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Many thanks Greg for that very kind introduction. It is an enormous pleasure to be here this morning and I formally extend my thanks to the Anglo-Australian Lawyers Society for the invitation to speak at this delightful venue.

My title this morning involves a subject which has interested me as an academic over the past fifteen years. In thinking about today's presentation, however, I realised that I had been thinking about the issue of British race patriotism in an unarticulated way for most of my adult life. For that reason, I chose a slightly quizzical title – thoughts from an interested party. I thought it might be a useful frame for what I am saying today to begin by explaining why I think I am interested party.

My interest in British race patriotism in Australian history does not come from any birthright connections with the United Kingdom. I was born in Brisbane, to parents who were themselves, depending on whom one counts, fourth or fifth generation Australians. I also cannot claim that my interested party status arises out of any eminence of my ancestors in the United Kingdom. My father's side of the family – the Lunney's – are Irish Catholic peasantry hailing from Enniskillen in County Fermanagh, now in Northern Ireland but, even in the mid 19th century when my forebears emigrated, a bastion for Protestant English and Scottish farmers. That was the posh side of the family. My mother's side hailed from Greenore, in County Louth, once a fishing town but now largely derelict and decrepit. When in the mid-1990s I went to show my new girlfriend where the Sharkey's had come from in Ireland we drove through it at night without realising it.

Such a background is at first glance not a fertile breeding ground for a British race patriot. Yet, remarkably, my father was a British race patriot of the highest order. This was not borne from his own travels – he did not leave Australia to travel to the United Kingdom until he was 50 – nor from a preponderance of British friends. Rather, my father's attachment to the United Kingdom was based on a community of identity. Born in 1933, he grew up in a world Boys Own Annuals, of Biggles, of the glories of the English language and literature. British race patriotism for him was to bask in the achievements of high 'culture', to gain a sense of self from that sense of connection.

Unlike my father, I did not have to wait until I was 50 to go to the United Kingdom. I was 22 when I first visited and 25 when I was fortunate enough to study in Cambridge. I spent almost 13 years in the United Kingdom, living mainly in London, before returning to Australia and spending the next 14 years here. The past five years have seen me spend about three quarters of the year in Australia and a quarter in the

United Kingdom. I now have appointments at both Australian and English universities. I am a dual citizen, acquiring my British citizenship by naturalisation once the Australian government allowed for it in 2002.

I don't for one minute claim to be able to get completely into the heads of earlier generations of Australians but I think I am interested party because my background has led me to interrogate, rather than simply accept, Whiggish accounts of Australian nationalism that revel in a storyline that sees a linear development from the repression of a white Australian nationalism to the triumphal escape from the imperial yoke into our own Elysian fields. And once I started to interrogate these myths, I was immediately confronted with a dilemma.

On the one hand, as an undergraduate history student at the University of Queensland during the mid 1980s, I was exposed to the 'thwarted nationalism' view of Australian identity – the idea that there had been a nascent Australian identity that had arisen almost as soon as white settlement began in Australia but had been quashed by a repressive elite of what Manning Clark described as Austral-Britons. These Austral-Britons, while not necessarily castigated as evil, were nonetheless on the wrong side of history. Their contribution to Australian development was essentially negative. The real heroes were those who proclaimed an Australian identity separate from its British base, an identity borne out of Australia's unique geography and mix of British races (both free and convict). Manning Clark was at the forefront of such views, as was Russel Ward, whose landmark book, *The Australian Legend*, published in 1957, finds the roots of Australian egalitarianism and pragmatism in the peripatetic bush workers of the mid-19th century and beyond. The earlier generation of historians, such as Ernest Scott at the University of Melbourne, who largely tried to explain Australian development in terms of its British connections, were dismissed. Today, I suspect they would have been labelled un-Australian.

