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24

*The Commonwealth of Australia: Themes and Traditions
in Australian Constitutional Law and History*
*Il Commonwealth australiano: temi e tradizioni
nella storia e nel diritto costituzionale australiano*

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THE COMMONWEALTH OF AUSTRALIA: THEMES AND TRADITIONS IN
AUSTRALIAN CONSTITUTIONAL LAW AND HISTORY

*Il Commonwealth australiano: temi e tradizioni nella storia e nel
diritto costituzionale australiano*



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In copertina: The Big Picture, the opening of the Parliament of Australia (9 May 1901, Melbourne). Painted by Tom Roberts (1853-1861) (Photo from Wikipedia)

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Introduction: The Commonwealth of Australia / *Introduzione. Il Commonwealth australiano*

AUGUSTO ZIMMERMANN

This special issue of *Journal of Constitutional History* is focused on themes and traditions in Australia's constitutional law and history. Written by leading Australian legal academics, the articles contained in this issue were especially prepared for a European public who may not be entirely familiar with the country's rich constitutional history.

Australia was colonised by Britain, and its path towards independence was gradual. It is not possible to identify a single event that marked the final break with the British Empire. Between 1855 and 1890, responsible government was achieved, and the Governors of the several colonies were bound to invite the leader of the largest party or coalition in Parliament to form the government. The majority party leader and the other members in his Cabinet remained in office as long as they commanded the support of Parliament.

In 1865, the British Parliament passed the *Colonial Laws Validity Act*, giving the

government of every colony in Australia the power to amend the common law received from England or to amend or repeal English statutes that were in force in the colony under the doctrine of reception. The British Parliament could still legislate for the colonies if it indicated that the law was also to apply to them.

Held between 1891 and 1899, representatives of every colony in Australia attended constitutional conventions which agreed on the elaboration of a federal Constitution. Upon the request of these colonies, the 'Constitution of the Commonwealth of Australia Act' was passed by the British Parliament on 5 July 1900, with Queen Victoria assenting to the Bill four days later. In September 1900, the Queen proclaimed that the Commonwealth of Australia would come into existence on 1 January 1901.

In 1931, the British Parliament passed the *Statute of Westminster*, stating that the *Colonial Laws Validity Act* would no

longer apply to the legislative powers of the Commonwealth Parliament. Likewise, the British Parliament would cease to make laws relating to the Commonwealth, unless explicitly requested to do so by the federal Parliament. In 1942, the *Statute of Westminster Adoption Act (Cth)* adopted the Statute of Westminster into Australian law with retrospective effect to 1939.

Because the *Statute of Westminster 1931 (UK)* did not apply to the Parliaments of the Australian states, the British Parliament passed the *Australia Act 1986* to remove its powers to make laws for Australia. The *Colonial Laws Validity Act 1865 (UK)*, which had given no power to colonial (state) parliaments to pass legislation having an extra-territorial effect, was repealed and the states finally received legislative power to introduce extra-territorial laws. The right of appeal from state courts to the Privy Council was also abolished. The right of appeal from the High Court of Australia to the Privy Council had already been abolished by the *Privy Council (Appeals from the High Court) Act 1975 (Cth)*.

Australia's Constitutional Framework

Australia has a federal system and a written (and rigid) constitution. Following the American model, the Commonwealth Constitution provides for a sharing of legislative powers between the federal Parliament and the Parliaments of the states. Each state has its own legislative power to elaborate their constitutions, parliaments, governments and laws, provided the explicit limitations in the Commonwealth Constitution are respected.

Inspired by the draft of the American Constitution, the first three chapters of the Commonwealth Constitution are headed 'The Parliament', 'The Executive Government', and 'The Judicature'. However, the relationship between the legislative and the executive arms reflects the British (Westminster) system of government and its conventions of responsible government, whereby a strict separation of powers between the legislative and the executive is not maintained¹. Responsible government is a system in which the Executive Government (the Prime Minister and other Ministers) is accountable to the House of Representatives, which is in turn accountable, under the principle of representative government, to the electorate. In *Nationwide News Pty v Wills* (1992) 108 ALR 681, the High Court defined representative government, together with the federal system and the concept of separation of powers, as 'one of the three main general doctrines of government which underlie the Commonwealth Constitution and are implemented by its provisions'².

Whereas no rigid separation of powers exists between the legislative and executive branches of government, the strict insulation of the judicial power from these two powers comprises a fundamental element of the Commonwealth Constitution³. Inspired once again by the American model, Section 76 of the Constitution allows the Commonwealth Parliament to grant original jurisdiction to the High Court in any matter 'arising under this Constitution, or involving its interpretation'.

Initially, the Constitution could be amended either by Section 128 or by an Act of the Imperial (British) Parliament.

The power of this Parliament to amend the Constitution unilaterally was terminated by the *Statute of Westminster 1931 (UK)*, which became operational in Australia only in 1942. Until 1986, the Constitution could theoretically be amended by an Act of the British Parliament upon request of the Commonwealth Parliament. This has never happened, and such a provision was repealed with the passage of the *Australia Act 1986 (Cth) and (UK)*.

As it stands, the Constitution can only be amended in accordance with the mode of alteration provided by Section 128. To amend it in line with Section 128, the Commonwealth Parliament has to submit the proposed change to a popular referendum in which the people must decide on whether to approve or reject the proposed change. For the referendum to pass successfully, the proposed change needs to receive the support a majority in the electorate as a whole as well as a majority of electors in a majority of states.

Since 1901, 44 proposals have been put to the Australian electorate. Only 8, or 18 per cent, of them have been successful. In the last constitutional referendum, in 1999, proposals for the establishment of a republic as well as adoption of a new preamble to the Constitution were soundly rejected. Curiously, 26 of these questions put to the people through referenda involved an attempt to enlarge the powers of the central government at the expense of that of the states. Only two of such proposals were carried, namely the social services proposal and the proposal to delete a discriminatory reference to Aborigines in 1967. This reveals the manifest will of the Australian people to resist the expansion of Commonwealth powers.

Absence of Bill of Rights

Curiously, the Commonwealth Constitution is devoid of a bill of rights because its framers believed that 'a Federal Constitution, which brings about a division of power in actual practice, is a more secure protection for basic political freedoms than a bill of rights'⁴. Since this federal Constitution is a document of limited powers, the federal government has only the powers granted by this document, and no more. Arguably, a bill of rights could be used as a pretext for the expansion of federal power. Sir Anthony Mason, when he was Chief Justice of the High Court of Australia, commented: 'The prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens... was one of the unexpressed assumptions on which the Constitution was drafted'⁵.

It is true, however, that various sections of the Commonwealth Constitution recognise particular and specific forms of rights and freedoms, for example: jury trial (Section 80); religious freedom (Section 116); freedom from discrimination (Section 117); right to property – acquisition of property must be on just terms (Section 51); and freedom of trade (Section 92). But generally speaking, under the Australian model of constitutionalism, one proceeds on the assumption of full rights and freedoms, and then turns to the law only to see whether there are exceptions to the rule. This being the case, it has been said that 'Australia is a common-law country in which the State is conceived as deriving from the law and not the law from the State'⁶.

Australia's Federal System

Australia is a federation of six states and two self-governing territories, the Australian Capital Territory and Northern Territory. These states and territories have their own constitutions, parliaments, governments, and laws. Each state maintains essentially the same relationship with the federal government. For example, Section 7 provides equal representation for every state in the Senate. Likewise, Section 51 (ii) restricts the power of the central government over taxation 'so as not to discriminate between states or parts of States'. Finally, Sections 51 (iii) and 88 impose uniformity to bounties and custom duties throughout the nation, and Section 99 informs that 'the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue give preference to one State or any part thereof over another State or any part thereof'.

The areas of federal legislative power are listed in Sections 51 and 52 of the Commonwealth Constitution. In addition to express concurrent (Section 51) and exclusive (Section 52) powers, the Commonwealth Parliament has express and implied incidental powers to deal with areas related to its grants of power within Section 51. Accordingly, the topics granted to federal legislative include areas such as marriage, quarantine and defence. And yet, other major areas such as health, education and industrial relations were not included in the list of federal powers.

The states were left with all the remaining legislative powers. Indeed, one of the main features of the Commonwealth Constitution is the express limitation on

the federal government. Whereas this government is limited to such powers as given by the Constitution, the remaining residue is left undefined to the states⁷. The rationale for this was given by the leading federalist Sir Samuel Griffith at the first constitutional convention in 1891: 'The separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government; to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves'⁸.

As can be seen, the framers' intention was to confer on the people of each Australian state the right to decide for themselves most of their legal issues through their own local legislatures according to their own local wishes. Thus A.V. Dicey, in a late edition of *Introduction to the Study of the British Constitution*, stated: 'The Commonwealth is in the strictest sense a federal government. It owes its birth to the desire for national unity... combined with the determination on the part of the several colonies to retain as states of the Commonwealth as large a measure of independence as may be found compatible with the recognition of Australian nationality'⁹.

The High Court of Australia

The High Court of Australia originally comprised Chief Justice Samuel Griffith and Justices Edmund Barton and Richard O'Connor. Griffith was the leader of the convention of 1891 and Barton in 1897-

1898; O'Connor was one of Barton's closest associates. These judges sought to protect the federal nature of the Commonwealth Constitution by applying two basic doctrines: 'implied immunity of instrumentalities' and 'state reserved powers.'

Whereas 'implied immunity of instrumentalities' ensured that both the central and state governments remained immune from each other's laws and regulations, 'state reserved powers' provided that the residual legislative powers of the states should not be undermined by an expansive reading of federal powers. Such doctrine appears to be manifested in Section 107 of the Constitution, which states that every power that is not explicitly given to the Commonwealth shall 'continue' with (or be reserved for) the Australian states.

Unfortunately, these doctrines of 'state reserved powers' and 'implied immunity of instrumentalities' began to be undermined when Justices Isaacs and Higgins were appointed to the High Court in 1906. Isaacs and Higgins had participated at the 1891 and 1897-1898 conventions, but they were often in the minority in most of the debates and had no formal role in shaping the final draft of the Constitution. Under Isaacs's leadership, those doctrines were overturned by the High Court. For Isaacs, Section 107 was not about protecting state powers but about continuing its exclusive powers and protecting them by express reservation in the Constitution. Of course this is a misreading of Section 107, which basically confirms that the state parliaments should have continued to exercise full legislative powers except for those exclusively given to the federal Parliament at Federation.



Sir Samuel Walker Griffith (1845-1920): Twice the premier of Queensland, that state's Chief Justice and author of its criminal code, he is best known for his pivotal role in drafting agreements that led to Federation and for being new nation's first Chief Justice. (Photo from Wikipedia)

The drafters intended to provide the states with 'original powers of local self-government, which they specifically insisted would continue under the Constitution, subject only to the carefully defined and limited powers specifically conferred upon the Commonwealth'¹⁰. Because their intention was to allow these powers to 'continue,' they opted for defining only the federal powers specifically. As such, it is correct to infer that the continuation of state powers in Section 107 is *logically* before the conferring of powers on the federal Parliament in Section 51. As Nicholas Aroney points out, 'such a scheme suggests that there is good reason to bear in mind what is *not* conferred on the Commonwealth by s.51 when determining the scope of what is conferred. There is a good reason, therefore, to be hesitant before interpreting federal heads of power as fully and completely as their literal words can allow'¹¹.

Inconsistency

This leads to the matter of inconsistency of laws. When a state law is inconsistent with a federal law, as is the case with most of the concurrent grants of power within Section 51, Section 109 resolves the conflict by stating that 'the latter (i.e., federal law) shall prevail, and the former (i.e., state law) shall, to the extent of the inconsistency, be invalid'. This being the case, it may appear that Section 109 confirms the supremacy of the Commonwealth over the states. And yet, two things must be said about this. First, only federal powers are explicitly limited by the Constitution, not state powers. Second, it is only a *valid* federal law that prevails over a state law. Hence, no inconsistency arises if the federal law goes outside the explicit limits of the Constitution, since the matter here no longer becomes one of inconsistency but rather of the invalidity of the federal law on grounds of unconstitutionality.

But a controversial 'test' has been applied by the courts to resolve matters of inconsistency. Such a test has been instrumental in expanding federal powers at the expense of the states. Inconsistency is said to arise when the Commonwealth, either expressly or impliedly, evinces the intention to 'cover the field.' First mentioned in *Clyde Enginnering Co Ltd v Cowburn* (1926), and then endorsed by the High Court in subsequent cases, the adoption of such a test, as Sir Harry Gibbs indicated, 'no doubt indicates that the Courts have favoured a centralist point of view rather than a federal one'¹².

The Court's centralist approach can also be observed, for instance, in the interpretation of Section 51(xxix), which

provides the Commonwealth Parliament with the power to make laws with respect to external affairs. The federal Executive has entered into thousands of treaties on a wide range of matters. These treaties are often related to topics not otherwise covered by the enumerated powers of the Commonwealth. However, the High Court has decided that the use of external affairs by the Commonwealth is not restricted to its power to make laws with respect to the external aspects of the subjects mentioned in Section 51¹³.

Together with the regular operation of Section 109 (inconsistency), the external affairs power offers the potential to 'annihilate State legislative power in virtually every respect'¹⁴. Such a possibility was once recognised by Justice Daryl Dawson, who saw a broad interpretation of external affairs as having 'the capacity to obliterate the division of power which is a necessary feature of any federal system and our federal system in particular'¹⁵.

Undoubtedly, one of the least satisfactory aspects of the federal system is its vertical fiscal imbalance. While the drafters of the Constitution wished to secure the states with a privileged financial position and independence, the courts have allowed for a dramatic expansion of Commonwealth taxation powers. In 1901, only the states levied income tax. In 1942, however, the federal government sought to acquire exclusive control over the income tax system, which was then confirmed by the High Court in *the First Uniform Tax Case* (1942)¹⁶, and subsequently in the *Second Uniform Tax Case* (1957)¹⁷, where the court confirmed the Commonwealth's income tax system and its power to impose whatever conditions it saw fit in granting money to

the states. As a result, the states have become heavily dependent on the Commonwealth for their revenue, so that any semblance of federal balance has largely disappeared.

Final Comments

This issue of *Journal of Constitutional History* has been conceived with the objective of discussing the overall structure, institutional arrangements, doctrines and organising principles of the Australian constitutional system and its most important rules, principles and concepts. Accordingly, the articles that are present in this issue introduce principles of Australian constitutionalism, such as representative and responsible government, judicial review, and separation of powers. They also involve relevant discussions of constitutional interpretation; state constitutionalism; Australia's federal system, including distribution of legislative and fiscal powers between Commonwealth and the states; inconsistency of law; Commonwealth legislative powers; limitations on governmental power; and whether or not Australia should adopt a national bill of rights. We hope you will find these articles both interesting and enjoyable.

Questo numero speciale del *Giornale di Storia Costituzionale* ruota intorno a temi e tradizioni del diritto e della storia costituzionale australiana. Scritti da eminenti

professori di diritto australiani, gli articoli contenuti in questo numero sono stati preparati in special modo per un pubblico europeo che potrebbe non essere interamente familiare con la ricca storia costituzionale del paese.

L'Australia fu colonizzata dalla Gran Bretagna e il percorso verso l'indipendenza fu graduale. Non è possibile identificare un singolo evento che segni la rottura finale con l'Impero britannico. Tra il 1855 e il 1890 fu ottenuto un governo responsabile, e i Governatori delle numerose colonie erano tenuti a invitare il leader del più grande partito o coalizione nel Parlamento a formare il governo. Il leader del partito di maggioranza e gli altri membri del suo gabinetto rimanevano in carica fino a quando essi avevano l'appoggio del Parlamento.

Nel 1865, il Parlamento britannico approvò il *Colonial Laws Validity Act* (Legge di Validità dei Diritti Coloniali), dando al governo di ogni colonia in Australia il potere di modificare il *common law* ricevuto dall'Inghilterra o di modificare o cassare leggi inglesi che erano in vigore nella colonia sulla base della dottrina della ricezione. Il Parlamento britannico poteva ancora legiferare per le colonie se avesse indicato che il diritto andava applicato anche ad esse.

Fra il 1891 e il 1899, i rappresentanti di ogni colonia in Australia parteciparono a assemblee costituzionali che concordarono l'elaborazione di una Costituzione federale. Su richiesta di queste colonie, la 'Constitution of the Commonwealth of Australia Act' (Legge di Costituzione del Commonwealth Australiano) fu approvata dal Parlamento britannico il 5 luglio 1900, ottenendo l'approvazione della regina Vittoria quattro giorni dopo. Nel settembre del 1900, la

regina proclamò che il Commonwealth australiano sarebbe entrato in vigore il primo gennaio 1901.

Nel 1931, il Parlamento britannico approvò lo *Statute of Westminster* (Legge di Westminster), che affermava che il *Colonial Laws Validity Act* non si sarebbe più applicato ai poteri legislativi del Parlamento del Commonwealth. Parimenti, il Parlamento britannico avrebbe cessato di produrre norme relative al Commonwealth, a meno che non fosse stato espressamente richiesto di fare ciò dal Parlamento federale. Nel 1942, lo *Statute of Westminster Adoption Act (Cth)* (Legge di Adozione della Legge di Westminster (Commonwealth)) recepì lo *Statute of Westminster* nel diritto australiano con effetto retroattivo al 1939.

Poiché lo *Statute of Westminster* del 1931 del Regno Unito non si applicava ai Parlamenti degli Stati australiani, il Parlamento britannico approvò la *Australia Act* (Legge di Australia) nel 1986 per abolire i suoi poteri di legiferare per l'Australia. Il *Colonial Laws Validity Act* del 1865 del Regno Unito, che non aveva dato potere ai Parlamenti coloniali (degli Stati) di approvare leggi aventi un effetto extraterritoriale, fu cassato e gli Stati finalmente ottennero potere legislativo per introdurre leggi extraterritoriali. Anche il diritto di appello dei tribunali degli Stati al Privy Council (Consiglio della Corona) fu abolito. Il diritto di appello della High Court of Australia (Alta Corte d'Australia) al Privy Council (Consiglio della Corona) era stato già abolito dal *Privy Council (Appeal from the High Court) Act 1975 (Cth)* (Legge del Consiglio della Corona (Appello da parte della Alta Corte) del 1975 (Commonwealth)).

Struttura costituzionale australiana

L'Australia ha un sistema federale e una costituzione scritta (e rigida). Seguendo il modello americano, la Costituzione del Commonwealth prevede una suddivisione dei poteri legislativi tra il Parlamento federale e i Parlamenti degli Stati. Ogni Stato ha il potere legislativo per elaborare la propria costituzione, parlamento, governo e diritto, a condizione che i limiti espliciti previsti nella Costituzione del Commonwealth siano rispettati.

Ispirati dalla bozza della costituzione americana, i primi tre capitoli della Costituzione del Commonwealth sono intitolati 'The Parliament' (il Parlamento), 'The Executive Government' (il Governo esecutivo), e 'The Judicature' (la Magistratura). Comunque, la relazione tra legislativo e esecutivo riflette il sistema di governo britannico (Westminster) e le sue convenzioni di governo responsabile, dove una rigida separazione di poteri tra legislativo e esecutivo non è mantenuta¹⁸. Il governo responsabile è un sistema nel quale il Governo esecutivo (il Primo Ministro e altri ministri) risponde alla House of Representative (Camera dei Deputati), che risponde a sua volta, sulla base del principio di governo rappresentativo, all'elettorato. In *Nationwide News Pty v Wills* (1992) 108 ALR 681, la High Court (Alta Corte) ha definito il governo rappresentativo insieme al sistema federale e al concetto di separazione di poteri, come 'one of the three main general doctrines of government which underlie the Commonwealth Constitution and are implemented by its provisions'¹⁹. (una delle tre principali dottrine generali di governo che sottostanno alla Costituzione del Commonwealth e sono realizzate attraverso le sue norme).

Dato che non esiste una rigida separazione di poteri tra i rami legislativo e esecutivo del governo, lo stretto isolamento del potere giudiziario da questi due poteri comprende un elemento fondamentale della Costituzione del Commonwealth²⁰. Ispirato nuovamente al modello americano, l'articolo (section) 76 della costituzione consente al Parlamento del Commonwealth di concedere giurisdizione originale alla High Court su ogni questione 'arising under this Constitution, or involving its interpretation' (che sorgesse sotto questa Costituzione o comportante la sua interpretazione).

Inizialmente la Costituzione poteva essere modificata o sulla base dell'articolo 128 o mediante una legge del Parlamento imperiale (britannico). Il potere di questo Parlamento di riformare la Costituzione unilateralmente terminò con lo *Statute of Westminster 1931 (UK)*, che entrò in vigore in Australia solamente nel 1942. Fino al 1986, la Costituzione poteva teoricamente essere emendata da una legge del Parlamento britannico su richiesta del Parlamento del Commonwealth. Ciò non è mai successo e tale norma fu abrogata con l'approvazione dell'*Australia Act 1986 (Cth) and (UK)*.

Così come promulgata, la Costituzione può essere modificata solamente secondo il modo di alterazione previsto dall'articolo 128. Per modificarla in linea con l'articolo 128, il Parlamento del Commonwealth deve sottoporre la proposta di modifica a un referendum popolare nel quale il popolo deve decidere se approvare o respingere la modifica proposta. Affinché il referendum sia approvato con successo, la modifica proposta deve ottenere il supporto di una maggioranza dell'elettorato nella sua interezza, così come di una maggioranza di elettori nella maggioranza degli Stati.

Dal 1901 44 proposte di modifica sono state sottoposte all'elettorato australiano. Solo 8, o il 18 per cento, di esse hanno ottenuto approvazione. Nell'ultimo referendum costituzionale, nel 1999, proposte per stabilire una repubblica e per adottare un nuovo preambolo alla Costituzione furono respinte pesantemente. Curiosamente 26 di queste questioni poste al popolo attraverso referendum comportavano un tentativo di allargare i poteri del governo centrale a scapito di quello degli Stati. Solo due di tali proposte furono realizzate, precisamente la proposta di servizi sociali e la proposta per cancellare un riferimento discriminatorio agli Aborigeni nel 1967. Ciò rivela il volere manifesto del popolo australiano di resistere all'espansione dei poteri del Commonwealth.

Assenza di un Bill of Rights (Carta dei Diritti)

Curiosamente, la Costituzione del Commonwealth è priva di una carta dei diritti perché i suoi compilatori credettero che 'a Federal Constitution, which brings about a division of power in actual practice, is a more secure protection for basic political freedoms than a bill of rights'²¹. (una Costituzione federale, che stabilisce una divisione dei poteri nella pratica effettiva, è una più sicura protezione per le libertà politiche basilari di una carta di diritti). Poiché questa Costituzione federale è un documento di poteri limitati, il governo federale ha solamente i poteri concessi da questo documento e nessun altro. Presumibilmente una carta di diritti potrebbe essere usata come un pretesto per l'espansione del potere federale. Sir Anthony Mason,

quando era giudice supremo della High Court of Australia (Alta Corte d'Australia), commentò: "The prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens... was one of the unexpressed assumptions on which the Constitution was drafted"²². (Il sentimento prevalente degli estensori che non ci fosse bisogno di incorporare un'estesa carta dei diritti per proteggere i diritti e le libertà dei cittadini... fu uno dei presupposti inespresi sui quali la Costituzione fu redatta).

È comunque vero che vari articoli della Costituzione del Commonwealth riconoscono particolari e specifiche forme di diritti e libertà, per esempio: processo con giuria (articolo 80); libertà religiosa (articolo 116); libertà da discriminazione (articolo 117); diritto alla proprietà – l'acquisizione di proprietà deve avvenire in termini equi (articolo 51); e libertà di commercio (articolo 92). In termini generali, secondo il modello australiano di costituzionalismo, si procede all'assunzione di pieni diritti e libertà, e poi tocca al diritto verificare se ci sono eccezioni alla regola. Essendo questo il caso, è stato detto che "Australia is a common-law country in which the State is conceived as deriving from the law and not the law from the State"²³. (L'Australia è un paese di *common law* in cui la Stato è concepito come derivante dal diritto e non il diritto dallo Stato).

Il sistema federale australiano

L'Australia è una federazione di sei Stati e di due territori dotati di autogoverno, l'Aus-

tralian Capital Territory (Territorio della Capitale australiana) e il Northern Territory (Territorio Settentrionale). Questi Stati e Territori hanno le loro proprie costituzioni, parlamenti, governi e diritti. Ogni Stato mantiene essenzialmente la stessa relazione con il governo federale. Per esempio l'articolo 7 attribuisce ad ogni Stato uguale rappresentanza in Senato. Similmente, l'articolo 51 (ii) limita il potere del governo centrale per quanto concerne la tassazione 'so as not to discriminate between States or parts of States' (in modo da non discriminare tra Stati e parti di Stati. Infine gli articoli 51 (iii) e 88 impongono uniformità a premi e imposte doganali in tutta la nazione, e l'articolo 99 informa che 'the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue give preference to one State or any part thereof over another State or any part thereof' (il Commonwealth non deve, mediante legge o regolamento di scambio, commercio, o imposte, dare preferenza ad uno Stato o ad una parte di esso rispetto ad un altro Stato o ad una parte di esso).

Le aree del potere legislativo federale sono elencate negli articoli 51 e 52 della Costituzione del Commonwealth. In aggiunta ai poteri espressi concorrenti (articolo 51) e esclusivi (articolo 52), il Parlamento del Commonwealth ha poteri accessori espressi o impliciti per gestire le aree correlate ai poteri concessigli dall'articolo 51. Conformemente, i settori concessi al potere legislativo federale includono aree quali il matrimonio, la quarantena e la difesa. Eppure altre aree rilevanti come salute, istruzione e relazioni industriali non sono state incluse nella lista dei poteri federali.

Agli Stati sono stati lasciati i rimanenti poteri legislativi. Infatti una delle princi-

pali caratteristiche della Costituzione del Commonwealth è di esprimere i limiti al potere del governo federale. Mentre questo governo è limitato a quei poteri che gli sono dati dalla Costituzione. Il residuo rimanente è lasciato indefinito per gli Stati²⁴. La ragione per ciò venne data dal leader del movimento federalista Sir Samuel Griffith alla prima assemblea costituzionale nel 1891: 'The separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government; to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves'²⁵. (Gli Stati separati devono continuare come corpi autonomi, rinunciando solo a quel tanto di potere che è necessario per la costituzione di un governo generale; affinché faccia per loro collettivamente quello che essi non possono fare individualmente per se stessi, e che essi non possono fare come corpo collettivo per se stessi).

Come si può vedere, l'intenzione degli estensori fu di conferire al popolo di ciascuno Stato australiano il diritto di decidere per se stessi la maggior parte delle questioni giuridiche attraverso la loro propria legislazione locale secondo i loro propri desideri locali. Così A.V. Dicey, in una delle ultime edizioni dell'*Introduction to the Study of the British Constitution*, affermò: 'The Commonwealth is in the strictest sense a federal government. It owes its birth to the desire for national unity... combined with the determination on the part of the several colonies to retain as states of the Commonwealth as large a measure of independence as may be found compatible with the recognition of Australian nationality'²⁶. (Il Com-

monwealth è, nel suo significato più stretto, un governo federale. Deve la sua nascita al desiderio di unità nazionale... combinato con la determinazione da parte delle numerose colonie di mantenere come Stati del Commonwealth la più ampia misura di indipendenza che può essere trovata compatibile con il riconoscimento della nazionalità australiana).

L'High Court of Australia (Alta Corte d'Australia)

L'High Court of Australia (Alta Corte d'Australia) originariamente comprendeva il Giudice Supremo Samuel Griffith e i Giudici Edmund Barton e Richard O'Connor. Griffith era il leader della assemblea del 1891 e Barton nel 1897-98; O'Connor era uno dei più vicini collaboratori di Barton. Questi giudici cercarono di proteggere la natura federale della Costituzione del Commonwealth applicando due dottrine basilari: 'implied immunity of instrumentalities' (immunità implicita degli enti) e 'state reserved powers' (poteri riservati dello Stato).

Mentre l'"implied immunity of instrumentalities" (immunità implicita degli enti) garantiva che i governi sia centrali che degli Stati rimanevano immuni dai diritti e regolamenti gli uni degli altri, gli 'state reserved powers' (poteri riservati dello Stato) facevano sì che i poteri residuali degli Stati non dovessero essere minati da una lettura espansiva dei poteri federali. Tale dottrina è resa manifesta nell'articolo 107 della Costituzione che afferma che ogni potere che non è dato esplicitamente al Commonwealth deve permanere negli (o essere riservato agli) Stati australiani.

Sfortunatamente queste dottrine di 'state reserved powers' (poteri riservati dello Stato) e 'implied immunity of instrumentalities' (immunità implicita degli enti) cominciò ad essere intaccata quando i Giudici Isaacs e Higgins furono nominati alla High Court (Alta Corte) nel 1906. Isaacs e Higgins avevano partecipato alle assemblee del 1891 e 1897-98, ma essi erano spesso in minoranza nella maggior parte dei dibattiti e non ebbero nessun ruolo formale nella costruzione del progetto finale della Costituzione. Sotto la guida di Isaacs, queste dottrine furono ribaltate dalla High Court (Alta Corte). Per Isaacs l'articolo 107 non concerneva la protezione dei poteri degli Stati, ma la continuazione dei suoi poteri esclusivi e la loro protezione attraverso la riserva espressa nella Costituzione. Certamente questa è una lettura errata dell'articolo 107, che fondamentalmente conferma che i parlamenti degli Stati avrebbero dovuto continuare ad esercitare pieni poteri legislativi ad eccezione di quelli esclusivamente attribuiti al parlamento federale al momento della Federazione.

Gli estensori intesero fornire gli Stati di 'original powers of local self-government, which they specifically insisted would continue under the Constitution, subject only to the carefully defined and limited powers specifically conferred upon the Commonwealth'²⁷. (poteri originali di autogoverno locale, che essi specificamente insistettero sarebbero continuati sotto la Costituzione, soggetti solamente ai poteri attentamente definiti e limitati specificamente conferiti al Commonwealth). In quanto la loro intenzione era di consentire a questi poteri di 'continuare', essi optarono di definire solamente i poteri federali in modo specifico. Pertanto è corretto desumere che la

continuazione dei poteri degli Stati prevista all'articolo 107 logicamente precede il conferimento dei poteri al Parlamento federale contenuto nell'articolo 51. Come Nicholas Aroney indica 'such a scheme suggests that there is good reason to bear in mind what is not conferred on the Commonwealth by s.51 when determining the scope of what is conferred. There is a good reason, therefore, to be hesitant before interpreting federal heads of power as fully and completely as their literal words can allow'²⁸ (tale schema suggerisce che c'è una buona ragione per considerare che cosa non è conferito al Commonwealth dall'articolo 51 quando si determina lo scopo di che cosa è conferito. C'è dunque una buona ragione per esitare prima di interpretare l'insieme dei poteri federali così pieni e completi come le parole letteralmente possono consentire).

Incompatibilità

Ciò conduce alla questione delle incompatibilità dei diritti. Quando un diritto degli Stati è incompatibile con un diritto federale, come accade nel caso delle concessioni concorrenti di potere all'interno dell'articolo 51, l'articolo 109 risolve il conflitto affermando che 'the latter (i.e., federal law) shall prevail, and the former (i.e., state law) shall, to the extent of the inconsistency, be invalid' (quest'ultimo (cioè il diritto federale) deve prevalere, e il primo (cioè il diritto degli stati) deve, nella misura in cui è incompatibile, essere invalido). Questo essendo il caso, può apparire che l'articolo 109 conferma la supremazia del Commonwealth sugli Stati. Eppure, due cose devono dirsi a questo proposito. Primo, solamente

i poteri federali sono esplicitamente limitati dalla Costituzione, non i poteri statali. Secondo, è solamente un diritto federale *valido* che prevale sopra il diritto degli Stati. Per cui, nessuna incompatibilità sorge se il diritto federale supera i limiti espliciti della Costituzione, poiché qui non è più una questione di incompatibilità, ma piuttosto di invalidità del diritto federale sulla base della sua incostituzionalità.

Però un 'esame' controverso è stato applicato dalle corti per risolvere questioni di incompatibilità. Tale esame è stato strumentale per l'espansione dei poteri federali a discapito degli Stati. Incompatibilità si dice sorge quando il Commonwealth, espressamente o implicitamente, manifesta l'intenzione di 'coprire il campo'. Dapprima menzionata in *Clyde Enginering Co Ltd v Cowburn* (1926), e poi avallata dalla High Court (Alta Corte) in casi successivi, l'adozione di tale esame, come Sir Harry Gibbs indicò, 'no doubt indicates that the Courts have favoured a centralist point of view rather than a federal one'²⁹. (senza dubbio indica che le Corti hanno favorito un punto di vista centralista piuttosto che federale).

L'approccio centralista della Corte può anche essere osservato, per esempio, nell'interpretazione dell'articolo 51 (xxix), che attribuisce al Parlamento del Commonwealth il potere di legiferare rispetto agli affari esteri. L'Esecutivo federale è entrato a far parte di migliaia di trattati concernenti una vasta gamma di questioni. Questi trattati sono spesso collegati a temi non altrimenti coperti dai poteri elencati del Commonwealth. Comunque l'High Court (Alta Corte) ha deciso che l'uso degli affari esteri da parte del Commonwealth non è ristretto al suo potere di legiferare riguardo agli aspetti esteri delle materie menzionate nell'articolo 51³⁰.

Insieme al regolare funzionamento dell'articolo 109 (incompatibilità), il potere degli affari esteri offre il potenziale di 'annihilate State legislative power in virtually every respect'³¹ (annullare il potere legislativo statale virtualmente sotto ogni rispetto). Tale possibilità fu una volta riconosciuta dal Giudice Daryl Dawson, che vide una interpretazione estesa degli affari esteri come avente 'the capacity to obliterate the division of power which is a necessary feature of any federal system and our federal system in particular'³² (la capacità di obliterare la divisione di potere che è un carattere necessario di ogni sistema federale e del nostro sistema in particolare).

Indubbiamente, uno dei meno soddisfacenti aspetti del sistema federale è il suo squilibrio fiscale verticale. Mentre gli estensori della Costituzione desiderarono garantire gli Stati con una posizione e indipendenza finanziaria privilegiata, le corti hanno consentito una drammatica espansione dei poteri di tassazione del Commonwealth. Nel 1901, soltanto gli Stati imponevano imposte sul reddito. Nel 1942, comunque, il governo federale cercò di acquisire controllo esclusivo sul sistema di tassazione sul reddito, che fu poi confermato dall'High Court (Alta Corte) nel *First Uniform Tax Case* (1942)³³, e successivamente nel *Second Uniform Tax Case* (1957)³⁴, dove la corte confermò il sistema di tassazione del reddito del Commonwealth e il suo potere di imporre qualsivoglia condizione che considerava idonea a assegnare denaro agli Stati. Come risultato, gli Stati sono diventati pesantemente dipendenti dal Commonwealth per le loro entrate, in modo tale che ogni sembianza di equilibrio federale è largamente scomparsa.

Commenti finali

Questo numero del Giornale di Storia Costituzionale è stato concepito con l'obiettivo di discutere la struttura generale, gli accordi istituzionali, le dottrine e i principi che organizzano il sistema costituzionale australiano e le sue più importanti regole, principi e concetti. Di conseguenza, gli articoli che sono presenti in questo numero introducono principi del costituzionalismo australiano, come governo responsabile e rappresentativo, revisione giudiziale, e separazione dei poteri. Essi includono anche discussioni rilevanti sull'interpretazione costituzionale; il costituzionalismo degli

Stati; il sistema federale australiano, compresa la distribuzione di poteri legislativi e fiscali tra il Commonwealth e gli Stati; incompatibilità di diritto; poteri legislativi del Commonwealth; limitazioni ai poteri di governo; e se l'Australia debba adottare oppure no una carta dei diritti nazionale. Speriamo che possiate trovare questi articoli interessanti e piacevoli da leggere.

¹ *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73.

² *Nationwide News Pty v Wills* (1992) 108 ALR 681, p. 721, per Deane and Toohey JJ.

³ *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54. See also: *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' case)* (1956) 94 CLR 259.

⁴ H. Gibbs, *A Constitutional Bill of Rights*, in K. Baker, *An Australian Bill of Rights: Pro and Contra*, Melbourne, Institute of Public Affairs, 1986, p. 325.

⁵ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, p. 136.

⁶ W.A. Wynes, *Legislative, Executive and Judicial Powers in Australia*, Sydney, The Law Book Co, 1955, p. vii.

⁷ M. Cooray, *A Threat to Liberty*, in K. Baker (edited by), *An Australian Bill of Rights: Pro and Contra*, Sydney, Institute of Public Affairs, 1986, p. 35.

⁸ S.W. Griffith, *Convention Debates*,

Sydney, Official Report of the National Australasian Convention Debates, 1891, pp. 31-32.

⁹ A.V. Dicey, *Introduction to the Study of the Constitution* (1885), Indianapolis, Liberty Fund, 1982, p. 387. This edition is a reprint of the eighth edition published by MacMillan in 1915.

¹⁰ N. Aroney, *Constitutional Choices in the 'Work Choices' Case, or What Exactly is Wrong with the Reserved Powers Doctrine*, in «Melbourne University Law Review», vol. 31, n. 1, 2008, p. 15.

¹¹ N. Aroney, *The Ghost in the Machine: Exorcising Engineers*, Sydney, Samuel Griffith Society, 2002, p. 69, <<http://www.samuelgriffith.org.au/papers/pdf/Vol14.pdf>>.

¹² H. Gibbs, *The Decline of Federalism?*, in «University of Queensland Law Journal», vol. 1, n. 1, 1994, p. 18.

¹³ *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, p. 641.

¹⁴ Gibbs, *The Decline of Federalism?* cit., p. 5.

