragmatic charter of Australian government. It is notable, however, that Meagher does not speak to the issue of how we give expression to Australia's national aspirations. What he had to say about this, over the years, was mostly negative, and is found in his attacks on political correctness. I discuss Meagher's approach to political correctness in *Roddy's Folly* and, at some further length, in "Larger than Life", my 2012 address to the Sydney Institute. I have nothing more to add to what I have already said on the subject.⁴¹ But I should like to revisit one part of his attack on political correctness: his

approach to the use of politically-correct language.

In an interview for *Roddy's Folly*, Jim Spigelman, then Chief Justice of New South Wales, said to me, in a conversation about Meagher's insistence that women on the Bench should be given the title "Mr Justice", and his continued reference to Aborigines as "Abos":

Everyone would accept that it's important to have some sort of change more than a gesture, but the facts are that symbols matter, and nobody who believes in the monarchy can doubt that. And the symbolic language matters. The very fact that he thinks 'Mr Justice' matters, he should understand that the 'Mr' would matter to others in the opposite way. His own predilection for the significance of language and the symbols associated with language are manifested not in 'Abos' but in 'Mr Justice'. The 'Abos' – this is just degrading.⁴²

For one who was so gifted in the use of language, Meagher seems to have had a blind spot when it comes to our aspirational use of language. Although he was keenly aware of the way in which political correctness can involve manipulating the way we use language as a tool to control the way we think about ideas, he simply could not see that the way a society uses language can also serve to empower or disempower individuals whose voices are otherwise marginalised in that society. In other words, sometimes we affect individuals' ability to be their best selves by the way we use language to talk about them. And I think he was equally blind to the symbolic use of language; the way that language can express (or fail to express) our national aspirations. In other words, sometimes a nation's collective ability to be their best selves is affected by the way they talk about themselves and their aspirations. If you read *Roddy's Folly*, you will find ample evidence to demonstrate that Meagher was not sexist, racist, or homophobic. But you will also see, I suspect, that he was wilfully

blind to the fact that how we use language can disempower individuals and diminish the expression of our national aspirations.

It would be a mistake for us to underestimate the importance of how we give expression to our shared values, as I believe Meagher might have done. Nevertheless, it is also possible that, however important our shared values are, it might not be the business of the High Court to give expression to them. Meagher's legitimate conviction that the High Court had no business in giving expression to Australia's "fundamental values" cost him his long and valued friendship with Sir Anthony Mason. It might have formed the basis for his cultivating a friendship with Justice Scalia. (I heard that they once had dinner together in Sydney.) Some will say that Meagher's weakness lay in his rejection of the Mason Court's attitude to fundamental values. I suggest, however, that his weakness might not lie in his rejection of the Mason Court's approach, but in his inability to affirm the enduring significance of shared values for our national life, in the way that the Crown once served Australians as the symbol of "Britishness", and in which the Declaration of Independence continues to serve in the United States.

Roddy Meagher and Patrick White were both very good haters (although Roddy once said to me, "Although I am a very good hater in public life, I'm not a very good hater in private life"). They were cousins, but that did not stop either hating the other. Meagher hated White's verbless sentences as much as White's betrayal of the social system which had always cocooned him in immense wealth. But I think he also hated White's aspirations for Australia. White hated Meagher's "creepiness" as much as his "florid Tory attitudes". But, I suspect, he also hated the Queen's Counsel's insensitivity to the need for appropriate expression of personal and national aspirations.⁴³

Patrick White was an artist. I find it hard to believe that he

could really have been that excited about the dull details of Australia's practical and pragmatic charter of government. But I can believe that he would have been deeply concerned about the drama of what are the appropriate aspirations for Australia as a nation, and how these might find adequate expression. (Thomas Keneally, more than Patrick White, exemplified the artist's passionate assertion of the republic as a new expression of Australia's national aspirations.)⁴⁴ But it would be a mistake to privilege the drama of aspirations over the dullness of pragmatics. That anyone could ever have made this mistake lies, I believe, in the fact that the Crown was central to the drama of national aspirations and remains central to the dull pragmatics of government. Roddy Meagher was a Queen's Counsel. I suspect that, where the famous author with a tea-cosy on his head was guilty of privileging the drama of giving expression to national aspirations over the dullness of a practical and pragmatic charter of government, the silk with a horsehair wig was guilty of privileging the dull legal charter over the dramatic expression of aspirations.

The relative merits of wearing a tea-cosy or a horsehair wig remains a moot point. The proper attitude to a practical and pragmatic charter of government or an expression of national aspirations is not.