But history was not my only discipline. In my parallel legal studies, none of this history made an appearance. In that setting, however, the judges of Australian courts, many of whom were sitting in courts at the time of the unfortunate British suppression of Australian identity, were still being cited in my legal studies. Not just cited, but often lauded. It did not take long for us to learn that Sir Owen Dixon was once considered perhaps the pre-eminent common law judge in the late 1950s and early 1960s but he was far from alone. True, my law degree of the early 1980s contained many more English judgments than today but there was no shortage of Australian precedents cited in support of the legal rule and principle under discussion.

The contrast between the legal and historical approaches to twentieth century Australian history led me to question how these competing visions could be reconciled. It is a question I have been trying to answer for most of my academic career. How could Dixon, Isaacs, Griffith, Evatt, Jordan and Cussen be recognised as leading 'Australian' lawyers at the time when the notion of what it meant to be Australian was supposedly being crushed by a British establishment hell bent on imposing their own values on Australian society? Conversely, if these judges were in fact merely puppets of a British elite, what claim did they have to recognition as Australian judges?

To the extent that I have found an answer it has been found in history and not law. Academic lawyers rarely engaged with these questions and when they did the assumption was that Australian legal history throughout the twentieth century was constructed around a binary: a period of judicial subservience where Australian courts simply followed English decisions and demonstrated little judicial ambition and creativity; followed by a period of liberation where judges were free to declare the law 'for Australia' free from the constraints of the imperial legacy. Although precise dates were hard to come by, the initial break began in the 1960s but was fortified by the Whitlam government's attempt at constitutional reform and cemented in place by the Australia Acts of 1986. The collection of essays edited by Ellighaus, Bradbrook and Duggan, *The Emergence of Australian Law*, published in 1989, is an exemplar of this kind of approach.

Yet the flaws with this approach were pointed out in a review of the work by the English Cambridge law academic John Collier, which appeared in 1991. Commenting on Ellinghaus' chapter on contract law - a chapter that among other things criticised Australian contract law's reliance on its common law roots – Collier, provocatively, noted that it would be hard to see that a development away from this:

> …would help a Bondi bather who buys a defective surfboard to know his rights, or two Sydney-based corporations contemplating a joint venture. Moreover, although the writer lists six fundamental differences between Australia and England, such that the former is much bigger than the latter, and has a much smaller population, and that Australia is near Asia and Oceania, whereas the United Kingdom is not, it is difficult to see how any of them, or all together, could help to determine whether a contract should require consideration, or the circumstances in which mistake as to the other party renders a contract void or voidable. (One could add to the author's list the fact that Australia has kangaroos and dingoes and we do not, this would be just as relevant and helpful.)

At the heart of Ellinghaus' critique was the sense of inferiority that Australian contract law exhibited: in Collier words, Ellinghaus disliked the 'excessive reliance of Australian judges and text-writers on rules propounded by the English courts, particularly when the point under discussion has not been decided in Australia, and he has a swipe at the legal "cultural cringe" towards England. One can only agree that this well-known phenomenon is extremely tiresome, especially to an Englishman.' Not everyone will appreciate Collier's deliberate pot-stirring but it seemed to me, then as now, that he was on to something quite significant. The Australian law of contract was not something that was external and independent of the English common law on which it was based. That, however, did not make it foreign law. The reason that questions of consideration and mistake in contract law were relevant to Australian lawyers was not because it was foreign English law but because it was their law. To a commentator of Ellinghaus' generation, that distinction might have seemed impossible because to be Australian was not necessarily to be British. However, by transferring that binary distinction in national identity back into the twentieth century we completely misrepresent the nature of both 'Australian' law and the contribution to the development of an 'Australian' law made by Australian judges, lawyers and legislators.