¹⁵ *Victoria v Commonwealth*

(*Industrial Relations Act*) (1996) 187 CLR 416, p. 9.

¹⁶ *South Australia v Commonwealth* (1942) 65 CLR 373.

¹⁷ *Victoria v Commonwealth* (1957) 99 CLR 575.

¹⁸ *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73.

¹⁹ *Nationwide News Pty v Wills* (1992) 108 ALR 681, p. 721, per Deane and Toohey JJ.

²⁰ *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54. See also: *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' case)* (1956) 94 CLR 259.

²¹ H. Gibbs, *A Constitutional Bill of Rights*, in K. Baker, *An Australian Bill of Rights: Pro and Contra*, Melbourne, Institute of Public Affairs, 1986, p. 325.

²² *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, p. 136.

²³ W.A. Wynes, *Legislative, Executive and Judicial Powers in Australia*, Sydney, The Law Book Co, 1955, p. vi.

- ²⁴ M. Cooray, *A Threat to Liberty*, in K. Baker (edited by), *An Australian Bill of Rights: Pro and Contra*, Sydney, Institute of Public Affairs, 1986, p. 35.
- ²⁵ S.W. Griffith, *Convention Debates*, Sydney, Official Report of the National Australasian Convention Debates, 1891, pp. 31-32.
- ²⁶ A.V. Dicey, *Introduction to the Study of the Constitution* (1885), Indianapolis, Liberty Fund, 1982, p. 387. Questa edizione è una ristampa dell'ottava edizione pubblicata da MacMillan nel 1915.
- ²⁷ N. Aroney, *Constitutional Choices in the 'Work Choices' Case, or What Exactly is Wrong with the Reserved Powers Doctrine*, in «Melbourne University Law Review», vol. 31, n. 1, 2008, p. 15.
- ²⁸ N. Aroney, *The Ghost in the Machine: Exorcising Engineers*, Sydney, Samuel Griffith Society, 2002, p. 69, <<http://www.samuelgriffith.org.au/papers/pdf/Vol14.pdf>>.
- ²⁹ H. Gibbs, *The Decline of Federalism?*, in «University of Queensland Law Journal», vol. 1, n. 1, 1994, p. 18.
- ³⁰ *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, p. 641.
- ³¹ Gibbs, *The Decline of Federalism?* cit., p. 5.
- ³² *Victoria v Commonwealth (Industrial Relations Act)* (1996) 187 CLR 416, p. 9.
- ³³ *South Australia v Commonwealth* (1942) 65 CLR 373.
- ³⁴ *Victoria v Commonwealth* (1957) 99 CLR 575.

Foundations



'Una società di società': Why Australia is a Federation*

NICHOLAS ARONEY

[La repubblica federativa] una società di società che ne formano una nuova, la quale si può ingrandire con altri associati¹.

It is commonplace these days to draw a distinction between aggregative and disaggregative federal systems². Aggregative systems come about when previously independent political communities agree to pursue a set of shared goals usually by establishing a set of shared institutions through which those goals will be pursued. Disaggregative systems come into being when a single political community decides in certain respects to relinquish the unified determination of its political goals in favour of a set of smaller political communities, the institutions of which it establishes. This commonplace distinction between aggregation and disaggregation helps us to understand both the similarities and the differences between classically aggregative federal systems, such as the United States and Switzerland, and disaggregative ones, such as Spain and Belgium. Thinking about

political systems in this way also sheds light on how we understand systems that are not ordinarily classified as federal, such as the aggregation of the Member States into the European Union³, and the dis-aggregation of political authority in the United Kingdom through processes of devolution to Scotland, Northern Ireland and Wales⁴.

But if the distinction between aggregation and disaggregation is illuminating, it can also be somewhat oversimplifying, for the categories of aggregation and disaggregation are like Weber's ideal types: they function as abstract conceptual forms to which particular empirical systems conform in varying degrees. Or, to put it another way: the sharpness of the distinction between aggregation and disaggregation depends upon a strict view of the *basis* upon which a collection of separate political communities *agree* to aggregate, or a single political community *decides* to disaggregate. Typically, this involves an ascription of "sovereignty" to the relevant constituent political community or communities. This



Sir Edmund Barton (1849-1920): Australian politician and judge, served as the first Prime Minister of Australia and became a founding justice of the High Court of Australia. (Photo from Wikipedia)

is relatively easy to assert in relation to the European Union, for despite the “transformative constitutionalisation” that is said to have occurred⁵, the Union is clearly founded upon a series of treaties between the Member States, the presupposition of which is the equal sovereignty of each state at international law⁶. But the matter is somewhat less straightforward in the case of the United States, where the original sovereignty of the constituent states is sometimes challenged by the view that independence from Britain was actually secured by them collectively as “the United States”⁷, and it is likewise somewhat difficult in the case of Switzerland, where the Constitution of 1848 was actually re-

jected by several Cantons and yet imposed upon them⁸. Similarly, the proposition that devolution in the United Kingdom derives simply from an exercise of sovereign legislative authority by the British Parliament, while plainly suggested by the legislative form of the devolution statutes, is undermined at least to some degree by the assertion of a kind of political sovereignty in the name of the Scottish people⁹. And again, similar observations can be made about the assertion of self-constituting authority by the ancient regions of Catalonia, the Basque Country and elsewhere in Spain¹⁰. It is even possible to consider decentralisation within Italy in a comparable light¹¹. No system is purely aggregative or disaggregative essentially because sovereignty itself is never pure; its purity can only be sustained as a narrow juristic doctrine that has only a “more or less” relationship to the actual exercise of political power and effective legal authority¹². It is in the complex relationship between law and politics¹³ that the aggregative and disaggregative dynamics of specific federal systems are characteristically embedded. Here, the particular characteristics of the Australian and Canadian federal systems are especially illuminating. For if the United States and Switzerland lie at one end of the aggregation/disaggregation spectrum, and Spain and Belgium at the other, Australia and Canada surely lie somewhere in the middle. For in formal juristic doctrine, both of the latter federations came into being as a consequence of Imperial statutes enacted by virtue of the sovereign authority of the British Parliament¹⁴. Yet both federal systems, and especially the Australian, came about as the result of activity and initiative within the constituent colonies¹⁵.

The British authorities long had hopes that the Australian colonies would one day be united along federal lines¹⁶. Such a scheme had many advantages from an Imperial point of view. It would simplify the task of imperial administration; it would enable the colonies to be more efficiently organised into a common defence; and it would encourage free trade among the colonies. However, for a long time the political leaders of the several Australian colonies resisted these overtures. The reasons were several. When Australia was first settled by Britain in the late eighteenth century, British colonial interests were originally organised around the single colony of New South Wales, which at one point in time extended over approximately two-thirds of the entire Australian continent — a truly massive administrative unit, much larger than any single colony located anywhere in the world. Moreover, the entire colony was governed centrally from the major settlement at Sydney Cove. And because it was originally established as a penal colony, it was also governed autocratically. However, over the course of time, two important changes occurred. First, the colonies were increasingly occupied by free settlers, who resented being governed by an autocratic state, and demanded the right to self-government. Second, separate settlements were established in Port Phillip Bay (modern Melbourne), Moreton Bay (Brisbane), Swan River (Perth) and Adelaide. While Melbourne and Brisbane were still technically within New South Wales, they resented being governed from such a distance and demanded separation as independent colonies.

Parliamentary responsible government was accordingly granted to the five major

colonies (that is, all except Western Australia) in the 1850s¹⁷. By the mid-1860s, this included the power to amend their own constitutions¹⁸. Thus, when the British authorities began pressing for some form of federal union among the colonies around this time, it was understandably resisted by the colonists as being contrary to the principle of local self-government. Having recently acquired such powers of self-governance, local politicians and voters were not about to acquiesce in the loss of those rights to a consolidated national government. Samuel Griffith, then Premier of the colony of Queensland, went so far as to say that the Australian colonies had been “accustomed for so long to self-government” that they had “become practically almost sovereign states, a great deal more sovereign states, though not in name, than the separate States of America”¹⁹. If the colonies were to be federated, it would have to be with their agreement and upon a basis that fully respected their autonomy. Rev Dr John Dunmore Lang, Head of the Presbyterian College in Sydney and a member of the N.S.W. Parliament — whom Charles Duffy said had “reared a generation of students destined to become public men” — fervently believed in a federation of the Australian colonies as “separate and independent communities” under “the law of nature and the ordinance of God”. Lang particularly derived inspiration from the American Union “as exemplified in the New England States”, a system under which the states enjoyed “complete independence; that is, the entire control of all matters affecting their interests, as men and as citizens, in every possible way”. Lang urged that the Australian colonies should “combine” into a similar form of federation in order to secure a

greater "weight or influence in the family of nations". He further desired that the constituent states not merely retain a "municipal independence" in "little matters", but should actively secure "the entire control of all matters affecting their interests"²⁰.

It was not until the 1880s, however, that an openness to federation began to consolidate among the colonies. At an inter-governmental meeting held in 1890, the colonial leaders agreed to the holding of a convention of delegates chosen by the colonial parliaments to negotiate the terms of a federal constitution for the colonies. This convention met in 1891 and, after long negotiations, formulated a draft constitution that was submitted to the colonial Parliaments for their consideration. However, in the minds of several political leaders, the time for federation had not yet arrived. A second convention was eventually held in 1897-1898 at which another draft constitution was formulated, again submitted to the Parliaments and eventually approved by the voters in referendums held in each colony. The British Parliament enacted the Australian federal constitution into law on this basis in 1900.

Federation was seen by the colonial leaders as a means to several ends. One was a more effective defence. Another was a guarantee of inter-colonial free trade. A third was to consolidate an emergent sense of Australian national identity. But underlying all of these rationales was a belief that a federal form of government would best enable Australians to participate in their own local self-government. The Australians were influenced in this respect by leading constitutional writers who undertook extensive studies of the existing federations of the day: James Bryce had written

extensively about the United States, John Bourinot about Canada, and Adams and Cunningham about Switzerland²¹. Another important scholar, Edward Freeman, who undertook a close study of the federations of the ancient Greek city states, wrote of "the absolute perfection of the Federal ideal" and observed that "the full ideal of Federal Government... in its highest and most elaborate development, is the most finished and the most artificial production of political ingenuity"²². Distinguished historians such as Henry Maine and Otto von Gierke also drew attention to a kind of "federalism" even within the Holy Roman Empire and the current German Empire²³. Moreover, celebrated political writers like Baron de Montesquieu and Alexis de Tocqueville had long argued that federalism enjoyed the strengths, and avoided the weaknesses, of small, independent republics and large, consolidated empires²⁴. And luminaries as diverse as Thomas Jefferson, David Hume and Pierre-Joseph Proudhon had championed very similar, federalistic ideals²⁵. Images and symbols such as these profoundly shaped Australian conceptions of federalism²⁶. For the Australians, the United States Constitution was undoubtedly the paradigm of federal constitutions²⁷. When prominent writers like Bryce, Freeman and A.V. Dicey wrote about federalism and the federal state, it was the American system that they pre-eminently had in mind. And as Bryce taught the Australians, the American Constitution embodied neither a loose compact league nor a unitary national government, but rather 'a Commonwealth of commonwealths, a Republic of republics, a State which, while one, is nevertheless composed of other States even more essential to its existence than it is to theirs'²⁸.

Central to the lessons that the American Constitution presented to the Australians were the formative processes by which the separate American states had integrated themselves into a "federal republic", the institutions that enabled the peoples of the states and the people of the nation to be represented in the federal legislature, the manner in which federal legislative power was distributed, and the means by which the entire arrangement could be amended. The Swiss Constitution reinforced these lessons, for it showed that these aspects of the American system could be reproduced elsewhere. Switzerland also contributed ideas of its own. In particular, it provided an example of a non-presidential model of executive government suitable to a federation, and it demonstrated how federalism could be integrated with direct, popular participation by way of referendum. As it happened, the Australians would reproduce many of the most conspicuous features of the American and Swiss Constitutions, including the general structure of the federal legislature (the Senate and House of Representatives) and the pattern of distributing only specific powers to the federal legislature, as well as the peculiarly Swiss idea of the dual referendum as the stipulated mechanism for ratifying constitutional amendments. The United States and Switzerland were, however, republics²⁹, and the Australians recognised that a federation of the Australian colonies would have to be instituted under the Imperial Crown and the authority of the Parliament at Westminster. The Australians naturally drew on their own political experience when it came to the exercise of representative and responsible government within the context of the British Empire. Canada's importance,

however, was that it showed the Australians how a specifically federal system might be adapted to a monarchical and parliamentary system operating within the British Empire.

The Australians thus made use of a wide variety of fundamental ideas, some of them derived from a rather eclectic range of sources. In order to understand and make use of these models, the Australians had to rely on a wide range of works that explained their intricacies. Each interpreter of federalism injected into his description of each system his own particular orientations, conceptions and theories. As far as ideas about federalism were specifically concerned, a close analysis of the debates in the federal conventions of the 1890s as well as the writings of the most influential participants in the debate about federation³⁰ suggests that the most significant influences upon the Australians were the writings of James Madison, James Bryce, Edward Freeman, A.V. Dicey and John Burgess.

Madison in particular, in his celebrated *Federalist No. 39*, presented the Australians with an analysis of the United States constitution which emphasised five interlocking characteristics³¹. First, he emphasised, the proposed constitution was founded upon a genuinely "federal" agreement among the peoples and governments of the several constituent states, expressed through ratifying conventions held in each of the states. Secondly, Madison observed that the representative institutions of the American federation combined two principles: that of the representation of the states as "co-equal societies" in the Senate, and that of the representation of the people of the United States as a whole in the House of Representatives. Relatedly, the President

would be chosen through an electoral college in which voting power would be apportioned partly among the states again as co-equal societies and partly in proportion to the national population. Thirdly, Madison pointed out that the powers of the federal government were limited to specific topics, while the powers of the states were original and plenary, subject only to validly enacted federal laws. Fourthly, the reach of federal laws was unique among federal systems at the time, for they applied directly to the citizens, and did not rely upon the states to apply or enforce them. Lastly, the amendment clause was likewise a "compound" of "federal" and "national" elements in so far as it required, neither a national majority, nor a unanimous vote of the states, but a special majority of the states, expressed through the state legislatures or state conventions.

Madison's account of the logic of the American system had a profound influence upon the Australians. They saw in it a principled conceptual model that could readily be adapted to Australian circumstances. Although there was certainly disagreement over the details, there was a strong consensus among the framers of the Australian constitution that the federation would have to be founded upon the unanimous consent of the people of each of the constituent states, and that this principle of ratification by the people of each state should be carried through into the institutions of the federation, including the bicameral structure of the Parliament, the configuration of legislative, executive and judicial power, and the process for amendment of the constitution as a whole. Here, the American model was profoundly influential, but not without important qualifi-

cations. The Swiss model of a referendum was thus adopted both for the ratification of the constitution and its future amendment: ratification required unanimous referendums in each state; and amendment would require a majority of voters in the nation as a whole as well as a majority of voters in a majority states³². Likewise, the Canadian model of adapting federal institutions to a British Imperial context and the Westminster tradition of parliamentary responsible government was adopted³³, but again not without adaptation, for the Canadian model was seen as too centralist and not federalist enough. In particular, the Australians insisted that the constituent colonies should be regarded as self-constituting "states", and not merely as subordinate "provinces"³⁴, and that the Senate, representing the people of the states³⁵, should have near-equal powers with the House of Representatives, including the power to refuse supply to the government³⁶. This was a power that potentially involved the capacity to bring down a government: a fact that the framers recognised³⁷, and which the Senate actually exercised in 1975 in controversial circumstances³⁸.

In constructing a federal system of this kind, the Australians deliberately wished to preserve the capacity of the people of the states to participate in their own local self-government – first, in their localities³⁹; secondly, in their respective states; and thirdly, through the institutions of the federation as a whole. For, as John Cockburn saw it: "local government, self government, and government by the people are analogous terms... [C]entralization is opposed to all three, and there can be no government by the people if the Government is far distant from the people"⁴⁰. On

this view, federation would strengthen this capacity at each level of government and enable Australians secure increasing political and constitutional independence from the United Kingdom. This was recognised by key leaders of the time. One of them, Andrew Inglis Clark, thus observed that he and others

knew what they were doing. They went to work with their eyes open; and he claimed part of the responsibility, or glory, or whatever they might call it. They told the Convention what they were doing, and it agreed with them. He had quoted Sir Samuel Griffith's words at the Convention, and surely they did not shirk the question. They did not hold anything back. They faced the position that they were going in for absolute legislative independence for Australia as far as it could possibly exist consistent with the power of the Imperial Parliament to legislate for the whole Empire when it chose⁴¹.

There were, as a consequence of this general outlook, four important categories of legislative powers that were dealt with under the new constitution. The first category concerned the original, plenary powers of the constituent states. The general principle was that these powers would continue⁴², subject only to a small number of topics that were to be exclusively vested in the federal parliament, such as the governance of federal territories and federal government departments⁴³. The second category concerned those powers that would be transferred to the federal government and parliament. They included the power regulate such things as interstate trade, banking, insurance, trading and financial corporations and intellectual property⁴⁴. A third category concerned matters that would enable the new federation to operate as an independent government; these included powers to impose taxes, borrow

money, determine expenditure and make financial grants to the states⁴⁵. Fourthly, the federation was vested with powers necessary to enable it to function, in due course, as an independent government in the world; these powers included defence and external affairs, and went so far as to include the exercise all of the powers of the British Imperial Parliament in relation to Australia⁴⁶. When the federation legislated in these fields, its laws would prevail over any inconsistent state laws⁴⁷, but apart from this, the underlying principle was that the people of the states would continue to regulate and govern themselves as before⁴⁸.

Pursuant to this fundamental principle of local self-government, it was expected that the states would continue to be political communities in which their respective peoples would participate in their own self-government and that the limited powers granted to the Commonwealth would be recognised. For the first twenty years of the federation this principle was largely respected⁴⁹. The High Court, under the leadership of three leading framers, Samuel Griffith, Edmund Barton and Richard O'Connor, interpreted the scope of federal legislative powers in a way that ensured that the general competences intended to be reserved to the states were preserved. However, in 1920 a watershed occurred. A new group of judges, led by Isaac Isaacs and Henry Bournes Higgins (both of whom had been among the framers but had been consistently outvoted during the federal conventions), reversed the Griffith-Barton-O'Connor approach by giving interpretive priority to federal powers in a way that deliberately excluded any consideration of the original and general powers reserved to the states⁵⁰. The consequences of this fun-

damental shift in method has led over the last ninety years to a gradually expanding field of federal legislative power, mostly at the expense of the states. Thus, the external affairs power, originally understood to concern the regulation of matters that were inherently external in nature, has been extended by the High Court to include the contents of any international treaty that the Australian national government happens to enter, whatever the topic⁵¹. The power with respect to trading and financial corporations, originally understood to concern only corporations whose predominant purposes were trading or financial, and to encompass only the regulation of the trading and financial activities of those kinds of corporations, has been extended to the regulation of any corporation which engages in a sufficiently significant degree of trading or financial activities, and also to extend to any activities of such a corporation, including its internal relations with its employees⁵². The examples can be multiplied. Only in certain specific areas has the High Court resisted this tendency — and here its efforts are to be commended. Recently, it held that the spending power of the federal government is in principle limited to topics upon which the federal parliament has legislative power and has legislated⁵³. This has led to the conclusion that a range of federal spending programs have been unconstitutional, and that the federal government will need to cooperate with the states in order to pursue those financial policies in the future. It is not clear where this latter line of cases will lead, although it is significant that in the very most recent decision, the Court referred to the regulation of schools as a matter that properly falls within the provenance of the states—an observation that, if

generalised to the interpretation of federal legislative powers generally, could help to rebalance the Court's interpretation of the constitution. However, the prospects that this might occur are not great. In order to see a better rebalancing of the federation, the states themselves need to be more assertive in their relationships with the federal government.

One radical means to this latter end, the author has argued, is for the state governments themselves to initiate a process by which the state constitutions would be submitted to the their respective peoples for ratification and approval by referendum⁵⁴. While there are no present prospects of this happening in the foreseeable future, such an initiative has the potential to reinvigorate the role and constitutional standing of the states within the federation. This is because, at present, only the federal constitution has been popularly ratified, and the democratic foundations of the federation have been one of the underlying reasons why the High Court has given interpretive priority to the powers of the federation in preference to those of the states. While the interpretive implications of such a change cannot be predicted with absolute certainty, if the state constitutions were ratified by their respective peoples, it would give the Court reason to consider the states as locations of constitutional, democratic self-governance at least as fundamental to the federation as the government of the federation as a whole. And to do so would be to recover, at least to some degree, the original understanding and intention of the framers of the constitution, which was to create what Montesquieu called a '*società di società*'⁵⁵ and what Bryce said amounted to 'a Commonwealth of commonwealths,

a Republic of republics, a State which, while one, is nevertheless composed of

other States even more essential to its existence than it is to theirs⁵⁶.

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¹ Ch.-L. de S. de Montesquieu, *De l'esprit des lois*, translated as *Lo spirito delle leggi*, with an introduction by R. Deranthé, Milano, Rizzoli, 1989, Pt. II, Bk. IX, ch. I, p. 283 – quoted by L. Lacchè, 'Un italiano a Ginevra, alla ricerca della patria comune', in P. Rossi (edited by), *Per la Patria comune*, Manduria, Piero Lacaita Editore, 1997, p. XII.

² Eg. K. Lenaerts, *Constitutionalism and the Many Faces of Federalism*, in «American Journal of Comparative Law», vol. 38, 1990, p. 205.

³ R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford, Oxford University Press, 2009.

⁴ S. Tierney, *Federalism in a Unitary State: A Paradox Too Far?*, in «Regional & Federal Studies», vol. 19, n. 2, 2009, p. 237.

⁵ J. Weiler, *The Transformation of Europe*, in «Yale Law Journal», vol. 100, 1991, p. 2403.

⁶ B. de Witte, *Rules of Change in International Law: How Special Is the European Community?*, in «Netherlands Yearbook of International Law», vol. 25, 1994, p. 299.

⁷ In fact, throughout the revolutionary era claims to independence were made by the American states both jointly and severally. See, eg. G.S. Wood, *The Creation of the American Republic, 1776-1787*, Chapel Hill, University of North Carolina Press, 1969, p. 355; J.N. Rakove (edited by), *Interpreting the Constitution: The Debate over Original Intent*, Boston, Northeastern University Press, 1990, p. 2. The

balances of power between Britain and the American colonies are in certain important respects better understood as “negotiated authorities”: J.P. Greene, *Negotiated Authorities: Essays in Colonial Political and Constitutional History*, Charlottesville, University Press of Virginia, 1994.

⁸ J.-F. Aubert, *Traité de Droit Constitutionnel Suisse*, Neuchâtel, Ides et Calendes, 1967, pp. 30-32.

⁹ Stephen Tierney, “We the Peoples”: *Constituent Power and Constitutionalism in Plurinational States*, in M. Loughlin and N. Walker (edited by), *The Paradox of Constitutionalism*, Oxford, Oxford University Press, 2008, p. 229.

¹⁰ C. Colino, *Constitutional Change without Constitutional Reform: Spanish Federalism and the Revision of Catalonia's Statute of Autonomy*, in «Publius», vol. 39, n. 2, 2009, p. 262.

¹¹ M. Keating and A. Wilson, *Federalism and Decentralisation in Italy*, Paper presented at the PSA Conference, Edinburgh, 2010.

¹² Thus, in relation to the founding of the American federation, Michael Zuckert has pointed out that among the framers “[t]here were some – notably Luther Martin on the federal side, Hamilton and perhaps Gouverneur Morris on the national side – who clung to the view that sovereignty must reside somewhere, in one government or the other. These few delegates insisted that one or the other must be sovereign, but the main thrust of the delegates’ thought was away from such a drastic either/or. Madison, both at the Convention and later, felt that too much was made of the ab-

stract issue of sovereignty [...] ‘a compleat supremacy somewhere is not necessary in every society’”. See M. Zuckert, *Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention*, in «Review of Politics», vol. 48, 1986, p. 166.

¹³ See N. Aroney, *Politics, Law and the Constitution in McCawley's Case*, in «Melbourne University Law Review», vol. 30, n. 3, 2006, p. 605.

¹⁴ *British North America Act 1867; Commonwealth of Australia Constitution Act 1900*.

¹⁵ The next section in this article draws extensively from N. Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution*, Cambridge, Cambridge University Press, 2009, chs. 3 and 4. Those studying the origins of the Australian constitution should also consult J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne, Melbourne University Press, 1974, and H. Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution*, Cambridge, Cambridge University Press, 1997.

¹⁶ A.J. Brown, *One Continent, Two Federalisms: Rediscovering the Original Meanings of Australian Federal Ideas*, in «Australian Journal of Political Science», vol. 39, n. 3, 2004, p. 485.

¹⁷ See *Australian Constitutions Act (No. 2) 1850 (U.K.)*, and the discussion in W.G. McMin, *A Constitutional History of Australia*, Melbourne, Oxford University Press, 1979, chs. 2-3; A.C.V. Melbourne, *Early Constitutional Development in Australia*, Brisbane,

- University of Queensland Press, 1963. Pt. V. ch. VI and 443-445; R.D. Lumb, *The Constitutions of the Australasian States* (5th ed.), Brisbane, University of Queensland Press, 1992, chs. 1-2, and ch. 4.
- ¹⁸ *Colonial Laws Validity Act 1865* (UK).
- ¹⁹ *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, Government Printer, 1890, p. 10.
- ²⁰ T. Just, *Leading Facts connected with Federation*, Hobart, The Mercury Office, 1891, pp. 35-37, reproducing J. Dunmore Lang, *The Coming Event, or Freedom and Independence of the Seven United Provinces of Australia*, Sydney, J.L. Sherriff, 1870.
- ²¹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (5th ed.), London, Macmillan, 1897; J. Bryce, *The American Commonwealth* (3rd ed.), London, Macmillan, 1893; J. Bourinot, *A Manual of the Constitutional History of Canada*, Montreal, Dawson, 1888; F.O. Adams and C.D. Cunningham, *The Swiss Confederation*, London, Macmillan, 1889.
- ²² E.A. Freeman, *History of Federal Government in Greece and Italy* (2nd ed.), London, Macmillan, 1893, pp. 1-3, and pp. 7-8. Freeman continued: "It is hardly possible that federal government can attain its perfect form except in a highly refined age, and among a people whose political education has already stretched over many generations".
- ²³ H.S. Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas*, London, John Murray, 1861, p. 109; Freeman, *Federal Government*; J. Bryce, *The Holy Roman Empire* (4th ed.), London, Macmillan, 1895.
- ²⁴ Montesquieu, *Spirit of Laws* cit.; A. de Tocqueville, *Democracy in America* (1835-1843), London, Oxford University Press, 1959.
- ²⁵ Letter from Jefferson to Cabell (2 February 1816); D. Hume, *The Idea of a Perfect Commonwealth* (1777), in *Essays, Moral, Political, and Literary*, Indianapolis, Liberty Fund, 1987; P.-J. Proudhon, *The Principle of Federation* (1863), Toronto, University of Toronto Press, 1979.
- ²⁶ For more detail, see N. Aroney, *A Commonwealth of Commonwealths: Late Nineteenth-Century Conceptions of Federalism and Their Impact on Australian Federation, 1890-1901*, in «Journal of Legal History», vol. 23, n. 3, 2002, pp. 253; N. Aroney, 'Althusius at the Antipodes: The Political and Australian Federalism', in F. Carney, H. Schilling and D. Wyduckel (edited by), *Jurisprudenz, Politische Theorie Und Politische Theologie*, Berlin, Duncker & Humblot, 2004, p. 529; N. Aroney, *The Influence of German and Swiss State-Theory on Late Nineteenth Century British, American and Australian Conceptions of Federalism*, in «International and Comparative Law Quarterly», vol. 59, 2010, p. 669.
- ²⁷ Sir Owen Dixon, Chief Justice of the High Court of Australia, 1952-1964, observed that the American Constitution was for the Australians an "incomparable model" which both "fascinated" them and "damped the smoldering fires of their originality": O. Dixon, *The Law and the Constitution*, in *Jesting Pilate*, Melbourne, Law Book Co, 1965, p. 44.
- ²⁸ Bryce, *The American Commonwealth* cit., vol. I, pp. 12-15, and p. 332.
- ²⁹ See J. Hutson, *The Sister Republics: Switzerland and the United States from 1776 to the Present*, Washington, Library of Congress, 1991.
- ³⁰ I refer here to the published records of the Australasian Federation Conference and Federal Conventions held in 1890, 1891 and 1897-1898, and include the Hansard records of the Imperial Parliament and the several colonial legislatures, as well as the numerous Australian books, articles and speeches published outside these formal venues.
- ³¹ J. Madison, *Federalist No. 39* (1788), in C. Rossiter (edited by), *The Federalist Papers*, New York, New American Library of World Literature, 1961.
- ³² Australian Constitution, section 128.
- ³³ The conventions of parliamentary responsible government were obliquely recognised in the requirement that a Minister of the Crown could not hold office for a period of more than six months without holding a seat in the parliament: Australian Constitution, section 64.
- ³⁴ Commonwealth of Australia Constitution Act 1900, section 6.
- ³⁵ Australian Constitution, section 7.
- ³⁶ Australian Constitution, section 53.
- ³⁷ *Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April, 1891*, Sydney, Acting Government Printer, 1891; reprinted Sydney, Legal Books, 1986, pp. 442-444; H.B. Higgins, *Essays and Addresses on the Australian Commonwealth Bill*, Melbourne, Atlas Press, 1900, pp. 16-17; J. Bryce, *Studies in History and Jurisprudence*, 2 vols., Oxford, Clarendon Press, 1901, vol. I, pp. 515-518.
- ³⁸ L.J.M. Cooray, *Conventions, the Australian Constitution and the Future*, Sydney, Legal Books, 1979.
- ³⁹ Albeit that local government was then, as now, regarded as a creature of the states.
- ⁴⁰ *Convention Debates, Adelaide*, 1897, pp. 338-339.
- ⁴¹ J. Reynolds, *A.I. Clark's American Sympathies and his Influence on Australian Federation*, in «Australian Law Journal», vol. 32, 1958, p. 66.
- ⁴² Australian Constitution, sections 106 and 107.
- ⁴³ Australian Constitution, section 52.
- ⁴⁴ Australian Constitution, section 51(i), (xiii), (xiv), (xx), (xxviii).
- ⁴⁵ Australian Constitution, sections 51(ii) and 96.
- ⁴⁶ Australian Constitution, section 51(vi), (xxix), (xxxviii).

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- ⁴⁷ Australian Constitution, section 109.
- ⁴⁸ See Aroney, *Constitution of a Federal Commonwealth*, chs. 9 and 10.
- ⁴⁹ For more detail on these points, see J. Allan and N. Aroney, *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*, in «Sydney Law Review», vol. 30, 2008, p. 245; N. Aroney, *Constitutional Choices in the Work Choices Case, or What Exactly Is Wrong with the Reserved Powers Doctrine?*, in «Melbourne University Law Review», vol. 32, n. 1, 2008, p. 1.
- ⁵⁰ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
- ⁵¹ *Commonwealth v Tasmania* (1983) 158 CLR 1.
- ⁵² *New South Wales v Commonwealth* (2006) 229 CLR 1.
- ⁵³ *Pape v Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth* [2012] HCA 2.
- ⁵⁴ N. Aroney, *Popular Ratification of the State Constitutions*, in P. Kildea, A. Lynch and G. Williams (edited by), *Tomorrow's Federation: Reforming Australian Government*, Sydney, Federation Press, 2012, p. 210.
- ⁵⁵ Montesquieu, *Lo spirito delle leggi* cit., p. 283.
- ⁵⁶ Bryce, *American Commonwealth* cit., vol. I, p. 332.

Why Australia Does Not Have, and Does Not Need, a National *Bill of Rights*

JAMES ALLAN

1. *Introduction*

Although my main topic in this article will be the absence of any sort of national bill of rights in Australia, I think that topic is best approached circuitously, or at least from the side. Put more bluntly, readers in continental Europe may well need some background and context in order to understand why Australia lacks such an instrument and why, in my view, the absence of a bill of rights is a very good thing indeed.

To start, and this will be surprising to some, Australia is one of the oldest democracies in the world and its written constitution is likewise one of the oldest continuous democratic written constitutions. Moreover, the biggest influence in drafting the Australian Constitution was the US Constitution. Back in the late nineteenth century the men who devised, argued over, debated about and eventually crafted Australia's written Constitution were extremely well acquainted with the American model.

In fact, they copied key aspects of that US model, albeit in the context of the inherited British Westminster model — or if you prefer, in the context of a parliamentary model where you choose your Prime Minister and Cabinet from the elected legislature unlike in the US. Indeed on key issues the Australian drafters consistently preferred the US model to the Canadian one, both being in front of them¹.

You can see this immediately when you consider the sort of bicameralism chosen in Australia with its potent, *elected* Upper House Senate, something unknown then in Canada and still unknown in Canada, and the United Kingdom, and New Zealand. As in the US each Australian State, regardless of its population, is given the same number of Senators². And again mimicking the American model, only a proportion of Senators contest each election as their terms run longer than those of legislators elected to the Lower House who contest every election³.

The American influence on the form of Australian bicameralism is plain for all to see.

The same can be said for federalism. The Canadian model was rejected in favour of the American one. So the Australian drafters opted for a list of enumerated powers for the central government alone (the residue going to the states), rather than the Canadian style option of enumerating the powers of both the centre and the provinces⁴.

Again, Australia left the choosing of the top State court judges to the States, as in the US, it did not give that power to the centre, as in Canada.

Australia even copied the US in opting to create a national capital city from scratch⁵.

If space allowed I think one could make a powerful case that Australia's written constitution is the closest copy of the US one in existence, the Philippines possibly excepted, and it is certainly the most successful one that owes much to the American predecessor. Indeed I would go so far as to generalise in this way: Australia took the US Constitution as a model, copied chunks of it, and then made it better while fitting the copied bits into a Westminster parliamentary framework.

Of course there are important features of Australia's written Constitution that do not resemble their American counterparts. The Swiss inspired amending provision⁶ is perhaps the second most important of those non-US resembling features, and as will be seen below it is a provision that bears on our topic of the lack of a national bill of rights insofar as no constitutional bill of rights can come into existence without asking the voters. For these introduc-

tory purposes, though, I need only clarify what I said last paragraph.

The Australian Constitution is remarkably democratic⁷. It took those aspects of the US Constitution that increased the input of representatives accountable to the voters (like an elected rather than an appointed or hereditary Upper House), blended them into an inherited Westminster system with parliamentary sovereignty at its core, and then, well aware of the US Constitution and after much debate⁸, rejected the most obviously aristocratic or counter-majoritarian or anti-democratic aspect of the US Constitution, namely its Bill of Rights⁹. This lack of a bill of rights is the most obvious way in which the Australian Constitution differs from the US Constitution.

Moreover, the omission was in no sense an oversight. The decision not to include a bill of rights was made after careful consideration, discussion and debate and on the assumption that the panoply of social policy, line-drawing decisions affected by a bill of rights – almost all of them being ones over which smart, well-informed, even nice people can and do disagree¹⁰ – was better left to elected, accountable-to-the-voters legislators (with bicameralism and federalism safeguards) rather than to a very small number of unelected top judges. Indeed, the consensus was that such line-drawing decisions were better left to the elected legislators even where the issues underlying these decisions had been translated into the language of rights.

Let me round off these prefatory remarks by noting that the highly democratic credentials of Australia's Constitution were arguably even further buttressed when the Commonwealth Parliament legislated to move to compulsory voting in 1924 and, for

Lower House of the Commonwealth Parliament elections, to preferential voting or ATV six years before that in 1918. This combination of voting systems is unique in the world.

2. *Why Australia Does Not Have a National Bill of Rights*¹¹

Various attempts have been made to try to bring in a bill of right nationally in Australia since that initial decision to reject one at federation in 1901. In 1944 and again in 1988 Australians were asked in section 128 constitutional amendment referenda whether they wanted constitutionalised bills of rights. Both times the answer was an emphatic 'no'¹². Indeed, in the more recent of these held only 24 years ago there was not a single Australian State in which the majority of voters was in favour, with no State recording more than 37 percent in favour of even the most popular of the four proposed new rights for entrenchment.

Against that backdrop and after those results, many Australian bill of rights proponents had something of a Damascene conversion. Entrenched, constitutionalised bills of rights were no longer for them. Instead, what was needed was a nice modest little statutory bill of rights, or so they tended to put it. The attraction of this alternative, of course, at least to those of a slightly cynical disposition, is that any statutory option could bypass the need to put the proposal to the Australian people in a referendum. The legislature could do this without asking, as it were.

Entering into the 2007 federal election, the one that then Prime Minister

John Howard's right-of-centre Coalition government lost, the Labor Party did not have as part of its manifesto any pledge to bring in a statutory bill of rights. That said, it was certainly true that the Labor Party looked more likely to try to do this than the opposition Coalition Parties, though even Labor was known to have a significant body of sceptics and opponents amongst its top ranks as far as bills of rights were concerned.

Then, midway through 2009 and rather out of the blue, the Labor government's Attorney General Robert McClelland, an avowed proponent of a statutory bill of rights, announced the establishment of a National Human Rights Consultation Committee (hereinafter 'the NHRCC'). The chair of this committee was to be the Jesuit priest and legal academic Father Frank Brennan, who was trumpeted by the Attorney General as a 'fence-sitter' when it came to the question of a bill of rights. In truth, though, however much Brennan might have been described (and described himself) as a fence-sitter as regards a bill of rights, he had in fact been on the record, in print, more than once before his appointment, as favouring a statutory bill of rights.

On top of that, there was not a single known bill of rights sceptic or opponent appointed to the NHRCC.

