Second Manning Clark Lecture

Manning Clark, 'Bourgeois Democracy' and Strange Tales From Supreme Courts[1]

Delivered by **Hon Justice Michael Kirby AC CMG**[2]

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MANNING CLARK REMEMBERED

Manning Clark was a great Australian. He was a public intellectual and a controversialist in a country that tends to slap such people down. As we now know, he was dogged in his early life by ASIO. He was accused by hysterical anti-communists of being a fellow traveller. After his death he was mauled by an equally toothless tiger in the Australian media that propounded the absurd proposition that he had spied on Australia for the Soviet Union and for his pains had received a secret Lenin Prize.

Even ASIO, in the end, could not stomach the notion that this historian, who spent his whole life thinking and writing about Australia, would betray it. Manning Clark could never submit himself to the dictates of others, whether within a political party or anywhere else. His sympathy was with the underdog. He disliked "spiritual bullies". Not a good start for servile devotion to the Soviets.

Like many profound historians, Clark was a mixture of prophet and pedant. At Oxford, he had been drawn to the study of the ideals of Alexis de Toqueville, the well connected French law graduate who studied, and then praised, the American governmental system. The attraction was explained by his tutor at Oxford as based on the Frenchman's interest "in what you are interested in". Both de Toqueville and Clark saw themselves as creatures of heart and head, of passion and reason. This ambivalence in Manning Clark's values (in which he was by no means alone) helps to explain both the industry of his output and the demands he felt to draw social and political lessons from history's mighty sweep.

Manning Clark wanted people to be passionately involved in society. He wanted Australians to be more connected with their land and its story. Yet in some ways he was a deeply pessimistic man, worn down by the repeated evidence of human cruelty and indifference to evil. Although he loved Australia (as witness his lifetime's devotion to recording, interpreting

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[1] This lecture was written with material much of it assembled by Mr Tim Gordon, Senior Research Officer to the Justices of the High Court of Australia.
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and sometimes romanticising its history) the conclusion is inescapable that Australia repeatedly disappointed him.

It did this, at first, by its unquestioning adherence to the British political institutions and Protestant religious values that had come with most of the early settlers. Even when the British Empire was still full of power, and we were part of it, he was suspicious of its myths. For example, he said sorry to Aboriginal Australians long before others did. He was depressed by the dullness and what he saw as an enforced mediocrity and conformity of the social values embraced by both sides of politics in Australia. He was unwilling to go along with what he regarded as the philistinism of puritanical adherence to the imperial British heritage.

Although in later days, Manning Clark became more closely associated with the Australian Labor Party (and specifically with its leaders Mr Whitlam and Mr Keating), he was, fundamentally, a stern critic of both major political groupings. Invoking what Max Harris called his "lofty parsonical tone" and inviting the accolade "Archbishop Manning Clark" from that most uncompromising of friends, Patrick White, he lamented, especially towards the end, what he saw as the basic tweedle-dum and tweedle-dee phenomenon of Australian political life. A visit to the historian John La Nauze, then profoundly disabled, on the eve of 1990 federal election, helped him close to his own death to see the political differences, as they actually exist in Australia, in a more realistic light:

"Perhaps what happens in the world of 'Who's in and Who's out' does not matter at all. I have never been able to make up my mind on that. Yesterday in the hospital other thoughts flowered in my heart".

For myself, I do not find it difficult to get into Manning Clark's head. On the day he was born, his parents moved to Burwood in Sydney, a suburb next to Concord where I grew up. His family circumstances were respectable, but not well-off. His religion was Anglican with strong links to Protestant Ireland. In childhood, he was fed a diet of the King James Bible and the matchless liturgy of the Book of Common Prayer. At school he imbibed the classics of the English language. But he soon revealed a certain rebelliousness against received wisdom and Imperial values. However, enough of discipline and ambition had been laid down in those early years to push him forward as a gifted teacher and energetic writer of what, until then, had been the largely neglected field of Australia's own history.

There is no way that I could give a lecture which carries Manning Clark's name, even in the year of the centenary of the federation, that addressed itself to the unalloyed wonders of our national achievements. In fact, he hated such anniversaries. He was extremely uncomfortable about the Bicentenary in 1988. Indeed, he did not have a very high opinion of the Constitution which the Founders fashioned for Australia. In 1977 he wrote:

"The Founding Fathers were still colonials - that is to say men who do not make their own history, men of a derived culture, and therefore derived ideas on political institutions. ... They drafted a Constitution that was neither exclusively British nor exclusively Yankee, but a combination of the two. ... It was therefore a British and Yankee Constitution, not an Australian Constitution. It was a bourgeois Constitution, not a people's Constitution".

For Manning Clark what was needed was a "wholesale replacement of the Constitution rather than 'tinkering with' or attempting to change" it. This was the libertarian and the prophet

speaking. It was not the cold-eyed pedant who, immersed in history, learned the constraints which practical compromise always imposes on political achievement in a country such as ours.