The idea that the self-conception of Australians of their national identity encompassed dual loyalties was most famously articulated by the historian WK (Keith) Hancock in his 1930 book, Australia. Chapter 2 of that work was entitled 'Independent Australian Britons' and Hancock detailed how Australian national identity comprised 'the ability to love two soils'. Australians were not 'either' British or Australian: they were both. In my view, attempts to explain the contribution of Australian lawyers to their common law cannot be understood without recognising it was never contemplated by Australian lawyers that their law could ever be anything other than the common law. It was not imposed on them: the common law was widely seen to be part of the birthright that British settlers took with them when they conquered or established new colonies. The idea of an Australian judge proclaiming a common law that was somehow outside the common law tradition was simply a non sequitur. Yet this is exactly what the Ellighaus approach seeks of find. As it is not there, for Ellinghaus, there is only one conclusion: Australian judges lacked the tools to declare an exceptional Australian law and hence engaged in a form of cultural cringe in replicating English law in Australia.

I am bound to say that I find this approach ahistorical and unconvincing. Apart from it not being in accord with conventional internal views of the merits of our best twentieth century judges, it assumes from structural analysis rather than detailed empirical research what Australian judges actually did when deciding cases. Once we recognise that the development of the common law was perceived as a corporate

project, one in which Australian judges could play their part, a very different picture emerges. As far back as 1938, Victor Windeyer in his *Lectures on Legal History* noted that 'the British people in Australia had developed the common law to meet their own peculiar problems.' Despite assertions of the 'one common law for Empire' principle that the Privy Council occasionally espoused, the reality was that both the content of the common law and the results of its application varied throughout jurisdictions. If we start to consider Australian legal contributions throughout the twentieth century by looking at what judges did, rather than what they say they did, and through the lens of British race patriotism, we will see a very different story from the stereotype that accounts such as Ellinghaus provide. In short, we are right to be proud of the contribution of Griffith, Isaacs, Dixon, Evatt, Cussen and Jordan. Far from practicing, in Roscoe Pound's words, mechanical jurisprudence, these and many other Australian judges played their part in developing their common law. Perhaps this is not a surprising conclusion: given their personalities and achievements, what is remarkable is any suggestion that they would have been passive recipients of an imposed law.

In my book on Australian tort law in the first half of the twentieth century, I provide examples from a wide variety of torts where Australian judges, and occasionally legislatures, adapted the common law to what was suitable for Australian conditions. This morning I want to briefly look at two situations where it has been suggested that earlier English legal rules were applied in Australia by dint of hierarchy rather than appropriateness.

The first relates to the immunity granted to highway authorities in respect of non-feasance. At common law, this rule is traced back to a decision of the Privy Council in an Australian appeal, *Municipal Council of Sydney v Bourke* in 1895, which itself interpreted an earlier Privy Council decision, *Borough of Bathurst v Macpherson* in 1879. Commenting on these cases in 1987 in *Law and Government in Colonial Australia*, Paul Finn argued that on two occasions the distant tribunal (the Privy Council) was 'thus to thwart the measured development of the colony's law.' The sense that separate Australian development was curtailed because of the need to follow English rules also finds expression in *Brodie v Singleton Shire Council*: at various stages the joint judgment of Gaudron, McHugh and Gummow, and also the judgment of Kirby J, suggest that the High Court decision of *Miller v McKeon* in 1905 might have been the starting point for a different Australian approach to the nonfeasance issue but later cases entrenched the perhaps unsuitable English rule of immunity. With very great respect to their honours, I think this is a misreading of *Miller v McKeon*. Miller involved a claim by a person injured when they fell off the edge of a cutting at night, his horse having drawn his buggy onto the higher ground between a fence and the edge of the

cutting. The cutting had been made to improve access to a crossing of the Namoi River and the plaintiff alleged the New South Wales government (McKeon was a representative defendant as was required under the legislation that abrogated Crown immunity at the time) was careless in not fencing the embankment created by the cutting. What is striking about the judgment in the High Court is that Griffith CJ did indeed refuse to accept certain English rules relating to the dedication of highways: rules suitable for England might not be suitable for a new country like Australia. That led Sir Samuel to impose only a standard of reasonable care on the government, a standard that also took into account that road users in country Australia had to be aware of the limits on what the government could do in creating roads.