Without going as far as saying that the whole NHRCC process was a foregone conclusion as soon as it was set up, one could certainly say that the NHRCC had little seeming legitimacy for those who opposed the enactment of a statutory bill of rights (or constitutionalised one, for that matter). Or perhaps one might just observe that no disinterested outside observer, agnostic as to the substantive merits at play here,

would consider this to be a good process for sounding out the views of Australians. That disinterested observer would label this a terrible process for accurately attempting to assess what actual Australians thought about a statutory bill of rights. Worse, it smacked (whether fairly or not) of being something of a sham, where the conclusion is a foregone one. Certainly it appeared to fall noticeably short of some of the more extravagant and triumphal claims of its defenders along the lines that this was a perfectly acceptable form of democratic consultation.

Leaving aside these deficiencies related to process, the NHRCC's main recommendations were unsurprising. It came out in favour of enacting a statutory bill of rights. (Recommendation 18). It opted to give a power to the judges of the High Court to make declarations of incompatibility. (Recommendation 29). The NHRCC also wanted its recommended statutory bill of rights to include a reading down provision, an interpretive provision analogous to section 3 of the UK's Human Rights Act and to section 6 of New Zealand's Bill of Rights Act, although in this Recommendation 28 the NHRCC did not actually provide any draft version of an interpretive provision that would satisfy its own requirements.

Two more of the main recommendations of the NHRCC are worth mentioning. The Committee urged that statements of compatibility be required for all Bills. (Recommendation 26). The NHRCC also urged that any statutory bill of rights be based on the 'dialogue' model. (Recommendation 19). Together with the earlier NHRCC recommendations that gives us a statutory bill of rights with a reading down provision, a declaration of incompatibili-

ty power in the hands of the High Court, a need for statements of compatibility before Third Reading, and mention of the 'dialogue' model.

In the next section of this paper I will outline briefly why this NHRCC call for a statutory bill of rights along these lines would have enervated parliamentary democracy (in the procedural sense noted above) in Australia. For the purpose of this section's account of why no national bill of rights exists in Australia, though, what followed after the NHRCC report was released was a political battle in the newspapers, within the Labor Party, and between the political parties. Surprising for many, including some opposed to these instruments, the pro bill of rights lobby lost the ensuing political battle.

First off, some senior figures in the Labor Party spoke out against any sort of bill of rights, and they spoke out strongly and vigorously. Former New South Wales Labor Premier Bob Carr (who has subsequently become Australia's Foreign Minister) was probably the most prominent and vociferous of the Labor Party opponents¹³, but he was far from alone in being a left-wing critic of the proposal. And the federal Cabinet clearly was divided on the issue. In addition, some senior judges, including former High Court Justice Ian Callinan and the current Chief Justice of Queensland, went public with their opposition to any sort of bill of rights.

The fact the government sat on the report and did not act immediately also allowed opponents to organise and write books against the mooted bill of rights¹⁴, the anti case slowly gaining support from the churches (who came to the conclusion that their interests would likely not

prevail in any contest between freedom of religion and equality rights, at least where they would be adjudicated on by judges). The one-sided composition of the NHRCC probably did not much help either. And the daily newspaper commentary pieces that ran giving the anti side may have helped move public opinion too¹⁵.

Add to that the fact the Opposition Coalition Party early on signalled it was implacably opposed to this and the difficulties grew. In addition, Labour did not control the Senate (meaning it would probably have to fight an election where a bill of rights was, or would be made, a major issue) so it could not ensure the proposal's quick and easy passage into law. This was magnified by the reality that the union wing of the Labor Party tended to dislike this bill of right proposal, or at least was much, much more sceptical of it than was what might be described as the lawyers' wing of the Labor Party. And, of course, the fact the Coalition Party was recovering in the polls also added to the difficulties for proponents within the government.

In the end, on April 21st, 2010, the Attorney General called a press conference and announced that the government would not be proceeding with any sort of bill of rights, just as it would not be inserting any sort of reading down provision into other legislation¹⁶. For the foreseeable future the campaign to enact a statutory bill of rights in Australia, at the national level, looked to be dead or in forced hibernation. The same was probably true of any such campaigns in all the States that also lacked one, meaning all of them except Victoria – which is the only State jurisdiction to have enacted one.

3. *Why Australia Does Not Need a Bill of Rights*

In the preceding section I briefly recounted why Australia does not have a national bill of rights. In this section I will argue that the absence is a good thing, that Australia is better off without one¹⁷.

Of course many of those pushing for some form or other of a bill of rights instrument like to point to the fact that Australia is one of the very few democracies – depending on how you look at the Basic Laws in Israel and the judiciary's unwillingness to make much of what they have in Japan and a few other non-common law countries, perhaps the only one – without a national bill of rights. On its own, of course, such a 'we differ from everyone else' type of argument tells us nothing. The real question is not whether Australia should emulate others but whether a bill of rights is a good idea in its own right. Would having one deliver better outcomes than Australia achieves without one?

My answer is an emphatic and resounding 'no'. Here is why. To start, notice that any sort of bill of rights enumerates a list of vague, amorphous – but emotively appealing – moral entitlements in the language of rights. It operates at a sufficiently high level of abstraction or indeterminacy that it is able to finesse most disagreement. Ask who is in favour of 'freedom of expression' or 'freedom of religion' or a 'right to life' and virtually everyone puts up his or her hand. And of course this is where bills of rights are sold, up in the Olympian heights of disagreement-disguising moral abstractions and generalities. Nevertheless, that is not where these instruments have real effect. People do not spend hundreds of thousands

of dollars going to court to oppose 'freedom of speech' in the abstract.

Bills of rights have real, actual effect down in the quagmire of social-policy decision-making where there is no consensus or agreement across society at all about what these indeterminate entitlements mean. Rather, there are smart, reasonable, well-informed, even nice people who simply disagree about where to draw the line when it comes to campaign finance rules or hate speech provisions or defamation regimes or whether Muslim girls can or cannot wear veils to school or whether to sanction gay marriage and so much more. One could sit around in groups, holding hands, singing 'Kumbaya', and chanting 'right to free speech' or 'right to freedom of religion' for as long as one wanted and it would help not at all in drawing these contentious, debatable lines.

What a bill of rights does is to take contentious political issues – and I will deliberately say this again, issues over which there is reasonable disagreement between reasonable people – and it turns them into pseudo-legal issues which have to be treated as though there were eternal, timeless right answers. Even where the top judges break 5-4 or 4-3 on these issues, the judges' majority view is treated as *the view* that is in accord with fundamental human rights.

The effect, as can easily be observed from glancing at the United States, Canada and now New Zealand and the United Kingdom, is to diminish politics and (over time) to politicize the judiciary. Meanwhile, the irony of the fact that judges resolve *their* disagreements in these cases by voting is generally missed. The decision-making rule in all top courts is simply that 5 votes beat 4, regardless of the moral depth or rea-

soning of the dissenting judgments, or that they made more frequent reference to J.S. Mill or Milton or the International Covenant on Civil and Political Rights. Only the size of the franchise differs.

None of this deters bill of right proponents from talking repeatedly about how such an instrument 'protects fundamental human rights', as though these things were mysteriously or magically self-defining and self-enforcing. They are not. They simply transfer the power to define what counts as, say, a reasonable limit on free speech over to committees of ex-lawyers (who have no greater access to a pipeline to God on these moral and political issues than anyone else, but who are immune from being removed by the voters for the decisions they reach).

Nor are statutory bills of rights of the sort recommended by the NHRCC immune from this criticism. Of course on one level it is true that non-entrenched, non-constitutionalised, statutory bills of rights do not allow judges to invalidate or strike down legislation. Instead the transfer of power to the judiciary is done more indirectly.

The main tool for increasing the power of the judiciary under a statutory bill of rights is the reading down provision. No provision has more potential to transmogrify the powers available under statutory versions into something approaching those under constitutionalised versions. Indeed (and here is what proponents downplay in the time when they are pushing for the enactment of a statutory bill of rights), if judges take such reading down provisions to be Spike Lee-like licences 'to do the right thing', then these provisions leave open the possibility of affording judges scope to do what the disinterested observer would

characterise as an out-and-out rewriting or redrafting of other statutes.

Consider the reading down provision in the UK's *Human Rights Act 1998* which reads to start:

So far as it is possible to do so, primary legislation and subordinate legislation *must be read* and given effect in a way which is compatible with Convention rights¹⁸.

The danger with these sort of reading down provisions – these directions to give the words of other statutes a meaning that you, the point-of-application interpreter, happen to think is more moral and more in keeping with your own sense of the demands of fundamental human rights – is that just about any statutory language (however clear in wording and intent) might possibly be given some other meaning or reading.

Here is how I framed the danger, the scope for abuse, of these provisions in an earlier article:

Put differently, reading down provisions such as these throw open the possibility of 'Alice in Wonderland' judicial interpretations; they confer an 'interpretation on steroids' power on the unelected judges. So although there is no power to invalidate or strike down legislation, the judges can potentially accomplish just as much by rewriting it, by saying that seen through the prism (that is, their own prism) of human rights, 'near black' means 'near white' or 'interim order becomes a final order' means 'interim order does *not* become a final order'¹⁹. They can make bill of rights sceptics half long for the honesty of judges (under constitutionalised bills of rights) who strike down legislation rather than gut it of the meaning everyone knows it was intended to have (rule of law values notwithstanding)²⁰.

Whether that characterization is alarmist or not, indeed how different the judicial approach to interpreting other statutes

will be, is a question of fact. In the United Kingdom we have to look to see how the top judges in the House of Lords (now Supreme Court) – judges who a decade or two ago were widely considered to be the most interpretively conservative judges in the Anglo-American common law world – have used the section 3 reading down provision to alter their former approach to interpretation.

And so let us turn to the *Ghaidan* case, the leading UK case on the section 3 reading down provision. What is remarkable in that case is not what the judges did, but what they were prepared openly and explicitly to admit they believed they could now do with the section 3 reading down provision in place. When interpreting all other statutes they could "depart from the intention of... Parliament"²¹. They could do so when "the meaning admits of no doubt"²². They could "read in words which change the meaning of the enacted legislation"²³. They could assert that "[t]he word 'possible' in s.31(1) is used in a different and much stronger sense"²⁴. They could imply that anything short of outright 'judicial vandalism' is now within their purview at the point-of-application²⁵. They could even use this new interpretive power to overrule one of their own House of Lords authorities – a case on the meaning of exactly the same statutory provision, an authority under four years old, and one that had held the meaning of that same statute to be clear²⁶.

I could go on. I could note again that this *Ghaidan* approach to using the reading down provision is no outlier and continues to be affirmed and re-affirmed in the UK and that the top judges there now see themselves operating under "a new legal order"²⁷ – one in which their views on a host

of political and moral line-drawing exercises are significantly more influential than before. Or I could explore the Rule of Law implications of this new *Chaidan* approach to interpretation – how citizens’ knowledge of what any statute means becomes wholly and inextricably linked to judges’ views of the scope, range, content and reasonable limits on human rights, all or which are contentious and debatable and give rise to reasonable disagreement amongst smart, well-informed and even nice people. Put bluntly, this new *Chaidan* approach to interpretation, whatever other sins it might have, most assuredly magnifies uncertainty from the citizen’s vantage and hence lessens the ability of all non-judges to know what the law demands of them and to be able to shape their conduct and expectations accordingly.

Or I could even note the other ways statutory bills of rights empower judges, most obviously by means of the Declarations of Incompatibility and Statements of Incompatibility powers²⁸.

However, for our present purposes I need only here note that the NHRCC recommended type of statutory bill of rights does have the effect of clearly enhancing the scope for judicial decision-making at the expense of decision-making that would otherwise be made by the elected representatives of the people. It would, to some extent, have diminished democracy.

And having been understood in those terms, and in the context of a country like Australia with superb democratic credentials, the push for a national statutory bill of rights not only did fail, it was also a good thing that it failed in my opinion.

Australia does not need a bill of rights.

4. *What Australia Does Have*

We have now seen that Australia has a long established written constitution with very strong democratic credentials but no national bill of rights, neither an entrenched, constitutionalized one nor a UK-style statutory one. To finish this article I will briefly outline two ways in which a focus on rights does play a role in Australia. The first is parochial, and applies only in one of the six states of Australia, namely in the State of Victoria. This is that State’s *Charter of Human Rights and Responsibilities Act 2006*, or statutory bill of rights. The second is nationwide, though of a fairly bracketed or contained scope of application. This is the series of constitutional cases dating from the early 1990s decided by the High Court of Australia which discovered or created (depending on one’s theory of what qualifies as a defensible approach to constitutional interpretation) an implied freedom of political communication.

The State of Victoria’s *Charter* is an amalgam of the UK’s *Human Rights Act 1998* and *New Zealand’s Bill of Rights Act 1990*. It has a reading down provision (section 32) that borrowed slightly more from the UK Act’s section 3 than from the NZ Act’s section 6. It has a Declaration of Inconsistent Interpretation provision (section 36) that is a reworked version of the UK’s Act’s section 4. Unlike the UK Act, but copying the NZ Act, it has an abridging or ‘reasonable limits’ provision (section 7)²⁹. And as with both of the predecessor statutes it was mimicking, the Victorian *Charter* has a Statements of Compatibility provision (section 28) requiring at Second Reading that the relevant Minister³⁰ make a statement to the legislature that a Bill is, or is not, compatible with the enumerated rights³¹.

To date there is only one High Court of Australia decision interpreting the Victorian *Charter*. This is the 2011 case of *Momcilovic v The Queen*³². This decision split the seven High Court Justices in various shifting permutations across the range of *Charter* issues raised³³, but the main ruling for our purposes was that the leading UK case of *Chaidan*³⁴ was emphatically rejected as regards the meaning of Victoria's reading down provision.

At the time of writing no other State seems likely to try to enact a statutory bill of rights in the near term.

As for Australia's so-called 'implied rights' jurisprudence³⁵, there is no need to canvas this in detail. Suffice it to say that beginning in 1992, most notably in what is known as the *ACTV* case³⁶, the High Court of Australia arrived at the conclusion that the Australian Constitution — one that explicitly and deliberately left out any US-style bill of rights or First Amendment free speech entitlements and protections opting, after much debate and discussion amongst the Founders, to leave these social policy balancing exercises to the elected Parliament — nevertheless implicitly created an implied freedom of political communication. The first step in that reasoning, the only one that drew on the actual text of the Constitution itself, notes that the Australian Constitution provides that elected Members of Parliament are to be 'directly chosen by the people'³⁷. After a series of further inferences the majority Justices concluded that there was an implied freedom of political communication³⁸.

The practical effect of discovering this implied freedom of political communication was that the High Court of Australia justices could then strike down or invali-

date part of the statute in that case. However, also notice that the justices were and are still clear that this implied freedom does not amount to a personal free speech type right vesting in the individual citizen³⁹.

Since then this implied rights jurisprudence has not expanded very widely, and indeed has only very rarely led to statutes being struck down or invalidated⁴⁰. It has, however, been used as the basis for what might be thought of as a limited implied right to vote jurisprudence⁴¹.

Nevertheless, the effects of this implied rights case law on parliamentary sovereignty are considerably less than those of a UK-style statutory bill of rights, and less so again than those of a Canadian or US-style entrenched, constitutionalized bill of rights.

5. Concluding Remarks

There is little prospect in the near term of Australia entrenching a constitutionalized bill of rights or even of enacting a statutory UK or NZ-style bill of rights nationally. In this article I have set out not only how that has come about, but also why I believe that absence is a good thing.

Whether or not the reader agrees with that normative position of mine, what is not disputable is that Australia has a written Constitution that copied much from its US predecessor, though not the more counter-majoritarian or anti-democratic features of that predecessor.

Indeed Australia's Constitution is a remarkably democratic one, in the letting-the-numbers-count or 'right to participate' sense.

- ¹ See N. Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution*, Cambridge University Press, 2009, ch. 3, *inter alia* p. 70. See too C. Saunders, *The Constitution of Australia: A Conceptual Analysis*, Oxford, Hart Publishing, 2011, p. 16.
- ² It is currently 12 for each of the six States.
- ³ There are 12 Australian Senators per State but only 6 contest each election on a rolling basis.
- ⁴ The Australian aim was, as in the US, to have strong States. This has not eventuated however. See J. Allan and N. Aroney, *An Uncommon Court: How the High Court of Australia has undermined Australian Federalism*, in «Sydney Law Review», vol. 30, 2008, p. 245.
- ⁵ See T. Winkelman, *Selecting a Capital Territory*, in «Quadrant», vol. 56, May 2012, pp. 80 s.
- ⁶ Australian Constitution, section 128.
- ⁷ By 'democratic' I mean the term in its thin, procedural, 'counting everyone as equal and letting the numbers count' sense. On the competing 'thin' and 'fat' understandings of democracy see J. Allan, *Thin Beats Fat – Conceptions of Democracy*, in «Law & Philosophy», vol. 25, 2006, p. 533.
- ⁸ See A. Reilly, G. Appleby, L. Grenfell and W. Lacey, *Australian Public Law*, Melbourne, Oxford University Press, 2011, pp. 44-45.
- ⁹ And its amending formula too.
- ¹⁰ This is the core basis, the fact of reasonable disagreement, for Jeremy Waldron's critique of constitutionalized bill of rights. See, for example, J. Waldron, *Law and Disagreement*, Oxford, Oxford University Press, 1999, and J. Waldron, *A Right-Based Critique of Constitutional Rights*, in «Oxford Journal of Legal Studies», vol. 13, 1993, p. 18. Waldron there makes his case for a 'right to participate' as the 'right of rights'.
- ¹¹ Parts of this section I have taken from my article: J. Allan, *You Don't Always Get What You Pay For: No Bill of Rights for Australia*, in «New Zealand Universities Law Review», vol. 24, 2010, p. 179.
- ¹² See *Parliamentary Library Department of Parliamentary Services*, *Parliamentary Handbook of the Commonwealth of Australia*, 42nd Parliament, 2008, p. 396 and pp. 407-408, at <http://parlinfo.aph.gov.au/parlInfo/download/handbook/newhandbook/2008-12-19/toc_pdf_repeat/Part%205%20-%20Referendums%20and%20Plebiscites.pdf;fileType=application%2Fpdf>, 24th November 2009.
- ¹³ Carr wrote many op-ed newspaper pieces against the proposed bill of rights. See, for example, B. Carr, *Bill of Rights is the Wrong Call*, *The Australian*, May 9th, 2009.
- ¹⁴ See, for example, J. Leeser and R. Haddrick, *Don't Leave Us With the Bill: The Case Against an Australian Bill of Rights*, Menzies Research Centre, 2009.
- ¹⁵ I confess, here, to having penned several dozen of these newspaper anti bill of rights op-ed pieces myself over the course of the debate.
- ¹⁶ For a commentary on the Attorney General's announcement, see J. Allan, *All's Well that Ends Well*, *The Australian*, April 23rd, 2010. See, also B. Carr's piece in the April 22nd edition of *The Australian*.
- ¹⁷ Parts of this section I have taken from my Invited Australian Senate Occasional Lecture Series Address, Canberra, April, 2008, and from: J. Allan, *Statutory Bills of Rights: You Read Words In*, in T. Campbell, K. Ewing and A. Tomkins (edited by), *The Legal Protection of Human Rights: Septical Essays*, Oxford, Oxford University Press, 2011, pp. 108-126.
- ¹⁸ *Human Rights Act 1998* ch. 42, section 3(1) (italics mine). The broadly similar reading down provision in the New Zealand *Bill of Rights Act 1990* reads:
- “Whenever an enactment *can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meanings*”, (section 6, italics mine). And the reading down provision in the Australian State of Victoria's *Charter of Rights* reads: “So far as it is possible to do so consistently with their purpose, all statutory provisions *must be interpreted* in a way that is compatible with human rights”. (section 32(1), italics mine).
- ¹⁹ See *SI by his next friend CC v KS by his next friend IS* (2005) 195 FLR 151 at 154 (Higgins CJ of the Australian Capital Territory using a similar provision in the *ACT Human Rights Act 2004*).
- ²⁰ J. Allan, *The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism*, in «Melbourne University Law Review», vol. 30, 2006, pp. 909-910.
- ²¹ *Chaidan*, para. 30, per Lord Nicholls. And could do so despite a total lack of ambiguity. For a similar New Zealand example of the relevant statute being blatantly read down, though without the judges explicitly referring to the section 6 reading down provision of the New Zealand Bill of Rights Act, see *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*].
- ²² *Chaidan*, para. 29, per Lord Nicholls.
- ²³ *Chaidan*, para. 32, per Lord Nicholls.
- ²⁴ *Chaidan* AC p. 573, per Lord Steyn.
- ²⁵ *Chaidan*, paras. 111-112, per Lord Rodger.
- ²⁶ *Fitzpatrick v Sterling Housing Association* [2001] AC 27.
- ²⁷ *Jackson v Attorney-General* [2006] 1 AC 262 at para. 102, per Lord Steyn.
- ²⁸ For fuller arguments to that effect see: Allan, *Statutory Bills of Rights: You Read Words* cit.
- ²⁹ This is section 5 in the *New Zealand Bill of Rights Act* which itself

was modelled on section 1 of the *Canadian Charter of Rights and Freedoms*.

³⁰ In New Zealand it is the Attorney-General.

³¹ For a full analysis of the Victorian Charter see: J. Allan, *The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism*, in «Melbourne University Law Review», vol. 30, 2006, p. 906.

³² [2011] HCA 34.

³³ For instance, the Declaration of Inconsistent Interpretation power was held to be valid at the State level (4-3) but not nationally (7-0), while the question of whether the s.7 abridging provision affects the s.32 reading down provision split the Justices in a way that makes it highly contestable or de-

batable what the answer is, everything depending on how you read Justice Heydon's judgment.

³⁴ *Chaidan v Codin-Mendoza* [2004] 2 AC 557 (HC).

³⁵ I have discussed the cases underlying this jurisprudence a number of times including in *Oh That I Were Made Judge in the Land*, in «Federal Law Review», vol. 30, 2002, p. 561; J. Allan, *Paying for the Comfort of Dogma*, in «Sydney Law Review», vol. 25, 2003, p. 63; and J. Allan, *Implied Rights and Federalism: Inventing Intentions While Ignoring Them*, in «University of Western Australia Law Review», vol. 34, 2009, p. 228.

³⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

³⁷ See sections 7 and 24.

³⁸ See, for instance, the five step reasoning process of Mason CJ in *ACTV* at para. 138.

³⁹ See the *University of Queensland Law Journal* special issue dedicated to the 20th anniversary of this jurisprudence in the volume 30, 2011 issue for considerable detail and analysis of these cases.

⁴⁰ *Ibid.*

⁴¹ See *Roach v Electoral Commissioner* (2007) 233 CLR 162 and *Rowe v Electoral Commissioner* (2010) 273 ALR 1.

Directions



The External Affairs Power in Australia and in Germany: Different Solutions, Similar Outcome?

JÜRGEN BRÖHMER

1. *Introduction*

Australia and Germany are both constitutionally organized federal states. That is a significant communality but should not disguise the fact that the models of federalism practiced in the two countries are quite distinct. The Australian model, for example, is predicated largely around the jurisdictional allocation of substance matter powers to the centre and, by default, to the states and allocates far more substantive matters to the states than is the case in Germany. The German federalist model, while also following an enumerative approach as far as substance matters are concerned is much stronger institutionally because of the direct institutional involvement of the states in the federal law making process. In both countries the external affairs power is regulated in the constitution. In Australia that is achieved by two words only, the naming of „external affairs” as one of the powers attributed to the Commonwealth Par-

liament’s legislative portfolio in Section 51 (xxix). Indirectly it is the prerogative power of the executive in Section 61, which governs the horizontal aspect of the external affairs power and attributes it to the executive branch of government. In Germany it is mainly Articles 32 and 59 of the Basic Law that deal with the external affairs power.

2. *Sovereignty*

The Commonwealth Constitution is a British statute passed by the British Parliament on 5 July 1900¹ after having successfully cleared the hurdle of several referenda in the Australian colonies between 1898 and 1900. The creation of an Australian federation under a common constitution did, however, not create a fully independent and sovereign state. The building of a sovereign nation continued through several steps, such as the Statute of Westminster 1931 and

the Statute of Westminster Adoption Act 1942² and was only and finally completed with the Australia Act 1986 (Cth), which finally put an end to the still existing doctrine of repugnancy under which British law prevailed in the several states.

The new constitutional entity created a partially autonomous „self-governing Dominion“ from the previously six colonies³. In essence the six colonies had merged into one⁴ and hence the principal relationship with the United Kingdom had not changed. In particular the „doctrine of repugnancy“ in Section 2 of the Colonial Law Validity Act 1865 continued to apply. According to this „doctrine“ – and similar to Article 31 of the German Basic Law – any colonial law standing in conflict with British law was null and void⁵. This situation continued until the passage of the Statute of Westminster⁶. In Section 2 this statute terminated the application of the Colonial Law Validity Act 1865 for „the Commonwealth of Australia“ (Section 1). Section 4 limited the prevalence of British legislation to such acts that were passed at the behest of or subsequently authorized by the Dominion⁷. However, the power to repeal or amend the Constitution remained with the United Kingdom even then⁸ and according to Section 9 the Statute of Westminster was applicable only to the federation but not to the several States. The latter were still bound by the Crown Laws Validity Act and hence the prevalence of British law. It remained legally possible for the House of Commons in London to pass legislation binding on the Australian states even against their will, notwithstanding the fact that it was accepted that this authority would not be used⁹.

Full legislative independence was achieved with the Australia Act 1986. Sec-

tion 1 unequivocally states:

No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.

There has been some controversy as to when Australia became fully independent. *Geoff Lindell* pointed out that the right to terminate dependencies and the actual exercise of this right are two different matters. Hence Australia could have, at its own will, become fully independent with the passage of the Statute of Westminster. Consequently it does not matter much that Australia chose to do so only later¹⁰. That is an interesting observation and relevant in other contexts as well. International law does not preclude a sovereign state from transferring sovereign powers to another entity yet remain a sovereign state nonetheless. The example of the European Union is an impressive illustration.

The development of the legal relationship between Australia – and other Dominions – to the United Kingdom is also interesting with regard to the European Union and its legal relationship with the member states and vice versa. The British Parliament is obviously able, to permanently terminate sovereign rights both territorially and pertaining to substance matter. That is a remarkable difference to the powers of the German parliament under the German Basic Law, where the German Constitutional Court, culminating in its decision on the constitutionality of the Lisbon decision¹¹, has set out significant thresholds and limitations for such transfers of sovereignty to other entities¹².

3. *The Relationship between International Law and Domestic Law in Australia*

Australia is an example of a strictly dualist country, i.e. a country that regards international law, i.e. international treaties and customary international law, as separate legal spheres outside the domestic legal system and with no direct impact on the latter. International law can only gain effectiveness within the domestic legal order if Parliament legislates accordingly, in which case it is precisely not the international law norm that as such becomes part of domestic law but a norm of domestic law that reflects the content of the international norm. The difference is important because if the international norm disappears, the domestic norm still remains unless it too is rescinded.

The dualistic approach was not without alternative when the Commonwealth Constitution was drafted. An earlier draft version contained a different clause:

The Constitution established by this Act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, and all treaties made by the Commonwealth, shall, according to their tenor, be binding on the courts, judges, and people of every State, and of every part of the Commonwealth, anything in the laws of any State to the contrary notwithstanding; and the laws and treaties of the Commonwealth shall be in force on board of all British ships whose last port of clearance or whose port of destination is in the Commonwealth¹³.

This language was later amended and all references to treaty law removed on the grounds that under English law treaties could not directly impact the municipal legal order¹⁴. The High Court has affirmed this dualistic approach consistently. It ap-

plies not only to treaties but also to customary international law. In the "Stolen Generations" case plaintiffs claimed that the Aboriginals Ordinance 1918 (NT), which authorized the forced removal of Aboriginal children from their families and culture, was unconstitutional because it amounted to "cultural genocide" within the means of the genocide convention, which was in force in Australia since 1951. The plaintiffs argued that this prohibition was already part of customary international law well before Genocide Convention became effective in 1951. Dawson J was not convinced. To the effect of the Genocide Convention he stated:

In any event, the Convention has not at any time formed part of Australian domestic law. As was recently pointed out in *Minister for Immigration and Ethnic Affairs v Teoh*, it is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. Where such provisions have not been incorporated they cannot operate as a direct source of individual rights and obligations. However, because of a presumption that the legislature intends to give effect to Australia's obligations under international law, where a statute or subordinate legislation is ambiguous it should be construed in accordance with those obligations, particularly where they are undertaken in a treaty to which Australia is a party. Such a construction is not, however, required by the presumption where the obligations arise only under a treaty and the legislation in question was enacted before the treaty, as is the situation in the present case¹⁵.

However, the Court also spelled out a powerful tool for the "indirect" application of international law within the domestic legal order. Statutory interpretation requires that domestic law be interpreted international law friendly. Whenever statutory

provisions leave room for interpretation, and they almost always do, and a *lege artis* interpretation yields more than one result of which one is in compliance with international law and the others are not, the courts must choose the one which honours Australia's international obligations. Justices Mason and Deane explained why that is so:

Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention¹⁶.

4. *The External Affairs Power in the Commonwealth Constitution*

The allocation of power in a federal system has two aspects, a federal (vertical) aspect and a horizontal aspect. The former is concerned with the allocation of a certain power between the centre and the constituent entities and the latter is concerned with the distribution of power between the various organs of government at a specific level of government.

Horizontally the power to enter into treaties is a Commonwealth executive power under s. 61 of the Constitution (prerogative power). The aspect of treaty making is to be distinguished from treaty implementation. If an international treaty requires domestic legislative action it is for the Parliament to legislate.

Vertically, the external affairs power is wholly attributed to the Commonwealth

and the several States and Territories have no external power at all. That is true both for treaty making and for treaty implementation.

4.1. *Historical Development*

As shown above the creation of an Australian Federation had not led to the immediate creation of an independent state and thus not to the creation of a new entity with (full) international personality¹⁷. The former colonies, now the states, never possessed sovereignty under international law¹⁸. Only the Crown could act internationally, notwithstanding the fact that even before full independence was achieved consultation procedures had been put in place and the participation of the colonies in treaties negotiated by the Crown was not automatic¹⁹. It was not until after World War I that the Dominions generally began to exercise greater powers in the area of external affairs. Australia was separately represented at the Versailles Peace Conference, signed the Versailles Peace Treaty and, for example, became an independent member of the League of Nations and the International Labour Organization (ILO) in 1919 and hence exercised at least partial international personality²⁰. At the Imperial Conference in 1923 it was recognized that the different Governments of the Empire had the right to make treaties with foreign powers, subject to a duty to consider any potential effect on other parts of the Empire, and a duty to inform other Empire Governments of their intentions. The Imperial Conference 1926 concluded with the Balfour Declaration, which stated:

They [the Dominions] are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

The Statute of Westminster 1931 – and its implementation by the Statute of Westminster Adoption Act 1942 (Section 3) – finalized this development by declaring that the Dominions, and thus the Commonwealth of Australia, had full power to make laws having extra-territorial operation²¹.

4.2. *Treaty Making and the States*

The Australian States did not gain any new powers with Federation and hence they have no power to enter into treaties. Section 2 (2) of the Australia Act 1986 explicitly states:

It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State but *nothing in this subsection confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.*

Consequently, whatever agreements states and territories enter into with other countries cannot be treaties under international law as the states do not possess international personality – neither from the perspective of international law nor from a domestic constitutional perspective²².

The lack of international personality is irrespective of the substance matter to be addressed in a treaty and the domestic allocation of legislative powers pertaining to this particular substance matter. Hence even if the substance matter to be addressed in an international treaty belongs to the purview of state powers the states are still unable to act internationally. That stands in stark contrast to Article 32.3 of the German Basic Law, which allows the states to enter into international treaties with foreign subjects of international law in matters which domestically constitute exclusive powers of the *Länder*²³, such as schools and universities.

However, there have been efforts to integrate the states into the whole process at least to some degree. The Council of Australian Governments (COAG)²⁴ agreed on 14.6.1996 to the establishment of a Treaties Council consisting the Prime Minister of the Commonwealth and all Premiers and Chief Ministers of the states and territories. The objective of the Treaty Council is to improve information and consultation procedures concerning treaties and other international instruments of sensitivity or importance to the States and Territories. According to the principles of the Treaty Council the Commonwealth will inform the States and Territories of international instruments covering matters of sensitivity and importance to the States and Territories. Not included in this undertaking are treaties concerning matters of national security. The Commonwealth will “seek and take into account the views” of the States and Territories in formulating Australian negotiating policy before becoming a party to a treaty or instrument. However, the procedure has not really gained traction

and the Treaties Council has only ever met once in 1997. One possible reason could be that its potential role has been largely subsumed by the Standing Committee on Treaties (SCOT) also established by COAG in 1996²⁵. SCOT consists of senior Commonwealth and State and Territory officers who meet twice a year, or more often if required, to identify treaties and other international instruments of sensitivity and importance to the States and Territories.

4.3. *Treaty Making, Treaty Implementation and the Role of Parliament*

The fact that external affairs are allocated to the executive is a traditional characteristic of Westminster based systems as is the consequential distinction between treaty making and treaty implementation. The Privy Council has quite succinctly summarized this position in a 1937 decision:

It will be essential to keep in mind the distinction between (1.) the formation, and (2.) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been

suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default²⁶.

As a result the Commonwealth Parliament has no formal role in the treaty making process²⁷. Negotiation, signing and ratification of international treaties are matters for the executive branch. Ratification of international treaties is consequently limited to its international law meaning as the step by which the country declares that it is now bound by the treaty in question. In Australia the term ratification does not have an additional domestic, constitutional meaning of parliamentary assent to a treaty as is the case for example in the United States, where the US-Senate must consent to any treaty with a two-thirds majority²⁸ or in Germany under Article 59.2 of the Basic Law, which requires assent by both houses of parliament, *Bundestag* and *Bundesrat*.

The 1996 reforms mentioned above in the context of the participation of the states also sought to improve the involvement of Parliament in the treaty making process. To that end the "Joint Standing Committee on Treaties (JSCOT) was introduced with the objective to improve the openness and transparency of the treaty making process in Australia. All treaty actions proposed by the Government are tabled in Parliament for a period of at least 15 sitting days

before action is taken that will bind Australia internationally unless the Minister for Foreign Affairs certifies that a treaty is particularly urgent or sensitive because it involves significant commercial, strategic or foreign policy interests. The government will provide a text of the treaty and "national interest analysis" (NIA) spelling out key information on the treaty such as effect, legal obligations, implementation or cost. In recent years JSCOT has increased its activities significantly²⁹. It is not surprising that these reports will not necessarily lead to a uniform view of the matter but rather reflect the various political views held on the matter³⁰.

However, the fact remains that from a legal perspective the role of Parliament in treaty making is very limited. That is not to say that the executive branch is hindered in involving the legislative branch in this process. The executive is, however, under no obligation to do so.

4.4. *Parliament and Treaty Implementation*

The fact that Parliament only has a small role in treaty making does not mean that Parliament has no role at all. Whenever performance of an international treaty obligation requires legislation to be passed domestically, it is for the Parliament to act. As shown the external affairs power is exclusively a power of the Commonwealth, the Parliament to act can only be the Commonwealth Parliament. The main question that has arisen in this context is whether the external affairs power of the Commonwealth is a sufficient basis of power for the Commonwealth Parliament to legislate or

whether the Commonwealth Parliament requires a specific substance matter power enumerated in the Constitution (especially Section 51). In other words, is the Commonwealth Parliament empowered to legislate under the external affairs power of Section 51 (xxix) even if it otherwise had no power to legislate and, if yes, are there any other limitations for the Commonwealth Parliament when legislating under the external affairs power?

Within the High Court the question was addressed for the first time when the implementation of the Versailles Peace Treaty into Australian law by the Treaty of Peace Act (1919) was upheld by one Justice on the basis of the external affairs power³¹. In 1936 the High Court upheld the Commonwealth Air Navigation Act (1920) on the bases of the external affairs power because it gave effect to the Paris 1919 International Convention for the Regulation of Aerial Navigation³². In particular it did not matter that the underlying facts of the case were entirely situated in New South Wales and in that sense had no international bearing whatsoever³³. Instead another limitation was used: the domestic provisions legislated on the basis of the external affairs power to implement an international treaty were held to be invalid because they were not sufficiently in line with the provisions of that underlying treaty³⁴.

In the *Burgess Air Navigation* case there was consensus that the matter regulated by the treaty was of international concern. Consequently it remained unclear whether the external affairs power could be utilised if the subject matter were found not to be of international concern but had nonetheless been dealt with internationally. *Dixon J* pointed out the potential for abuse. He ex-

plained that “it would be an extreme view” that the Commonwealth should be able to legislate internally based on the external affairs power when the only international nexus of the matter is the fact that the government has engaged in a treaty on the matter³⁵. The matter resurfaced almost 50 years later in regard to the Racial Discrimination Act³⁶ which implemented the 1966 International Convention on the Elimination of All Forms of Racial Discrimination. Stephen J reemphasized the need for a bona-fide limitation of the external affairs power to combat possible abuse:

[...] that to fall within power, treaties must be bona fide agreements between states and not instances of a foreign government lending itself as an accommodation party so as to bring a particular subject-matter within the other party’s treaty power; and that to fall within power a treaty must deal with a matter of international rather than merely domestic concern³⁷.

However, as in the *Burgess* case the answer could be avoided because the subject-matter of the prohibition of racial discrimination was regarded as sufficiently of international concern³⁸.