Sometimes the other side of Manning Clark's nature would come to the fore as he looked reality in the face and saw the true features of Australia's society which he chronicled so indefatigably. His great gift was to put Australian history on the map. Against that achievement, a few factual errors in millions of words, matter not a jot.

His other gift was to refocus our national history so that it would be viewed from within Australia, and not from London or anywhere else. Political, economic and demographic events made this change inevitable. But Manning Clark was an early herald. The enthusiasms of his criticism of the British institutions that we adopted in Australia, sometimes led him to controversial conclusions. Thus, it resulted in his attack on the "trinity of bourgeois liberalism, democracy and material progress" which he saw as discredited nineteenth century values. It led him to disdain the Australian "worship" of the ballot box as if it were the end, and not simply the beginning, of a true democracy. Something in him was reacting, with an "over-simplistic" aversion, to Australia's nascent relationship with Britain. We may look back and wonder at the apparently extreme rejection that he voiced. We can do this without losing admiration for his strength as a healthy antidote, or purgative, to the concept of Australia as no more than a transplanted collection of mediocre British towns.

Like all of us, Manning Clark was a bundle of contradictions. But his life made a difference to Australia. He held a mirror up to Australian society and its past. After we peered into it, things would never seem quite the same again. Beside him, his carping critics appear as pygmies. His mistakes are part of a complex personality who set out to change our view of ourselves and succeeded beyond what would ever have seemed possible. And he did so by the sheer "style, elegance and force" of his industry, his personality and the written legacy he has left us.

PRESIDENTIAL SONS AND DAUGHTERS

Election year: In reacting to Manning Clark's view of electoral democracy, and his disdain of the Australian worship of the ballot box, I want to propound the thesis that he was both wrong and right. By doing so, you will appreciate, I am simply displaying the same Celtic tendency to intellectual schizophrenia that he himself often portrayed.

The year 2001 is a big year for elections. Already Australians have gone to the ballot box in two States and in the federal electorate of Ryan. In accordance with the Constitution, a federal general election must take place this year. Already the media are full of speculation. I fear that we may not see a lot of substance in politics for months to come as the politicians gird their loins for the joy of battle.

Despite Manning Clark's disdain, this nation appears to maintain its commitment to liberalism, electoral democracy and material progress. Recently, it has shown its resistance to formal constitutional change. Indeed, such has been the record of a full century.

For those who yearn for a more libertarian society and rescue from the unquestioning adherence to the imported safe and stable (but passionless) institutions expressed in our Constitution, it may all seem rather boring and unexciting. Boredom and complacency are not

the features of constitutional arrangements in most parts of the world, as recent events disclose.

Congo: In January 2001 Laurent Kabila, President of the Democratic Republic of Congo, was murdered. He had few friends. The coup d'état was not unexpected. He was shot by one of his own soldiers. The power vacuum was soon filled when his son, Joseph Kabila, was sworn in as President. The Supreme Court of Congo was asked to intervene, apparently to quell suggestions that the new President was disqualified because born outside Congo during his father's long years as a rebel. It passed to the judges to uphold the succession. They did so rapidly despite doubts and although the young Mr Kabila has no fluency in French, the lingua franca of Congo. Perhaps the sight of unpaid soldiers with guns at the ready smoothed the path to a creative judicial decision.

Philippines: No one can suggest that that is the explanation of what happened in the same month in the Philippines. There, the constitutional process of impeachment, to remove from office the elected President, Joseph Estrada, broke down in the Senate. It did so when that Chamber determined, by 11 votes to 10, to reject evidence that was thought to show that President Estrada had amassed 3.3 billion pesos since becoming President in June 1998. Mr Estrada, once a popular film actor, was opposed by the powerful Roman Catholic Church as a womaniser, gambler, drinker and father of several children out of wedlock. He was never accepted by the political elite.

Following the close vote in the Senate, and Mr Estrada's attempts to broker a deal for a graceful exit, large crowds gathered to manifest so-called "people power". This grew into an extra constitutional revolution. Supporters described it as a "demand by the people" for freedom from politicians suspected, although not found, to be corrupt. The crowd was impatient with the procedures to remove the President, laid down by the Constitution.

Once again, the person sworn into office before the Chief Justice was the daughter of a former President. Gloria Arroyo is the daughter of President Dios Dada Macapagal. At the time she assumed the presidency, she was Vice-President. In the midst of the turmoil on the streets, twelve members of the Supreme Court of the Philippines authorised the Chief Justice, on 20 January 2001, to administer publicly, in the midst of the crowd, the oath of office as President to Mrs Arroyo. This was done at noon on that day.

The request to the Chief Justice was treated by the Court as an administrative matter. Subsequently, under seal of the Court and signature of an assistant clerk addressed to Mrs Arroyo as President, the Court recorded the unanimous confirmation of all Justices for what had been done. The certificate, however, stated that the resolution of the Court was "without prejudice to the disposition of any justiciable case that may be filed by a proper party".

Two legal problems were presented by this presidential succession. First, it did not appear to conform to the succession by a Vice-President under the Constitution, confined to cases where a President dies in office, resigns or is lawfully removed for proved incapacity or misconduct. Secondly, Mr Estrada told hundreds of cheering supporters, at a Party rally in Manila on 31 January 2001, that he was not resigning, but remained the elected and lawful President.