Endnotes

1. Stephens, T, "The republican debate: wigs v tea-cosies", *Sydney Morning Herald*, 20 November, 1992, 1.
2. Meagher, R P, "Address Launching *Upholding the Australian Constitution*, Volume 1" in *Proceedings of the Samuel Griffith*

- Society*, Vol. 3, 1993, 145-53, at 145.
3. Shearer, I A, Letter to the Editor, *Sydney Morning Herald*, 17 December, 1993, 12.
 4. Murray Gleeson, “The Birth, Life and Death of Section 74,” *Upholding the Australian Constitution*, vol 14, 2002, 1-10.
 5. Abbott, T, “On Roddy Meagher”, *Quadrant*, Vol. 56, No 6, June, 2012, 30-31.
 6. Freeman, D, *Roddy’s Folly: R. P. Meagher QC – art lover and lawyer*, Ballan, Victoria: Connor Court, 2012, 348.
 7. Kingston, M, “A High Court grappling with change and politics”, *The Age*, 1 December, 1992, 17.
 8. (1992) 175 CLR 1.
 9. Meagher, *op. cit.*, 147-148.
 10. (1992) 177 CLR 106.
 11. Meagher, *op. cit.*, 149.
 12. *Vide* Dixon, O., “Concerning Judicial Method” in his *Jesting Pilate*, Melbourne, Law Book Company, 1965, 152-65; Mason, A., “Future Directions in Australian Law”, *Monash University Law Review*, Vol. 13, 1987, 147-63; and my discussion of Dixon, Mason, and Meagher, in *Roddy’s Folly*, 403-17.
 13. Meagher, *op. cit.*, 153.

14. L J M Cooray, "The High Court – The Centralist Tendency," *Upholding the Australian Constitution*, vol 1, 1992.
15. Rossum, R A, *Antonin Scalia's Jurisprudence* (Lawrence, Kansas: University Press of Kansas, 2006), 25.
16. *Vide* The Chancery's Jurisprudence, chapter 11 of *Roddy's Folly*.
17. Baker, J (ed.), *The Oxford History of the Laws of England*, Oxford, Oxford University Press, 2010, Vol. XI, 771.
18. Rossum, *Antonin Scalia's Jurisprudence*, 47-48.
19. *Vide* Meagher, R. P., "Civil Rights: Some Reflections", *Australian Law Journal*, Vol. 72, 1998, 47-52.
20. Rossum, *Antonin Scalia's Jurisprudence*, 22.
21. *Ibid.*, 47.
22. *Ibid.*, 50.
23. L H Tribe was one of four lawyers to respond to Justice Scalia's 1995 Tanner Lectures on Human Values, delivered at Princeton University, and published with Scalia's replies to these responses in *A Matter of Interpretation: Federal Courts and the Law* (Princeton, N.J.: Princeton University Press, 1997).
24. Scalia, A, *A Matter of Interpretation: Federal Courts and the Law*, Princeton, N.J., Princeton University Press, 1997, 134.

25. Leeser, J and R Haddrick (eds), *Don't Leave Us with the Bill*, Canberra, Menzies Research Centre, 2009.
26. Abbott, T, *The Minimal Monarchy*, Kent Town, SA, Wakefield Press, 1995, 48.
27. *Ibid.*, 48.
28. *Ibid.*, 48-49.
29. *Ibid.*, 49.
30. *Ibid.*, 50.
31. Abbott, T, *Battlelines*, Melbourne, Melbourne University Press, 2009, 159.
32. *Commonwealth of Australia Constitution Act*, 63 & 64 Victoria, Chapter 12.
33. Abbott, T, *How to win the constitutional war*, Kent Town, SA, Wakefield Press, 1997, 151.
34. *Ibid.*
35. *Ibid.*, 152.
36. Abbott, *The Minimal Monarchy*, 37 and 47.
37. Abbott, *Battlelines*, 164.
38. Abbott, *The Minimal Monarchy*, 24.
39. Abbott, *Battlelines*, 79.

40. <
<http://www.sbs.com.au/news/article/2013/08/10/abbott-unveils-plans-indigenous-australia>>. Retrieved 1 November, 2013.
41. *Vide* PC Judge: Persian Carpets and Political Correctness, Chapter 12 of *Roddy's Folly*, and Freeman, D., "Larger than Life: Roddy Meagher QC", *The Sydney Papers*, online issue 16, the Sydney Institute, 23 May, 2012.
42. *Roddy's Folly*, 433.
43. For my discussion of the relationship between Meagher and White, *vide Roddy's Folly*, 36-41.
44. *Vide* Keneally, T, *Our Republic* (Port Melbourne, Victoria: Heinemann Australia, 1993).