The High Court took what appeared to be a more centralistic view in the *Tasmania Dam* case³⁹. The case concerned a highly controversial interference of the federal government based on the *World Heritage Properties Conservation Act 1983*⁴⁰ against plans in the state of Tasmania to dam the Franklin River. In a practical application of what elsewhere might be referred to as the political question doctrine or judicial restraint, *Mason J* wrote:

In any event, as I observed in *Koowarta*, at p. 651, the Court would undertake an invidious task if it were to decide whether the subject matter of a convention is of international character or con-

cern. On a question of this kind the Court cannot substitute its judgment for that of the Executive Government and Parliament. The fact of entry into, and of ratification of, an international convention, evidences the judgment of the Executive and of Parliament that the subject matter of the convention is of international character and concern and that its implementation will be a benefit to Australia⁴¹.

Mason J saw no criteria against which one could measure whether something was of international concern or not. One could, of course, have taken the opposing view, namely that the benefit of the doubt goes against the Commonwealth. That would not have stifled international cooperation of the Commonwealth. It would have curtailed the Commonwealth’s implementation power of any such treaty and hence have required the Commonwealth to seek consensus by the states upon which subsequent legislative implementation would then have depended.

The question of whether something is of “international concern” can also be raised apart from treaty implementation. It was only coincidental that in both the *Koowarta* and the *Tasmania Dam* cases international treaties existed as nexus points. The *Tasmania Dam* decision insofar only reaffirmed that the presence of an international treaty renders the question of whether the substance of that treaty is of “international concern” moot⁴². Not surprisingly, the *Tasmania Dam* decision has given rise to criticism that it essentially gives the Commonwealth unlimited power to legislate if only a treaty partner can be found. One might caution that the “good faith” principle would in all probability and could be brought forward if the federal level abused this power and were to construe a treaty for the sole reason of creating legislative pow-

ers⁴³. That notwithstanding, the Commonwealth power has been construed broadly and the states have largely been taken out of treaty implementation⁴⁴.

4.5. *Parliament and International Recommendations*

The further question is whether the external affairs power can be invoked as a basis for legislation regardless of whether a treaty requires implementation or not. In *R v Sharkey* the High Court considered a criminal norm in the Commonwealth Crimes Act, which made it a crime “to excite disaffection against the Government or Constitution of any of the King’s Dominions”, to be an *intra vires* exercise of the external affairs power⁴⁵. The issue also arises in the context of non obligating legal acts emanating from treaties, for example recommendations by international organizations, or from intergovernmental recommendations or attempts to coordinate certain policy actions. A prominent example of this was the decision in *Pape v Commissioner of Taxation*. In 2009 Pape had challenged a fiscal stimulus package by the Commonwealth Government under which every Australian received a tax bonus of up to AUD 900 on the basis that the Commonwealth had no power to legislate⁴⁶. The Commonwealth had based the underlying legislation on several powers, the external affairs power being one of them. The Commonwealth argued that the G-20 group of nations as well as the IMF and the OECD had recommended to their members to undertake fiscal stimulus to combat the financial crisis. Only three of the judges ad-

ressed the external affairs power in this context and their opinions point in the direction of a limitation of the external affairs power were the Commonwealth to legislate based solely of recommendations or other non-binding expressions by international bodies⁴⁷.

4.6. *Conclusion*

In Australia, the High Court has broadened the potential scope of the external affairs power significantly. It has been construed as a stand-alone power without systematic limitations with regard to the powers otherwise attributed to the States. Interestingly *Mason J* explained in *Tasmania Dam* what could be referred to as a reverse “living instrument” interpretation approach, namely that the meaning of the Constitution (in this case of the term ‘external affairs’) does not change merely because the practical realities have changed:

It is, of course, possible that the framers of the Constitution thought or assumed that the external affairs power would have a less extensive operation than this development has brought about and that Commonwealth legislation by way of implementation of treaty obligations would be infrequent and limited in scope. The framers of the Constitution would not have foreseen with any degree of precision, if at all, the expansion in international and regional affairs that has occurred since the turn of the century, in particular the cooperation between nations that has resulted in the formation of international and regional conventions. But it is not, and could not be, suggested that by reason of this circumstance the power should now be given an operation which conforms to expectations held in 1900. For one thing it is impossible to ascertain what those expectations may have been. For another the

difference between those expectations and subsequent events as they have fallen out seems to have been a difference in the frequency and volume of external affairs rather than a difference in kind. Only if there was a difference in kind could we begin to construct an argument that the expression "external affairs" should receive a construction which differs from the meaning that it would receive according to ordinary principles and interpretation⁴⁸.

The external affairs power, though not limitless, will go a long way to support central action and lock out the states from a substantive role. The various limitations could be summarized as *bona fide* limitations, i.e. as limitations that by and large would only curtail attempts to employ the external affairs power in what effectively would amount to a circumvention of otherwise applicable limitations of central legislative powers.

5. *The External Affairs Power in Germany*

The vertical aspect of the external affairs power, i.e. its distribution between the federal level and the *Länder* is addressed in Article 32 of the Basic Law:

1. Relations with foreign states shall be conducted by the Federation.
2. Before the conclusion of a treaty affecting the special circumstances of a *Land*, that *Land* shall be consulted in timely fashion.
3. Insofar as the *Länder* have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government.

The text makes it clear that the Federation as a whole is the one conducting the foreign affairs, lining up the international concept of "state" and the domestic allocation of the external affairs power.

However, the text also makes it clear that the German federation, from its own constitutional perspective, attributes partial international legal personality to the *Länder*, which are able under Article 32.3 to conclude international treaties with foreign states, albeit with the consent of the Federal Government⁴⁹, in areas where the constituent *Länder* have retained the – exclusive – power to legislate⁵⁰.

The language suggests a conflict between sections 1 and 3 of Article 32 as far as the power to conclude international treaties is concerned. If this power belonged exclusively to the centre, as Article 32.1 would suggest, there would be no room for the application of Article 32.3 and any treaties concluded by the *Länder*. However, the rules of statutory interpretation imply, by contrast, not to interpret a provision in such a way that another provision is rendered useless. The *Länder* must therefore at least retain a concurring power to conclude treaties where they possess respective powers domestically, i.e. the treaty making power is shared by both the federation and the constituent *Länder* and can be exercised by the *Länder* as long as the federation has not acted.

The next question is whether the federation's treaty making is limited to those areas where the Basic Law has attributed powers to the federation under the enumeration principle. Where above the question was whether Article 32.1 provides for an exclusive treaty-making powers for the federation, the question now is whether Article 32.3 provides for exclusive treaty-making powers for the *Länder* in the areas left to them. Three approaches were initially discussed⁵¹.



Australian Coat of Arms. (Source: Wikipedia)

The centralistic “Berlin solution” solution proposed that the federal level should have full treaty-making power while acknowledging the concurrent rights of the *Länder* under Article 32.3 of the Basic Law. It also proposed that the legislative powers necessary to implement a treaty should follow the treaty-making power in essence giving the federation full powers to make and implement treaties and keeping the treaty making and treaty implementing powers aligned. The “Berlin solution” is thus very similar to the Australian solution of the problem. The second approach, referred to as the “South-German federalist solution” because it was mainly pushed by the more federally oriented states in the south such as *Bavaria* and *Baden-Württemberg*, limited both the treaty making and the

treaty implementing power of the federation to those areas covered by the legislative powers attributed to the federation by the Basic Law. In other words the external powers were to follow the internal powers. This approach also keeps treaty making and treaty implementation aligned but limits the ability of the federation to act internationally. In fact in its pure form it would often require mixed treaties where both the federation and the *Länder* conclude the same treaty simultaneously⁵². The middle ground is held by so-called “North-German” approach under which the federation has full treaty-making power but the implementation follows the general attribution of legislative power. The downside is that treaty making and treaty implementation are separated.

Somewhat untypically for open questions in German constitutional law, the issue has never been clarified by the German Constitutional Court. Instead a practical solution has been found in 1957 that has become known as the *Lindau Agreement* between the Federation and the *Länder*⁵³. Under this agreement the Federation will have comprehensive treaty making powers, i.e. even with regard to matters otherwise falling to the *Länder*. In exchange, if a treaty touches upon matters of exclusive powers of the *Länder*, the Federation accepted an obligation to seek the agreement of the *Länder* before entering into an international obligations and the *Länder* will also be informed as early as possible about any matter of concern to them. Institutionally the collaboration was secured by the creation of a "Permanent Treaty Commission of the *Länder*" where the *Länder* will coordinate their position on treaty issues and communicate the outcomes to the Federation⁵⁴.

It is noteworthy that the German debate and the practical solution in the *Lindau Agreement* is about treaty making and not about treaty implementation. The centralistic approach – comprehensive treaty-making and implementation powers for the federation – did not prevail. Treaty implementation in all areas where the *Länder* have jurisdiction to legislate they will also be responsible to afford the necessary implementation. Their procedural integration through the Treaty Commission is therefore not a polite offer to inform but a necessity for the federal actors if they want to achieve their policy goals.

It should also be noted that the *Lindau Agreement* is a practical solution only and not a legal solution. The Basic Law deter-

mines the legal situation and the Basic Law cannot be amended by agreement between the Federation and the *Länder*. The interpretation of the Basic Law is the domain of the Federal Constitutional Court but as long as no challenge is brought to the Court, the *Lindau Agreement* will stand as it has for the past 55 years.

6. Conclusion

The Commonwealth Constitution and the German Basic Law approach the distribution of power between the centre and the constituent entities in external affairs matters from opposite directions. In the end, in both cases a compromise of sorts, an institutional *modus vivendi*, has been found in trying to balance the interests of the federation with those of the constituent entities by improving information and communication between the two levels and by involving and listening to the constituent entities.

However, the position of the German *Länder* in external affairs is considerably stronger than that of their Australian counterparts. Whereas both participate through treaty commissions in the treaty making process, only the German *Länder* have a decisive role to play in the (constitutional) ratification of important, so-called political, treaties under Article 59.2 of the Basic Law. Such treaties must be passed by both houses of Parliament, the *Bundestag* and by the state chamber, the *Bundesrat*. The latter consists of members (ministers and premiers) of the executive government of the *Länder* and is as such a truly federal organ⁵⁵. In addition, the *Länder* retain the

implementation power in areas where they have legislative jurisdiction.

There is a further reason why the *Länder* enjoy considerably more power in external affairs than Australian States, at least if one is willing to regard matters concerning the European Union as external affairs. Germany is a member state of the European Union and the representation of Germany in the Council of Ministers of the EU, its main legislative body, is dealt with separately in Article 23 of the Basic Law. The details of this regime are beyond the scope of this paper. Suffice it to say that the participation of the *Länder* can go as far as being entitled, if matters are legislated on the European Union level, which internally would constitute an exclusive legislative power of the

Länder, to determine that Germany will not be represented in the Council by a minister of the Federal Government but will instead be represented by a delegate to be chosen by the *Länder* in the *Bundesrat*. Whereas the Article 23 regime is clearly an indication of the potentially strong position of the *Länder* in external affairs, it is also an indication of the degree to which European Union matters have evolved into a *sui generis* relationship and which can no longer be regarded as merely a subset of traditional external affairs even if they cannot be regarded as domestic affairs either.

¹ The Commonwealth of Australia Constitution Act 1900.

² L. Zines, *The High Court and the Constitution* (5th ed.), Sydney, Federation Press, 2008, p. 376.

³ *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, para. 21.

⁴ *New South Wales v Commonwealth (Seas and Submerged Lands case)* (1975) 135 CLR 337 (373), para. 49 (“A new colonial polity was brought into existence”) and para. 52: “Whilst the new Commonwealth was upon its creation the Australian colony within the Empire, the grant of the power with respect to external affairs was a clear recognition, not merely that, by uniting, the people of Australia were moving towards nationhood, but that it was the Commonwealth which would in due course become the nation state, internationally recognized as such and independent. The progression from colony to inde-

pendent nation was an inevitable progression, clearly adumbrated by the grant of such powers as the power with respect to defence and external affairs. Section 61, in enabling the Governor-General as in truth a Viceroy to exercise the executive power of the Commonwealth, underlines the prospect of independent nationhood, which the enactment of the Constitution provided. That prospect in due course matured, aided in that behalf by the Balfour Declaration and the Statute of Westminster and its adoption”.

⁵ Colonial Laws Validity Act 1865. Section 2 states: “Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be

read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative”.

⁶ Statute of Westminster 1931, ch. 4 (Regnal. 22 and 23 Geo 5). However, under Section 10 this statute only became effective after the Statute of Westminster Adoption Act 1942 had been passed. This happened in 1942 and took retrospective effect on 3.9.1939, the beginning of World War II. This sequence of events shows that there was certainly no immediate pressure in the Australian political sphere to formally ensure full sovereignty and independence.

⁷ See *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958) 100 CLR 597, where the High Court held, that the new British Copyright Act 1956 could have no effect in Australia because enactment thereof had not been “requested or consented to”.

- ⁸ Section 8 of the Statute of Westminster states: "Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act".
- ⁹ G. Winterton, *The Acquisition of Independence*, in R. French, G. Lindell, C. Saunders (edited by), *Reflections on the Australian Constitution*, Sydney, The Federation Press, 2003, p. 31 referring to the decision of the Supreme Court of Victoria in *Ukley v Ukley* (1977) VR 121, pp. 129-130.
- ¹⁰ G. Lindell, *Further Reflection on the Date of the Acquisition of Australia's Independence*, in French, Lindell, Saunders (edited by), *Reflections on the Australian Constitution* cit., p. 51.
- ¹¹ BVerfG, 2 BvE 2/08 of 30.6.2009 (BVerfGE 123, 267). See also the decision of 7.9.2011 regarding the European sovereign debt crises and related rescue efforts, BVerfG, 2 BvR 987/10.
- ¹² It is not quite clear where exactly the boundaries lie and whether they are absolute and hence only surmountable by revolutionary act (Article 79.3 of the Basic Law) or whether these boundaries could be overcome by framing a new constitution under Article 146 of the Basic Law. See J. Bröhmer, *Containment eines Leviathans—Anmerkung zur Entscheidung des Bundesverfassungsgerichts zum Vertrag von Lissabon*, in «ZEuS», 2009, p. 543.
- ¹³ Cited after H.B. Connell, *International Agreements and the Australian Treaty Power*, in «Australian Year Book of International Law», vol. 83, 1968-1969, p. 85.
- ¹⁴ *Ivi*, but see Article VI Sec. 2 of the US-Constitution: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made,

under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding".

- ¹⁵ *Kruger v Commonwealth* ("Stolen Generations case") (1997) 190 CLR 1, the decision referred to was rendered by the High Court in the case *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* ("Teoh's case") (1995) 183 CLR 273. Teoh was a convicted drug dealer who was denied permanent residence in Australia and who was to be deported. The deportation would have breached the rights of his four children in Australia under the Convention on the Rights of the Child (CRC) but the CRC had not been incorporated into Australian law.
- ¹⁶ *Kruger v Commonwealth* ("Stolen Generations case") (1997) 190 CLR 1.
- ¹⁷ *Fn. 1 supra* and subsequent text.
- ¹⁸ *New South Wales v Commonwealth* (1975) 135 CLR 337, p. 373, para. 51 (Seas and Submerged Lands case). The legal term 'colony' refers to an entity without legal personality and hence without sovereignty, see, for example, A. Aust, *Handbook of International Law* (2nd ed.), Cambridge, Cambridge University Press, 2010, p. 30.
- ¹⁹ *Victoria v Commonwealth* ("Industrial Relations Act case") (1996) 187 CLR 416, para. 11.
- ²⁰ For a brief instructive overview see the High Court decision in *Victoria v Commonwealth* ("Industrial Relations Act case") (1996) 187 CLR 416, paras. 8 et seq. There were some that argued that full international legal personality had been achieved. See Justice Murphy in dissenting opinions, e.g. in *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, Murphy J. para. 2 ff.
- ²¹ See also Zines, *The High Court and the Constitution* cit., p. 376.
- ²² See H.B. Connell, *International*

Agreements and the Australian Treaty Power, in «Australian Year Book of International Law», vol. 4, 1968-1969, pp. 87-88, who raises the question with a comparative look to Canada and states that at any rate "[t]he Australian States have appeared to acquiesce in the fact that they have no *locus standi* in negotiations between international states". That something is not an international treaty in the sense of the Vienna Convention on the Law of Treaties (or any customary international law not codified in that Convention) does not necessarily mean that there can only be a private contractual arrangement. For example, the German Federal Constitutional Court had to decide whether the 'Agreement Between the Land Baden and the *Port Autonome de Strasbourg*' concerning the Joint Administration of the Port of Kehl ('Kehl Agreement') was an international agreement in the sense of Article 32 of the Basic Law between the then existing Land Baden and the French local authority. The fact that it was not only meant, in this particular context, that the arrangement did not need the consent of the federal government. See I. Couzigou, *Kehl Hafen Case*, in R. Wolfrum (edited by), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008-, online edition, <www.mpepil.com>, 7th August 2012. See also below The External Affairs Power in Germany.

²³ Article 32.3 of the Basic Law states: "Insofar as the *Länder* have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government".

²⁴ Members of the COAG are the Prime Minister, the State and Territory Premiers and Chief Ministers and the President of the Australian Local Government Association (ALGA).

²⁵ H. Charlesworth, M. Chiam, D. Hovell, G. Williams, *Deep Anxie-*

- ties: Australia and the International Legal Order*, in «Sydney Law Review», vol. 25, n. 4, p. 423.
- ²⁶ *The Attorney General of Ontario (Appeal No. 105 of 1936) v The Attorney General of Canada and others* [1937] UKPC 11, pp. 5-6.
- ²⁷ See also Nielsen and Claire, *The Executive Treaty-Making Prerogative. A History and Critique*, in «New Zealand Yearbook of International Law», vol. 4, 2007, p. 173.
- ²⁸ Article II Section II, Clause 2 of the United States Constitution: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; [...]"
- ²⁹ JSCOT tabled 12 reports in 2011 and 2012 (as of 1st August 2012), <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives/Committees?url=jscot/reports.htm>.
- ³⁰ See T. Blackshield and G. Williams, *Australian Constitutional Law and Theory – Commentary and Materials* (5th ed.), Sydney, The Federation Press, 2010, pp. 887-888.
- ³¹ See concurring opinion of Higgins J in *Roche v Kronheimer* 29 CLR 329 (1921): "It is difficult to say what limits (if any) can be placed on the power to legislate as to external affairs. There are none expressed. No doubt, complications may arise should the Commonwealth Parliament exercise the power in such a way as to produce a conflict between the relations of the Commonwealth with foreign Governments and the relations of the British Government with foreign Governments. It may be that the British Parliament preferred to take such a risk rather than curtail the self-governing powers of the Commonwealth; trusting, with a well-founded confidence, in the desire of the Australian people to act in co-operation with the British people in regard to foreign Governments".
- ³² *R v Burgess; ex parte Henry* 55 CLR 608 (1936).
- ³³ Henry had been charged with piloting a small aircraft without the necessary license in Australia, when there was no chance for him to cross any borders. The Court nonetheless stated: "If, however, it should be thought that before a subject can legitimately be dealt with under this heading it should possess some characteristics which make it specially proper to be dealt with on an international basis, there can be little room for doubt that aviation is such a subject. Aircraft pass rapidly from one country to another, and the subject of their regulation and control not only is suitable for international agreement but almost imperatively demands it".
- ³⁴ *R v Burgess; ex parte Henry* 55 CLR 608 (1936): "But it is a necessary corollary of our analysis of the constitutional power of Parliament to secure the performance of an international convention that the particular laws or regulations which are passed by the Commonwealth should be in conformity with the convention which they profess to be executing" (Evatt and McTiernan JJ).
- ³⁵ *R v Burgess; ex parte Henry* (1936) 55 CLR 608, per Dixon J.
- ³⁶ See in particular Section 7, and preamble of the Racial Discrimination Act.
- ³⁷ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, per Stephen J at para. 23.
- ³⁸ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
- ³⁹ *Commonwealth v Tasmania (Tasmanian Dam case)* (1983) 158 CLR 1.
- ⁴⁰ This Act purported to implement the Convention Concerning the Protection of the World Cultural and Natural Heritage, Adopted by the General Conference at its Seventeenth Session Paris, 16/11/1972, <<http://whc.unesco.org/en/conventiontext/>>.
- ⁴¹ *Commonwealth v Tasmania (Tasmanian Dam case)* (1983) 158 CLR 1, Mason J para. 11.
- ⁴² See Dawson J: "The Tasmanian Dam Case does, I think, provide an answer in the present case because whatever else it decided, it did decide that the legislative implementation of an international treaty concluded in good faith is within the ambit of the external affairs power". *Richardson v Forestry Commission* (1988) 164 CLR 261, para. 4.
- ⁴³ Gibbs CJ expressed doubts as to the effectivity of the *bona fides* limitation referring to it as "at best, 'a frail shield'", *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, para. 30.
- ⁴⁴ The High Court confirmed its broad interpretation of external affairs with regard to treaty implementation in *Victoria v Commonwealth (Industrial Relations Act case)* (1996) 187 CLR 416. The majority there even denied the notion that the scope of international relations today was not foreseen or foreseeable at Federation in 1901: "The phrase „External affairs“ was adopted in s 51(xxix) of the Constitution in preference to „foreign affairs“ so as to make it clear that the power comprehended both the relationship between the Commonwealth of Australia and other parts of the then British Empire and the relationship with foreign countries (44). As we have indicated earlier in these reasons, the Commonwealth of Australia was established at a time of evolving law and practice in the external relations between sovereign powers and between the self-governing units of the Empire. It would be a serious error to construe par (xxix) as though the subject-matter of those relations to which it applied in 1900 were not continually expanding. Rather, the external relations of the Australian colonies were in a condition of continuing evolution and, at that time, were regarded as such. Accordingly,

it is difficult to see any justification for treating the content of the phrase „external affairs” as crystallised at the commencement of federation, or as denying it a particular application on the ground that the application was not foreseen or could not have been foreseen a century ago”, id. at para. 25 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

⁴⁵ *R v Sharkey* (1949) 79 CLR 121.

⁴⁶ *Pape v Commissioner of Taxation* (2009) 238 CLR 1. The case is and will remain highly relevant for some time to come. Whereas Bryan Pape, then a Senior Lecturer at the University of New England School of Law, lost the case, he won on some crucial points pertaining to the scope of legislative powers of the Commonwealth on which the underlying Tax Bonus For Working Australians Act (No 2) 2009 (Cth), <http://www.austlii.edu.au/au/legis/cth/num_act/tbfaa22009406/>, had been based, among them not only the external affairs power but also the taxation power, the so-called nationhood power and an alleged appropriations power. For interesting background and a discussion of the legal issues listen to the audio conversation between Bryan Pape and this author at <<http://abmp3.com/download/6056721-mp3.html>> or <<http://blog.une.edu.au/the-professions/2009/04/30/bryan-pape-senior-law-lecturer-challenges-the-high-court/>>.

⁴⁷ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, para. 368 et seq., 371: “As was pointed out in *Victoria v The Commonwealth* (Industrial Relations Act Case) legislation may be supported under the external affairs power if the legislation gives effect to some international obligation. But as also pointed out in that case, what is said to be the legislative implementation of a treaty may present some further questions for consideration, including whether the treaty in question sufficiently

identified the means chosen in legislation as one of the ways in which parties to the treaty are to pursue some commonly held aspiration expressed in the treaty. In the present case, however, it is not necessary to examine these questions. It is sufficient to observe that neither the Declaration by the leaders of the G-20, nor the recommendations of either the IMF or the OECD, imposed any obligation on Australia to take action of the kind now in question”.

⁴⁸ *Commonwealth v Tasmania (Tasmanian Dam case)* (1983) 158 CLR 1, para. 13. See also Zines, *The High Court and the Constitution* cit., p. 389.

⁴⁹ The situation under international law is more complicated. Articles 1 and 7 of the Vienna Convention on the Law of Treaties only mention “states” as the term is understood in international law and that meaning does not include constituent entities of federal states. That does not preclude such entities from attaining limited, partial international personality for entering into a treaty but points to complications. For example, questions arise as to the legal consequences for a breach of treaty obligations of a treaty entered into by a constituent entity, such as the addressee of counter-measures, the available means for dispute resolution etc. See Doehring, Karl, *Völkerrecht*, p. 64, Rn. 144. See also Steinberger, Helmut, *Constitutional Subdivisions of States or Unions and Their Capacity to Conclude Treaties – Comments on Art. 5 Para. 2 of the ILC’s 1966 Draft Articles on the Law of Treaties*, *ZaöRV* 1967, p. 411.

⁵⁰ The German Basic law follows the enumeration principle where the federation has only those legislative powers that are assigned to it by the Basic Law either as exclusive or concurrent powers, see Articles 30, 70, 71-74 of the Basic Law. The *Länder* do not have too many exclusive legislative powers:

education (schools, universities), cultural affairs, broadcasting, police (but only the preventive and institutional part, not criminal procedure and criminal law) are the main ones. The Basic Law also differentiates between legislative and administrative powers and the administrative powers do not follow the legislative powers and are attributed separately, again with the *Länder* being responsible unless otherwise provided. German federalism is not so much predicated on the allocation of substantive legislative power but more on the still far-reaching institutional involvement of the *Länder* in federal law making through the second chamber, the *Bundesrat*. See Bröhmer, Jürgen, *The Federal Element of the German Republic - Issues and Developments*, in J. Bröhmer (edited by), *The German Constitution Turns 60 – Basic Law and Commonwealth Constitution, German and Australian Perspectives*, Verlag, Peter Lang, 2011, pp. 15 et seq.

⁵¹ For the following see H.-J. Papier, *Abschluß völkerechtlicher Verträge und Föderalismus – Lindauer Abkommen*, *DÖV* 2003, p. 265 (p. 267).

⁵² The European Union operates with mixed treaties but in a context where the external affairs powers are much more limited in the first place.

⁵³ Text of Agreement in German at <<http://www.lexexakt.de/glossar/lindauerabkommentxt.php>>.

⁵⁴ See No. 4 b and c of the Lindauer Agreement.

⁵⁵ See Articles 50 and 51 of the Basic Law.

Engineers: The Case that Changed Australian Constitutional History

MICHELLE EVANS

1. *Introduction*

In Australia, the framers of the *Constitution*¹, by adopting a federal system of government, intended to protect state power and autonomy against centralisation. The Commonwealth *Constitution* that resulted from the Constitutional Convention Debates of the 1890s limits central powers; provides for the continued existence of the states, their Constitutions and powers; and consequently, mandates a federal balance between the central and state governments. Central to a federal system of government, such as Australia's, is the ideal of maintaining the powers and autonomy of the states so that decisions can be made, and problems solved locally wherever possible.

Despite the federal origins and intentions of the framers of the Commonwealth Constitution, the Australian federal landscape has become increasingly centralised. The turning point towards centralisation was the decision in

Engineers, in which the High Court irreparably altered the balance of power between the Commonwealth and the states by interpreting the Constitution literally, or in other words, as a statute of the British Parliament, devoid from any historical intentions or federal implications. In the words of Craven: 'Since the decision in the *Engineers* case in the 1920s, the High Court has been strongly, institutionally, anti-federal'².

In fact, federalism in Australia has been compromised to such an extent that Australia can no longer be seen as an authentic federation³. This trend towards centralisation has gradually worsened, culminating in decisions such as *New South Wales v Commonwealth of Australia* ('*Work Choices*' case). In *Work Choices*, a majority of the High Court affirmed that the federal balance is not relevant when interpreting the *Constitution* and endorsed a very broad interpretation of the Commonwealth Parliament's corporations power. This greatly expanded the Commonwealth Parliament's legislative powers in that area

and paved the way for further expansions. An example of the states' loss of financial autonomy occurred after the decision in *Ha v New South Wales* ('Ha'), in which the High Court affirmed a broad interpretation of excise duties resulting in a loss of \$5 billion per annum to the states because s 90 of the Constitution provides that only the Commonwealth can levy duties of excise.

When one looks at how the High Court interpreted the Constitution before *Engineers*, the extent of the *Engineers* High Court's departure from precedent and tradition can be seen as nothing less than radical, and to use more modern terminology, it could be said to amount to judicial activism. In decisions regarding the extent and delineation of Commonwealth and state powers after federation, the High Court developed two interpretive doctrines that were implied from the federal nature of the Constitution. These were the 'immunity of instrumentalities doctrine' and the 'reserved state powers doctrine'. This approach to constitutional interpretation became known as 'originalism' because it sought to give effect to the original intent of the framers of the *Constitution*.

The 'immunity of instrumentalities doctrine', also known as the 'implied intergovernmental immunities doctrine', was an implication developed and applied by the early High Court that was based on the federal nature of the *Constitution*. It recognised that the Commonwealth and state governments were independent entities, and consequently, could not legislate so as to interfere with the operation of each other's affairs. This meant that both the Commonwealth and states were immune from the operation of each other's legislation if that legislation impinged on the exercise of

their legislative or executive powers⁴. The doctrine was a necessary implication in order to preserve and protect the federal division of powers between the Commonwealth and the states.

At the same time as they implied the doctrine of implied intergovernmental immunities, the High Court, prior to *Engineers* also implied the 'reserved powers doctrine' or 'reserved state powers doctrine', once again on the basis of the federal nature of the *Constitution*. It provided that the legislative powers of the Commonwealth prescribed by the *Constitution* should be read narrowly so as not to detract from the power of the states 'reserved' by s 107 of the Commonwealth *Constitution*⁵. Section 107 provides that the states will retain their powers after federation, except to the extent that they had been given exclusively to the Commonwealth, or otherwise withdrawn from the states, by the new *Constitution*.

This paper will examine and critique the *Engineers* decision in detail, outlining how it radically departed from these earlier interpretive doctrines employed by the High Court to protect the federal balance of power between state and Commonwealth governments. In the latter part of this paper, the application of precedent by the High Court will be examined, in order to explain why the *Engineers*' High Court was so readily able to depart from it. Some observations will be made as to why the decision has proven to be so enduring, despite being so ill-conceived.

2. *The Engineers Case – Disregarding the Federal Balance*

The *Engineers* decision was handed down on 31 August 1920 in Melbourne. In *Engineers*, a 5-1 majority of the High Court rejected the immunity of instrumentalities doctrine, and in passing, also rejected the reserved powers doctrine. *Engineers* was, and remains, a controversial decision sparking considerable debate. This was primarily because, as noted above, it completely reversed the approach taken by the early High Court by endorsing an expansive interpretation of Commonwealth powers, and without limitation by any concept of a federal balance, unless expressly stated in the *Constitution*. The lack of logic and reasoning in the joint majority decision, attributed to the authorship of Isaacs J and delivered by him, was noted by Sawyer who stated, "The joint judgment is one of the worst written and organised in Australian judicial history. Isaacs was given to rhetoric and repetition, and here he gave these habits full rein"⁶. Despite this, *Engineers* has proved to be a lasting constitutional precedent that has even recently been used to justify centralisation⁷.

2.1. *The Facts*

The Amalgamated Society of Engineers ('the Union') was a Trade Union representing workers throughout Australia. The Union served a log of claims on 844 employers throughout Australia claiming improved wages and conditions for its members. When the Union's demands were not met, it commenced proceedings in the Common-

wealth Arbitration Court. The *Conciliation and Arbitration Act 1904* (Cth) gave the Court jurisdiction to prevent and settle industrial disputes that extended beyond the limits of any one state. The types of disputes that the Court was empowered to resolve included those where the Commonwealth, state or any Commonwealth or state public authority was an employer.

Included in the list of 844 employers who were parties to the dispute were several public authorities of the state of Western Australia. These were the Western Australian Minister for Trading Concerns, the Western Australian State Implement and Engineering Works and the Western Australian State Sawmills. Western Australia argued that they should be exempt from the operation of the *Conciliation and Arbitration Act 1904* (Cth) on the basis of the immunity of instrumentalities doctrine. In other words, they argued that the conciliation and arbitration power in s 51(xxxv) of the *Constitution* should not allow the Commonwealth to legislate for the regulation of the states as employers. To do so, they argued, would contravene the immunity of instrumentalities doctrine. As this argument raised constitutional issues, the President of the Commonwealth Arbitration Court referred the case to the High Court, pursuant to s 18 of the *Judiciary Act 1903* (Cth)⁸.

2.2. *Summary of the Decision*

A 5-1 majority of the High Court held that the conciliation and arbitration power in s 51(xxxv) was wide enough to allow the Federal Parliament to make laws with respect to state government employers and

employees. Additionally, the state was not immune from interference by the Commonwealth on the basis of any immunity implied from the federal nature of the *Constitution*. The majority, consisting of Knox CJ, Isaacs, Rich and Starke JJ wrote a joint judgment ('the joint majority'). Higgins J, also in the majority, delivered a separate judgment which was consistent with that of the joint majority on its central arguments. Powers J, for unknown reasons did not sit to hear the case⁹.

2.3. *Willingness to Depart from Existing Authorities*

Such a result was somewhat unexpected when contrasted with the original argument put forward by Robert Menzies, Counsel for the Union. His initial argument was to distinguish the application of the implied intergovernmental immunities doctrine on the basis that Western Australian employees were engaged in 'trading activities', rather than 'governmental activities'¹⁰. However, after Starke J asserted that this line of argument was 'a lot of nonsense', Menzies asserted that he could put forward a 'sensible argument' if allowed to challenge the previous line of authorities which had affirmed and applied the implied intergovernmental immunities doctrine¹¹. Menzies' 'sensible argument' was enthusiastically accepted and endorsed in the joint majority judgment, and in the majority judgment of Higgins J. In fact, the joint majority judgment in *Engineers* commences with criticism of previous decisions of the High Court which it claims are inconsistent and based on 'personal opinion'¹².

This is then justified by the joint majority in a somewhat self-satisfying manner when they state that it was their 'manifest duty' to give 'earnest attention' to the interpretation of the *Constitution* in order 'to give true effect to the relevant constitutional provisions'¹³, because this had not been done previously. The joint majority harshly criticised the previous line of federalist decisions, stating: 'The attempt to deduce any consistent rule from them has not only failed, but has disclosed an increasing entanglement and uncertainty, and a conflict both with the text of the *Constitution* and with distinct and clear declarations of law by the Privy Council'¹⁴.

Again, this highly critical approach was echoed by Higgins J in his separate majority judgment, stating at the beginning of his judgment, 'it is our duty to reconsider the subject, and to obey the *Constitution* and the Act rather than any decision of this Court, if the decision be shown to have been mistaken'¹⁵. The confidence in which these statements were made was arguably an attempt to mislead potential critics of the *Engineers* decision away from its activist nature by accusing previous justices of judicial activism when they upheld the federal nature of the *Constitution*. Further comment will be made in the following section about the arbitrariness of this literalist approach, despite its outward appearance of objectivity.

2.4. *A Literal, yet Expansive Approach*

The *Engineers* majority advocated a new method of constitutional interpretation from the previous line of decisions which is known as 'literalism'. The joint major-

ity stated that the words of the *Constitution* must be interpreted in their 'natural sense'¹⁶ and by utilising 'the ordinary lines of statutory construction'¹⁷. That is, the *Constitution* was to be interpreted as if it was a statute, with its words being given their literal and widest possible meaning. Quoting from the English authority of *Hodge v The Queen*¹⁸, the joint majority commented that grants of Commonwealth power should be construed as 'plenary' and 'ample... as the Imperial Parliament in the plenitude of its power possessed and could bestow'¹⁹. This method of interpretation was also adopted by Higgins J in his majority judgment:

The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result would be inconvenient or impolitic or improbable. Words limiting the power are not to be read into the statute if it can be construed without a limitation. [...] The Parliament is given a power here to make any law which, as it thinks, may conduce to the peace, order and good government of Australia on the subject of pl. xxxv., 'subject to this *Constitution*.' There is no limitation to the power in the words of the placitum; and unless the limitation can be found elsewhere in the *Constitution*, it does not exist at all²⁰.

Like Higgins J, the joint majority also noted that enumerated Commonwealth legislative powers were to be interpreted as extensively as possible unless they were limited by express provision in the *Constitution*. They stated:

It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority. But we also hold that, where the affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some lim-

itation or restriction upon the power, to indicate it in the *Constitution*²¹.

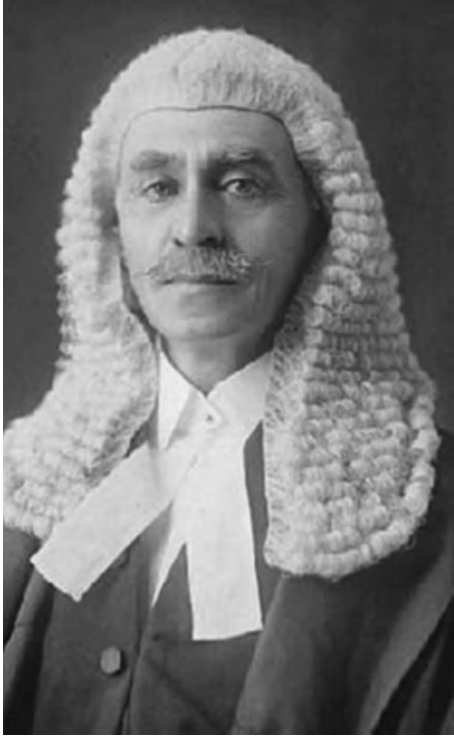
Higgins J also noted the lack of express limitation on the legislative powers of the Federal Parliament in the conciliation and arbitration placitum²², concluding that the Federal Parliament could bind the states unless the express wording of the *Constitution* excluded it:

My view is that, on the true construction of sec 51, the State activities which are not distinctly excluded from the Federal powers by the *Constitution* are subject to the Federal laws, to the full extent of their meaning; and that there is no exemption from Federal Acts unless and until they pass beyond the limits of the Federal powers on their true construction²³.

By characterising the conciliation and arbitration power generally and expansively, the majority sanctioned the enactment by the Federal Parliament of legislation that interfered with state government employers²⁴.