A petition was then filed in the Supreme Court of the Philippines asking it to issue "a definitive ruling on whether or not Joseph Estrada is still the President" and requesting a

declaration that the proclamation and oath taking of "Madame Arroya" is null and void. On 6 February 2001, this petition was dismissed by a "resolution" of the Supreme Court of the Philippines en banc. The court apparently refused to rule on the legal merits, simply holding that "the herein petitions have miserably failed to present justiciable controversies brought by the proper parties to deserve further considerations by this Court".

Subsequently, however, proceedings were brought by Mr Estrada himself. In his own name, he sought a declaration. This was not so easily rebuffed on technical grounds. Moreover, he asked the Chief Justice and other compromised judges to stand aside for their part in Ms Aroyo's installation. This they agreed to do. Mr Estrada's lawyers admitted that they were asking the Court to acknowledge that it had made a mistake in endorsing the handover of power. Supporters of Mrs Arroya, by then in charge of the nation's administration, pressed on with "plunder" charges against Mr Estrada. Mrs Arroya's Justice Secretary declared that the Supreme Court could no longer overturn its earlier decision. In an attempt to impose some order on the chaos, the Court restrained the lawyers and the parties from making public statements. Meantime, both Presidents claimed the office.

On 2 March 2001, by unanimous decision of the thirteen participating Justices, the Supreme Court of the Philippines ruled that Mr Estrada had "effectively resigned his post as President and that therefore Mrs Arroyo was the duly constituted President of the Philippines. The decision was written for the Court by Associate Justice Puno. He rejected the assertion that Mr Estrada was President "on leave". He recorded Mr Estrada's admission on 20 January 2001 that he was "unable to exercise the powers and duties as President". The Court held that it was necessary, in order to have compliance with the resignation provision in section 8, Article VII of the Philippines Constitution, for Mr Estrada to have intended to resign. But from the circumstantial evidence, that intention was inferred. It was a blessed relief for President Arroyo and perhaps for the Philippine nation. But, not for the first time, the effect confirmed the power of the Manila crowds and their ability to topple a national government.

United States of America: The biggest case of them all, also unfolded on the cusp of January 2001. It concerned the accession of yet another presidential son, George W Bush. Is it not a little curious to Australians, living in a constitutional monarchy, to observe this modern tendency of republics to hand political succession to presidential children? The same has never happened to our Prime Ministership, although there is some evidence of a political gene on both sides of the federal House.

The case of President Bush II is in some ways as extraordinary as those that I have just recounted. Everyone knows the broad outline. The Democrat candidate for President of the United States, Mr Al Gore, won half a million votes more than the Republican candidate, Mr Bush. However, the United States Constitution provides that the President is chosen by an electoral college, not direct suffrage. In the end, it turned out that the majority in that college would be decided by which candidate won a plurality of votes in the State of Florida.

The votes in Florida, when counted, were breathtakingly close. The situation was greatly complicated by extraordinary problems. One was a suggestion that large numbers of voters (mainly African Americans) had been turned away from exercising their right to vote. Another was that a "butterfly" ballot design had misled or confused voters depriving Mr Gore of thousands of votes and defying a State law that specifically required the voter's indication of preference be placed to the right of the candidate chosen, not to the left as the butterfly design required. The third and most important defect, however, led to the battle of the chads.

Mechanical defects in antique voting machines (mainly banished to poor, African American, Latino and predominantly Democrat voting districts) had resulted in mechanical rejection of thousands of ballot papers placed in the ballot box. Because, unlike Australia, voting is not compulsory in the United States, an inference would ordinarily arise that the overwhelming majority of the people who actually bothered to vote intended that their vote should be counted. All but a fractional percentage of them would have intended to vote for a presidential candidate. After all, that is the main game. In most elections the discarded votes, with the incompletely perforated chads, might not have mattered. But with the vote in Florida so close, it was sufficient to decide the presidency of the United States of America. De Toqueville and Manning Clark would have been fascinated.

The Florida Supreme Court, in a series of decisions, acted on the principle that the challenged votes, being material, should be counted individually by hand. However, in formulating guidelines to control the counters, that Court came to be assailed by large and noisy cohorts of Mr Bush's supporters chanting that the judges were changing electoral law and, in effect, shifting the goalposts after the election had been conducted.

The seven judges of the Florida Supreme Court had been appointed by a previous Democratic Governor, partly excepting one case in which Governor Jeb Bush (the presidential candidate's brother) had participated. Accordingly, the judges were denounced as partisan. Whereas the Governor properly retired, at first, from public view, citing conflict of interest in favour of his brother's candidacy, Florida's Secretary of State, Ms Harris, contested every case that carried the possibility of an ultimate Gore ascendancy. Mr Jeb Bush then re-emerged to endorse an astonishing proposal that, even if the judges insisted on the counting of the votes rejected by the machines, the State legislature, with a majority of Republicans, should exercise the power "courageously" to determine how the electors in the college should be chosen. They should bypass the people's vote.

