- The Australian Constitutional Convention Council has had its first meeting and the Victorian Premier Mr Cain has been elected Chairman. The Australian Government was represented at the meeting although its attitude to the Council has still not been finally determined.
- The Convention passed a resolution that the Commonwealth should, within 12 months of the conclusion of a plenary session of the Convention, make a statement to the Parliament concerning its response to the proposals passed by the Convention.
- The proposal for fixed term Parliaments can be traced back to the work of the Convention. The idea was approved at the 1983 Plenary session of the Constitutional Convention and was first taken up by Victoria in 1984.

There have been two further developments in the area of constitutional reform.

Federal Cabinet has approved the nomination by the Attorney-General, Mr Bowen, of six people to form the commission to draw up a revised Constitution. They are former Prime Minister Gough Whitlam, former Victorian Premier Sir Rupert Hamer, Sir Maurice Byers, a former Commonwealth Solicitor-General, now at the Sydney Bar, Professor Leslie Zines, Dean of the Law Faculty of the Australian National University, Professor Enid Campbell of the Law Faculty at Monash University and Mr Justice John Toohey of the Federal Court. The possibility of appointing Malcolm Fraser was excluded when Mr Fraser was appointed to the Commonwealth Committee on South Africa. Mr Whitlam's term as Ambassador to the United Nations Educational Scientific and Cultural Organisation is due to expire during 1986. The Chairman will be Sir Maurice Byers, a former part-time member of the ALRC.

Mr Bowen proposes that the Commission be assisted by a wider group of about 36 people, split into about 6 committees and including lawyers, academics, businessmen, trade unionists, media figures (to assist in publicising constitutional reform) and others. The commission is to report by June, 1988. (*Age*, 3 December, 1985).

The other development is that the Commonwealth Parliament has passed the Australia Bill and the Australia (Request and Consent) Bill which are necessary to implement the agreement between the Federal Government, the State Governments, the British Government and the Queen to sever the residual constitutional links between Australia and Britain. The Bill was passed by the Senate on 2 December, 1985 having passed the House of Representatives the previous week. (*Age*, 3 December, 1985).

commercial disputes centre

Non nostrum inter vos tantas componere lites.

It's not in my power to decide such a great dispute between you.

Vergil, Eclogues, iii, 108

On 25th September 1985 the New South Wales Attorney-General Mr Terry Sheehan announced plans to establish a Commercial Disputes Centre in Sydney (*Australian Financial Review*, 26 September, 1985). The New South Wales Government is to fund the centre which is intended to provide parties to commercial disputes with a method of resolving those disputes which is faster and cheaper than commercial litigation. It is hoped that the Centre will serve as a forum not only for the domestic business sector but for the entire Asia-Pacific region. The Victorian Government has similar hopes for the Australian Centre for International Commercial Arbitration located in Melbourne which was officially opened by the Victorian Attorney-General Mr Kennan in August.

The New South Wales Government has appointed a committee of experts to review the needs to be catered for by the new Centre. The committee is chaired by the Chief Justice Sir Laurence Street and also has Justices Rogers and Smart as members. Mr Michael Ahrens a partner of the law firm Baker and

McKenzie in Sydney and the committee's Consultant/Director is co-ordinating the preparatory research.

disadvantages of the present system. The impetus for a new system of dispute resolution has come from the following disadvantages of the present system of commercial litigation:

- expense resulting from traditional formalised court procedures, the employment of highly qualified corporate lawyers and incursions into managerial time in the preparation of a case;
- delays caused by the number of cases in the court lists and cumbersome pretrial procedures; and
- a lack of technical knowledge on the part of most lawyers in cases which require particular expertise.

the proposed system. The emphasis of the new system will be on techniques of mediation and conciliation. It is proposed to investigate the Chinese and Japanese systems of dispute resolution to which such techniques are central.

It is anticipated that an arbitrator or mediator under the new system would either be an early retiree who was respected in the particular industry and familiar with the technical problems or a lawyer skilled in arbitrations or techniques of compromise who could conduct a hearing either by himself or with the assistance of an expert.

The role of the Supreme Court would be to provide support to the arbitrator rather than to supervise his or her activities. The court could, for example, at the invitation of the arbitrator, resolve disputed questions of law arising out of a contract or make orders for the sale of deteriorating cargo so as to minimise losses pending the resolution of a dispute.