One of the many problems with this new, supposedly value-neutral, literal approach to interpretation adopted by the *Engineers* majority was that it failed to achieve objectivity. Gageler notes:

The difficulty is that a purely judge-based interpretation of the wording of constitutional powers and restraints is necessarily open to the same criticism as was employed in the *Engineers*' case to consign the old doctrines to oblivion. That is not to suggest that legalism is a mere cloak for blatantly political action. [...] It is simply to say that legalism is incapable of fulfilling its own agenda: that a neutrally based a priori approach to constitutional line drawing is in its own terms impossible and that the High Court's acknowledged readiness to depart from old doctrine where it considers it misconceived or inappropriate means that the choice between any number of reasonable alternative positions assumes an air of arbitrariness²⁵.



Sir Isaac Isaacs (1855-1948): Australian judge and politician, the third Chief Justice of the High Court, ninth Governor-General of Australia and the first born in Australia to occupy that post. He is the only person ever to have held both positions of Chief Justice of the High Court and Governor-General of Australia. (Photo from Wikipedia)

However, Craven has suggested that literalism is, to use Gagler's words, 'a mere cloak for blatantly political action'. He argues that the High Court is best viewed not as a legal institution, but as a political institution attempting to 'acquire and exercise power' in a 'calculated' manner²⁶. Thus, instead of fulfilling its intended role as a 'protector of federalism', the High Court has pursued its own 'progressivist', anti-federal, centralist agenda²⁷.

The mechanics of the expansive literal approach adopted by the *Engineers* majority

have been widely criticised by commentators such as Walker who noted that a 'literal meaning' means something very different from 'the widest literal meaning'²⁸ or 'the widest (that is, most centralist) meaning that the words can possibly bear'²⁹. In addition, as Walker explains, the Court disregarded the fact that a broad reading of one power may make another power 'redundant or meaningless'³⁰. Craven has also fiercely criticised the majority's literal approach in *Engineers* because it undermines the 'central character' of the *Constitution* as fundamentally federal, oversimplifying the *Constitution*, and ignoring the 'complex range of historic intentions' behind the document as fundamentally and incontrovertibly federal³¹. Instead, Craven (perhaps rather cynically) points out that: 'The essence of literalism is thus that the *Constitution* may be read in much the same way as a telephone directory or the instructions to a model aeroplane kit, with the assistance of a dictionary, but not much else'³².

2.5. Rejection of Implications Based on Federalism

In adopting a broad and general interpretation of Commonwealth powers, the joint majority also rejected any implications from the constitutional text, and accordingly rejected the previously recognised immunity of the states from the application of Commonwealth laws that were otherwise within power, and vice versa. The joint majority dismissed the relevance of looking at the federal intentions on which the *Constitution* was based, stating:

It is an interpretation of the *Constitution* depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognised principle of the common law of the *Constitution*, and which, when started, is rebuttable by an intention of exclusion equally not referable to any language of the instrument or acknowledged common law constitutional principle, but arrived at by the Court on the opinions of Judges as to hopes and expectations respecting vague external conditions³³.

They went on to state that: 'The doctrine of "implied prohibition" finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning'³⁴. Thus, instead of viewing the *Constitution* as a federal document, with corresponding immunities of each level of government from interference with one another, the majority treated the *Constitution* as a British statute and regarded the relevant question to be whether the *Constitution* could bind the Crown. They concluded that the Crown, consisting of both the state and federal executive, was indivisible and was subject to the *Constitution*, meaning that the states were subject to Commonwealth laws:

The first step in the examination of the *Constitution* is to emphasise the primary legal axiom that the Crown is ubiquitous and indivisible in the King's dominions. Though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities [...] the Federal *Constitution* of Australia, being passed by the Imperial Parliament for the express purpose of regulating the royal exercise of legislative, executive and judicial power throughout Australia, is by its own inherent force binding on the Crown to the extent of its operation [...] The Commonwealth *Constitution* as it exists for the time being, dealing expressly with sovereign functions of the

Crown in its relation to Commonwealth and to States, necessarily so far binds the Crown, and laws validly made by authority of the *Constitution*, bind, so far as they purport to do so, the people of every State considered as individuals or as political organisms called States — in other words, bind both Crown and subjects³⁵.

According to the majority, limitations based on the federal nature of the *Constitution* were erroneously based on American authorities and the American federal system. Instead, they argued that English authorities, namely those of the Privy Council, should be followed. The joint majority stated:

American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own *Constitution* [...] they cannot [...] be recognised as standards whereby to measure the respective rights of the Commonwealth and the States under the Australian *Constitution*. For the proper construction of the Australian *Constitution* it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and, notwithstanding considerable similarity of structural design, including the depository of residual powers, radically distinguish it from the American *Constitution*. Pervading the instrument, they must be taken into account in determining the meaning of its language. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government³⁶.

The English authorities advocated by the majority regarded parliamentary sovereignty as paramount to responsible government. This meant that it should be a political question for Parliament to determine the limits of its legislative power, rather than the Courts. Hence, parliamentary sovereignty gives a great deal of latitude to Parliament, without interference from the judiciary. Ratnapala notes that this notion of sovereignty supports centralism, defin-

ing 'constitutional sovereignty' as 'a limitlessly empowered supreme authority within a national legal system'³⁷. He further states that, 'The driving sentiment behind sovereignty in the constitutional sense is the belief that governments, particularly those responsible to the electorate, must not be restrained in the pursuit of the public good'³⁸. Ratnapala notes that the result of *Engineers* was a shift to this constitutional sovereignty model, even to the extent that the Commonwealth could 'extend itself to matters over which it has no express constitutional authority'³⁹.

It is interesting to note that although the majority rejected the reserved powers doctrine and implied intergovernmental immunities doctrines as unauthorised constitutional implications, they endorsed the British tradition of parliamentary sovereignty and the constitutional implication of responsible government. This selective approach has been criticised by Walker as contradictory⁴⁰. Further, Craven argues that if any implication must be elevated above all others, it must be one of federalism, to which all other concepts, such as responsible government, play a supporting role. In fact, in discussing the intended role of the High Court Craven argues that federalism is much more than a mere implication:

The positive and fundamental role of the High Court was to protect federalism. In this connection, it goes without saying that the *Constitution* itself breathes federalism, not merely implicitly, but expressly in its very terms. If one had to pick the 'great theme' of the *Constitution*, it could only be federalism, upon the broad stage of which all other concepts play their crucial but undeniably supporting roles. The critical function of the Court in relation to federalism was to maintain the Commonwealth and the States within their

respective spheres, and in particular to ensure that the Commonwealth kept within the ambit of its powers and did not invade the realms of the States⁴¹.

The approach of the *Engineers* joint majority is also problematic because, as noted above, the federal structure of Australia's system of government is obvious upon reading express provisions of the *Constitution*, and upon viewing the document as a whole. In fact, even Higgins J stated that a 'fundamental rule of interpretation' was 'that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole'⁴². Although Higgins J was referring to the language throughout the document, he acknowledged (albeit inadvertently) that the whole document was nevertheless relevant. The myopic view of the joint majority overlooked this, instead focusing on an expansive interpretation of individual words in the *Constitution*. They stated:

the legislative powers given to the Commonwealth Parliament are all prefaced with one general *express* limitation, namely, 'subject to this *Constitution*,' and consequently those words, which have to be applied *seriatim* to each placitum, require the Court to consider with respect to each separate placitum, over and beyond the general fundamental considerations applying to all the placita, whether there is anything in the *Constitution* which falls within the express limitation referred to in the governing words of sec. 51⁴³.

One of the flaws of this literalist approach is that it fails to take into account the method of interpretation to be applied in the event of ambiguity in wording, and does not take into account how to interpret provisions that require historical background

to be understood, such as the meaning of 'duties of customs and excise' in s 90⁴⁴.

2.6. *The Elevation of s 109*

As well as being selective about what could be implied from the *Constitution* and what could not, the joint majority was selective about how to read the specific federal provisions of the *Constitution*. They read down s 107 (which, as noted earlier in this paper, saved state powers after federation), and elevated s 109 (which seeks to resolve inconsistency between overlapping state and Commonwealth legislation by stating that the Commonwealth legislation will prevail to the extent of any inconsistency) as paramount in demonstrating the Commonwealth's supremacy over the states. The joint majority stated:

Sec. 107 continues the previously existing powers of every State Parliament to legislate with respect to (1) State exclusive powers and (2) State powers which are concurrent with Commonwealth powers. But it is a fundamental and fatal error to read sec. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated⁴⁵.

The joint majority continued on to discuss 'the supremacy [...] established by express words of the *Constitution*'⁴⁶, or rather s 109 specifically, which they declared illustrated Commonwealth supremacy:

That section, which says 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid,' gives supremacy, not to any particular class of Com-

monwealth Acts but to every Commonwealth Act, over not merely State Acts passed under concurrent powers but all State Acts, though passed under an exclusive power, if any provisions of the two conflict; as they may — if they do not, then *cadit quaestio*⁴⁷.

They said that s 109 could be used to justify some of the previous decisions, concerning taxation laws, where the implied immunity of instrumentalities doctrine has been applied⁴⁸. However, as is commonplace throughout this decision, little reasoning or justification is given for the elevation of s 109, contrary to early High Court authorities which regarded s 107 as the more crucial provision.

The *Engineers* majority irreparably altered the federal balance by rejecting any implication from the Constitutional text; eliminating the doctrine of immunity of instrumentalities and with it, the reserved powers doctrine, whilst at the same time expressly proclaiming the 'supremacy' of the Commonwealth over the states. Instead of the Commonwealth and the states being recognised as independent and autonomous in their own spheres, the *Engineers* majority endorsed Commonwealth interference in state matters, thus jeopardising their sovereignty as provided by the federal nature of the *Constitution*⁴⁹.

2.7. *The Dissenting Judgment*

Gavan Duffy J was alone in dissent, and his dissent is very far from a valiant attempt to save the federal balance from its future demise. Discussion of Gavan Duffy J's dissent is largely omitted from academic commentary on the *Engineers* decision. This is per-

haps because it is inherently weak in terms of its failure to address the matters raised in the majority judgments and its failure to consider and address thoroughly the earlier line of cases that the High Court was being asked to reconsider. This point is noted by Booker and Glass, who also comment that ‘Gavan Duffy J’s dissent has been forgotten and for good reason’⁵⁰.

Gavan Duffy J commented on the importance of the states in the federal compact and the intent of the framers of the *Constitution*:

The existence of the States as a polity is as essential to the *Constitution* as the existence of the Commonwealth. The fundamental conception of the Federation as set out in the *Constitution* is that the people of Australia, who had theretofore existed in several distinct communities under distinct polities, should thenceforward unite for certain specific purposes in one Federal Commonwealth, but for all other purposes should remain precisely as they had been before Federation⁵¹.

He also remarked upon the operation of ss 106 and 107, which he noted evidenced the intention of the colonies⁵² prior to federation to preserve state sovereignty after federation had occurred:

secs. 106 and 107 preserve the *Constitution* of each State as it existed at the establishment of the Commonwealth, and every power of a State Parliament unless it is by the *Constitution* exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State. In this case it is not disputed that the industrial operations conducted by the Crown in Western Australia are within the *Constitution* of that State. They are authorised under its legislative power and conducted under its executive power, and therefore free from the authority conferred upon the Federal Parliament by sec. 51⁵³.

However, these comments were made in the context of Gavan Duffy J’s argument that any laws made by the Federal Parliament were required by the *Constitution* to be ‘subject to this *Constitution*’⁵⁴. As a result, the question for Gavan Duffy J then became whether a law made pursuant to s 51 could bind the Western Australian Crown. This reasoning was premised on the common law rule that the Crown was not bound by a statute unless the statute itself purported to bind the Crown — so like the majority, Gavan Duffy J treated the *Constitution* as if it was a British statute. He concluded that as s 51 (xxxv) was not expressed to bind the Crown it did not bind the Western Australian government Crown.

3. Engineers: A Radical Departure From Precedent

In the words of Geoffrey de Q Walker, the *Engineers* decision ‘switched the entire enterprise of Australian federalism onto a diverging track that carried it to destinations far removed from those intended by the generation that had brought the federation into being’⁵⁵. In order to examine why this may have occurred, and why the High Court was so willing in *Engineers* to deviate from precedent, this section will discuss the role of precedent, specifically, *stare decisis*, in the High Court. It will also seek to examine why the High Court was so readily able to part with it in *Engineers*, yet felt so bound to follow *Engineers* in subsequent cases. In fact, some commentators have suggested that the way *Engineers* treated precedent is nothing short of alarming and was therefore tantamount to judicial

activism. Geoffrey de Q Walker, quoting Dr Colin Hughes, notes, 'After nearly twenty years' experience the ruling criterion for the construction of the *Constitution* was rejected and a new one put in its place'⁵⁶. He also notes that despite the fact that the dismissal of the reserved powers doctrine was obiter dicta, and never formally overruled, its dismissal has subsequently been taken as binding precedent⁵⁷.

The starting point of this discussion should be to define the terms 'precedent' and '*stare decisis*'. The terms are often used interchangeably. However, sometimes 'precedent' is defined in a broader sense, for example, as 'a broad class of practices employed in rendering judicial decisions'⁵⁸. At a general level, Duxbury notes that: 'A precedent is a past event — in law the event is nearly always a decision — which serves as a guide for present action'⁵⁹. Precedent requires that the '*ratio decidendi*' from prior cases of the same or higher courts must be followed to ensure consistency, and some degree of predictability in judicial decision-making⁶⁰. '*Ratio decidendi*' means the 'reason for deciding'⁶¹. This does not refer to all of the Judge's reasoning, some of which could be incidental to the outcome or not directly related to the facts in issue. This reasoning is known as 'obiter dicta', which translates as 'saying by the way'⁶².

The doctrine of precedent and *stare decisis* originated in medieval England⁶³ and was developed further during the eighteenth century, when William Blackstone stated, 'it is an established rule to abide by former precedents, where the same points come again in litigation', and in the nineteenth century⁶⁴. In an American context, its importance was even noted by Alexan-

der Hamilton in *Federalist Paper* number 78⁶⁵.

The term '*stare decisis*' refers to the binding nature of precedent. That is, where a legal rule has been applied in a particular way in a previous decision, it must be applied again if the same issues come before the court again⁶⁶. It provides that a court should follow prior decisions, except in exceptional circumstances⁶⁷. Despite this, a departure from precedent can be readily found in constitutional cases⁶⁸, perhaps due to the High Court's primary role as the guardian of the *Constitution* and the lack of any direction in the *Constitution* as to how they must interpret it⁶⁹. In addition, the High Court has held that it is not bound by its own previous decisions⁷⁰ but nevertheless should be reluctant to overturn them. As an example of this reluctance, Moens and Trone cite *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* where the High Court refused to reconsider two prior decisions because government had acted in reliance on them, to maintain certainty, and because they had been applied by the High Court in numerous preceding decisions⁷¹.

In contrast, as Kirby points out, there is a willingness on the part of some High Court Justices to overrule past decisions because, in their opinion, they are, to use the words from High Court judgments that have done so, 'manifestly wrong', 'fundamentally wrong' or 'plainly erroneous'⁷². As we saw in the discussion of *Engineers* above, the majority and joint majority made statements like these. For example, Higgins J stated: 'I fully accept the view that it is fitting *stare decisis* unless the decision, to our minds, is manifestly wrong'⁷³. The joint majority provided another justifica-

tion for overruling the implied intergovernmental immunities and reserved powers doctrines, asserting that, 'the utmost confusion and uncertainty exist as the decisions now stand'⁷⁴.

However, as Boeddu and Haigh suggest, the very nature of constitutional decision-making, including the very serious effects of overturning precedent, and the fact that a decision of the High Court cannot be overruled or corrected by Parliament, suggest that Justices in constitutional cases should be reluctant to overrule previous constitutional precedent⁷⁵. In this context, the decision in *Engineers* can be seen as somewhat radical and activist in nature because it was a complete reversal from precedent.

The 'diametrically opposed approaches' in the attitude of the High Court to the issue of overruling precedent are also highlighted by Moens and Trone⁷⁶. Moens and Trone cite Gibbs J in *Queensland v Commonwealth*, who espoused a cautious approach to overruling precedent:

No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court [...] It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinion in preference to an earlier decision of the Court⁷⁷.

In contrast, Moens and Trone cite Isaacs J in *Australian Agricultural Co Ltd v Federated Engine Drivers and Firemen's Association of Australasia*, as an example of the readiness of some Justices to depart from established precedent:

Our sworn loyalty is to the law itself, and to the organic law of the *Constitution* first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than it should be ultimately right⁷⁸.

Given Isaacs J's leading role in the fundamental departure from precedent in the majority's decision in *Engineers*, these comments are quite appropriate and show a marked determination to pursue his own interpretive agenda. Perhaps these comments can be attributable to the fact that the doctrine of *stare decisis* is a 'self imposed legal duty'⁷⁹ that is viewed as a policy or guideline⁸⁰, rather than a binding interpretive method.

In fact, Craven has openly accused the High Court of deliberately pursuing a centralist agenda, and in fact, of a 'centralist revolution' by its furtherance of *Engineers*-inspired literalism⁸¹. Craven suggests that the easiest way to make sense of the demise of the federal balance is to view the High Court as a political, rather than an impartial institution. It was perhaps the self-assuredness of the correctness of the majority judgments in *Engineers*, and the fact that Isaacs and Higgins JJ remained on the bench until 1931 and 1929 respectively (some eleven and nine years after *Engineers*), that they were able to consolidate their centralist agenda, helping to ensure that *Engineers* became binding precedent, and not simply a mistaken departure from established precedent that would have been corrected in subsequent decisions.

The increased centralist agenda of the High Court may also have been encouraged

by changing social and political conditions and their own growing sense of nationalism after the First World War⁸². To expand on the possible motivations for this centralist agenda, Walker's comments about the possible sources of centralist ideology are relevant. Walker stated the first of these to be the anti-federalist writings from communists such as Marx, Lenin and Harold Laski. According to Walker, Marx, who disproved of federal constitutions and approved of large unitary governments, became well-regarded in 'Australian intellectual circles'⁸³. Secondly, Walker noted the importance of the work of A V Dicey who advocated the plenary power of the unitary British Parliament and was a 'violent opponent of federalism'⁸⁴. He stated that Dicey's 'anti-federalist message was taught to generations of Australian law students with no pro-federalist material to balance it'⁸⁵. Walker noted that this was coupled with Australia being allied with Britain in the First World War, whose government was presented as the 'ideal'⁸⁶. Thirdly, with the effect of the world becoming 'smaller' due to the advent of new technologies and globalisation, there was a growing perception that power could be more efficiently concentrated in a centralised government⁸⁷.

4. Conclusion

Whatever the reasons behind the centralist agenda of the High Court in *Engineers*, it became binding precedent from which Justices in subsequent judgments were unwilling to depart. Subsequently, *Engineers* provided the justification for the pursuit of a centralist agenda that has continued up until the present time. In fact, Craven has described the success of the Commonwealth in these decisions as one which 'must rival any win-loss ratio in the history of either professional sport or dubious umpiring'⁸⁸. These 'legal triumphs' include the expansion of Commonwealth financial powers through a broad definition of duties of excise and the expansion of Commonwealth legislative powers such as the corporations power and the external affairs power. The High Court's interpretation of the *Constitution*, post-*Engineers*, has resulted in the federal balance of power between the Commonwealth and the states being displaced to such an extent that Australia's system of government can no longer be described as truly federal.

¹ *Commonwealth of Australia Constitution Act 1900* (UK) ('*Constitution*').

² G. Craven, *The High Court of Australia: A Study in the Abuse of Power*, in «University of New South Wales Law Journal», vol. 22, 1999, p. 222.

³ For an overview of the evolution of federalism in Australia, the centralisation of legislative

powers and vertical fiscal imbalance, see A. Fenna, *Australian Public Policy* (2nd ed.), Pearson Longman, 2004, pp. 171-175.

⁴ The first case to recognise Commonwealth immunity from state legislation was *D'Emden v Pedder* (1904) 1 CLR 91 and the first case to recognise state immunity from Commonwealth

legislation was *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* ('*Railway Servants' case*') (1906) 4 CLR 488.

⁵ See, for example, *Peterswald v Bartley* ('*Peterswald*') (1904) 1 CLR 497; *R and the Minister of State for the Commonwealth Administering the Customs v Barger*:

- The Commonwealth and AW Smart, Collector of Customs v McKay* ('R v Barger') (1908) 6 CLR 41; and *Huddart, Parker & Co v Moorehead* ('Huddart') (1909) 8 CLR 330.
- ⁶ G. Sawyer, *Australian Federalism in the Courts*, Melbourne, Melbourne University Press, 1967, p. 130.
- ⁷ A recent example of the centralist ramifications of *Engineers* was *Work Choices* (2006) 229 CLR 1 where the majority used an *Engineers* based literalist approach.
- ⁸ This section provided that if a case involved matters arising from the constitution or involving its interpretation it could be remitted to the High Court for consideration.
- ⁹ J. Douglas, *Sir Charles Powers: His Contribution to the High Court*. Paper presented at the Supreme Court of Queensland Library Conference, 29 March 2003, p. 16, at <http://archive.sclqld.org.au/judgepub/2007/douglas290403.pdf>.
- ¹⁰ Sawyer, *Australian Federalism in the Courts* cit., p. 129.
- ¹¹ K. Booker and A. Glass, *The Engineers Case*, in H.P. Lee and G. Winterton (edited by), *Australian Constitutional Landmarks*, Cambridge, Cambridge University Press, 2003, p. 34 and p. 39.
- ¹² *Engineers* (1920) 28 CLR 129, pp. 141-142, per Knox CJ, Isaacs, Rich and Starke JJ.
- ¹³ Ivi.
- ¹⁴ Ivi.
- ¹⁵ *Engineers* (1920) 28 CLR 129, 161, per Higgins J.
- ¹⁶ *Engineers* (1920) 28 CLR 129, 149, per Knox CJ, Isaacs, Rich and Starke JJ.
- ¹⁷ Ivi.
- ¹⁸ *Hodge v The Queen* 9 App. Cas. 117.
- ¹⁹ *Hodge v The Queen* 9 App. Cas. 117, p. 132 cited in *Engineers* (1920) 28 CLR 129, p. 153, per Knox CJ, Isaacs, Rich and Starke JJ.
- ²⁰ *Engineers* (1920) 28 CLR 129, 162, per Higgins J.
- ²¹ *Engineers* (1920) 28 CLR 129, 154, per Knox CJ, Isaacs, Rich and Starke JJ.
- ²² *Engineers* (1920) 28 CLR 129, pp. 162-163, per Higgins J.
- ²³ *Engineers* (1920) 28 CLR 129, p. 171, per Higgins J.
- ²⁴ *Engineers* (1920) 28 CLR 129, p. 154, per Knox CJ, Isaacs, Rich and Starke JJ.
- ²⁵ S. Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, in «Federal Law Review», vol. 17, 1987, p. 178.
- ²⁶ Ivi, pp. 219-220.
- ²⁷ Ivi, p. 222.
- ²⁸ G. de Q Walker, *The Seven Pillars of Centralism: Federalism and the Engineers' Case*, in «The Australian Law Journal», vol. 76, 2002, p. 684.
- ²⁹ Ivi, p. 688.
- ³⁰ Ivi, p. 689.
- ³¹ G. Craven, *The Engineers Case: Time for a Change?* Paper presented at the Eighth Conference of the Samuel Griffith Society, University House, Canberra, 7-9 March 1997, pp. 75-79.
- ³² Ivi, p. 76.
- ³³ *Engineers* (1920) 28 CLR 129, p. 145, per Knox CJ, Isaacs, Rich and Starke JJ.
- ³⁴ Ivi, p. 155.
- ³⁵ Ivi, p. 153.
- ³⁶ *Engineers* (1920) 28 CLR 129, p. 146, per Knox CJ, Isaacs, Rich and Starke JJ.
- ³⁷ S. Ratnapala, *Government Under the Law: The Ebb and Flow of Sovereignty in Australia*, in «University of New South Wales Law Journal», vol. 24, n. 3, 2001, p. 670.
- ³⁸ Ivi, p. 670.
- ³⁹ Ivi, p. 674.
- ⁴⁰ Walker, *The Seven Pillars of Centralism: Federalism and the Engineers' Case* cit., p. 691.
- ⁴¹ Craven, *The High Court: A Study in the Abuse of Power* cit., p. 221.
- ⁴² *Engineers* (1920) 28 CLR 129, pp. 161-162, per Higgins J.
- ⁴³ Ivi, p. 144, per Knox CJ, Isaacs, Rich and Starke JJ.
- ⁴⁴ Craven, *The Engineers Case: Time for a Change?* cit., pp. 86-91.
- ⁴⁵ *Engineers* (1920) 28 CLR 129, p. 155, per Knox CJ, Isaacs, Rich and Starke JJ.
- ⁴⁶ Ivi, pp. 154-155.
- ⁴⁷ Ivi, p. 155.
- ⁴⁸ Ivi, p. 154.
- ⁴⁹ Ivi, p. 155.
- ⁵⁰ K. Booker and A. Glass, *The Engineers Case* in Lee and Winterton (edited by), *Australian Constitutional Landmarks* cit., p. 41.
- ⁵¹ *Engineers* (1920) 28 CLR 129, p. 174, per Gavan Duffy J.
- ⁵² Prior to federation, the states were known as 'colonies'.
- ⁵³ *Engineers* (1920) 28 CLR 129, p. 174, per Gavan Duffy J.
- ⁵⁴ Ivi, pp. 173-174, per Gavan Duffy J.
- ⁵⁵ Walker, *The Seven Pillars of Centralism: Federalism and the Engineers' Case* cit., p. 678.
- ⁵⁶ Ivi, p. 682 (no source cited for Dr Hughes).
- ⁵⁷ Ivi, p. 682.
- ⁵⁸ L.A. Kornhauser, *An Economic Perspective on Stare Decisis*, in «Chicago-Kent Law Review», vol. 65, 1989, p. 66.
- ⁵⁹ N. Duxbury, *The Nature and Authority of Precedent*, Cambridge, Cambridge University Press, 2008, p. 1.
- ⁶⁰ M. Kirby, *Precedent Law, Practice and Trends in Australia*, in «Australian Bar Review», vol. 28, 2007, pp. 243 and 245.
- ⁶¹ P. Butt (edited by), *Butterworths Concise Australian Legal Dictionary* (3rd ed.), Sydney, LexisNexis Butterworths, 2004, p. 363.
- ⁶² Duxbury, *The Nature and Authority of Precedent* cit., pp. 67-68.
- ⁶³ M-F. Kuo and K. Wang, *When is an Innovation in Order?: Justice Bader Ruth Ginsberg and Stare Decisis*, in «University of Hawai'i Law Review», vol. 20, 1998, p. 839.
- ⁶⁴ R. Barnhart, *Principled Pragmatic Stare Decisis in Constitutional Cases*, in «Notre Dame Law Review», vol. 80, 2005, p. 1912. For a discussion of the development of the doctrine of precedent in the eighteenth and nineteenth century, see J. Evans, *Change in the Doctrine of*

- Precedent During the Nineteenth Century*, in L. Goldstein (edited by), *Precedent in Law*, Oxford, Clarendon Press, 1987, p. 35.
- ⁶⁵ Kuo and Wang, *When is an Innovation in Order?: Justice Bader Ruth Ginsberg and Stare Decisis* cit., p. 839.
- ⁶⁶ Duxbury, *The Nature and Authority of Precedent* cit., p. 12.
- ⁶⁷ The full latin maxim has been translated as, 'stare decisis et non quieta movere' translated as 'stand by the thing decided and do not disturb the calm': See G. Boeddu and R. Haigh, *Terms of Convenience: Examining Constitutional Overrulings by the High Court*, in «Federal Law Review», vol. 31, 2003, p. 167. Duxbury translates the maxim as, 'abide by earlier decisions and do not disturb settled points': Duxbury, *The Nature and Authority of Precedent* cit., p. 12.
- ⁶⁸ R.C. Springall, *Stare Decisis as Applied by the High Court to its Previous Decisions*, in «Federal Law Review», vol. 9, 1978, pp. 488-489.
- ⁶⁹ Kirby, *Precedent Law, Practice and Trends in Australia* cit., p. 247.
- ⁷⁰ *Nguyen v Nguyen* (1990) 169 CLR 245, 269 cited in G.A. Moens and J. Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* (7th ed.), Sydney, LexisNexis Butterworths, 2007, p. 34.
- ⁷¹ *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2] ('Capital Duplicators')* (1993) 178 CLR 561, pp. 592-593, cited in Moens and Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* cit., p. 34.
- ⁷² M. Kirby, *Precedent Law, Practice and Trends in Australia*, in «Australian Bar Review», vol. 28, 2007, p. 247. See also Springall, *Stare Decisis as Applied by the High Court in its Previous Decisions* cit., p. 483.
- ⁷³ *Engineers* (1920) 28 CLR 129, p. 170, per Higgins J.
- ⁷⁴ *Engineers* (1920) 28 CLR 129, p. 159, per Knox CJ, Isaacs, Rich, Starke JJ.
- ⁷⁵ Boeddu and Haigh, *Terms of Convenience: Examining Constitutional Overrulings by the High Court* cit., pp. 167-168.
- ⁷⁶ Moens and Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* cit., p. 28.
- ⁷⁷ *Queensland v Commonwealth* (1977) 139 CLR 585, p. 599, per Gibbs J, cited in Moens and Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* cit., p. 28.
- ⁷⁸ *Australian Agricultural Co Ltd v Federated Engine Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, p. 278, per Isaacs J, cited in Moens and Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* cit., p. 28.
- ⁷⁹ J. Hardisty, *Reflections on Stare Decisis*, in «Indiana Law Journal», vol. 55, 1979, p. 48.
- ⁸⁰ M.S. Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, in «North Carolina Law Review», vol. 86, 2008, p. 1170.
- ⁸¹ G. Craven, *The High Court of Australia: A Study in the Abuse of Power*, in «University of New South Wales Law Journal», vol. 22, n.1, 1999, p. 223.
- ⁸² J. Goldsworthy, *Justice Windeyer on the Engineers' Case*, in «Federal Law Review», vol. 37, 2009, pp. 363-365; H. Patapan, *Politics of Interpretation*, in «Sydney Law Review», vol. 2, 2000, p. 253.
- ⁸³ Walker, *The Seven Pillars of Centralism: Federalism and the Engineers' Case* cit., p. 684.
- ⁸⁴ Ivi, p. 685.
- ⁸⁵ Ivi.
- ⁸⁶ Ivi.
- ⁸⁷ Ivi.
- ⁸⁸ G. Craven, *Conversations with the Constitution: Not Just a Piece of Paper*, Sydney, University of New South Wales Press, 2004, p. 78.

The Power of the Purse: An Examination of Fiscal Federalism in Australia

LORRAINE FINLAY

In 1901 the people of six self-governing Crown Colonies “agreed to unite in one indissoluble Federal Commonwealth”, to be known as the Commonwealth of Australia. The drafters of the *Australian Constitution* established a federal structure to divide power between the federal and State levels of government. This federal balance “is not to be maintained as a matter of political or social preference, but as a matter of constitutional imperative”¹. When considering the federal balance today it is important to remember that while the Founding Fathers created a Commonwealth government they still intended for the State governments to continue operating as independent constitutional entities and not merely as branch offices of the central government. This is apparent in the assertion by Deakin at the 1897 Adelaide Convention that delegates should remember that “the States are only parting with a small part of their powers of self-government, and that the Federal Government has but a strictly defined and limited sphere of action”².

The advantages of a federal system, such as the one created in the *Australian Constitution*, are well known³. It is designed to be a system that “controls power, safeguards democracy, and promotes liberty”⁴. In a federation, compared to a unitary system of government⁵:

government is more adaptable to the preferences of the people, more open to experiment and its rational evaluation, more resistant to shock and misadventure, and more stable. Its decentralized, participatory structure is a buttress of liberty and a counterweight to elitism [...] Through greater ease of monitoring and the action of competition, it makes government less of a burden on the people. It is desirable in a small country and indispensable in a large one.

These benefits are not purely structural, with a well designed federal system of government also resulting in direct economic benefits. In Australia, the ‘federalism dividend’ (being the specific economic advantage achieved through the federal structure) was estimated to be approximately \$4,507 per capita in 2006⁶. Across the

world the modern trend is strongly towards federalism, with a federal constitutional structure being regarded internationally as a structure that “enables a nation to have the best of both worlds, those of shared rule and self-rule, co-ordinated national government and diversity, creative experiment and liberty”⁷.

Whilst the international trend has been firmly in the direction of federalism, the opposite has been the case in Australia. Since federation the Australian federal system has grown progressively weaker, with the powers and reach of the Commonwealth government continuing to expand. Nowhere is this more evident than in the area of fiscal federalism, with Australia’s systems of intergovernmental fiscal relations performing comparatively poorly by international standards⁸. The result has been the transformation of the States over the past century from financially independent colonies to “institutionalized beggars”⁹ dependent on Commonwealth hand-outs and “impotent debating societies”¹⁰. The fiscal dominance of the Commonwealth Government has important implications for the federal balance as “[w]ith fiscal power comes policy power [...] Thus fiscal dominance within a federal system brings with it the ability to skew the federal balance”¹¹.

This paper will trace the growing financial dominance of the Commonwealth government over the past century and its implications for the federal balance in Australia. It will argue that such an economically dominant central government was never intended by the Founding Fathers, and indeed that it undermines many of the protections they sought to establish through the adoption of a federal structure in the *Constitution*. Finally, it will go on to brief-

ly highlight a number of possible reforms that, if introduced, would go some way to restoring the fiscal position of the States relative to the Commonwealth government.

Fiscal Federalism at the time of Federation

The question of finances was a contentious one at the time of the drafting of the Constitution and threatened on more than one occasion to derail the entire process of federation. So controversial was it that one delegate said at the time of the 1897 Sydney Convention¹²:

No human being – I do not believe even an arch-angel from heaven – could at this moment introduce into the constitution which it is our mission to frame a provision which would do justice all round upon the financial question.

Ensuring the continued independence of the States was seen as an important consideration at the time, with financial independence being recognized as an important element of this. As was noted by Barton during the Sydney Australasian Convention¹³:

we cannot do away with the solvency of the several States. If we do that those States die, and we have no longer a federation but a legislative union.

The debate concerning the financial provisions of the Commonwealth Constitution has been described as “the hardest nut to crack”, and as creating divisions that “were deeper and more serious than those caused by any other issue”¹⁴. In particular, colonies that had protectionist economic policies and who derived much of their income from inter-colonial tariffs were con-

cerned about the economic consequences of federation and the creation of a 'free trade zone' within the new Commonwealth. One such example was Western Australia, a late and reluctant entrant into the Commonwealth who derived half of its revenues from customs duties and expressed concern "that their economy would be crippled for the benefit of continental neighbours with whom they had little affinity"¹⁵. The insertion of special five-year transitional arrangements for Western Australia under s. 95 of the *Constitution* was one way of trying to address some of these concerns.

On the revenue side it was agreed that the Commonwealth would have the exclusive power to impose customs and excise duties (s. 90), which was at the time the primary source of revenue for the colonies, averaging three-quarters of colonial revenues¹⁶. The Commonwealth was also granted a general taxation power to operate concurrently with State taxation powers (s. 51(ii)), although not all delegates foresaw the Commonwealth needing to levy taxes beyond customs and excise duties with, for example, McMillan commenting that "they will never go beyond Customs; nobody dreams of such a thing"¹⁷.

Another key provision was the power of the Commonwealth under s. 96 to "grant financial assistance to any State on such terms and conditions as the Parliament thinks fit". This was never intended to be an expansive power, but rather a safeguard to be invoked only in the exceptional situation of a State being "threatened with a financial shipwreck"¹⁸. It was described at the time as "a guarantee to the public with regard to dangers that are never likely to happen"¹⁹ and as a power that was "not intended to be used, and ought not to be used, except

in cases of emergency"²⁰. The clause itself was a compromise inserted by the Premiers Conference following the failure of the first constitutional referendum in New South Wales, and "most of the Premiers assumed that the grants power would be terminated as soon as the States' financial arrangements were adjusted to the uniform tariff scheme and as soon as the operation of the Braddon clause was itself terminated"²¹.

Many of the early debates concerning the financial provisions of the *Constitution* centred around the question of transferring what were expected to be the surplus revenues from the Commonwealth back to the various States. A number of complicated formulas were considered and, interestingly in light of the current debate about the existing Commonwealth Grants Commission formula, the Finance Committee Report of 1897 recommended that after a five year transitional period "all future surpluses should be distributed to the several States on a *per capita* basis"²². By the time of the final document this formulation had been abandoned, with the adoption instead of a provision providing for the Parliament to distribute surplus Commonwealth revenue "on such basis as it deems fair"²³ after the expiry of a five year transition period.

Despite the framers seeking to ensure a federal balance in the *Constitution*, the financial provisions that were ultimately adopted "gave the whip hand to the Commonwealth"²⁴. Alfred Deakin prophetically foresaw that the *Constitution* would leave the States "legally free, but financially bound to the chariot wheels of the central Government"²⁵. This is borne out when examining the evolution of fiscal federalism in Australia, with the Commonwealth continuously extending its financial reach

over the past century while the financial independence of the States becomes ever more precarious. The end result, according to Professor Greg Craven, is that²⁶:

even within some of their acknowledged areas of power, the states are no longer masters of their own destiny.

An increasingly centralized fiscal landscape

It did not take long for the federal balance that had been carefully constructed by the Founding Fathers to begin shifting decisively towards the Commonwealth, aided by a series of key constitutional decisions by the High Court of Australia. Among the key features that have contributed to this increasingly centralized fiscal landscape are the takeover of income taxes by the Commonwealth government, the broad reading that has been given to the excise duties power under s. 90, and the expansive interpretation of the grants powers under s. 96. The combined effect has been to "have left financial resources and power disproportionately in the hands of the Commonwealth"²⁷.