It was at this stage that the Supreme Court of the United States "flung itself into the political vortex". It decided to receive a challenge from Mr Bush to the direction by the Florida court for a manual counting of the ballot. Within 34 hours, following oral argument, it delivered a sharply divided and bitterly contentious decision. The Florida court had instructed counting officials to inspect each ballot to determine so far as possible the intention of each voter. In the Supreme Court majority's view, this allowed for too much arbitrariness in the evaluation of individual ballots. This possibility was said to be incompatible with the equal protection clause of the United States federal Constitution requiring clear principles before a recount could proceed.

Normally, such logic would have required remitter to the Florida State court to permit it to satisfy the federal requirement and move on with the recount according to concrete standards. But this is exactly what the Supreme Court of the United States absolutely forbade. Instead, it found that Florida could no longer proceed with the recount at all. It held that, under Florida law, all disputes had to be resolved by 12 December 2000 and not a moment later. Since the Supreme Court handed down its decision at 10 p.m. on 12 December, and had restrained counting during the whole time of its own deliberations, there was, alas, no time left to do anything but to declare Mr Bush the winner. Into the hands of another President's child would pass the most powerful elected office in the world.

Mr Gore could not contest the accumulated authority of the Supreme Court of the United States, despite the powerful dissents and the close division within that Court. He could only

lick his wounds and take psychological comfort from the opinion of Justice Stevens, dissenting:

"The endorsement of [the majority] position ... can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law".

Some initial commentators praised the Supreme Court's intervention for saving the United States from a "potential constitutional crisis". Delay in the resolution of the matter until the electoral college met in January 2001 was said to be like creating "a train wreck" which would have been "reckless". On the other side, critics castigated the "conservative majority" in the Supreme Court for indulging in what they denounced as "judicial activism" and "judicial over-reach", when it suited them. Whereas in 1974 the Supreme Court had spoken unanimously to tell Richard Nixon that he had to go, on this occasion the judges were divided, like the nation. However, unlike the voters of the nation the judges had the final say. Another President was sworn into office by a Chief Justice to the accusations of the supporters of his opponent that he had "stolen" the election with judicial help and to the tune of "Hail to the thief".

Soon after these events, in January 2001, one of the dissenting judges, Ruth Bader Ginsburg visited Australia. She spoke at Melbourne University. She told of a powerful member of the United States Congress, Mr Tom DeLay, who had advocated the impeachment of judges who rendered unpopular decisions which, in his view, did not follow the law. According to Justice Ginsburg, Mr DeLay is not a lawyer but "an exterminator by profession". He placed on his list of judicial pests a District Court Judge in San Antonio, Texas who had held up certification of the election of two victors in electoral races for county sheriff and county commissioner. The judge did so to permit absentee ballots to be counted. Once the State Court held the ballots valid, the federal judge promptly vacated the judge's stay order. In justification of his effort to expand the use of impeachment of judges, Congressman DeLay commented that federal judges "need to be intimidated".

I am ashamed to say that, in Australia, we saw similar attempts at intimidation of judges of the High Court after the Mabo and Wik decisions. However, in United States political discourse, where most judges have to run for election, such conduct has become an art form. In Australia, it is still shocking because it is less frequent. Justice Ginsburg expressed suspicion that she would one day herself end up as one of Mr DeLay's impeachment targets.

ELECTORAL CLOSE SHAVES IN AUSTRALIA

Sailing along with our century-old Constitution, and an unbroken record of national, state, local and other elections, we in Australia have had no events like the judicial determination of the passage of presidential power in Congo, the Philippines and the United States, just described. That is not to say that we have not occasionally had close shaves in the election business. We had one in the electorate of Ryan; but it could not affect the fate of the Government in Parliament. But when Neville Wran first came into office in New South Wales in 1976, and later Steve Bracks in Victoria in 1999, it was weeks before the final votes were

counted and the composition of the State Parliament and Government assured. Many have been the cases where State Governors have had to resolve the close run thing, and do the right thing, in calling on the political leader most able to form a government.

In the federal sphere, the closest election of the twentieth century was that called by Mr Menzies for 9 December 1961. After the votes were counted, the fate of the federal Government hung in the balance, depending on the outcome of the poll for the electorate of Moreton in Queensland. The sitting member Mr (now Sir) James Killen suffered from the strongest swing in Queensland in favour of the ALP since Chifley's days.

At the end of counting on the Saturday night of the election, Labor appeared to have won eight government-held seats in Queensland. Moreton was described as "a certain Labor gain". That party had a pluralcy of 3,000 primary votes. However, there were Queensland Labor Party and Communist votes to be counted as well as 5,000 postal and absentee votes. Painstakingly, each and ever ballot paper was examined by the officials of the Commonwealth Electoral Office in the presence of the vigilant scrutineers. For a week things hung in the balance. If the Menzies government were to survive, Killen had to win Moreton. Already newspaper headlines predicted "Menzies to quit ... McEwen is likely leader" and so on.