Justice Rogers has said that the Commercial Division of the Supreme Court will be able to co-operate with the arbitrators in two ways. First, the Court will exercise its powers under the Commercial Arbitration Act 1984 to support the arbitration system by:

- appointing an arbitrator to fill a vacancy where no other method of appointment is reasonably available;
- removing an arbitrator for misconduct, susceptibility to undue influence, incompetence or lack of suitability to deal with a particular dispute;
- entering judgment in terms of an award and enforcing the award as a judgment;
- making interloctory orders;
- being slow to grant leave to appeal from an arbitration. Such an appeal can, in any case, only apply on a question of law arising out of the award and not on the ground of an error of fact or law on the face of the award. There is also provision for the parties to the arbitration to agree in writing to exclude even this right of appeal.

Secondly, the Court may refer particular issues or entire cases to arbitrators. His Honour has pointed out that

- amendments to the Supreme Court Act made at the same time as the enactment of the Commercial Arbitration Act 1984 give the Court a wide power to make rules concerning cases in which an entire proceeding or particular issues may be referred to an arbitrator;
- an adventurous use of the rule-making power could permit the appointment of experts as arbitrators to sit jointly with the judge as de facto assessors.

overseas experience. An alternative to litigation which has been used with success in the United States of America and recently adopted by the Zurich Chamber of Commerce is the 'mini trial'. In the mini trial, the

case of each of the disputants is put to a joint meeting of senior executives of the disputants. If the mini trial is successful, the disputants settle the dispute themselves on the basis of the facts before them. Mr Justice Rogers, a supporter of the mini trial concept (which, as he points out, is really a highly structured way of exchanging information and negotiating a settlement), has pointed out its advantages as a method of dispute resolution:

- the disputants are apprised of all the facts;
- the attention of top management is engaged at an early stage, before bitterness sets in;
- each side realises the strengths of its opponent's arguments and the weaknesses of its own arguments;
- the disputants are able to reach settlements which a judge could simply not provide.

current consultations. Consultations with the business community concerning the Centre proposed for New South Wales are continuing. A survey to determine the needs of the business community has been distributed and the replies are presently being received. The survey is designed to ascertain:

- the involvement of organisations or individuals in commerical arbitration (or other forms of dispute resolution) or litigation over the past 5 years;
- the relative importance to business people of the following factors in a dispute resolution process: simplicity, choice of arbitrator, choice of venue, choice of rules, expertise of arbitrator, the possibility of resolving disputes according to commercial custom or mercantile commonsense rather than principles of law, confidentiality, preserving goodwill between the disputants, cost of obtaining a resolution, involvement of company executives, delay in obtaining a resolution, finality and enforceability of the arbitrator's decision and the independence of the arbitrator;
- ways in which skilled arbitrators could be useful in resolving typical commercial disputes for particular industries;
- the possibility of utilising the proposed Centre for international dispute resolution.

Mr Ahrens hopes that a broad cross section of interested parties will respond to the survey. While the survey results are being assessed Mr Ahrens is organising workshops involving participants from business, government and the law to consider in greater detail the functions of the Commercial Disputes Centre. The Centre will be searching for its first SecretaryGeneral early in the coming year.

aboriginals, anthropologists and the law

> there can be no withholding of information simply on the ground that an anthropological researcher is of the view that it will not assist my level of understanding or that of the other participants . . . It is for me to decide what might assist my understanding and that of the other participants. I cannot allow that function to be usurped by other persons. It is simply not tenable that in a judicial investigation such as mine relevant information may be withheld on the basis of the exercise of discretion by somebody else.
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> Maurice J, *Warumungu Land Claim*, Reasons for Decision, 1 October 1985, 132

In the long-running Warumungu Land Claim orders were issued pursuant to the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s54 for the production of a large volume of materials gathered over a number of years by anthropologists, linguists and others acting on their own behalf, or on behalf of the Central Land Council or the Aboriginal Sacred Sites Protection Authority. Justice Maurice, the Aboriginal Land Commissioner, had to consider claims of legal professional privilege, public immunity and confidentiality raised in an attempt to avoid disclosure of field notes and other materials.