An early example of the Commonwealth deliberately circumventing the federal balance envisaged by the drafters of the *Constitution*, and the assistance that would be provided to them in these attempts by the High Court of Australia, can be seen in the *Surplus Revenue Case*²⁸. This case concerned s. 94 of the *Constitution*, which provides:

After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

In 1908 the Commonwealth passed legislation that diverted surplus revenue into trust funds, with the result that there was no surplus revenue remaining to be distributed under s. 94. The High Court upheld the constitutional validity of this legislation in the *Surplus Revenue Case*, holding that the diverted money had been duly appropriated and was no longer surplus revenue for the purposes of s. 94.

Federal taxation powers have also expanded to the point today where income tax is levied exclusively by the Commonwealth government. Although the Commonwealth was given the power to make laws with respect to taxation under s. 51(ii) of the *Constitution*, this was a power to be exercised concurrently with the States and the States initially continued to levy their own income taxes. The Commonwealth first introduced concurrent personal income taxes in 1915, and went one step further during World War II when it introduced a uniform income tax scheme that effectively took over all income tax collection from the States. The Commonwealth initially asked the States to cease levying income tax for the duration of the war, and offered financial compensation if they did so. When the States refused the Commonwealth proceeded in 1942 by way of legislation, with a series of four Acts that imposed a Commonwealth income tax at a level approximately equal to the combined total of the previous Commonwealth and State income taxes, gave legislative priority to the payment of Commonwealth income tax over any State income taxes, provided financial grants to the States conditional upon them not imposing income taxes, and transferred State resources used in the collection of income taxes to the Commonwealth²⁹. This scheme was upheld

by the High Court of Australia in the *First Uniform Tax Case*³⁰. As Professor Greg Craven noted³¹:

If the *Surplus Revenue Case* sounded a shrill warning note for the States, the *First Uniform Tax Case* in 1942 set their financial death knell in earnest.

At the conclusion of the war the continuation of this scheme was unanimously opposed by the State Premiers. The Chifley Government nevertheless decided to continue the scheme over these objections, and its peacetime continuation was subsequently largely validated (with some exceptions) by the High Court in the *Second Uniform Tax Case*³². As Brian Dollery noted³³:

The effects of the uniform taxation scheme were profound. By the fiscal year 1948/49, the Commonwealth was collecting 88 per cent of all taxes levied in Australia, compared to 8 per cent by the states and 4 per cent by local governments.

The States therefore find themselves in a position today where they are effectively unable to raise their own income taxes, and are realistically unable to raise anywhere near the revenue that they need to fund their areas of responsibility. The result is a "steady decline in the revenue raising powers of the States"³⁴ and a level of vertical fiscal imbalance that is "among the highest of any federation"³⁵. The impact on the overall fiscal balance and the financial independence of the States was not an entirely unintended result. At the time of the uniform income tax scheme being introduced by the Labor Government, Minister Arthur Calwell predicted "the slow strangulation of the States" noting that "[...] if they lose their right to impose income tax, they will become mendicants existing upon the bounty of the Commonwealth"³⁶.



Alfred Deakin (1856-1919): Australian politician, was a leader of the movement for Australian federation and later the second Prime Minister of Australia. (Photo from Wikipedia)

The High Court has also reinforced the financial dominance of the Commonwealth through its expansive interpretation of the Commonwealth's exclusive power to impose customs and excise duties under s. 90 of the *Constitution*. Although a relatively narrow interpretation of excise duties was adopted in the early case of *Peterswald v Bartley*³⁷, subsequent cases have significantly expanded the scope of s. 90. For example, in *Commonwealth v South Australia* Rich J criticized the narrow approach in *Peterswald* and interpreted s. 90 as granting the Commonwealth exclusive power "[...] over all indirect taxation imposed immediately upon or in respect of goods"³⁸. Similarly in *Matthews v Chicory Marketing Board* Dixon J

defined an excise duty as “a tax on or connected with commodities”³⁹ and in *Parton v Milk Board (Vic)* he held that the intention of s. 90 had been to give the Commonwealth “real control of the taxation of commodities and to ensure that the execution of whatever policy is adopted should not be hampered or defeated by State action”⁴⁰. In *Hematite Petroleum Pty Ltd v Victoria*⁴¹ the High Court ruled that excise duties not only encompassed taxes on the production of goods, but also extended to include any tax on the distribution or sale of goods.

For a number of years the States were able to continue obtaining significant revenue through the imposition of “business franchise fees” on petroleum products, tobacco and alcohol. This ended however with the majority decision of the High Court in *Ha v New South Wales*⁴² when it struck down these fees, and unexpectedly removed an important source of revenue for State governments. This left a considerable financial hole in State budgets, with the State governments raising just under \$5 billion (or one-sixth of their total taxation revenue) from these business franchise fees in 1995-1996⁴³. In response to this judgment the Commonwealth introduced a rescue package of revenue replacement payments, however the effect of these measures was to further entrench State reliance on Commonwealth funding. The decision in *Ha* (which was decided by a 4:3 majority) has been described as “perhaps the most significant for Federal-State financial relations since the *First Uniform Tax Case* of 1942”⁴⁴ and as a decision that will “further marginalize the States within the Australian Federal system”⁴⁵.

It is arguable that the broad interpretation of s. 90 is at odds with the original

intentions of the drafters of the Constitution. This observation was made by Neil Warren⁴⁶:

An examination of the historic record shows that in fact the rationale for s. 90 was to avoid the imposition of discriminatory tariffs between States and hence facilitate free trade. This has led to the argument that the High Court’s interpretation of s. 90 is not only economically and financially unsound, it is in conflict with the intentions of the founders of the federation.

The High Court’s expansionist approach to the interpretation of s. 90 has had significant consequences for the fiscal balance in Australia. As noted by Professor Colin Howard⁴⁷:

The definition of excise duty cannot be counted among the High Court’s successes. No escape from the morass of judicial disagreement now seems possible by curial action alone. The main consequences have been lasting uncertainty, and consequential litigation, in a significant area of liability to taxation and now a severe and unnecessary restriction on the taxation revenue of the States [...] The case law on s. 90 suggests that the High Court is by and large unsympathetic to State revenue and expenditure problems in general.

The third constitutional provision which has helped to entrench an unequal financial relationship between the Commonwealth and State governments is s. 96 which provides that:

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

This provides the Commonwealth with “considerable leverage over State policies and actions”⁴⁸. Over time specific purpose payments (“SPPs”) made by the Common-

wealth to State governments under s. 96 of the *Constitution* have become⁴⁹:

a major, and flexible, instrument for enlarging the boundaries of Commonwealth action; or, to use realistic terms, Commonwealth power.

While grants made by the Commonwealth government to the States were initially made "largely on an ad hoc and unconditional basis"⁵⁰ this changed with the *Federal Aid Roads Act 1926* (Cth) where the Commonwealth Government attempted to make s. 96 grants to the States contingent on the money being spent on the construction of roads nominated by the Commonwealth. In *Victoria v Commonwealth*⁵¹ the High Court upheld this legislative approach, rejecting the argument that any conditions attached to grants made under s. 96 were limited to the exercise of legislative powers provided for under s. 51 of the *Constitution*. As a result of this decision the Commonwealth is effectively empowered to make s. 96 grants conditional on virtually any terms and conditions that it sees fit⁵². The conditions imposed by the Commonwealth do not need to be conditions that themselves fall within the constitutional reach of the Commonwealth, with the result that s. 96 allows the Commonwealth to insert itself into policy areas that were never designed to fall within its domain.

The expansive approach adopted in *Victoria v The Commonwealth* was subsequently questioned by Dixon CJ in *Second Uniform Tax Case*⁵³. The Chief Justice suggested that, but for the weight of existing legal precedent, he might have taken a narrower approach to the interpretation of s. 96 such that⁵⁴:

the true scope and purpose of the power which s. 96 confers upon the Parliament of granting money and imposing terms and conditions did not

admit of any attempt to influence the direction of the exercise by the State of its legislative or executive powers. It may well be that s. 96 was conceived by the framers as (1) a transitional power, (2) confined to supplementing the resources of the Treasury of a State by particular subventions when some special or particular need or occasion arose, and (3) imposing terms or conditions relevant to the situation which called for special relief or assistance from the Commonwealth. It seems a not improbable supposition that the framers had some such conception of the purpose of the power. But the course of judicial decision has put such limited interpretation of s. 96 out of consideration.

The Commonwealth began to use s. 96 grants more extensively from the early 1950s and by the end of the Whitlam government in 1975 SPPs accounted for 57% of all Commonwealth grants⁵⁵. By 2006-07 there were⁵⁶:

at least 90 distinct SPP programs providing \$28 billion to the States or directly to non-government schools and local governments. SPPs account for 42 per cent of total payments made by the Commonwealth to the States. The requirements in many SPPs that States match funding and maintain existing efforts mean that up to 33 per cent of State budget outlays can be effectively controlled by SPPs, reducing State budget flexibility.

There has been significant reform of SPP arrangements in recent years. A rationalized SPP framework commencing operation on 1 January 2009, being designed to provide States with greater flexibility and discretion in the way that they spend the funds allocated to them. It has been suggested that these reforms "in retrospect, represented the high point of cooperative federalism under Kevin Rudd"⁵⁷. However, the overall conditional funding provided to the States for specific purposes remains significant, with an estimated \$50.1 billion being allocated in 2009-10, which equates

to 14.8 per cent of total Commonwealth expenditure⁵⁸. Furthermore, while the SPP framework has been consolidated the system of tied grants continues with the introduction of National Partnership Payments, being highly conditional payments to the States totaling \$19 billion by 2010-11. Under this new payment stream "the Commonwealth remained free to engage in the kind of selective and coercive intervention it had traditionally applied via SPPs"⁵⁹.

The current fiscal imbalance

The stark turn-around in the relative financial positions of the States *vis-à-vis* the Commonwealth can be seen by examining their changing share of revenue and expenditure over the past century. Immediately following Federation State and local governments raised 87% of total taxation revenues, whilst the Commonwealth collected only 13%. A century later this situation had almost entirely reversed, with the Commonwealth collecting 82% of total taxation revenues in 2004-05 and State and local governments collecting only 18%⁶⁰. In the 2011-12 federal budget grants to State Governments are estimated to amount to \$95 billion, which represents approximately 50% of total State revenue⁶¹.

The Australian federation today is characterized by comparatively high levels of vertical fiscal imbalance ('VFI'), with Twomey and Withers suggesting that the extent of VFI in Australia "is the most extreme of any federation in the industrial world"⁶². The revenue raising powers of the State governments no longer match their expenditure responsibilities, and they have

become increasingly reliant on Commonwealth grants to make up this shortfall. This has a number of damaging consequences. Most importantly, State government reliance on Commonwealth funding allows the Commonwealth government to assert "financial and policy control over the States"⁶³ and has given the Commonwealth government the opportunity to enter into policy areas that have traditionally been the exclusive domain of the States.

The 1999 *Intergovernmental Agreement on the Reform of the Commonwealth-State Financial Relations* represented an attempt partially address and reduce VFI. The Commonwealth government agreed to allocate GST revenues to the States, which was intended to give the States access to a growth tax. This has, however, arguably actually worsened the situation, with the States being required as part of this arrangement to abolish a number of their existing taxes and becoming even more reliant upon the Commonwealth. As was noted by Neil Warren⁶⁴:

The GST has only replaced one form of general revenue assistance with another. The GST is not a shared tax base, but is the base for calculating general revenue grants to the States. The States have no ability to alter either the GST rate or its base. Furthermore, GST revenue grants are subject to high level equalization and are therefore not distributed among the States according to where the revenue is raised, resulting in a large redistribution between States.

Western Australian in particular has been increasingly critical of horizontal fiscal equalization arrangements that have seen its share of GST funding drop from 72 cents in the dollar in 2011-12 to 55 cents in the dollar in 2012-13, with projections that it will continue to drop to 25 cents in the dollar by 2015-16⁶⁵. The most recent

recommendation by the Commonwealth Grants Commission would result in Western Australia's share of GST funding falling by \$598 million in 2012-13, which was described by the WA Treasurer as "a slap in the face for all Western Australians"⁶⁶. The WA government has argued that such significant cuts to its funding "severely constrain the state government's ability to continue investing in the infrastructure and services needed to grow WA's resource sector, which is propping up the national economy"⁶⁷. It is the WA government that has been the most vocal in arguing for reform of the GST funding arrangements, suggesting in particular that a 'floor' should be imposed on the GST equalization formula so that a States' share of GST revenues cannot fall below a minimum return of 75 cents in the dollar.

Partly as a result of the political controversy generated in Western Australia by the reduction in its share of GST funding, a review into GST distribution arrangements was announced in early 2011. An interim report was released on 23 April 2012 and a final report is due to be given to Parliament before the end of the year. Although the establishment of the review committee is a positive step forward in acknowledging the need for reforms to strengthen fiscal federalism in Australia it is notable that the review committee does not include a representative from Western Australia. While the interim report has acknowledged the need for reform it has rejected the above argument by Western Australia that a 'floor' should be applied to the GST equalization formula.

The state of the Australian federation has emerged in recent years as a topic of some political significance and controver-

sy. The 2020 Summit identified the creation of a "modern federation" as one of its "priority themes" and one of its proposed goals was to "reinvigorate the federation to enhance Australian democracy"⁶⁸. This was followed by the creation of the Senate Select Committee on the Reform of the Australian Federation in June 2010 which was charged with inquiring into "key issues and priorities for the reform of relations between the three levels of government within the Australian federation" and exploring "a possible agenda for national reform"⁶⁹. The Committee reported to the Australian Senate on 30 June 2011, presenting twenty-one recommendations for reform.

All too often, however, discussions about reinvigorating or reforming the Australian federation are really discussions about shifting State responsibilities into the Commonwealth sphere and the further centralization of power. This has certainly been the case in recent years, with the Commonwealth government continuing to move into traditional areas of State responsibility. Two controversial recent examples include the use of an expanded corporations power to create a national industrial relations system (which was upheld by the High Court in the *Work Choices Case*⁷⁰) and the proposed "claw-back" of a third of GST payments to fund national health reforms. The Commonwealth government tends to justify such policy expansions by pointing to underperforming State governments that they claim are failing to fulfil their responsibilities in these areas of public policy. However, as Twomey and Withers have observed⁷¹:

It is disingenuous to suggest that the States are failing in their responsibilities because they require Commonwealth funding and that the

Commonwealth should therefore take over State policy functions, when this is the system that the Commonwealth deliberately created.

On the revenue side the Commonwealth government has also been aggressive in recent years in attempting to increase its revenue share. One example of this has been the introduction of the Minerals Resource Rent Tax on 1 July 2012, which is a tax to be imposed on the profits generated from the mining of iron ore and coal. The new tax is designed to ultimately replace State royalties, which would seemingly exacerbate VFI by further expanding the revenue base of the Commonwealth at the expense of the States. Western Australia, in particular, has been a vocal critic of the tax, with the Western Australian Department of Treasury and Finance stating that the mining tax regime is viewed within WA "as an unwelcome intrusion into an area of state government responsibility, undermining the state's autonomy and budget flexibility"⁷². The tax has been called "an attack on Western Australia"⁷³ on the basis of estimates that \$7 billion of the expected \$10.5 billion raised from the tax in 2012-2014 will come from WA⁷⁴. It is currently being challenged in the High Court, with the Fortescue Metals Group and Queensland arguing that the legislation invalidly discriminates against States and is therefore constitutionally invalid.

Reforming Australian fiscal federalism

The growing financial dominance of the Commonwealth government and the increasing financial dependence of the States

has significant implications for Australia. Neil Warren argues that "Australia performs comparatively poorly in international comparisons of intergovernmental fiscal arrangements"⁷⁵ and notes that "National and State governments in Australia have not had a serious discussion between the different tiers of government since prior to federation in 1901"⁷⁶. The Business Council of Australia considers this to be an issue that Australia needs to address as a priority, noting that:

[t]he extent of the problems and dysfunctions of the current system of federal-state relations[...] is such that it has become a major barrier to future prosperity. The challenge of reforming federalism has now become an economic imperative.

There have been a number of reforms that have been proposed as measures that could be instituted to redress the fiscal imbalance currently characterizing the Australian federation. On the revenue side there is no constitutional impediment to the States reintroducing their own personal income taxes, although there would certainly be significant political hurdles to be overcome. Another reform that would reduce VFI and increase the financial independence of the States would be the introduction of a formal tax-sharing arrangement between the Commonwealth and the States, guaranteeing the States a certain percentage of Commonwealth tax revenue. Such an arrangement would not only reduce VFI but would provide all States with a direct economic interest in the financial success of the entire federation, introduce greater certainty and transparency into financial transfers from the Commonwealth to the States, and would likely reduce State reliance on specific purpose payments.

In relation to the distribution of GST revenue there is an urgent need for reform, with growing anger particularly in Western Australia over what are perceived to be serious inequities enshrined within the existing arrangements. The establishment of the current GST review committee is a positive step, although it remains to be seen precisely what recommendations are put forward by the committee. While there is disagreement about whether the current equalization formula should be amended to insert a 'floor' into the allocation of GST revenues to the States there does appear to be general agreement that the existing formula is overly complicated, and would benefit from reforms that would introduce greater certainty and transparency to the transfer process.

On the expenditure side the key issue from the States perspective is the continued entry by the Commonwealth into policy areas that have traditionally been the domain of the States. In many respects this is an inevitable result of the financial dominance of the Commonwealth, which has become adept at using its financial muscle to impose itself across a range of policy areas far removed from the limited enumerated powers provided for under s. 51 of the *Constitution*. Addressing the fiscal imbalance described above and strengthening the financial independence of the States would provide the States with a greater ability to resist further Commonwealth intrusion

into their traditional policy areas. At the same time, given that the *Constitution* is now over one hundred years old, there is merit in the suggestion that it may be beneficial to revisit the distribution of constitutional powers and responsibilities between that national and state levels of government at a constitutional convention to ensure greater clarity and to better reflect modern conditions.

Conclusion

Since Federation the Commonwealth government has continued to expand well beyond the intentions of the Founding Fathers, and the Australian federal system "has not always been as coherent or effective as the framers might have hoped"⁷⁷. The financial dominance of the Commonwealth government, and the increased reliance of the State governments on Commonwealth funding, has significant implications for the federal balance in Australia. Reforming fiscal federalism in Australia, with the aim of restoring the fiscal position of the States relative to the Commonwealth government, is an important goal if Australia is to protect the independent status of our State governments and to fully realize the benefits that a true federal structure is intended to bring.

¹ *New South Wales v Commonwealth* (2006) 229 CLR 1, p. 796, per Callinan J.

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- ⁷¹ Twomey and Withers, *Australia's Federal Future: Delivering Growth and Prosperity* cit., p. 26.
- ⁷² Senate Select Committee on Fuel and Energy, *The Mining Tax: Still bad for the economy - Still bad for jobs (Second Interim Report)*, July 2010, [3.50].
- ⁷³ Forrest calls MRRT attack on WA, *Business Spectator*, November 1st, 2010.
- ⁷⁴ The Hon. Norman Moore MLC (Minister for Mines & Petroleum), *Senate Committee findings into mining tax highlights State's gloomy prediction* (WA Ministerial Statements), 30 July 2010.
- ⁷⁵ Warren, *Benchmarking Australia's Intergovernmental Fiscal Arrangements (Final Report)* cit., p. xix.
- ⁷⁶ *Ibid.*, p. xx.
- ⁷⁷ Appleby et al., *The Future of Australian Federalism* cit., p. 3.

The Australian Constitution and Expressive Reform

ERIC GHOSH

1. *Introduction*

Stable constitutions create the possibility for increasing tension over time between the values they express and contemporary values. The Australian Constitution is no exception. It is a comparatively old constitution, having been agreed to in 1900, and it has proved to be one of the more difficult to change¹.

This tension between past and present is the concern of this paper. Australia's Constitution has been criticised for failing to express contemporary values. One criticism made in popular debate leading to referendum proposals has been that the Constitution fails to explicitly refer to values, such as democracy, and to rights that governments should respect and promote². It not only appears thin, in that respect, but it has also been criticised for suggesting values in tension with democracy and Australia's independent status³. A further criticism is that it marginalises indigenous Australians⁴.

The literature on the expressive quality of the Constitution has largely been generated by the 1999 referendum proposals. These unsuccessful proposals were to become a republic and to insert a new preamble into the Constitution which would acknowledge indigenous Australians and affirm values such as freedom, the rule of law, and protection of the environment⁵. Literature relating, for instance, to the preamble has considered its wording, whether the existing preamble should be amended or a new one inserted, whether it should be non-justiciable, and whether any change to the preamble should be linked to changes to justiciable provisions of the Constitution⁶. There were occasional pieces that were more general in character. An example is an article by Canadian legal scholar Jeremy Webber that urged an ethic of reticence with respect to expressive constitutional reform, largely due to its divisive and exclusionary potential, difficulties revealed in an earlier attempt at reform in Canada⁷.

The present paper is also general in character. It outlines general features of the Constitution that are relevant to popular debate on the expressive quality of the Constitution, and does so through reference to the framing of the Constitution in the 1890s, the 1967 amendment to the Constitution, the 1999 referendum proposals, and the recent recommendation for amendments suggested by a government-commissioned report on constitutional recognition of indigenous Australians.

While this paper refers in chronological fashion to some important historical moments in the life of the Constitution, it is not deeply historical in the sense that it sheds new light on those moments through examination of the historical record. Instead, it is aimed partly at comparative constitutionalists interested in what general lessons might be gleaned from Australian debate about changing the expressive quality of its constitution. The Australian debate is placed in the context of literature relevant to the expressive quality of constitutions in general.

The argument proceeds as follows. Section 2 explores the terms "constitution" and "expressive quality". It refers to the Australian Constitution as a codified document and the surrounding understandings sometimes described as the small "c" constitution. It also discusses the distinction between a Constitution's expressive and instrumental attributes, contrasting the way the distinction is drawn here with how it has been drawn in discussion of the British and US constitutions. It also distinguishes between two expressive aims and considers their feasibility. Finally, it explores the connection between expres-

sive voting and expressive constitutional reform.

Section 3 outlines some features of the Australian Constitution that are relevant to the most prominent criticisms directed at the expressive quality of the Constitution. Section 4 deals with alterations to the Constitution. It discusses the only significant expressive amendment to the Constitution, which related to indigenous Australians. It then turns to the most significant expressive referendum proposals since federation, which occurred in 1999, and a current recommendation for a referendum proposal.

Section 5 draws on the factual material in the previous two sections to discuss expressive features of the Constitution. It refers to the multiple meanings of constitutional symbols, and the lack of symbolic charge that constitutional provisions may have, partly due to ignorance of the contents of the Constitution. It also describes complexities that arise from the Constitution being both instrumental and expressive. All this might suggest abandonment of attempts at such reform. However, the symbolic charge of the 1967 referendum stands against defeatism. Furthermore, the paper discusses ways in which the symbolic charge of the Constitution could be enhanced. This involves an original suggestion concerning the process of constitutional reform.

2. *Discussion of "Constitution" and "expressive quality"*

In discussing the Australian Constitution, it is first helpful to refer to the British con-

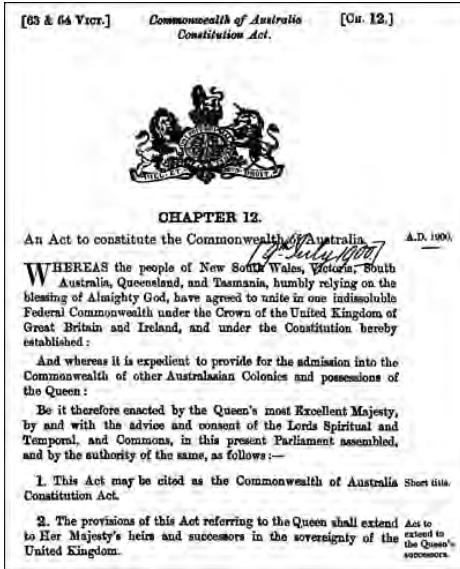
stitution. Eighteenth-century politician and philosopher Viscount Bolingbroke said that «[b]y constitution we mean... that assemblage of laws, institutions and customs... that compose the general system, according to which the community hath agreed to be governed»⁸. That «assemblage» includes written documents (reported common law decisions, legislation, and treaties, eg, the Magna Carta), but there is no single document recognised as “The Constitution”. The idea of a codified constitution came to prominence with the French and American revolutions.

The codified Australian Constitution, however, resulted from a peaceful process. The British colonies in Australia, after conducting plebiscites, requested the British Imperial Parliament to establish a federal Australian commonwealth with the British Crown at its head. The Imperial Parliament passed the Constitution after insisting on some changes⁹. That this new nation involved no radical separation from Britain is evident in the retention of the British Crown and also the small “c” constitution in Australia borrowing much from British constitutional practice. In other words, the written document described as “The Constitution” is informed by values and understandings about the system of government that comprise the small “c” constitution.

This paper’s interest in the expressive quality of the Australian constitution stems from popular debate about the expressive quality of Australia’s codified constitution. The reference here is to the Constitution’s expression of facts, ideas and values to the community at large. This contrasts with what will be described as the Constitution’s instrumental function. Here, the constitution is perceived as a set of rules and prin-

ciples which determine the legal power that government officials have. Constitutional provisions can vary in their instrumental and expressive significance. These two variables are linked. For example, the absence of instrumental significance can undermine expressive significance – a provision can appear *merely* symbolic. However, there can be provisions of great expressive and little instrumental significance, and vice versa. In focusing on the expressive, it can be useful to consider provisions where the balance is towards expressive and away from instrumental significance. Indeed, such provisions are sometimes described in this paper simply as “expressive” while provisions with instrumental but little expressive significance are simply “instrumental”. That this is only one way to distinguish these terms is illustrated by noting other approaches.

The distinction has to be drawn differently when discussing the British constitution, since its justiciability lies only in certain principles of statutory interpretation. Nineteenth-century English journalist Walter Bagehot distinguished two components of the English constitution: the dignified (that part which is symbolic) and the efficient (the way things actually work and get done)¹⁰. He mentioned that «every constitution must first *gain* authority and then *use* authority»¹¹. He argued that the symbolism of the government personified through the Crown helped to legitimise the government which, in its practical operation, was democratic. Bagehot suggested that the vast majority of British subjects were «narrow-minded, unintelligent, incurious»¹². Their allegiance to a system of government was not achieved by arguments about practical utility but, instead, by ideas



Part of the first page of the Commonwealth of Australia Constitution Act (Photo credit: Parliament House Art Collection, Canberra)

which seem to «elevate men by an interest higher, deeper, wider than that of ordinary life»¹³. It is the theatrical elements of the constitution that excite easy reverence and the most imposing institutions are the oldest. The Crown enjoyed both these attributes.

Bagehot's understanding of «dignified» or «symbolic» seems similar to this paper's definition of "expressive", but his «efficient» category is broader. While "instrumental" refers in this paper to justiciable elements of the Constitution, Bagehot's «efficient» component includes non-justiciable provisions recognised by government officials and others which guide the practical operation of the system of government.

Often, though, "expressive" and "symbolic" are defined more broadly, so that

they squarely include provisions which may also have a significant instrumental function. American legal scholar Max Lerner, in his discussion of the US Constitution, mentioned that he found Bagehot's general approach suggestive. Writing in the 1930s, Lerner stated, under the explicit influence of Freud, that we live in «a dream-world of symbols in which the shadows loom far larger than the realities they represent»¹⁴. He also suggested that American life had been riddled with violence, and that the Constitution and the Supreme Court had become symbols of an ancient sureness and a comforting stability. There is an attempt to articulate the symbolic meaning of the US Constitution and the Supreme Court, both of which have significant instrumental functions.

The distinction made in this paper also fails to reflect Marxist concern that liberal constitutions symbolise equality, through institutions such as the vote and the rule of law, but this symbolism masks substantive inequality in the operation and effects of those institutions¹⁵. Marxists attempt to distinguish the symbolic meaning of institutions not from the formal practical operation of the system which interested Bagehot, but from their practical consequences for individuals in a society marked by an unequal distribution of economic resources. However, both Bagehot and Marxists claim that the constitution has a symbolic function in legitimising the system of government.

Turning from the expressive-instrumental distinction to a focus on the "expressive", one can distinguish different public aims behind expressive reform, ie, aims which are disclosed as a public justification for reform. That public justifica-

tion will suggest that the reform reflects or promotes certain values. The two aims to be distinguished are the intrinsic and the goal-directed. The intrinsic depends upon it being intrinsically valuable that the community expresses its allegiance to certain values. This aim is not contingent upon an expectation that the values expressed will influence attitudes and behaviour. The other aim is goal-directed, where the goal is affecting behaviour, through influencing people's attitudes and values.

American philosopher Robert Adams accepts that goal-directed acts are valuable and can take precedence over intrinsic acts in certain circumstances¹⁶. However, especially where consequences are highly uncertain or where individuals cannot alter consequences, intrinsic expressive actions are significant in measuring the moral quality of individuals' lives. Adams refers to religious martyrdom, but his discussion can be related to constitutional politics. One could argue that intrinsic expressive acts can also shape a nation's moral life. Consider constitutional recognition of an indigenous perspective. There might be substantial uncertainty over whether achieving such recognition would significantly influence social attitudes. In this circumstance, a justification based on intrinsic expressive reasons might assume especial importance. That justification would rely on an assumption that the majority can speak on behalf of the nation and thereby shape its identity. Members of the community can have an interest in that identity, since national identity can influence individuals' identity¹⁷.

The distinction between intrinsic and goal-directed expressive actions is also relevant to the feasibility of expressive

constitutional reform. Intrinsic expressive aims are relevant to voting in national elections. An individual's vote is extremely unlikely to influence the outcome of an election. Australian economist Geoffrey Brennan and American philosopher Loren Lomasky have explained voting in elections in terms of its intrinsic expressive value for the individual: «though I may not be able unilaterally by my action at the polls to determine who wins the election, I *can* unilaterally articulate something about who I am»¹⁸. While consumers may often act to maximise their self-interested preferences, voters operate under a «veil of insignificance» which tilts incentives to act in an expressive direction¹⁹.

Brennan has linked intrinsic expressive voting to expressive constitutional reform. Brennan says that the expressive quality of voting suggests that the ethic of reticence towards expressive constitutional reform urged by Webber, while meritorious, may not be realistic. Expressive proposals may be particularly attractive to the public because such proposals fit well with intrinsic expressive voting²⁰. Brennan, however, too closely links intrinsic expressive voting with voting for expressive proposals. The expressivism of the individual vote does not indicate that expressive political proposals are likely to attract substantial support. A strong pragmatic strain in value-orientations may be expressed by rejecting purely expressive reform. Brennan was writing with the 1999 referendum proposals in mind²¹. However, most referendum proposals have concerned instrumental change. The expressivism of the individual vote only suggests that one should not exclude the possibility of expressive measures obtaining support.

This section, then, has provided some background discussion about expressive and instrumental attributes of constitutions. The next section outlines some well-known features of the Australian Constitution relevant to its expressive quality.

3. *The Australian constitution*

The Australian Constitution was enacted by the UK Imperial Parliament in 1900²². The Act contains covering clauses including a preamble, which is followed, in section 9, by "The Constitution". The Constitution establishes a federal system of government, with a federal legislature, executive and judiciary. The federal parliament is limited to enumerated heads of power. Alterations to the Constitution require legislation passed by at least one House of Parliament and a popular referendum achieving a national majority and majorities in a majority of States.

The Constitution was framed towards the end of the 19th century, with British constitutional practice in mind. Attention was also paid to the Canadian Constitution, which established a federal structure under the British Crown, the American Constitution, which limited the federal government to enumerated powers, and the Swiss Constitution, which provided a referendum procedure for constitutional (and legislative) alterations²³. The nationalism which developed in the 1890s had a republican strand, but major participants in drafting the constitution emphasised that federation would not jeopardise links with Britain. Alfred Deakin, a politician in Victoria and a leading figure in the framing of the Consti-

tution who would become Australia's second prime minister, called himself an «independent Australian Briton»²⁴. While one motive for federation lay in ensuring more adequate defence cooperation amongst the States in the face of any security threat from the emergence of European powers nearby, Australia would continue to look to Britain for assistance in this regard until the Japanese attack on Pearl Harbour in 1941.

Other issues raised in the context of federalism were tariffs and immigration. However, addressing these concerns did not necessarily require a full-blown federal system of government. Samuel Griffith, who was Premier of Queensland before becoming Chief Justice of the Supreme Court of Queensland, played one of the most prominent roles in drafting the Constitution. He said that federation would have the advantage that the absurdity of colonies fighting each other through raising tariff walls would be apparent. The creation of a nation would have a moral effect on the people²⁵. Rather than petty jealousies between colonies, people would identify with broader interests and Australia would be a player on the international stage, «practically commanding the Southern Seas».

The Constitution reflected formal elements of the British system, with the Crown enjoying a pre-eminent position, and informal elements, such as constitutional conventions, which tempered monarchic power to achieve democratic government. These conventions were understandings that were not viewed as justiciable. Its first three chapters are concerned with Parliament, the Executive and the Judicature. Section 1 vests the legislative power of the Commonwealth in a Federal Parliament «which shall consist of the Queen, a Senate,

and a House of Representatives». Section 5 states that the Governor-General, who is elsewhere described as «her Majesty's representative in the Commonwealth», «may appoint such times for holding the session of the Parliament as he thinks fit». However, section 6 requires «a session of the Parliament once at least in every year». In chapter II, section 61 states that the «executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General». Section 62 says that there «shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen... by the Governor-General... and shall hold office during his pleasure». As the political scientist Donald Horne has observed:

There is no specific mention of universal franchise, no specific mention of the need for a government to maintain a majority in the Lower House, no reference to the existence of the position of Prime Minister or of Cabinet, no explicit statement limiting the powers of the Governor-General...²⁶.

Horne also referred to there being «very little statement of liberal rights»²⁷. Instead, only a few rights are included. One is provided by section 117:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other state.

To understand this provision, it is helpful to note that the Constitution was drafted at two constitutional conventions, the first in 1891 and the second, which was popularly elected, in 1897 and 1898²⁸. The 1891 convention in fact began with a draft that

was the outcome of the Federation Conference in 1890. After that conference, Andrew Inglis Clark, the Tasmanian Attorney-General and an admirer of the US Constitution, inserted a section modelled on the broad equality guarantee found in the 14th amendment to the US Constitution²⁹. This provision was rejected at the second constitutional convention. Concern was expressed that this provision was inconsistent with the White Australia policy³⁰. There were racially discriminatory provisions in Victorian factory legislation, for instance. Only a provision against discrimination based on State residence was agreed to.

Another right conferred by the Constitution is provided by section 116: «The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance...». The inclusion of this section was as a counterbalance to the reference to «Almighty God» in the preamble:

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.

During the 1897 Convention, delegates were inundated with petitions demanding acknowledgment of God in the Constitution³¹. On the other hand, minority religious groups petitioned their concern that such acknowledgment could give the Commonwealth the implied power to make laws in regard to the nation's religion³². Section 116 was intended to assuage this concern.

A third right is provided by section 80. It requires that a trial on indictment of any

offence against the Commonwealth shall be by jury. However, it was observed at the time of the framing of the Constitution that this offered little guarantee for trial by jury in serious cases, for, unlike the US Constitution, there was no explicit requirement that serious crimes be tried by indictment³³.

There is disagreement on why the Constitution states few substantive rights. John Williams has argued that the High Court has wrongly interpreted this as an endorsement of British constitutional practice, which assumes that rights are adequately protected through parliament³⁴. Williams points instead to what he claims as the predominant reason for the rejection of Clark's proposal for a broad guarantee. That reason was to ensure that states could continue to discriminate on racial grounds. However, Williams does not adequately connect this reason to the rejection of other substantive rights, demonstrated, for instance, by the thinness of the jury-trial guarantee.

Furthermore, there seems little basis to exclude a general opposition to the inclusion of rights from an explanation for the specific rejection of Clark's equality proposal. One justification given at the convention debates for rejecting this proposal was that its inclusion «would be a reflection on our civilization»; in other words, it would reflect inappropriate distrust of the people and their representatives³⁵. The British did not have an entrenched bill of rights and Australians would not need provisions drawn from a bill of rights either.

Apart from containing few substantive rights, the Constitution had discriminatory provisions. Section 127 stated: «In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall

not be counted». Reckoning the numbers was relevant to the allocation of seats in the House of Representatives between States, and also to financial allocations between States and the Commonwealth³⁶. While there is little recorded discussion of the reasoning behind this provision, it is inconsistent with viewing indigenous Australians as equal citizens³⁷.

Another discriminatory provision was section 51(xxvi). This sub-section empowered the Federal Parliament to make laws with respect to «The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws». This section empowered the Federal government to pass the type of laws which the colonies had passed to limit certain non-European people to various localities and occupations³⁸. The exclusion of «the aboriginal race» affirmed that they would remain a State responsibility.

In summary, the Constitution, read literally, vests substantial powers in the representative of the Queen and contains few substantive rights. It thereby followed British constitutional practice. It also contains discriminatory provisions. These features are clearly relevant to the expressive quality of the Constitution. The Constitution, however, can and has been altered.

4. *Alterations to the constitution*

A. *The 1967 referendum on indigenous Australians*

Section 128 enables the Constitution to be altered through passage of legislation through at least one house of parliament

and the popular referendum referred to earlier. Of the 44 proposed changes to the Constitution, eight have passed³⁹. Most alterations and unsuccessful proposals have concerned instrumental provisions. A significant number of proposals have attempted to increase the powers of the Commonwealth and most have been rejected.