By the Monday week, however, nine days after the poll, the final figures were in. Killen won by 110 votes. Menzies telephoned him to tell him "You are magnificent". A legend was born. Federal Labor had another eleven years in the wilderness until it was, eventually, time. But was no rioting in the streets. There was no extra-constitutional process. There was not even an appeal to the Court of Disputed Returns. There was absolutely no suggestion that the High Court of Australia, as the nation's federal supreme court, should step in. No one would have dared to claim that a single vote of the good electors of Moreton should be ignored. Everyone accepted that the way the Commonwealth Electoral Office called the count would be neutral, professional, impartial, helped along by the hawkeyed scrutineers. No decrepit mechanical devices were used, just ordinary pencils and ballot papers. No impatient suggestions were made that the whole thing had to be wrapped up because a long delay was intolerable to media patience or to the Stock Exchange. Boringly enough, as had happened before and as has happened since, the institutions of our "liberal, bourgeois democracy" had swung into gear. Everyone accepted the umpire's decision. And, in Australia, the umpire was the electors, not the judges.

Yet what would have happened in Moreton if the margin of votes upon which the future of the federal Government hung, had been tiny, by our standards, and a challenge had been brought by the losing candidate contending that this or that ballot paper was ambiguous, or not marked in accordance with the law? As in the United States, the election dispute would have ended up in the apex court. It would have done so, not by the choice of the High Court itself but because federal legislation constitutes the High Court as the national court of disputed returns. It has done so virtually since federation. A swift and settled procedure would have been followed. And the Court, in reaching its decision, would have drawn on settled legal principle, in turn based on English judicial authority devised by the judges during the nineteenth century after the Reform Bills had rendered the House of Commons substantially accountable to the electors.

Following the first federal election in Australia, a series of decisions of the High Court stated the standard that we have observed ever since. Thus, the law then required the voter to make

a cross inside the square next to the preferred candidate's name. The question arose, in an early case, whether failure strictly to comply with that law would render the vote informal if otherwise the intention of the voter was clear on the face of the ballot. The voter might, for example, have put the figure "1" or a tick beside the preferred candidate. Was that enough?

From the start, the High Court held that formal failures of such a kind would not render the vote invalid because the search was for the true intention of each voter. Over and over again, the High Court has reaffirmed and applied this principle. Thus, redundant marks on the ballot paper do not invalidate a ballot unless they identify the voter. In 1919, Justice Isaacs said that "clumsy" markings were to be construed with the voter's intentions in mind:

"... remembering that voters may be young or old, ill or well, scholarly or not ... The doubtful question of form [must be resolved] in favour of the franchise".

The introduction of compulsory preferential voting in Australia made it more difficult to overlook errors or omissions. But, both by law and by judicial decision in this country, if the voter's first preference is indicated and the order of remaining preferences is clear enough, the Electoral Commission must give effect to that unmistakable intention. An informal vote or a failed vote is not a conclusion to which Australians easily come. Moreover, in our Commonwealth, there is no electoral college, save for the exceptional choice of a replacement Senator to fill casual vacancies. In all other cases, the Senators and members of the House of Representatives are "directly chosen by the people".

As we reflect on the eventful passage of power in other countries, some of them with legal systems not dissimilar to our own, Australians can, I think, be reasonably satisfied with the professionalism, speed and national standards with which their electoral democracy has been practised for more than a century. We may not have always liked the government elected. We may sometimes have fallen out of love with it when the honeymoon was over. But it has all been accomplished in accordance with the Constitution, with federal and state laws and with judicial decisions.

And as to the last, the judges of Australia have not, I believe, lost the confidence of the people. Nor have they ever taken their eyes off the constitutional purpose of a representative democracy. It may be "bourgeois" to some. But to others it provides the rule of law, the bedrock of the nation's government. In electoral disputes that come before judges in Australia the guiding principle is always ascertaining the true intention of each voter expressed and upholding the franchise. No competing principle or agenda dares intervene for the judges would, and should, give it short shrift. And I do not believe that any of the political players in Australia would expect it to be any other way.

The notion that a party politician (like the Secretary of State of Florida) would be directing and controlling the Commonwealth Electoral Office is completely unthinkable. And in our system, as an ultimate resort, we are not locked into a final vote on a specified date. In a necessary case, where the call is very close and the true intentions of the voters cannot be ascertained, a new election may be ordered if this is needed to uphold the franchise.

In the United States, the individual citizen has no federal constitutional right to vote for the electors of the President. In Australia, electors have the right to vote by federal and State law. Indeed they have a duty to vote. They have been required to vote on pain of a fine for three quarters of the past century. So central is the notion of representative democracy for the

language, purpose and structure of our Constitution that it seems to me to be distinctly arguable that, in Australia, there may be a constitutional right to vote implied in the text of that document. It is unthinkable that a law could be valid which, in terms or effect, deprived large numbers of Australians of that right.

I point all these features out to explain, perhaps, why Australians as a whole have confidence in the system of electoral democracy. But is this why Manning Clark was irritated by what he saw as the uncritical Australian worship of the ballot box in a secular religion that he could not join?