It is quite clear, then, that both Griffith CJ and O'Connor J were prepared to depart from an unsuitable English rule. Equally interesting is the fact that Griffith CJ actually cited *Bourke* – the Privy Council case that affirmed the non-feasance immunity – before saying: 'In my opinion there is no duty cast upon the Government except that in doing the work they must take reasonable precautions not to cause injury to people who are invited to make use of the work when completed.' This was hardly surprising: the whole emphasis of the *Miller* judgment was to recognise the limits imposed on government in creating infrastructure in what was (for white Australia) undeveloped country. Three years later, attempts to interpret New South Wales legislation as imposing an obligation to repair on a highway authority were rejected by the Full Court of the Supreme Court of New South Wales. Chief Justice Sir Frederick Darley showed no signs of dissatisfaction with the highway immunity rule:

> This liability is so far reaching in a country such as this, that it is very necessary to be very certain that the statute has imposed a liability which really amounts to this: that the shire or municipality within its own area becomes an insurer to each member of the public against accidents arising from the non- repair of the road. A public road may run through a shire for some 50 miles, and if every portion of that road is to be kept in such a state of repair as will insure against accidents occurring from the non- repair, no amount of rates which a shire can raise (the amount is limited) would suffice

The case was heard at the time of wide public debate as to whether the legislation should be amended to remove any doubts as to whether it imposed an obligation to repair: once the decision was handed down, the legislation was not amended to impose such an obligation. My point this morning is not to argue over the desirability or otherwise of highway authority's immunity from non-feasance – although the legislative response to Brodie suggests that the issue is no less divisive today than it was 100 years earlier – but

simply to say that Australian courts engaged with the immunity not as passive recipients of an unsuitable English rule but as one that was especially *appropriate* for Australian conditions.

The second area where Australian courts made a distinctive contribution, and fashioned their own rules, was in relation to liability for fire. At the beginning of the 20th century, there remained uncertainty in English law as to whether there was any rule of strict liability for fire, and if there was, what its limits were.

The basis of liability for damage caused by fire, whether lit by another or by the occupier, was a recurrent feature of litigation at all levels of court in Australia. The reasons are obvious: fire was a common tool used in agriculture and pasturing where it was considered a valuable practice, but in the Australian environment, the burdens it placed on neighbours if the fire escaped were enormous. I won't this morning go through the many cases dealing with the issue but what one finds is that Australian courts vacillated between imposing strict liability, whether under a special fire rule or under *Rylands v Fletcher*, or only imposing liability for fault. Today I will focus on only two cases, the first the decision of the High Court of Australia in *Whinfield v Land Purchase Management Board of Victoria* in 1914. Here the plaintiff's crops were damaged when a fire deliberately lit by an employee of one of the defendants escaped. Of particular interest was the attempt to make the occupier of the land on which the employee camped liable for the fire he had lit. For the first time in the case, it was argued before the High Court that the defendant occupier should be liable for the spread of the fire based on either a special rule relating to fire or under the rule in *Rylands v Fletcher*. The arguments were dismissed without calling on counsel for the defendants. In one sense, it is hard to see why both Griffith CJ and Isaacs J dealt with the wider issue of the nature of liability for fire: it was very likely on the facts that the employee was a trespasser and hence a stranger to the occupier and that would have been a defence under *Rylands v Fletcher* and very probably to any special strict liability rule for fire if it still existed. But there was a related, and very Australian, context that was in the thinking of Griffith CJ. What would be the position of the occupier if the person who lit the fire was on the land with the occupier's consent? Griffith CJ was in no doubt:

> It would be a shocking thing to lay down as a rule of law that in a country like Australia, where probably hundreds, if not thousands, of men travelling on foot in sparsely settled districts ask every day for permission to camp for the night on private property, the owner by granting such poor hospitality becomes responsible for the lighting of a fire by the wayfarer to boil his 'billy' or keep himself warm.