The most significant expressive amendment was in 1967 and it concerned the position of indigenous Australians. At the time of federation, it was not anticipated that they would play a role in federal politics. Indeed, the electoral laws enacted by the newly constituted Federal Parliament banned indigenous Australians from voting, other than the small number enfranchised at the State level. This ban was removed in 1962⁴⁰. With the removal of the ban, section 127's exclusion of «aboriginal natives» from being counted was clearly anomalous. The referendum proposal involved the deletion of this section. This proposal was largely symbolic, since it was unlikely to affect the composition of Parliament or Commonwealth-State financial arrangements, given the small population of indigenous Australians.

The referendum also approved an amendment to section 51(xxvi). As previously indicated, this empowered the Federal Parliament to make laws with respect to «The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws». Proposals to give the Commonwealth power over Aborigines have been traced to the late 1920s and were motivated partly by a belief that the Commonwealth had the resources to assist Aborigines and was also more likely to have a wider vision⁴¹. The 1967 referendum proposal involved the

deletion of «other than the aboriginal race in any State». This was an instrumental amendment. It should be noted, though, that the conservative government under Prime Minister Harold Holt did not plan to use any new Commonwealth power⁴². The media unequivocally supported the referendum proposal, and no group in Parliament supported a No case that would be sent to the electorate⁴³. Over 90 percent of the population voted in favour of the proposal, the strongest endorsement of a referendum in Australian history⁴⁴.

Bain Attwood and Andrew Markus mention that many Aborigines do not view the referendum highly⁴⁵. On the other hand, they note that other Aboriginal people view it as highly significant, asserting that they «got the rights in 1967» or were allowed «to go to places that we never went before, such as pictures [and] swimming pools»⁴⁶. There is an account that the day after the referendum, more Aborigines were seen on the streets of Brisbane, presumably enjoying a new sense of confidence and security⁴⁷. For a significant number of Aborigines, the referendum result appears to have had greater significance than the 1962 legislation removing the ban on voting⁴⁸. While the 1967 amendments did not confer citizenship rights on Aborigines, the resounding majority in favour of the proposal may have been interpreted as indicating greater acceptance within the wider community than many Aborigines expected.

Attwood and Markus state that the primary historical significance of the referendum was that it bestowed upon the Whitlam government and its successors the moral authority to expand the Commonwealth's role in Aboriginal affairs⁴⁹. The Whitlam government seldom used the race pow-

er in pursuing its policy agenda, but it relied heavily upon the referendum to justify that agenda. Attwood and Markus point, though, to a mythology that grew around the referendum, including the claim that it gave Aborigines equal citizenship⁵⁰. While overstating the significance of the referendum can be helpful to the Aboriginal cause since that interpretation suggests that Australia has not fulfilled a commitment previously made, they are concerned that the referendum result can also be used to suggest that Aborigines have already achieved equal citizenship⁵¹.

B. *The 1999 referendum and beyond*

The most significant expressive referendum proposals that were unsuccessful occurred in 1999. The republican proposal received the most attention. The other proposal was for a new preamble.

There had been republican sentiment since the last decades of the nineteenth century. It achieved greater support with the election of the Labor Government in 1972, due to its support of a republic⁵². After the controversial dismissal of the government by the Governor-General, employing his reserve powers, becoming a republic was associated partly with an opportunity to limit reserve powers⁵³. By contrast, for Prime Minister Paul Keating, who promised that adopting an Australian republic would be a core plank of Labor's platform if Labor were re-elected in 1996, the emphasis was on symbolism. Becoming a republic would symbolise independent nationhood and give a new sense of unity and pride⁵⁴. The conservative opposition,

on the other hand, variously portrayed Keating's support for a republic as a tactic to divert attention from the government's inept economic management, as divisive, and a denial of British heritage and its symbols⁵⁵. The political scientist Ian McAllister notes that for republicans, «Australia's increasing cultural diversity in the post-war years, moves to establish closer links with Australia's Asian neighbours, and not least Britain's own closer role with Europe, have made the British link appear increasingly anachronistic»⁵⁶. For monarchists, on the other hand, the Crown symbolises Australia's British heritage and the values and institutions associated with that heritage, including democracy and the rule of law.

The conservative opposition nevertheless promised a Convention on the republic question if elected. It fulfilled this promise. Half the members of the Convention were popularly elected with the other half appointed by the government. The model which attracted the greatest support was a minimalist model. It would substitute a president for the governor-general and only change the method of appointment. While the governor-general is appointed by the government, the president would be appointed by a two-thirds majority of parliament. This model was described as elitist by those arguing that the people should directly elect the president. On the other hand, those favouring the parliamentary-appointment model expressed concern that the symbolism of a popularly elected president could encourage an overly assertive presidency. The third main group were the monarchists, who favoured the status quo.

The Convention also favoured a new preamble to the Constitution. One of the first official statements expressing dissat-

isfaction with the preamble was in a 1987 report advising the Constitutional Commission, which was established in 1985 in the lead-up to the 1988 bicentenary of white settlement of Australia. The bicentenary was seen as an opportune moment to revise the Constitution. The 1987 Report stated that a preamble «should embody the fundamental sentiments which Australians of all origins hold in common» and recommended a preamble touching on the themes of multiculturalism, Aboriginal ownership, equality and the environment⁵⁷. The Constitutional Commission, however, was worried that a preamble proposal could distract from other substantive and important proposals submitted to the electorate⁵⁸. Also, criticisms of the proposed preamble indicated «the difficulty in isolating the fundamental sentiments which Australians of all origins hold in common and stating them in a concise and inspirational form»⁵⁹.

Nevertheless, calls for recognition of Indigenous Australians in the preamble continued⁶⁰. In 1998, the Republican Convention favoured a new preamble that would provide a broad overview of Australian history and values⁶¹. It should, however, be accompanied by a non-justiciability clause. This was a response to anxiety that a statement in the Constitution of values that judges could draw on might encourage judicial activism⁶². A new, non-justiciable preamble was in fact passed by parliament, but the process of consultation was not an especially open one⁶³.

It was the Convention's republican proposal, though, that captured most attention. Republicans argued that it was appropriate that there should be an Australian head of state⁶⁴. The No campaign

had two main messages: «Vote No to the politicians' republic» and if you «Don't know, vote No»⁶⁵. A deliberative poll was held on the republic question on 22-24 October 1999. A deliberative poll commences in a similar way to an ordinary opinion poll, but those polled are also invited to participate in a weekend discussion concerned with the same issues canvassed by the survey, after which there is a final poll⁶⁶. The final poll is intended to measure any shift in opinion and knowledge gained through the deliberative process. The initial poll not only asks questions about the topics that are the subject of the deliberative poll but also information that assists in determining how representative the group that accepts the invitation to the weekend discussion is. The telephone interviews were conducted in early September. With the final poll, there was a 20 percent increase in yes voters, from 53 to 73 percent. Support for the direct election model fell from 50 to 19 percent⁶⁷.

The referendum was on 6 November. One survey conducted in the week before the referendum found that only 12 percent of respondents did not know how they would vote. By contrast, 40 percent of respondents said they had never read or heard anything about the preamble⁶⁸. The preamble obtained 39.3 percent of the total vote. The republican model achieved 45.1 percent of the vote. In relation to the republic, there was a deep division between the wealthy, educated, inner-city areas, which generally voted Yes, and poorer areas, which predominantly voted No. A survey conducted soon after the referendum suggested that the No vote was divided fairly equally between monarchists and direct electionists⁶⁹.

Turning to the final proposal for expressive constitutional reform, the government in 2010 committed to hold a referendum to further reconciliation between indigenous and non-indigenous Australians⁷⁰. The expert panel established to advise the government noted that while the 1967 referendum empowered the Commonwealth to make laws with respect to Aborigines through the race power, the origins of the race power lay in the contemplation of legislation discriminating against certain races. Furthermore, including Aborigines in the race power failed to recognise their special status as indigenous people dispossessed by white settlement.

The panel proposed, amongst other things, the deletion of the race power and the inclusion of a new section conferring power to make laws with respect to «Aboriginal and Torres Strait Islander peoples»⁷¹. This section would have introductory words that would include recognition of first occupancy and acknowledgment of a continuing relationship with traditional lands and waters. The panel quoted with approval from the submission by the Royal Australian and New Zealand College of Psychiatrists, which stated that «The lack of acknowledgment of a people's existence in a country's constitution has a major impact on their sense of identity, value within the community and perpetuates discrimination and prejudice which further erodes the hope of Indigenous people»⁷². The panel also proposed another section prohibiting racial discrimination, but the conservative opposition party has not agreed with this prohibition, leaving the future of the panel's recommendations in doubt⁷³.

5. *The expressive quality of the Constitution*

A. *The Crown*

The factual material in sections 3 and 4 enables an exploration of certain claims about the expressive quality of the Constitution. The introduction mentioned that the Australian Constitution has been criticised for failing to endorse properly important values. For example, the republican movement portrayed the Crown as a symbol of lack of independence and in tension with democratic values. However, the ensuing debate demonstrated that the Crown carried different meanings over which the community divided, most obviously between republicans and monarchists, but also over the symbolic meaning of the two main republican options.

That law is amenable to multiple symbolic meanings was highlighted by the American lawyer Thurman Arnold. He argued in 1935 that the law provides a reservoir of symbols that create an illusion of unity of thought. It is an illusion because those symbols are in fact given quite different meanings by individuals⁷⁴. The symbols are sufficiently vague that they are accepted by most individuals, although being interpreted in different ways.

Social psychologists have indeed found subsequently a tendency to overstate the extent to which one's own values are held by others⁷⁵. It is this tendency which Arnold was largely relying on for law's ability to create an illusion of consensus: each individual sees ideals referred to in the law, and may assume that it is their own interpretation of those ideals that the law upholds. One could add that those ideals could form part of the symbols shared in common that

can foster a sense of belonging to a community, and that might facilitate commitment to it⁷⁶. Support for the republic was partly motivated by concern that the symbolism in the Australian Constitution was not unifying. Nevertheless, the republican debate may have heightened a sense of difference, as Australians were confronted by competing interpretations of the symbolism of the Crown and of the different republican models.

Indeed, the republic debate perhaps raises questions more generally about some academic approaches to interpreting constitutional symbols. Section 2 referred to the sociologist Cotterrell. He is concerned that an embrace of multiple symbolic meanings can envelop the social scientist in a «forest of symbols» from which it is impossible to find patterns of symbolic interpretation that are useful in furthering social understanding⁷⁷. His strategy is to choose those symbols that illuminate legal communication and which structure the problems addressed by constitutional lawyers⁷⁸. In relation to the British monarchy, he suggests that its hierarchical depiction of authority must be incorporated within British constitutional thought⁷⁹.

Of course, the British monarchy is likely to have different meanings in the Australian context. Political scientist Brian Galligan discloses one such meaning. He has argued that with the Australian Constitution being enacted after being approved in a plebiscite and the amendment procedure requiring a referendum, popular sovereignty is the central image of authority underlying the Constitution⁸⁰. The link with the monarchy, though, placed Australia within the protective sphere of Britain. While the symbolism of the British monarchy will be

different in Australia, the multiple symbolic meanings of the Crown so nicely illustrated by the republican debate in Australia supports doubts about Cotterrell's analysis. Pointing to a symbolic meaning does not indicate what impact it actually has on constitutional thought⁸¹. The plurality of symbolic meanings evident in the republican debate provides a cautionary tale about expressive constitutional reform.

B. *The absence of procedural and substantive values*

The alleged thinness of the Constitution, due to the absence of a bill of rights and an explicit statement of values, say, in its preamble, was raised in debate in the 1980s about citizenship. Citizenship can refer to what rights individuals require to distinguish them from mere subjects. However, it is also used to explore what being a good citizen entails⁸². The duties of citizens are often interpreted in liberal terms. There is a concern to strengthen values such as tolerance and democracy in the face of ethnically exclusive interpretations of national identity or in the face of concern that some immigrants may come from countries without a democratic tradition. There is also concern to strengthen allegiance to the state in the face of surveys suggesting high levels of alienation and distrust of government⁸³.

A government-commissioned Civics Expert Group mentioned that the uninspiring language of the Constitution is an obstacle to promoting commitment to a democratic system of government⁸⁴. The Report proposed a preamble and a bill of

rights. As in most discussion, the Report had a justiciable bill of rights in mind. This paper, though, is focusing largely on provisions where the expressive is of much greater significance than the instrumental. In fact, legal philosopher Tom Campbell has argued for entrenchment of a non-justiciable bill and of a parliamentary committee which would scrutinise compliance of draft legislation with the bill⁸⁵. He has argued that such a bill could provide a unifying ideology upon which a culture of rights is developed⁸⁶.

The approach to expressing values in the Constitution that has attracted general interest, though, has focused on the preamble. In the context of this debate, Horne has asked: «How practical is it to imagine that there can be an almost universal acceptance of certain declared civic principles and practices in Australia if there is no place where they are described?»⁸⁷. Section 3 indicated, though, that once one takes into account the small “c” constitution, the very absence of explicit procedural and substantive values in the Australian Constitution aligns with British constitutional practice. The Constitution’s lack of codification of values can be interpreted as expressing trust in the political culture to constrain violation of rights or serious departures from democratic practice. The small “c” constitution itself contains values such as democracy and some other rights. Indeed, the Australian Constitution was unusually democratic at the time it was framed, with its requirement of direct election of the upper as well as the lower house and amendment through popular referendum.

Horne in fact recognises the small “c” constitution⁸⁸. However, he asks: If con-

fronted with the Constitution, how many Australians know about the small “c” constitution? Where is the special benefit to democratic life and harmonious society in keeping them in the dark? Even if our courts and general political culture have worked well, that does not mean that the Constitution has worked well. He refers to a Report which stated:

It is often argued that one can spell out too much in a constitution and that to do so can hobble future political development... But it can also be argued that there is some necessity for particularity... A constitution must appear to be the property of the people, the government of whose affairs is its concern. It must speak to them in their own language⁸⁹.

Horne’s hypothetical of citizens looking at the Constitution is unlikely to be substantially realised. A 1994 survey found that only 18 percent of people had some understanding of what the Constitution contained⁹⁰. In a 1996 Australian Election Study Survey, 34 percent responded: «Don’t know» to the statement that «The Constitution can only be changed by the High Court» and 29% agreed⁹¹. Thirty-seven percent recognised the statement was false. It would seem that two-thirds of the people did not recognise when responding to this question that the Constitution can be changed by popular referendum. These survey results suggest that the symbolic charge attached to the contents of the Constitution may be modest. Even on issues that achieve significant exposure, such as the republic proposal, there is substantial ignorance. Otherwise, the significant shift of opinion demonstrated by the deliberative poll on the republic referred to in the previous sub-section should not have occurred.

Political scientist Hugh Emy links this ignorance to the uninspiring nature of the constitutional text⁹². He does not acknowledge, though, that even where a Constitution has a significant symbolic charge, such as in the US, knowledge of the Constitution is low⁹³. Concern about political ignorance often leads to attention being paid to civics education in school. However, civics education has not been hindered significantly by the prosaic nature of the constitutional document. Indeed, while the Civics Expert Group suggested that the uninspiring language of the Constitution is an obstacle to better appreciation of citizenship, it did not view it as a significant obstacle⁹⁴. Instead, it focused on what changes could be made to civics education.

Indeed, the Australian government's «Discovering democracy» program for learning at various points in primary and secondary school, launched a few years after the Group's report, referred not only to the Constitution, but also the pledge of citizenship found in the *Citizenship Act 2007* and the United Nations Declaration of Human Rights⁹⁵. The pledge refers to citizens accepting the obligation to share the community members' democratic beliefs, rights and liberties. Those beliefs, rights and liberties are not specified. However, students are referred to the UN Declaration. Students should thereby recognise that democratic beliefs, rights and liberties are not just Australian or British, but enjoy international recognition.

Horne's and Ely's argument that the Constitution is unfortunate in its failure to reinforce civic-mindedness is undermined by the weakness of the link asserted. Instead, perhaps Horne's argument can be modified in an expressive direction. The

argument would be that one way to affirm allegiance to democratic principles is by supporting changes to make the Constitution more intelligible to a lay person. Such a Constitution would, by its very intelligibility, express a democratic ethos. What weight this aim should have in comparison to other policy priorities is, however, a different matter.

C. *The interaction between expressive and instrumental provisions*

This sub-section turns to concern with the Constitution's marginalisation of indigenous Australians. It also points to a difficulty with expressive reform. That difficulty lies in the interaction between the expressive and instrumental features of the Constitution. The discussion refers to the 1999 referendum proposal concerning a preamble and also the proposed referendum on recognising indigenous Australians.

The instrumental function of the Constitution seems to enhance its expressive potential. The Constitution is not only a founding document but also a legal document defining governmental powers. However, this instrumental function raises complications for expressive reform. With a somewhat activist phase of the High Court being associated with a shift from legalism, with its emphasis on precedent, to an approach that draws on community values⁹⁶, there was concern at the Republican Convention that general values appearing in the Constitution or its preamble might encourage activism. A non-justiciability clause was therefore added.

Megan Davis and Zrinka Lemezina suggest, however, that if constitutional acknowledgment of indigenous Australians is limited to a preamble that is non-justiciable, this would demonstrate that indigenous Australians belong to the legal and political fringes: their only place in the Constitution is on the fringes of the Constitution itself⁹⁷. They also claim that indigenous Australians do not see Parliament as an effective safeguard of their interests⁹⁸. For constitutional reform to go beyond the merely symbolic, it must engage with the instrumental potential of the Constitution; it must confer justiciable rights, say, against discrimination.

This approach is reflected in the 2012 report on constitutional recognition of indigenous Australians⁹⁹. It recommended that a statement of recognition should be part of a new substantive provision conferring power on the Commonwealth Parliament with respect to Aboriginal and Torres Strait Islander peoples¹⁰⁰. Such a statement would «ensure that the purpose of the new power was clear»¹⁰¹. In other words, the statement would have instrumental implications.

The difficulty in combining the instrumental and the expressive is, however, demonstrated by the Opposition response especially to the Report's recommended constitutional prohibition on racial discrimination. Without bipartisan support, any referendum on indigenous recognition is likely to fail. This provision raises the controversy over entrenched rights. Legal philosopher Wojciech Sadurski, writing in the context of constitutionalisation in Eastern Europe, points to two narratives on constitutionalising rights¹⁰². The first points to the possibility of reasonable disa-

greement about rights. Once this is recognised, it seems that decisions should rest with elected representatives. The second narrative is the "parade of horrors". This has more purchase on the collective imagination in Eastern Europe because people know that the horrors in their part of the world do happen. Sadurski suggested that only when the new democracies became more stable would the first narrative gain in influence.

Transposing this to the Australian context, the second narrative (the "parade of horrors") may not have significant purchase amongst the majority, for the majority appear to believe that their rights are well protected¹⁰³. However, it may have potency for indigenous Australians, given their experience of dispossession and discrimination. Even the limited native title rights that the High Court in the 1990s found in the common law provoked a fierce backlash. A 1996 survey indicated that 61 percent thought that the «transfer of land rights to Aborigines» had «gone too far»¹⁰⁴. An empathy for what may be the predominant indigenous perspective might lead some who adhere more to the first (reasonable disagreement) rather than the second ("parade of horrors") narrative to nevertheless support constitutionalisation here. However, the power asymmetry between indigenous and non-indigenous Australians suggests that the second narrative will not prevail. Instead, there is the possibility that any referendum proposal that has a strong chance of success might need to be limited to the purely expressive, and such symbolism may be too tainted to warrant indigenous support.

D. *The symbolism of the 1967 referendum and the significance of the referendum procedure*

This paper has so far highlighted difficulties in pursuing expressive constitutional reform. The Constitution carries multiple meanings over which the community can divide, rendering it difficult to find unifying symbols. Also, most people have little knowledge of the contents of the Constitution. Finally, the fact that the Constitution is also an instrumental document creates not only advantages but also complications.

All this might suggest reticence to embark on expressive constitutional reform. It might suggest a focus on expressive legislative measures or on instrumental measures that might achieve some of the aims of constitutional expressivism. To the extent that the concern is with social cohesion and a sense of citizenship, could greater social equality be helpful? Indeed, a Marxist perspective might raise the question of whether a focus on symbolism can divert attention from substantive inequalities and injustices.

It is, however, necessary to at least consider whether the 1967 amendment to the Constitution suggests that constitutional expressivism cannot be so easily dismissed. It will be recalled that the «Aboriginal natives shall not count» amendment was expressive while the race power amendment was instrumental. For indigenous champions of the proposal, the expansion of Commonwealth power was critical¹⁰⁵.

One lesson from 1967 is not that purely expressive change can be powerful, but that expressive change combined with instrumental change can be symbolically cogent. The way “instrumental” and “expressive” are often distinguished in this paper could

lead to the view that the instrumental provision (constituted by the race power) lent symbolic power to the expressive provision (constituted by the counting provision). Instead, it should also be recognised that the race power amendment itself had great symbolic and instrumental significance. Its symbolic significance, derived partly through the resounding referendum victory, facilitated it becoming a significant instrumental provision as well, through the general legitimacy that it conferred upon Commonwealth action in this area. More broadly the referendum victory has, at least for some, overshadowed in symbolic significance the legislative conferral of the vote. This invites exploration of what is symbolically different about legislative versus constitutional changes.

Clearly, the Constitution can be seen as fundamental to the political system and thereby having a special place in reflecting values underpinning the political system. This status is fortified by the Constitution being only alterable through popular referendum, while legislative changes can be achieved by parliament alone. The significance of the referendum to constitutional change is well-recognised. Stephen Tierney, writing in the UK and European context, has highlighted the significance of the popular referendum in altering constitutional, in contrast to ordinary, law. He says that using the referendum in relation to ordinary legislation may be a symbolic reminder that democratic authority finds its legitimacy in the consent of the people. However, only the constitutional referendum manifests popular sovereignty¹⁰⁶. It expresses the idea that the political system itself rests on the authority of the people. Returning to the Australian context, that

the original Constitution was endorsed by a plebiscite furthers its symbolic potential as an expression of popular sovereignty.

On the other hand, the popular sovereignty achieved through the referendum is limited: the people are restricted to approving or rejecting proposals that the Commonwealth Parliament passes. In the US context, Christopher Zurn has argued that the deliberative poll process could be modified to democratise the process of constitutional amendment¹⁰⁷. Proposals for amendments, if a certain threshold number of signatures are gathered from citizens, would go to large juries, which would certify which proposals should go to a referendum. Three different juries 'spaced out over a significant time span' must agree to the certification¹⁰⁸. After certification but before the referendum, there would be a deliberation day, where all interested citizens participate in a process modelled on deliberative polls. Zurn is adapting here Bruce Ackerman and James Fishkin's idea of a deliberation day that would occur before important elections¹⁰⁹.

Zurn expects that his recommendation would democratise in a deliberative direction constitutional amendment in the US¹¹⁰. I have suggested elsewhere, though, that the requisite threshold for signatures may limit the proposals that reach the certification stage to those sponsored by well-resourced interests¹¹¹. Also, the expense of deliberation days might discourage juries from certifying proposals.

In the Australian context, Ron Levy points to the Canadian experiment with Citizens' Assemblies, which occurred in British Columbia in 2004 and Ontario in 2007¹¹². They were established by legislation and charged with considering the

electoral system. The British Columbian assembly had 160 members who met over a period of close to a year¹¹³. They then voted for a proposed amendment to go directly to a referendum. That referendum achieved 57.7 percent endorsement, just short of the 60 percent requirement¹¹⁴.

Levy also reports on a nationwide poll which elicited views on employing a citizens' assembly rather than the parliamentary process to write proposed amendments, and the case for and against the amendment, which would then be put to a referendum¹¹⁵. The poll indicated that the proposed assembly attracted 17.2 percentage points greater trust than the parliamentary model¹¹⁶. This may be significant, Levy argues, given that in over half of all referendums held, the difference in percentages between votes cast for and against referendum proposals has been less than 10 points¹¹⁷.

However, it would seem that parliament would dictate the issues on which a Citizens' Assembly can deliberate. In the Canadian examples, the issue was the electoral system¹¹⁸. What needs to be pursued is how agenda-setting can be democratized. I have argued elsewhere for a Citizens' Court which would empower large juries to not only decide bill-of-rights matters, but also what bill-of-rights matters should be heard¹¹⁹. I proposed an expert panel to provide an initial sorting of cases in order of merit¹²⁰. Such panels would combine diversity and expertise in order to enhance the likelihood of a Citizens' Court being furnished with a range of expert opinions.

Analogously, a Citizens' Assembly could be furnished with such opinions in order to set the agenda of constitutional reform. That Assembly, or a follow-up Assembly,

would certify what proposals should go to a referendum. These Assemblies could sit once a decade. It is through ongoing conversations about our system of government that popular sovereignty is manifested. A by-product would be enhancing the symbolic charge of the Constitution as an expression of popular sovereignty. It could also facilitate the passage of expressive reform through referendums.

6. *Conclusion*

This paper has attempted to throw light on the Australian Constitution and constitutionalism more generally through a discussion of the expressive quality of the Australian Constitution and some general literature relevant to constitutional expressivism. It has described some historic landmarks in the expressive quality of the Constitution, involving its framing, the 1967 referendum on indigenous matters, and the 1999 proposals relating to becoming a republic and inserting a new preamble. It referred also to the most recent proposal concerning indigenous recognition.

These historic moments are helpful in indicating difficulties with expressive reform, due to lack of agreement over the meaning of symbols and lack of knowledge about the Constitution. That the Constitution is also an instrumental document both supports the expressive quality of the Constitution as well as complicating reform. Of course, since the emphasis has been on historical lessons in the Australian context, this paper does not provide necessary truths about expressive constitutional reform in general or, indeed, about reform

of the Australian Constitution. One could imagine a different history. Suppose, the race power originally did not exclude Aborigines but, by 1967, there had been no use by the Commonwealth Parliament of the race power with respect to Aborigines. Suppose that the 1967 referendum proposal was limited to removing the «aboriginal natives shall not be counted» provision. Suppose further that this proposal was resoundingly affirmed in a referendum, and it gave legitimacy to Commonwealth attempts to improve the position of indigenous Australians. Then, the historical lesson would point to the cogency of purely symbolic change. The lessons drawn from the historical record are limited by that record. They need to be understood as merely pointing to possible difficulties and opportunities.

The actual 1967 amendment only points to the possible potency of constitutional symbolism when combined with instrumental change. This led to a discussion of the significance of the popular referendum for the expressive value of the Constitution, and how that symbolism could be enhanced. I proposed the use of randomly selected citizens to shape the agenda of constitutional reform and suggested it might facilitate expressive reform. This proposal takes the paper beyond a concern with the expressive quality of the Constitution, for its direct aim is deepening popular sovereignty and democracy. Nevertheless, it also is a reminder of the strong links that can exist between the expressive and the instrumental.

- ¹ D. Lutz, *Towards a theory of constitutional amendment*, in S. Levinson (edited by), *Responding to imperfection: The theory and practice of constitutional amendment*, Princeton, Princeton University Press, 1995, pp. 237-274 at p. 261. Indeed, Lutz ranks it as the most difficult constitution to change out of those surveyed, based on a quantitative analysis.
- ² D. Horne, *A constitution of openness, accessibility and shared discourse?*, in «University of New South Wales Law Journal», n. 24, 2001, pp. 610-619, G. Williams, *Human rights under the Australian Constitution*, Melbourne, Oxford University Press, 1998, p. 26.
- ³ C. Hide, *The Recent Republic Debate – A Chronology*, in C. Hide (edited by), *The Constitution Papers*, Canberra, Australian Government Publishing Service, 1996, pp. 231-321.
- ⁴ Commonwealth of Australia, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, 2012, <<http://www.youmeunity.org.au>>, July 2012.
- ⁵ On the preamble, see A. Winckel, *A 21st century constitutional preamble – An opportunity for unity rather than partisan politics*, in «University of New South Wales Law Journal», vol. 24, 2001, pp. 636-651 at pp. 650-651.
- ⁶ See, eg. Constitutional reform unit, University of Sydney Law School, *Constitutional recognition of Indigenous Australians in a preamble*, 2011, <http://sydney.edu.au/law/cru/documents/2011/Report_2_2011.pdf>, July 2012.
- ⁷ J. Webber, *Constitutional reticence*, in «Australian Journal of Legal Philosophy», n. 25, 2000, pp. 125-155.
- ⁸ Letter X in *The Works of Lord Bolingbroke* 88, Philadelphia, Carey & Hart, 1841, vol. 2 referred to in L. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, in «Harvard Law Review», vol. 115, 2001-2002, pp. 5-169 at p. 16 fn 36.
- ⁹ J. La Nauze, *The making of the Australian Constitution*, Melbourne, Melbourne University Press, 1972, ch. 16.
- ¹⁰ W. Bagehot, *The English constitution*, edited by P. Smith, Cambridge, Cambridge University Press, 2001, p. 5 (ch. 1).
- ¹¹ *Ibidem*.
- ¹² Bagehot, *The English constitution* cit., p. 6.
- ¹³ Ivi, p. 7.
- ¹⁴ M. Lerner, *Constitution and court as symbols*, in «Yale Law Journal», n. 46, 1937, pp. 1290-1319 at p. 1290.
- ¹⁵ See, eg. R. Cotterrell, *The Sociology of Law: An introduction*, London, Butterworths, 1984, pp. 112-116.
- ¹⁶ R. Adams, *Finite and infinite goods: A framework for ethics*, Oxford, Oxford University Press, 1999, ch 9. Adams actually refers to "expressive" rather than "intrinsic expressive" acts.
- ¹⁷ J. Waldron, *Superseding historic injustice*, in «Ethics», n. 103, 1992, pp. 4-28 at p. 6.
- ¹⁸ G. Brennan, *Constitutional reticence and expressive voting*, in «Australian Journal of Legal Philosophy», n. 25, 2000, pp. 175-184 at p. 177, referring to G. Brennan and L. Lomasky, *Democracy and decision*, Cambridge, Cambridge University Press, 1993. Like Adams, Brennan also refers to "expressive" rather than "intrinsic expressive" acts.
- ¹⁹ G. Brennan and A. Hamlin, *Democratic devices and desires*, Cambridge, Cambridge University Press, 2000, p. 9.
- ²⁰ Brennan, *Constitutional reticence* cit., pp. 176-178.
- ²¹ See also G. Brennan and A. Hamlin, *Expressive constitutionalism*, in «Constitutional Political Economy», n. 13, 2002, pp. 299-311 at p. 304.
- ²² *Commonwealth of Australia Constitution Act* 1900.
- ²³ G. Williams and D. Hume, *People power: The history and future of the referendum in Australia*, Sydney, UNSW Press, 2010, p. 5.
- ²⁴ H. Irving, *To constitute a nation: A cultural history of Australia's Constitution*, Cambridge, Cambridge University Press, 1999, p. 30.
- ²⁵ Ivi, p. 84.
- ²⁶ Horne, *A constitution of openness, accessibility and shared discourse?* cit., p. 616.
- ²⁷ *Ibidem*.
- ²⁸ Williams, *Human rights* cit., pp. 27-28.
- ²⁹ J. Williams, *Race, citizenship and the formation of the Australian Constitution: Andrew Inglis Clark and the "14th amendment"*, in «Australian Journal of Politics & History», vol. 42, 1996, pp. 10-23.
- ³⁰ Williams, *Human rights* cit., p. 41.
- ³¹ Irving, *To constitute a nation* cit., p. 166.
- ³² Ivi, p. 167.
- ³³ J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), Sydney, Legal Books, reprint, 1995, pp. 807-808 Historical Note.
- ³⁴ Williams, *Race, citizenship* cit., at p. 18.
- ³⁵ See Williams, *Race, citizenship* cit., p. 15.
- ³⁶ J. Chesterman and B. Galligan, *Citizens without rights: Aborigines and Australian citizenship*, Cambridge, Cambridge University Press, 1997, pp. 70-71.
- ³⁷ B. Attwood and A. Markus, *The 1967 referendum: Race, power and the Australian Constitution*, Canberra, Aboriginal Studies Press, 2007, p. 3.
- ³⁸ *Recognising Aboriginal and Torres Strait Islander Peoples* cit., p. 18.
- ³⁹ Williams and Hume, *People power* cit., p. 11.
- ⁴⁰ There had been an earlier, slight broadening of the franchise: M. Goot, *The Aboriginal franchise and its consequences*, in «Australian Journal of Politics and History», n. 52, 2006, pp. 517-561 at pp. 524-526.
- ⁴¹ Williams and Hume, *People power* cit., pp. 142-144.
- ⁴² Attwood and Markus, *The 1967 referendum* cit., pp. 42-43.
- ⁴³ Williams, Hume, *People power*

- cit., p. 145.
- 44 Attwood and Markus, *The 1967 referendum* cit., pp. 54-56.
- 45 Ivi, p. 69.
- 46 *Ibidem*.
- 47 Ivi, p. 57.
- 48 Goot, *The Aboriginal franchise* cit., p. 546.
- 49 Attwood and Markus, *The 1967 referendum* cit., p. 64.
- 50 Ivi, p. vi.
- 51 Ivi, pp. viii, 70.
- 52 I. McAllister, *Elections without cues: The 1999 Australian republican referendum*, in «Australian Journal of Political Science», n. 36, 2001, pp. 247-269 at pp. 248-249.
- 53 M. McKenna and W. Hudson (edited by), *Australian Republicanism: A reader*, Melbourne, Melbourne University Press, 2003 at p. 184 (reading 95).
- 54 Hide, *The Recent Republic Debate* cit., p. 274.
- 55 Ivi, pp. 234, 235 and 269 respectively.
- 56 McAllister, *Elections without cues* cit., p. 260.
- 57 Australia, Constitutional Commission, *Report of the Advisory Committee on Individual and Democratic Rights under the Constitution*, Canberra, Australian Government Publishing Service, 1987 at p. 30.
- 58 Commonwealth of Australia, *First report of the Constitutional Commission*, vol. 1, Canberra, Australian Government Publishing Service, 1988 at pp. 161-162.
- 59 *Ibidem*.
- 60 *Constitutional recognition of Indigenous Australians in a preamble* cit., p. 11.
- 61 Williams and Hume, *People power* cit., p. 184.
- 62 M. McKenna, A. Simpson, and G. Williams, *First words: The preamble to the Australian Constitution*, in «University of New South Wales Law Journal», n. 24, 2001, pp. 382-400 at pp. 396-397.
- 63 Winckel, *A 21st century constitutional preamble* cit., pp. 639-640.
- 64 Williams and Hume, *People power* cit., p. 187.
- 65 Ivi, p. 189.
- 66 J. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform*, New Haven, Yale University Press, 1991.
- 67 See, eg. R. Gibson and S. Mishkin, *Australia Deliberates? The Role of the Media in Deliberative Polling*, in J. Warhurst and M. Mackerras (edited by), *Constitutional Politics: The Republic Referendum and the Future*, St Lucia, Qld., University of Queensland Press, 2002, pp. 163-175 at p. 168.
- 68 Williams and Hume, *People power* cit., p. 195.
- 69 McAllister, *Elections without cues* cit., p. 256.
- 70 J. Gillard, J. Macklin, and R. McClelland, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 8 November 2010, Commonwealth of Australia, Hon Jenny Macklin MP Media releases, <<http://www.jennymacklin.fahcsia.gov.au/node/986>>, July 2012.
- 71 *Recognising Aboriginal and Torres Strait Islander Peoples* cit., p. 230.
- 72 Ivi, p. 40.
- 73 P. Karvelas, *Referendum rethink urged*, in «Australian», 1 February 2012; P. Coorey, *Gillard aims to time it right as voters back race equality*, in «Sydney Morning Herald», 7 February 2012.
- 74 Cotterrell, *Sociology of Law*, p. 108, referring to T. Arnold, *The Symbols of Government* (1935), New York, Harcourt Brace and World ed, 1962.
- 75 Referred to in C. Fitzmaurice and K. Pease, *The psychology of judicial sentencing*, Manchester, Manchester University Press, 1986, p. 19.
- 76 A. Smith, *National identity*, London, Penguin Books, 1991, ch 1.
- 77 R. Cotterrell, *Some aspects of the communication of constitutional authority*, in D. Nelken (edited by), *Law as communication*, Aldershot, Hants, Dartmouth, 1996, pp. 129-151 at pp. 133-134.
- 78 Ivi, p. 145.
- 79 Ivi, p. 146.
- 80 B. Golligan, *A federal republic: Australia's constitutional system of government*, Cambridge, Cambridge University Press, 1995.
- 81 D. Nelken, *Can there be a sociology of meaning?*, in D. Nelken (edited by), *Law as communication*, Aldershot, Hants, Dartmouth, 1996, pp. 107-128 at p. 111.
- 82 W. Kymlicka, *Contemporary Political Philosophy: An Introduction* (2nd ed.), New York, Oxford University Press, 2002, ch 7.
- 83 Report of the Civics Expert Group, *Whereas the people: Civics and citizenship education*, Canberra, Australian Government Publishing Service, 1994 at pp. 18-21.
- 84 Ivi, p. 16.
- 85 T. Campbell, *Human rights strategies: An Australian alternative*, in T. Campbell, J. Goldworthy, and A. Stone (edited by), *Protecting rights without a bill of rights: Institutional performance and reform in Australia*, Aldershot, Hampshire, Ashgate, 2006, pp. 319-341.
- 86 Ivi, p. 333.
- 87 Horne, *A constitution of openness* cit., p. 619.
- 88 Ivi, p. 617.
- 89 Ivi, p. 618 referring to Constitutional Commission, Commonwealth of Australia, *Report of the Advisory Committee on Executive Government*, 1987, pp. 13-14.
- 90 *Whereas the people* cit., p. 133.
- 91 I. McAllister, *Civic Education and Political Knowledge in Australia*, in «Australian Journal of Political Science», n. 33, 1998, pp. 7-23 at p. 12.
- 92 H. Emy, *Citizenship, democracy and the Constitution*, in S. Davis (edited by), *Citizenship in Australia: Democracy, law and society*, Carlton, VIC, Constitutional Centenary Foundation, 1996, pp. 15-35 at pp. 23-24.
- 93 M. Serota, *Intelligible justice*, in «University of Miami Law Review», n. 66, 2012, pp. 649-669 at p. 659.
- 94 *Whereas the people* cit., p. 17.
- 95 *Discovering Democracy units*, Department of Education, Science and Training first published in

- 1998, <<http://www1.curriculum.edu.au/ddunits/sources/sources.htm>>, July 2012. This was funded until 2004, with the resources continuing to be available.
- ⁹⁶ An academic rationalisation of this practice is critiqued in E. Ghosh, *Republicanism, Community Values and Social Psychology: A response to Braithwaite's model of judicial deliberation*, in «Sydney Law Review», n. 20, 1998, pp. 5-41.
- ⁹⁷ M. Davis and Z. Lemezina, *Indigenous Australians and the preamble: Towards a more inclusive constitution or entrenching marginalisation?*, in «University of New South Wales Law Journal», n. 33, 2010, pp. 239-266 at pp. 261-262.
- ⁹⁸ Ivi, p. 242.
- ⁹⁹ *Recognising Aboriginal and Torres Strait Islander Peoples* cit., p. 115.
- ¹⁰⁰ Ivi, p. 130.
- ¹⁰¹ *Ibidem*.
- ¹⁰² W. Sadurski, *Rights-based constitutional review in central and eastern Europe*, in T. Campbell, K. D. Ewing and A. Tomkins (edited by), *Sceptical Essays on Human Rights*, Oxford, Oxford University Press, 2001, pp. 315-333 at p. 333.
- ¹⁰³ *National Human Rights Consultation Report*, 2009, <<http://www.humanrightsconsultation.gov.au/>>, July 2012, Appendix B: Colmar Brunton Community Research Report, pp. 9-10. That an opinion poll indicated 80 percent support for a constitutional guarantee against racial discrimination (see *Recognising Aboriginal and Torres Strait Islander Peoples* cit., p. 157) leaves unclear the depth of that support.
- ¹⁰⁴ I. McAllister and J. Clark, *Trends in Australian political opinion: Results from the Australian Election Study 1987-2007* 2008, Australian Social Science Data Archive, Australian National University, <<http://assda.anu.edu.au/aestrends.pdf>>, July 2012, p. 31. A more recent concern for many indigenous Australians was the suspension of the *Racial Discrimination Act* with respect to the Northern Territory Intervention: *Recognising Aboriginal and Torres Strait Islander Peoples* cit., p. 94.
- ¹⁰⁵ Attwood and Markus, *The 1967 referendum* cit., ch 6.
- ¹⁰⁶ S. Tierney, *Constitutional referendums: A theoretical enquiry*, in «Modern Law Review», n. 72, 2009, pp. 360-383 at p. 364.
- ¹⁰⁷ C. Zurn, *Deliberative democracy and the institutions of judicial review*, New York, Cambridge University Press, 2006, p. 336.
- ¹⁰⁸ Ivi, p. 338.
- ¹⁰⁹ B. Ackerman and J. Fishkin, *Deliberation Day*, New Haven, Yale University Press, 2004.
- ¹¹⁰ Zurn, *Deliberative democracy* cit., p. 339. The main amendment process requires a two-thirds majority in both houses of Congress and ratification by three-quarters of the State legislatures: art V of the US Constitution.
- ¹¹¹ E. Ghosh, *Deliberative democracy and the countermajoritarian difficulty: Considering constitutional juries*, in «Oxford Journal of Legal Studies», n. 30, 2010, pp. 327-359 at p. 344.
- ¹¹² R. Levy, *Breaking the constitutional deadlock: Lessons from deliberative experiments in constitutional change*, in «Melbourne University Law Review», n. 34, 2010, pp. 805-838 at p. 808.
- ¹¹³ Ivi, p. 828.
- ¹¹⁴ Ivi, pp. 808-809.
- ¹¹⁵ Ivi, p. 835.
- ¹¹⁶ Ivi, p. 837.
- ¹¹⁷ *Ibidem*.
- ¹¹⁸ M. Warren and H. Pearce (edited by), *Designing deliberative democracy: The British Columbia Citizens' Assembly*, Cambridge, Cambridge University Press, 2008.
- ¹¹⁹ Ghosh, *Deliberative democracy* cit.
- ¹²⁰ Ivi, pp. 346-347.