HE WAS WRONG BUT RIGHT

The very stability of Australia's institutional arrangements derive from our British heritage. Thus Australia has avoided almost completely military involvement in its politics. It gets by with one of the smallest military budgets per capita in the world. This is surely another beneficial legacy of the British connection. It is absurd to deny all these legacies. Doing so detracts from the legitimate need to cast away irrelevant imperial phantoms.

In my view Manning Clark was wrong to see liberalism, electoral democracy and material progress as discredited goals of the nineteenth century. They remain deeply ingrained in Australia - the nation as it is. Those who would prefer a more adventurous, libertarian, even anarchistic country just have to pack their bags. The deep imprint of the quest for lawfulness, that probably came with the convicts and the first settlers, continues to stamp its mark on Australian society. Taken as a whole, and by the standards of comparison which the real world allows, Australia has been unrivalled in its spaciousness and freedom. If Manning Clark thought otherwise, respectfully I think he was wrong.

Ordinary people may be prosaic. Their aspirations and ideals may be modest, even mediocre. But they are individuals. They have human rights and dignity. And in the Australian Commonwealth they are "electors" and have special constitutional and legal privileges as good or better than those in most other nations.

For all this, Manning Clark's criticism of the Australian worship of the ballot box still has a point. The ballot box is not always a good protector of minorities. The ballot box can sometimes be an instrument to legitimise oppression by law. The law in the first century of our federation was not always "unrivalled in its spaciousness and freedom" for Aboriginals and other indigenous peoples. Nor for women. Nor for the old. Nor for the disabled. Nor for Asian Australians. Nor for other people of colour. Nor for gays and lesbians.

Often it has required court decisions, and sometimes international intervention to stimulate parliaments, elected by the ballot box, to defend minority rights. Unlike the majoritarian conception of democracy, Australians of today must appreciate that a modern democracy ensures an effective interaction between the will of the majority and the needs of minorities. Until Australia has a Bill of Rights, it will lack the occasional constitutional corrective that stimulates and cajoles the politicians, answerable to the ballot box, into reflecting modern notions of pluralism and equality.

I know these things at first hand. I do so because, for most of my life, as a homosexual Australian, I have been oppressed by unjust laws. I do not doubt that had there been a constitutional Bill of rights in this country the reforms, slowly and sometimes reluctantly (and

even apologetically) enacted for homosexual equality would have come more quickly from the courts. The courts would have upheld fundamental human rights to privacy, to equality and to full human equality and dignity more speedily. This is borne out by the experience of Europe. Even today, basic equality is still denied to my segment of Australians. Governments and Parliaments endorse or refuse to remove, discriminatory laws. The ballot box has denied us full equality, as it continues to do to several other minorities in Australia. So on this point, Manning Clark was correct to sound a cautionary note about Australia's self-satisfaction with the ballot box.

Manning Clark was also correct in appreciating that the ballot box is just the beginning of any democratic process. Democracy is not about the game of elections. It is about true accountability of rulers and giving the electors real choices. In short, it is not about tweedle-dum and tweedle-dee. The changing character of politics, the shifts of power and the demands of new media have all too often frustrated the carrying into effect of the assumptions of our Constitution concerning the way the Parliaments will function and the way the Executive Governments will be answerable to them. Sometimes actualities turn the letter of the law on its head.

And perhaps Manning Clark, the prophet, in his call to us to replenish the nineteen century notions of electoral democracy, was prescient beyond even his own understanding. Since his death in 1991, we have seen the ever-growing emergence of phenomena that make national parliaments, such as our own, relatively powerless in the face of global forces. This is so despite the ballot box. Such forces may include bodies like the World Bank, the World Trade Organisation, the IMF and so on. They are substantially impervious to the electoral will of our citizens.

Or they might include the sheer economic clout of trans-national corporations, accountable to far away shareholders and the NASDAQ indifferent to local regulation. Or the vast complexity of global problems, like how to combat AIDS. Or how to regulate patenting of the human genome. Or how to make the slow moving organs of the United Nations more accountable to the people of the earth. These global forces will not go away. They will shape Australia's destiny in the century to come. But we have to see our electoral democracy now for what it is in relation to global and regional forces. The future, controlled by technology and economics, is probably not the libertarian place that Manning Clark dreamed of. But it is the only future we Australians are likely to have. Now we must look out, as he taught, and see ourselves in relation to our region and to the world. Looking inwards and understanding ourselves and our history is no longer enough.

Before it was possible for Australians to look the world in the eye, they had to know who, in all their diversity, they were. Manning Clark helped in that process. If he made a few mistakes of fact or opinion, so what? All of us do. His over-reaction, as I would see it, to the indelible Britishness of our institutions was part and parcel of the need he felt to realign our nation's perspective to the realities of its geographic, strategic, political and historical realities. Until we came to peace with those realities, we could never solve the big issues facing us. Ending White Australia. Terminating discrimination against Aboriginals. Embracing multiculturalism. Closing the chapter of sectarianism. Ridding our society of sexism. Throwing out homophobia. Respecting minorities. Protecting the economically disadvantaged. Finding our place in global movements of money and power.