Even when it seemed to be clear that, if there was any strict liability for the spread of a fire one had personally lit it existed under *Rylands v Fletcher*, there was no sense that this was anomalous. In *Hazelwood v Webber*, decided by the High Court of Australia, in 1933, it was held that the occupier of land who lit a fire for the purpose of clearing the land was engaged in a non-natural use of land (a necessary requirement to establish the tort). This was despite the fact that the practice of burning land to clear was common, even in summer (the events took place in February). The joint judgment of Duffy CJ, Dixon, McTiernan and Rich argued:

> Now in applying this doctrine to the use of fire in the course of agriculture, the benefit obtained by the farmer who succeeds in using it with safety to himself and the frequency of its use by other farmers are not the only considerations. The degree of hazard to others involved in its use, the extensiveness of the damage it is likely to do and the difficulty of actually controlling it are even more important factors. These depend upon climate, the character of the country and the natural conditions. The question is not one to be decided by a jury on each occasion as a question of fact. The experience, conceptions and standards of the community enter into the question of what is a natural or special use of land, and of what acts should be considered so fraught with risk to others as not to be reasonably incident to its proper enjoyment. In Australia and New Zealand, burning vegetation in the open in midsummer has never been held a natural use of land…

Two points are worth making in relation to this paragraph. The first is that the extract gives no sense that strict liability for the spread of fire was in all cases inappropriate. All would depend on the circumstances. Strikingly, the question of when strict liability existed was kept as a question of law, not fact, so could not be watered down by sympathetic local juries feeling that it could have been them being sued. There is a strong sense – as there was in many cases throughout the first half of the twentieth century – that some fires, at least, were lit at the lighter's peril.

The second point I would make is similar to the one in respect of highway immunity: that there has been a tendency to see the rejection of any strict liability rule for fire – either under a special rule or as under *Rylands v Fletcher* – as a move to reject an English rule unsuitable for Australian conditions. In *Burnie Port Authority v General Jones*, the decision of the High Court that condemned *Rylands v Fletcher* to history as an Australian cause of action, the brief discussion (and rejection) of any special strict liability rule for fire

suggested strongly its inappropriateness for Australian conditions. Hence in the joint judgment of Mason CJ, Deane, Dawson, Toohey and Gaudron JJ it was said that the '*ignus suus* ' (strict liability for fire) rule was formulated as 'appropriate to urban circumstances in medieval England' and that 'though fire is an exceptional hazard in Australia, contemporary conditions in this country have no real similarity to urban conditions in medieval England where the escape of domestic fire rivalled plague and war as a cause of general catastrophe'. Similarly, Brennan J thought it arguable that the 'natural and social conditions of this wide brown continent' made absolute liability rules for the escape of fire an intolerable burden. Of course, it is perfectly possible, as the law now has, to reach a position that there should be no strict liability rules for the escape of fire but the appropriateness of the rule to Australian conditions gains nothing by hinting that its application in Australian conditions was the result of solely of imperial heirarchy. Neither the general history of the use of fire in agriculture or the legal responses to it throughout the first half of the twentieth century indicate any sullen judicial application of an imposed English rule that did not work in the very different conditions of Australia.

In a very real sense, Australian (and New Zealand) courts reinvigorated discussion of these rules. There were very few English cases on strict liability for fire and the ones that were decided in the first half of the 20th century were uninspiring or unhelpful, involving situations such as a fire in a domestic setting caused by faulty wiring or a chauffeur carelessly staring a car and causing a fire that burnt down a garage. In an era when Australian cases were almost universally ignored in England, the English *Solicitors Journal* opined that a South Australian case from 1912 might actually provide guidance to English courts such was the importance of the Australian discussion. More broadly, the fire cases are an example of what the Austrian Marxist legal theorist, Karl Renner observed about the longevity of legal rules: that they keep their outward similarity with the past while the substratum of reasons that support the rule change with underlying societal changes. Strict liability for fire may have been appropriate for Australian conditions not because of the reasons that created the rule in medieval England but for reasons that were distinctly Australian.