The progress we have made on all of these fronts is itself, in part, a tribute to the strength of Australia's institutions. At their core, those institutions depend for their legitimacy on the ballot box. In practical terms, this the only way we have yet discovered to reflect the will of the people who make up our Commonwealth. But Manning Clark was right to see the imperfections of electoral democracy in Australia. As I have shown, those imperfections do not lie in how we vote and how the electors' will is ascertained and upheld. In these respects we are, I think, without peer. It lies, instead, in what then happens. And, increasingly, in the extent to which votes count for much after the polls are declared.

A century of federation is definitely not the occasion for self-flagellation or black armbands. Neither is it a time for unrealistic schemes. For most of us, it is a time for honesty, a measure of pride, and a few modest proposals for reform, which seems to be all that the electors of Australia will tolerate in the short run.

But then there are the dreamers. Australians need them too. They are the people of poetry and1 philosophy. They are the mystics and the prophets. They are the romantic and ambivalent soothsayers. Such people do not march to the common drum. They hear a distant melody. Their life's work is to listen, imperfectly to describe it to others and, as they are compelled, to keep in step with its tune. Manning Clark was such a one. We Australians are his beneficiaries.

Australian Security Intelligence Organisation.

S Holt, A Short History of Manning Clark (1999) 80 ("Holt").

Holt, 237.

He had an "absolute obsession with Australia and he passed that wonder and pride on to us". Thomas Keneally in ANU Reporter, 12 June 1991, 1.

Holt, 80.

T W A Baker, "Manning Clark", in Overland 124-1991, 28 at 29.

Holt, x.

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H Stretton, "Clark on Democracy" in Australian Book Review, No 227, January 2001, 14.S Davies, "The Teacher" in C Bridge, Manning Clark - Essays on His Place in History (MUP, 1994) 137 at 151 ("Bridge").

M Dixson, "Clark and National Identity" in Bridge, at 188.G P Shaw, "A Sentimental Humanist" in Bridge, 30 at 33.

S Macintyre, "'Always a Pace or Two Apart'" in Bridge, 17 at 18; cf M Dixson, above n 9 at 196.

J Wormington, "'I'm Sorry, Very Sorry ...'" in Bridge, 104 at 111; J Hirst, "The Whole Game Escaped Him" in Bridge, 117.

J Wormington, above n 14 at 104.

M Dixson above n 11 at 205.

Ibid at 193.

D Craven, "The Ryan Affair" in Bridge, 165 at 186.

Max Harris cited Holt, at 190.

Holt, 224; J Rickard, "Manning Clark and Patrick White: A Reflection" (1992) 25 Australian Historical Studies 116.Holt, 83.

Letter to Kathleen Fitzpatrick, cited Holt, 221.

Holt, 1.

J Warhurst, "In the Public Arena" in Bridge, 153 at 162.

Chamberlain Lecture (1977) cited by Warhurst, ibid at 161.

Loc cit.Holt, 94.

Holt, 199.

K Inglis, "Remembering Manning Clark" in Overland, 124-1991, 23 at 27.

The phrase is Geoffrey Bolton's. See D Craven, "The Ryan Affair" above n 18 at 187; cf P Cochrane, "The History Man", Eureka Street (1999) Vol 9 No 938 at 39; cf S Macintyre, "Why Do the Tories Hate Manning Clark?" in Symposium: Defending Manning Clark, Labor Forum, 17 at 18.

The words are those of Dr John Hewson, leader of the Liberal Party and Leader of the Opposition in the House of Representatives Condolence Motion debate. See Holt, 231.

K Inglis, "Remembering Manning Clark" in Overland, 124-1991, 23 at 27.

Australian Constitution, s 28.

For Manning Clark's view see Holt, 176.

Holt, xi.

Holt, 59.

The Economist, 20 January 2001, 41.

New York Times, 27 January 2001, A5; International Herald Tribune, 27 January 2001, 3.

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The Times, 1 February 2001, 15.

Resolution of the Supreme Court of the Philippines, 6 February 2001, 5.

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Estrada v Desierto; Extrada v Macapagal-Arroyo, decision of the Supreme Court of the Philippines, en banc, unreported, 2 March 2001
<http://www.supremecourt.gov.ph/146310.15.htm>

United States Constitution, Art II, section 1.

B Ackerman, "Anatomy of a Constitutional Coup" in London Review of Books, 2001 (forthcoming). Professor Ackerman is Professor of Law at Yale Law School.

Ibid, 5.

Bush v Gore 531 US .... (2000) 7; cf J Bleich and K Kelly, "Bush v Gore" (2001) 48 Federal Lawyer (No 2) 38-41.

Ibid per Stevens J, 7 of print.

R D Novak, Washington Post, 14 December 2000, A35 cited R Bader Ginsburg, "Remarks on Judicial Independence: The Situation of the US Federal Judiciary", unpublished paper for the University of Melbourne Law School, January 2001 ("Ginsburg"), 6.

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D Montgomery, "Also Heard: 'Hail to the Thief'" in International Herald Tribune, 19 January 2001, 3.