A pivotal moment in Anglo-Australian legal relations came with the decision of *Parker v R* in 1963, where a unanimous High Court held that it would not follow the 1961 decision of the House of Lords in *DPP v Smith*. I have recently argued that the decision in *Parker* should be seen as part of the fundamental realignment in Anglo-Australian relations brought about by the Macmillan government's decision to seek membership of the European Economic Community. The High Court had never formally been bound by

decisions of the House of Lords so on one level the decision, while clearly significant, did not alter the existing arrangements. Yet the gravity of Dixon's words – 'I say too unfortunately for I think it [*Smith*] forces a critical situation in our (Dominion) relation to the judicial authority as precedents of decisions in England' – hints at the wider break that was occurring in Anglo-Australian relations. While the profundity of the pronouncement seeps through, British race patriotism was far too deeply entrenched in the Australian judicial psyche to be lightly cast aside.

In my recent lecture, I argued that the road from *Parker* to the Australia Acts of 1986 needed to be interpreted in part through the eyes of the British race patriots who were responsible for exercising the new freedom that *Parker* allowed. There was certainly no sense of triumph in Dixon CJs language. Nor was there in the judgments and writings of Sir Victor Windeyer. Windeyer is an important figure in understanding the complexity and nuance surrounding the emergence of an explicitly Australian law. While he was not alone, he was perhaps the only senior judicial figure of the period who grappled with what the increased freedom of Australian courts to depart from English authority might mean. For my purposes, Windeyer is especially interesting as he was undoubtedly a British race patriot. His family had lived in New South Wales under British rule for five generations. As early as 1933, when he attended the British Commonwealth Relations Conference as an Australian delegate, he was surprised by the 'strange forms' that Canadian nationalism took and the first reason he identified was race: 'In the first place Canadian nationalism is not based as is Australian national feeling on common British stock, on federation, and on the achievements of the war years.' His connection to the British Empire was based not on subjugation but on kinship, something that was reinforced by his involvement in the Second World War.

Windeyer was a member of the *Parker* court so we can take it that he shared in the gravitas that surrounded Dixon CJ's choice of words. But I doubt whether Windeyer saw *Parker* as creating a new type of freedom. As he pointed out in a speech he gave to the New Zealand Law Conference in April 1966, Australian legislatures had been free to amend the common law by statute in accord with the quite limited strictures of the *Colonial Laws Validity Act 1865*. For the reasons I've already mentioned, the cultural milieu was as much a barrier to legislative innovation as the legal constraints but Australian legislatures did indeed exercise this power, sometimes to reject an English position. Windeyer would have been aware of s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* which introduced a new statutory claim for family members of a victim who was physically injured for what we would today describe as psychiatric injury that was causally related to the victim's physical injury. More broadly, as he expressed in both

Skelton v Collins and *Uren v John Fairfax & Co* – both tort cases – the common law had to apply in very different social and environmental conditions and it was inevitable that this would lead to some variance. The failure to follow a House of Lords decision 'indicates no disrespect for the high authority of their Lordships' House, no breaking of the ties light as air, if we, having a duty to abide by the law that we have inherited and having in mind the way it has been declared here, feel unable to join in this.' But Windeyer saw no reason why this divergence in concrete rules should detract from the sense of unity that underlay the methods and fundamental beliefs of the common law. In his 1966 lecture, Windeyer suggested that Australian courts would look to the *corpus iuris* of the common law to declare what the law would be for Australia. English decisions would be important but not determinative. The idea that the common law 'position' would be the result of competition between judicial equals provided an answer as to how unity, disunity and harmony might happily co-exist in the post *Parker* world: method and underpinnings would be common, while specific rules were determined both by suitability for the particular environment and a consideration of possibilities from around the common law world. British race patriotism remained the glue that kept the common law 'common' amongst its users.

As we know now, while perhaps not quite the nightmare and the noble dream, the vision splendid did not last. First, the idea of a *corpus iuris* freed from the hierarchies of the past proved a step too far. Despite some early promise, the decision of the Privy Council in *MLC v Evatt* in November 1970, overturning the majority decision of the High Court, and the refusal of the House of Lords in *Cassell & Co v Broome* in 1972 to reconsider their earlier decision in *Rookes v Barnard* on the availability of exemplary damages in light of vociferous criticism of the High Court in *Uren v John Fairfax*, showed that, as far as English courts were concerned, old habits died hard. Secondly, Australian courts continued to be vexed by the ghost of *Commissioner for Railways (NSW) v Quinlan*, a Privy Council decision from 1964 that had arguably disapproved of an innovative line of High Court cases relaxing the strict rules on when a trespasser was owed a duty by an occupier. One senses even Windeyer's exasperation: in *Munnings v Hydro-Electric Commission* in 1971, the next High Court case to consider the issue after *Quinlan*, he said:

> It is a decision that has provoked critical, indeed disparaging comment in several parts of the common law world. The Court of Appeal in England has pointedly declined to be bound by it. But we are not at liberty to do that. As a strongly expressed reiteration of a rigid rule, the judgment of the Privy Council has been seen by many commentators as arresting the growth of the common law, which was proceeding, in accordance with traditional principles and

> methods, to meet the needs of men in modern times. The decision is binding upon courts in Australia. Therefore we, accepting our heritage of the common law of England, must not seek to subordinate the categorical rules of occupier's liability to the general and more generous doctrines of the law of negligence and of a common duty of care based on foreseeability of harm. For Australia as a whole that must now await the tardy action of seven Parliaments.

While the Privy Council had always been the elephant in the room in discussions of Australian judicial freedom, its formal position as the superior court in the Australian court system was increasingly anachronistic if the *corpus iuris* model of the common law Windeyer described was to come about.

Finally, the political ties that had begun to weaken in the early 1960s continued to fracture with the United Kingdom's continuing, and ultimately successful, attempt to enter the European Economic Community. That is not to say the ties of British race patriotism – on both sides – suddenly disappeared. In a particularly poignant letter from Richard (Lord) Wilberforce to Windeyer in January 1973, he wrote about the proposal to make Australians and New Zealanders obtain visas before entry to the United Kingdom:

> We feel bitterly about it and there have been strong things said in both House of Parliament. Nobody is in favour of this policy which has emerged from some dark corner of Whitehall… Whatever the Treaty of Rome may say, Australians and N-Z^{ers} so long as they keep coming will be <u>us</u> and not visitors

No doubt such sentiments were meant as genuine consolation for Windeyer but the ties were quickly moving from the institutional to the personal.

Windeyer's British race patriotism remained with him all his life: his last major lecture, the Commonwealth Lecture delivered at Cambridge in November 1977 is a defence of the benefits British race patriotism had brought to Australia. In hindsight, it reads as much as a lament for a lost world as a forward-looking assessment of Australia's place in the Commonwealth.

I have not time this morning to discuss the relationship between the *Australia Acts* and the demise of British race patriotism in Australia except to say there remains work to be done in fitting this legal landmark into wider Australian historiography. I hope I have started that process in my lecture. But I want

this morning to give the last word to the British race patriots. In 1909, the English travel writer John Foster Fraser visited Australia and published a book about this visit in 1910. It is an excoriating read, a work redolent of the political economy of the time. While he liked some things about Australia, some he clearly did not (such as tendency of Australians to proclaim Australia as the greatest country on earth having never been to any other). But the final paragraph of the introduction could have described the *zeitgeist* of the British race patriots in Australia:

> You have done what you have done because you come from British stock. No other race could have done what you have done. You live freely beneath the Union Jack. It is well sometimes to think what that means.

Australian lawyers for a good part of the twentieth century took this last sentence to heart. Viewed from the twenty first century, we might not like what that sentiment produced. No doubt they and the law they administered and created were imperfect. They deserve, however, much more than being unwanted footnotes in the story of the development of an Australian law.