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M D Kirby, "Attacks on Judges - A Universal Phenomenon" (1998) 72 Australian Law Journal 599.Later reports on non-official counts contained conflicting opinions on whether counting of the votes would have given the election in Florida to Mr Bush or Mr Gore. See eg "Newspaper Counts Show Gore Should Have Won It", The Australian, 31 January 2001, 9; Miami Herald, 13 March 2001, 1 ("Dade Undervotes Support Bush Win"; Palm Beach Post,

11 March 2001, p 1 "Over-votes cost Gore the election in FL" (referring to 6,600 votes lost by the "butterfly" designed ballot). Such unofficial counts lack the imperative of accuracy which electoral authenticity and impartial legal supervision would tend to ensure. This is why Stevens J's comment in Bush v Gore remains valid. We will just never know who the real winner of the Presidency was, attributing to each voter the privilege of having his or her vote formally counted in a poll that truly mattered.

G Winterton, "The Constitutional Position of Australian State Governors" in H P Lee and G Winterton (eds) Australian Constitutional Perspectives, (LBC, 1992), 274 at 304: affording a case study on the consequences of the Tasmanian election 1989.

J Killen, Inside Australian Politics (Methuen, 1985), 48.

Ibid, 51.

Sue v Hill (1999) 199 CLR 462 at 537-539 [195]-[295], 559-560 esp [258]. The Commonwealth Electoral Act 1902 (Cth), s 197(iv) constituted the High Court of Australia as the Court of Disputed Returns for the Federal Parliament.

Chanter v Blackwood (1904) 1 CLR 39.

Blundell v Vardon (1907) 4 CLR 1463.

Keane v Kirby (1920) 27 CLR 449 at 465.

Blakey and Fidley v Elliott (1929) 41 CLR 502.

Cane v McClelland (1962) 111 CLR 518 at 527.

Free v Kelly (1996) 185 CLR 296; Sykes v Cleary (1992) 176 CLR 77 at 102.

Australian Constitution, s 15.

Ibid, s 5 (Senate), s 24 (House of Representatives).

cf In re Wood (1988) 167 CLR 145.

Commonwealth Electoral Act 1919 (Cth), ss 360(vii), 374(iii).

Bush v Gore 531 US ... (2000), at 5 per curiam referring to McPherson v Blacker 146 US 1 at 35 (1892).

McGinty v Western Australia (1996) 186 CLR 140 at 202-204, 223. Contrast 171, 180, 236-237, 285.

H Colebatch, "Manning Clark - Myth and Reality", Australian and World Affairs No 12 Autumn 1992, 37 at 46.

Holt, 199.

Peter Ryan, cited P Craven "The Ryan Affair" in Bridge, 178.eg Mabo v Queensland [No 2] (1991) 175 CLR 1; Wik Peoples v Queensland (1996)

eg Toonen v Australia (1994) 1 Int Hum Rts Reports 97 (No 3) reproduced in H J Steiner and P Alston, International Human Rights in Context, (Clarendon, 1996), 545-548. The decision of the Human Rights Committee led to the passage by the Federal Parliament of the Human Rights (Sexual Conduct) Act 1994 (Cth).

Law Reform (Decriminalisation of Sodomy) Act 1989 (WA), Preamble.

Holt, 83, citing Manning Clark: "The Liberals are afraid of the electoral consequences of presenting a case for conservatism, and Labour has been terrorised out of the camp of radicalism. So for the moment, we have the Conservatives posing as progressives, and Labour as moderates. I wonder whether we will have to pay a heavy price for being contemptuous of conservatism, and being too timid to encourage radicalism".

In this genre may fall the Third Barton Lecture by Professor Mary Kalantzis, reported Sydney Morning Herald, 21 February 2001, 18 and G Williams, "Out of Date Constitution Will Cost Dearly", reported Australian Financial Review, 21 July 2000, 34; G Williams, "Constitution Remains a Dud Vehicle", Australian, 1 January 2001, 15. "A New Nation Founded on Racism and Genocide", 18.

G Henderson, "A Birthday Bash by and for the Pollies", Sydney Morning Herald, 2 January 2001, 10; cf D Flint, "Nation Founded on Foresight, Not Folly", Australian, 5 January 2001, 11.

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eg "Getting Down to Business", Australian Financial Review, 3 January 2001, 30; M Sexton and C Saunders, "Durable, But in Need of a Makeover", Australian Financial Review, 4 January 2001, 29; A Clark, "Boom and Bust Birthed a Nation", Australian Financial Review, 29 December 2000, 25; C Saunders, "Updating Our Democracy", Sydney Morning Herald, 19 January 2001, 11; A M Gleeson, "Celebrating a Historic Coming of Age", Sydney Morning Herald, 27 November 2000, 10; J Spigelman, "A Nation Wise Beyond Its Years", Sydney Morning Herald, 11 July 2000, 13; C Saunders, "Founding Blueprint Has Faded With Time", Australian, 5 July 2000, 15; P Kelly, "A Nation Born of Two Fathers", Australian, 6 July 2000, 7.

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