Interpreting the Australian Constitution: Express Provisions and Unexpressed General Principles¹

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1. *Early Disagreement: British versus American Approaches to Constitutional Interpretation*

Compared with its American counterpart, the Australian Constitution is “a prosaic document expressed in lawyers’ language”². It consists almost entirely of structural and machinery provisions establishing the institutions of the national government (legislative, executive and judicial), and dividing powers between them and between the national and state governments. It lacks the grand and inspirational declarations of national values or principles that are found in the American Declaration of Independence and federal Constitution. The Australian Constitution includes a handful of provisions designed to suppress regional favouritism, and to curb the power of the federal Parliament, but no Bill of Rights. Its framers were heavily influenced by the design of American federalism, but with respect to rights, they were influenced more by the

British than the American constitutional tradition. Australian federation resulted not from armed rebellion against perceived tyranny, but from calm, pragmatic reform by colonial politicians encouraged and assisted by the imperial government. In general, the framers thought it both unnecessary and unwise to fetter their parliaments. Given the progress of liberal ideas under British institutions, democratically elected parliaments seemed to them the best possible guardians of liberty³. It was necessary to arm an independent federal judiciary with power to enforce the terms of the federal compact. But, with a few minor exceptions, the traditional British doctrine of parliamentary supremacy was disturbed only to that extent⁴.

The Constitution, set out in a statute enacted in 1900 by the British Parliament, says nothing about how it should be interpreted. In choosing principles of interpretation, the High Court initially had two traditions to draw upon: first, the way that courts in Britain and other British colonies had in-

terpreted statutes, including colonial constitutions such as that of Canada; and second, the way the American Supreme Court had interpreted the United States Constitution. Since the Australian Constitution combines the British system of responsible government with an American-style federal system, it was appropriate that the Court seek guidance from both traditions. But by 1900 they were arguably different: British courts tended towards literalism and formalism, whereas the American Supreme Court was widely believed to have adopted a more purposive or even creative approach. The interpretive principles that have predominated in Australia since 1920 emerged from an initial contest between these two traditions. In that year, the High Court in the *Engineers'* case authoritatively adopted the British rather than the American approach. But the underlying disagreement between these interpretive approaches has subsequently resurfaced.

In 1900, both approaches were consistent with the modern theory (or cluster of theories) of interpretation that are called "originalism". The core thesis of originalism is that the meaning of a constitution is fixed at the time it is enacted or adopted, and can be lawfully changed only through the procedures for amendment prescribed by the constitution itself. Principles of statutory interpretation inherited from Britain were consistent with that thesis. One such principle was that, until they are formally amended, statutory provisions mean what they meant when they were enacted⁵. The principle was endorsed in Sir Edward Coke's *Institutes of the Laws of England* in the early seventeenth century⁶. In 1888, Lord Esher affirmed that "the words of a statute must be construed as they would have

been the day after the statute was passed"⁷. The author of a leading textbook stated that this was "obvious"⁸, presumably because otherwise Parliament's statutes would be, in effect, vulnerable to amendment by extra-parliamentary means.

A closely related principle concerned the nature of this fixed, original meaning. By 1900, British courts had held for many centuries that the main object of statutory interpretation "is to determine what intention is conveyed either expressly or by implication by the language used", or in other words, "to give effect to the intention of the [law-maker] as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed"⁹. In 1844, this was described as "the only rule" of statutory interpretation¹⁰. It can be found as far back as the fifteenth century¹¹, and many early authorities consistently attested to legislative intention being the crucial ingredient in statutory interpretation¹².

In the United States, these principles of statutory interpretation had also been inherited from Britain, and unquestioningly applied to the interpretation of the Constitution for the first century after its adoption¹³. The idea of a "living" or "organic" constitution, with an evolving meaning that adapts to social developments, did not appear until the late 19th Century, and had little influence until political progressives adopted it in the 1920s to attack the Supreme Court's *laissez-faire* constitutional jurisprudence¹⁴.

So the contest between the British and American approaches to interpretation did not concern the principle that the objective is to clarify the Constitution's original, intended meaning. Instead, it in-

volved disagreement about the nature of that meaning, and in particular, whether it could legitimately be found only in the Constitution's express provisions, or also in more general principles that it was reasonable to suppose the express provisions were intended to implement. Should a constitution be regarded as a set of discrete written provisions, or as a more holistic normative structure whose written provisions are intended to give effect to more abstract principles that are judicially enforceable even when not expressly stated? To what extent should unwritten but arguably implicit principles be recognised and applied? Potentially at stake in this contest were, first, the possibility that the High Court might mistakenly add to the Constitution general principles that the framers never intended it to include, and secondly, the greater scope for judicial discretion and creativity that usually attends the application of abstract principles compared with concrete rules. This was bound to be controversial, given that (as previously noted) the Australian Constitution consists mainly of structural and machinery provisions, and expressly enunciates few if any abstract principles.

Many of the Australian framers were aware of the potential for considerable judicial creativity in constitutional interpretation, but disagreed about its desirability. Some had studied the British writer James Bryce's *The American Commonwealth* (1889) – once called the “bible” of the Australian framers – in which he applauded the creative development of the American constitution by the Supreme Court¹⁵. In the Constitutional Conventions, and subsequently, some framers and lawyers expressed admiration for the work of the American Court,

and criticised the more literal approach of the Judicial Committee of the Privy Council (the highest court of appeal from colonial courts in the British Empire) in interpreting the Canadian Constitution¹⁶. One of them summed up the difference by arguing that constitutions lay down broad, general principles, and courts must therefore be guided “by a far higher and broader apprehension than the mere lawyer who is dealing with an ordinary Act of Parliament” – in short, it must adopt a “statesmanlike” approach¹⁷. But many others criticised American judicial creativity for being political rather than legal, and argued that the Constitution should be interpreted strictly, as a British statute¹⁸. They insisted that the Constitution should be changed only by formal amendment, and not by creative judicial interpretation¹⁹.

Many early cases involved claims of intergovernmental immunity: that is, immunity of the organs of government at one level of the federal system (Commonwealth or state) from legislation passed at the other level. The Constitution is deficient in not including express provisions dealing generally or comprehensively with the issue²⁰. The first High Court adopted the doctrine of intergovernmental immunity previously developed in American cases such as *McCulloch v Maryland* (1819) and *Collector v Day* (1871)²¹. That Court consisted of three judges – Chief Justice Griffith, and Justices Barton and O'Connor – who were all eminent lawyers, but also experienced politicians who had been actively involved in framing the Constitution. In *D'Emden v Pedder* (1904), they emphasised similarities in the drafting of the Australian and American constitutions, and maintained that “some, if not all” of the framers of the Constitution

(including, presumably, themselves) were familiar with the American Constitution, and “intended that like provisions should receive like interpretation”²². But in reality, the Court was not really concerned with specific provisions, but with inferences from unexpressed premises on which the whole federal system was supposedly based²³. It held that the Commonwealth and the states were all intended to possess sovereignty in exercising their respective powers; that “sovereignty subject to extrinsic control is a contradiction in terms”; and therefore that each was entitled to exercise its powers without any interference or control from the others²⁴.

This American doctrine was a prime example of the kind of purposive, and arguably creative, judicial approach that some Australian lawyers admired, but others disapproved of²⁵. The Privy Council was believed to have discouraged its adoption in Canada, and the High Court, therefore, to have preferred American to British authority²⁶. Its endorsement of the American immunities doctrine encouraged hopes that it would favour similar reasoning in other contexts.

In the third constitutional case to arise, *Tasmania v Commonwealth*, one party argued that “[t]he Constitution is only a declaration of principles for guidance”²⁷, and that the Court should “look beyond the letter of the Constitution”, identify principles of “inter-State ethics”, and interpret the text accordingly²⁸. But in this case the same judges rejected the proposal that the Constitution should be governed by special rules of interpretation²⁹. Ordinary principles of statutory interpretation had to be applied. These principles required a statute to be interpreted according to the intent of

the legislature, but if its words – understood in their ordinary and natural sense – were unambiguous, they constituted the best evidence of that intent³⁰. Only if the words were ambiguous could the legislature’s intention be “gathered from the other provisions of the Statute aided by a consideration of surrounding circumstances”, namely, “the history of the law”, consisting of “previous legislation... [and] the historical facts surrounding the bringing of the law into existence”³¹. One of the judges was a little more flexible, holding that the “spirit and intention” of the legislature, to be gathered from the Act itself, might be “so plain and cogent as to shake, and, perhaps, control, the otherwise plain meaning of the words themselves”³². But even he was adamant that principles of abstract justice, equity, or public policy should not be used in this way, absent clear evidence within the Act itself that the legislature intended to implement them³³.

These judges denied that there was any difference between British and American principles of interpretation³⁴. They argued that ordinary principles of statutory interpretation themselves required the special nature of a constitution to be taken into account. They frequently quoted Chief Justice John Marshall’s statement in *McCulloch v Maryland* that “we must never forget, that it is a *Constitution* we are expounding”³⁵. The Constitution was special in that it was not a detailed code, so that many powers and rights were conferred by implication rather than expressly³⁶. *McCulloch* was influential in the development of the doctrine that, by implication, every express legislative power includes an implied power over matters that are “incidental and ancillary” to the principal subject-matter.

The Court was wrong to regard the doctrine of intergovernmental immunities as consistent with orthodox British interpretive principles. The Constitution expressly confers supremacy on federal law, grants some exclusive powers to the Commonwealth, exempts the states from some Commonwealth powers, and exempts the property of both the states and Commonwealth from one another's taxes. The maxim *expressio unius exclusio alterius* suggests that no further immunities were thought necessary. After all, the Commonwealth is able to protect itself from state interference by enacting overriding legislation, and the framers expected the states to protect themselves through their equal representation in the Senate. In this regard the framers have been proved wrong: in practice, the Senate has operated as a party rather than as a states' house³⁷. Nevertheless, this was their expectation. And there is no evidence whatsoever that a significant number of the framers had any knowledge of the American doctrine of intergovernmental immunities, let alone that they intended – without expressly providing – that it be part of the Constitution. Indeed, there is no reference to the doctrine in the Convention Debates, which there surely would be if they really had such an important doctrine in mind³⁸. In reality, the judges relied on their own, *post hoc*, understanding of what kind of federation a majority of the framers had wanted to establish, and what was necessary for it to function effectively. But some of the framers subsequently disagreed with them³⁹, and since the matter was not discussed, it is impossible to know what a majority would have intended. In any event, the judges' *post hoc* understanding was not manifested in the words of the

Constitution itself: in effect, they were correcting what they regarded as a major oversight in its drafting⁴⁰. Whether or not this was justified, it was an exercise of creative statesmanship that went well beyond the application of orthodox interpretive principles⁴¹.

When a relevant case was appealed from a state court directly to the Privy Council, it rejected the doctrine of intergovernmental immunities, criticising the High Court's suppositions about what the framers had in mind as an "expansion" of orthodox interpretive principles, and upholding the *expressio unius* argument⁴². But its reasoning was marred by a failure to grasp some consequences of written constitutionalism. In a scathing response, the Court disparaged the quality of the Privy Council's interpretation of the Canadian constitution – "the subject of much criticism" – by quoting James Bryce's quip that the United States would never have achieved greatness had its constitution been interpreted in a similar manner⁴³.

2. *The Engineers' Case*

In the end, the opinion of the Privy Council prevailed. In 1906, two new Justices – Sir Isaac Isaacs and Henry Higgins – were appointed to the High Court. They, too, had been active participants in the Constitutional Conventions, but did not accept the doctrines of intergovernmental immunities and reserved state powers. Applying the same interpretive principles as the Privy Council, Justice Isaacs insisted that the Court should be guided by the Constitution's language alone, rather than

"wander at large upon a sea of speculation searching for a suitable intent by the misty and uncertain light of what is sometimes called the spirit of the document, for that is largely fashioned subjectively by the pre-conceptions of the individual observer"⁴⁴. Justice Higgins described Chief Justice Marshall's judgment in *McCulloch v Maryland* as "the utterance rather of the statesman than of the lawyer"⁴⁵, and disapproved of uncritical reliance on American cases, which often overlooked crucial differences between the two constitutions⁴⁶. He denied that the Court had a duty to ensure that the intention behind the Constitution was not defeated: "Our function is to construe the [Constitution], not to improve it, or to alter it on the ground of probable intention"⁴⁷.

By 1920, the original three judges had departed, and three out of four new judges joined Justices Isaacs and Higgins to overrule the doctrine of implied intergovernmental immunities⁴⁸. In the celebrated *Engineers'* case, the majority affirmed that British rather than American interpretive principles should be applied. The Court's duty was "faithfully to expound and give effect to [the Constitution] according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed", "clear of any qualifications which the people of the Commonwealth or, at their request, the Imperial Parliament have not thought fit to express"⁴⁹. Orthodox principles did permit the recognition of "necessary" implications⁵⁰. But the rejected doctrines were necessary only in a political, and not a legal, sense. They were "based on distrust, lest powers, if once conceded to the least degree, might be abused to the point of destruction. But possible abuse of pow-

ers is no reason in British law for limiting the natural force of the language creating them"⁵¹.

Here, the majority was strongly influenced by the British tradition of parliamentary sovereignty, which was antithetical to American distrust of government, and relied on political rather than legal control of government. In British law,

the extravagant use of the granted powers in the actual working of the *Constitution* is a matter to be guarded against by the constituencies and not by the Courts... If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper⁵².

The rejected implications were also condemned as "referable to no more definite standard than the personal opinion of the Judge who declares it", based on "a vague, individual conception of the spirit of the compact"⁵³. They were too subjective and contentious to provide a proper basis for legal judgment.

The *Engineers'* case did not put an end to disagreement about the proper approach to constitutional interpretation. In 1937, the Court was criticised for rejecting the "thoroughly relevant learning" of American precedents

in favour of the crabbed English rules of statutory interpretation, which are one of the sorriest features of English law and are... particularly unsuited to the interpretation of a rigid constitution⁵⁴.

But in 1936 another commentator criticised American precedents for paying excessive regard "to considerations of policy,

necessity, and other vague notions which can have no place in a statutory constitution”⁵⁵, and praised the Court for being “as jealous of the written word as the Privy Council, if not more so”⁵⁶. Both views continue to be advocated to this day.

3. *Later Developments*

Ever since the *Engineers*’ case, the Court has been wary of so-called “top-down” reasoning that deduces conclusions from abstract principles – especially unexpressed ones – rather than concrete provisions⁵⁷. Chief Justice Garfield Barwick once asserted that constitutional disputes are “not to be solved by resort to slogans or to political catch-cries or to vague and imprecise expressions of political philosophy”, but instead, “by the meaning of the relevant text of the Constitution having regard to the historical setting in which the Constitution was created”⁵⁸.

Nevertheless, the Court has often been guided by general principles that it regards as underlying parts of the Constitution. Even Justice Isaacs, who wrote the majority judgment in *Engineers*, referred in another case to “the silent operation of constitutional principles”⁵⁹. The most important are federalism, the separation of powers, responsible government, representative government, nationhood, and the rule of law. Some judges have recently added popular sovereignty to this list.

These principles have frequently been used to interpret specific provisions, for example, in cases involving textual ambiguity or vagueness. They have also been used to derive implications from the text,

but that has been much more controversial, given the Court’s disapproval in *Engineers* of implications not firmly based on “legal”, as distinct from “political”, necessity. But as Justice Dixon later insisted, a rule completely excluding implications “would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied”⁶⁰.

Justice (and later Chief Justice) Dixon, a dominant intellectual force on the Court from the 1930s until the 1960s, led a gradual revival of new doctrines of intergovernmental immunities, which are still being refined. These prohibit both the Commonwealth and the states from either (1) passing laws that impose discriminatory disabilities or burdens on one another; or (2) interfering in certain ways with one another’s “capacities” as independent governments⁶¹. The precise rationale of these immunities remains unclear. The Court has relied on reasoning not dissimilar to that which was rejected in the *Engineers*’ case, and American decisions have once again been extensively cited⁶². These immunities are apparently regarded as practically necessary to ensure the minimal degree of autonomy that is required by governments in any genuine federation. They have been distinguished from the pre-*Engineers* immunities on the ground that they are exceptional rather than typical⁶³. Their impact has therefore been relatively infrequent and not of major practical significance.

The way in which the first three Chapters of the Constitution follow the American pattern of dealing separately with legislative, executive and judicial powers, and vesting each in a distinct branch of government, was regarded as powerful ev-

idence that the Constitution embodies the doctrine of the separation of powers, modified by the system of responsible government and considerations of practical convenience⁶⁴. That inference is debatable, since the Convention Debates offer little evidence that the framers had any such intention, although they clearly wanted to protect the independence of the federal judiciary⁶⁵. Nevertheless, the Court has established a fairly strict separation of judicial and non-judicial powers, but not of legislative and executive powers. The Court has always been zealous in protecting the exclusivity and independent exercise of judicial power, at least at the federal level. As we are about to see, this is the area in which the Court has most frequently succumbed to the temptation to stray beyond the limits of orthodox *Engineers* legalism, and engage in “doctrinal basket weaving”⁶⁶.

4. Since 1990

Judicial reasoning based on underlying structural principles became much more common in the 1990s⁶⁷. Australian judges were increasingly influenced by the global trend of expanding judicial power to protect rights, either by the adoption of bills of rights, or by creative interpretation of their existing powers. Previously, they had tended to express scepticism about the desirability of a bill of rights, partly because they did not feel well qualified to make the inherently political judgments that it would require of them⁶⁸. But the balance of judicial opinion began to shift. An increasing number of judges appeared to be losing faith in parliamentary supremacy, partly

because of the extent to which parliaments seemed to be dominated by executive governments⁶⁹. These judges seemed less content with their subordinate and generally passive role in protecting rights. One way of expanding their role was to rely on unexpressed general principles.

In *Kable v Director of Public Prosecutions for N.S.W.* (1997), the Court stretched the principle of the separation of federal judicial power far beyond the provisions from which it was originally inferred⁷⁰. These concern federal jurisdiction only. They allow Parliament to vest state courts with federal jurisdiction, but say nothing about their exercise of state jurisdiction. Nevertheless, the Court held in *Kable* that no state court vested with federal jurisdiction may exercise, even in cases of state jurisdiction, any non-judicial power that might jeopardise its reputation for independence from the political branches of the state government. This was supposedly because damage to that reputation might also taint its exercise of federal jurisdiction. That principle is sound, but its application in *Kable’s* case was dubious and has been subject to harsh criticism. The Court held invalid a state law that applied to only one man, and authorised the State Supreme Court to order that he be imprisoned if it concluded from evidence that he was more likely than not to constitute a danger to the community.

It is difficult to see how this power damaged the Supreme Court’s integrity or independence at all, given that the Court eventually decided to release *Kable*⁷¹. But it is even more difficult to see how the challenged powers could possibly have undermined either the actual or perceived integrity or independence of the Supreme Court *when exercising federal jurisdiction*.



The first bench of the High Court: Edmund Barton, Samuel Griffith and Richard O'Connor seated, with court officials in the background. Photo taken at the first sitting of the court on 6 October 1903. (Photo from Wikipedia)

It is implausible to think that, if Supreme Court judges are obligated by state law to depart from traditional judicial practices in dealing with particular matters in their state jurisdiction, they are more likely to depart from such practices in exercising federal jurisdiction when they are not legally required to do so. Not only is the actual integrity and independence of Supreme Court judges far stronger and more resilient than that⁷², there is simply no reason whatsoever to think that this might happen. The majority's reasoning was described by Professor George Winterton as "barely even plausible"⁷³; by Professor Geoffrey Lindell as "imaginative and strained", indicating "the lengths that judges are now prepared to

go" in order to protect rights in the absence of a bill of rights⁷⁴; and by Professor George Williams as not "adequately ground[ed] in the text and structure of the Australian Constitution" and having "the appearance of being contrived" in order "to protect fundamental freedoms"⁷⁵. Dr Greg Taylor suggested that the majority's reasoning was a rationalisation of a conclusion desired for policy reasons⁷⁶. Nevertheless, what is now called the "*Kable* doctrine" has been further expanded and applied in a series of subsequent cases whose facts did not make its application any more plausible than in the parent case⁷⁷.

In 1992, the Court held that the Constitution includes an implied freedom of

political communication⁷⁸. The judges disagreed about its basis. Some held that it was implied by a few specific provisions requiring that members of Parliament be "directly chosen by the people". Others argued that it was implicit in the principle of representative democracy, which underlies numerous provisions dealing with Parliament, the executive, and constitutional amendment. Some judges also suggested that, with Australian independence from the United Kingdom, the Constitution had come to rest on the sovereignty of the people, an even deeper principle than that of representative democracy.

The judges held that the people would be unable to make a genuine electoral choice, or that true representative government or popular sovereignty would be impossible, in the absence of freedom of political communication. The freedom was therefore a necessary implication in that it was practically necessary for the Constitution to achieve some of its most fundamental purposes. On these grounds, the Court invalidated legislation that prohibited political advertising on radio and television stations during election campaigns, and in lieu thereof, required stations to provide free time for the broadcast of political messages⁷⁹. The declared purposes of the legislation were to reduce the dependence of politicians on the donors of the vast funds needed for political advertising, with its associated risks of undue influence or even corruption; to reduce inequality, due solely to variable economic resources, in the ability of citizens to influence public opinion; and to improve the quality of public political debate.

These decisions gave rise to the hope, or fear, that the Court would go much further,

and find other rights implicit in the principles of representative democracy or popular sovereignty. One of the more activist judges said in a speech that the gradual development of an implied bill of rights was a possibility⁸⁰, and in *Leeth v Commonwealth*, he and another judge held that the Constitution contained an implied right to equality⁸¹. A new era of bold judicial creativity was widely anticipated⁸².

These developments provoked a vigorous theoretical and critical commentary. In addition, they aroused heated disagreement within the Court itself, between those who derived the implied freedom of political communication from specific provisions, and those who derived it from general principles. In *Theophanous v Herald & Weekly Times Ltd.*, Justice McHugh, in dissent, objected that judges who treated the principle of representative democracy as if it were part of the Constitution independently of specific provisions, "unintentionally depart from the method of constitutional interpretation that has existed in this country since the time of the *Engineers' Case*"⁸³. Another dissenter, Justice Dawson, insisted that implications must be

necessary or obvious having regard to the express provisions of the Constitution itself. To draw an implication from extrinsic sources... would be to take a giant leap away from the *Engineers' Case*, guided only by personal preconceptions of what the Constitution should, rather than does, contain⁸⁴.

In *McGinty* (1996), it was argued that either the words "directly chosen by the people", or the principle of representative democracy, required that Commonwealth elections conform to the principle of "one vote, one value", and therefore that the

number of voters in electorates be as equal as possible⁸⁵. But the composition of the Court had changed, and those who had dissented in *Theophanous* found themselves in the majority. Justice McHugh repeated his complaint that representative democracy should not be treated as an independent or “free-standing” constitutional principle⁸⁶, and added that insofar as they so treated it, the previous decisions were “fundamentally wrong and... an alteration of the Constitution without the authority of the people under s 128”⁸⁷. One of the new judges, Justice Gummow, agreed that the earlier cases were inconsistent with orthodox interpretive principles and should be reconsidered⁸⁸.

McGinty suggested that a majority of the Court was unwilling to develop implied rights in the creative fashion that many had hoped for, and others had feared. The judges then attempted to resolve their interpretive disagreements. In *Lange* (1997) they delivered a unanimous judgment, which was a remarkable achievement, given their previous passionate disagreements. The implied freedom of political communication was held to be based on “the text and structure of the Constitution”, rather than on representative democracy as an independent general principle⁸⁹. This appeared to concede the main objection of Justices McHugh and Dawson. But they, too, were required to compromise. Justice McHugh had previously insisted that the implied freedom operated only during federal election campaigns, but this was rejected in *Lange*. As for Justice Dawson, he had not previously conceded that there was an implied freedom of political communication at all. The decision left the implied freedom intact, but by rejecting the

broader of the two grounds on which it had previously been based, appeared to reduce the likelihood that further implied rights would be recognised. In *Kruger* (1997), a majority rejected the previously suggested implied right to equality, but left open the possibility of an implied freedom of movement and association⁹⁰.

Doubts remain about the consistency of the implied freedom of political communication with the interpretive orthodoxy established in the *Engineers’* case. Its recognition made a substantial change to Australia’s system of government, which to many, seemed more like a constitutional amendment than the discovery of a genuine implication. It signified a change in judicial approach to implications. When the very activist Justice Murphy suggested, in 1986, that the Constitution included an implied right to free speech, his brethren treated the suggestion with disdain⁹¹. In 1975, Chief Justice Barwick said

It is very noticeable that no Bill of Rights is attached to the Constitution of Australia and that there are few guarantees... [U]nlike the case of the American Constitution, the Australian Constitution is built upon confidence in a system of parliamentary Government with ministerial responsibility. The contrast in constitutional approach is that, in the case of the American Constitution, restriction on legislative power is sought and readily implied whereas, where confidence in the parliament prevails, express words are regarded as necessary to warrant a limitation of otherwise plenary powers⁹².

By deciding against a bill of rights, the framers entrusted to parliaments, not courts, the responsibility for striking the necessary balances between competing rights, and between rights and other community interests, balances that require political rather than legal judgment. The

implied freedom had escaped the notice of Australian lawyers and judges (other than Justice Murphy) for the previous ninety years, despite cases such as *Communist Party* (1950) in which it might have proved decisive⁹³. Moreover, this in itself suggests that the implied freedom is not necessary, either for the existence of representative government, or for the people to make genuine electoral choices. The fact is that Australia had such a government, and the people were able to make such choices, throughout those ninety years. It would undoubtedly be legitimate for the Court, in enforcing express provisions requiring that the people directly choose their representatives, to invalidate legislation restricting political communication so severely that it prevents them from doing so. But the Court has gone one step further, and derived from those provisions an implied freedom that it then applies largely independently of them, invalidating laws deemed to infringe

the freedom whether or not they prevent genuine electoral choices⁹⁴.

In other words, the implied freedom is vulnerable to the same kind of objection that Justice McHugh raised, to representative democracy being treated as a free-standing general principle, independent of the express constitutional provisions from which it is inferred, and which give it only partial effect. That is the very issue that divided the Court in its formative years. The implied freedom is very difficult to reconcile with the orthodox approach to interpretation established in 1920 in *Engineers*. Disagreement about the recognition of unexpressed general principles that supposedly underlie the Constitution's express provisions therefore continues, and will probably always do so.

¹ This article includes material previously published in J. Goldsworthy, *Australia: Devotion to Legalism*, in J. Goldsworthy (edited by), *Interpreting Constitutions. A Comparative Study*, Oxford, Oxford University Press, 2006, pp. 106-160.

² A. Mason, *The Australian Constitution in Retrospect and Prospect*, in R. French, G. Lindell, C. Saunders (edited by), *Reflections on the Australian Constitution*, Sydney, Federation Press, 2003, p. 8.

³ J. Goldsworthy, *The Constitutional Protection of Rights in Australia*, in G. Craven (edited by), *Australian Federation Towards the Second Century*, Melbourne, Melbourne University Press, 1992, pp. 151, 152-154.

⁴ J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney, Angus & Robertson, 1901, pp. 509-510; *D'Emden v Pedder* (1904) 1 CLR 91, 110, per Griffith CJ; *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495, pp. 503-504, per Williams J.

⁵ D.J. Hurst, *The Problem of the Elderly Statute*, in «Legal Studies», 1983, p. 21.

⁶ 2 Co Inst 2.

⁷ *Sharpe v Wakefield* (1888) 22 QBD 239, p. 242.

⁸ P. Langan, *Maxwell on the Interpretation of Statutes* (12th ed.), London, Sweet & Maxwell, 1969, p. 264.

⁹ P.P. Maxwell, *On the Interpretation of Statutes* (1875), p. 1; *Attorney-*

General v. Carlton Bank [1899] 2 QB 158, p. 164, per Lord Russell.

¹⁰ *Sussex Peerage Case* (1844) 8 ER 1034, p. 1057, per Tindall CJ.

¹¹ S.B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (1936), New York, American Scholar Publications, 1966 reprint, p. 294; P. Hamburger, *Law and Judicial Duty*, Cambridge, Mass., Harvard University Press, 2008, pp. 52-58.

¹² S.E. Thorne (edited by), *A Discourse Upon the Exposition and Understanding of Statutes* (pre-1567), Lawbook Exchange Ltd, 2003 reprint; *Stradling v Morgan* (1560) 1 Plowd 199, p. 205; 4 Co. Inst. 330 (1630s); F. Bacon, *New Abridgement of the Law* (1736);

- W. Blackstone, *Commentaries on the Laws of England* (1765); F. Dwaris, *A General Treatise on Statute* (2nd ed.), London, 1848, pp. 551-52 and 556-560. These and other early authorities are cited in R. Berger, 'Original Intention' in *Historical Perspective*, in «George Washington Law Review», vol. 54, 1986, pp. 299-308; R. Berger, *The Founders Views - According to Jefferson Powell*, in «Texas Law Review», vol. 67, 1989, pp. 1059-1065.
- ¹³ See J. Story, *Commentaries on the Constitution of the United States*, 1833, pp. 678-682, 693-698; S. Miller, *Lectures on the Constitution of the United States*, 1893, pp. 100-103; H. Black, *Handbook of American Constitutional Law* (3rd ed.), 1910, pp. 75-81; W. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth*, 1995, pp. 234-236.
- ¹⁴ T. Peebles, *A Call to High Debate: The Organic Constitution in Its Formative Era, 1890-1920*, in «University of Colorado Law Review», vol. 52, 1980, p. 49.
- ¹⁵ London, McMillan, 2nd ed. 1889, pp. 267-268, 363-368, 373-375. For its influence on the Australian framers, see J. La Nauze, *The Making of the Australian Constitution*, Melbourne, Melbourne University Press, pp. 18-19, and J. La Nauze, *The Name of the Commonwealth of Australia*, in «Historical Studies», vol. 15, 1971, p. 59.
- ¹⁶ G. Craven, *Heresy as Orthodoxy: Were the Founders Progressivists?*, in «Federal Law Review», 31, 2003, especially pp. 104, 116-117, 108-109, 113-115 and 117-118.
- ¹⁷ Ivi, p. 117.
- ¹⁸ Ivi, pp. 107-108, 117-121.
- ¹⁹ *Ibidem*.
- ²⁰ There are only a few relevant provisions that deal with particular aspects of the issue, some granting immunity, and others excluding it. Compare ss 51(13) and 51(14) and s 114 with s 51(31) and s 98.
- ²¹ *McCulloch v State of Maryland* 17 US 316 (1819); *Collector v Day* 78 US 113 (1871).
- ²² *D'Emden Pedder* (1904) 1 CLR 91, 113. See also *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208 (HCA) 239-240, per O'Connor J.
- ²³ Comments of the Privy Council in *Webb v Outtrim* [1906] HCA 76; (1906) 4 CLR 356 (PC), p. 359.
- ²⁴ *D'Emden Pedder* (1904) 1 CLR 91, p. 110, plus later cases extending the same doctrine to protect the states.
- ²⁵ Views of Higgins J noted in *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087 (HCA), p. 1164.
- ²⁶ *Re Income Tax Acts (No 4); Deakin's and Lymes's Cases* (1904) 29 VLR 748 (VSC), pp. 763-764.
- ²⁷ *Tasmania v Commonwealth* (1904) 1 CLR 329, p. 335.
- ²⁸ Ivi, p. 338 and p. 359.
- ²⁹ Ivi, p. 338, per Griffith CJ, pp. 358-359, per O'Connor J, and clearly assumed by Barton J. See also *Federated Sawmill Timberyard & General Woodworkers Employees Association of Australasia v James Moore & Sons Pty Ltd* (1909) 8 CLR 465, p. 486 and p. 501.
- ³⁰ *Tasmania v Commonwealth* (n 27), pp. 338-339, per Griffith CJ.
- ³¹ Ivi 359, per O'Connor J. For an example of the practical application of this approach, see *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, pp. 239-240, per O'Connor J. See also *Deakin v Webb* (1904) 1 CLR 585 (HCA), p. 630.
- ³² *Tasmania v Commonwealth* (1904) 1 CLR 329, pp. 348-349.
- ³³ Ivi, pp. 347-350.
- ³⁴ *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, pp. 237-238.
- ³⁵ *Eg, Attorney-General (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469 (HCA), p. 612.
- ³⁶ *Tasmania v Commonwealth* (1904) 1 CLR 329, p. 338, per Griffith CJ; *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087, p. 1105; *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309, p. 343 and p. 356.
- ³⁷ S. Bach *Platypus and Parliament*, The Department of the Senate Parliament House Canberra 2003, pp. 143-145.
- ³⁸ Even the better informed framers seem to have had little knowledge of American case law: in 1898, even Sir Edmund Barton acknowledged that he had not heard of *Marbury v Madison*: see J. Williams, *The Emergence of the Commonwealth Constitution*, in H. P. Lee and C. Winterton (edited by), *Australian Constitutional Landmarks*, Cambridge, Cambridge University Press, 2003, pp. 23-24.
- ³⁹ See the views of Justices Isaacs and Higgins, described in section 2.
- ⁴⁰ Many of these points are made in G. Sawyer, *Implication and the Constitution Part II*, in «Res Judicatae», vol. 4, 1948-1950, pp. 88-90.
- ⁴¹ G. Sawyer, *Australian Federalism in the Courts*, Melbourne, Melbourne University Press, 1967, p. 200.
- ⁴² *Webb v Outtrim* (1906) 4 CLR 356, pp. 359-361.
- ⁴³ *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087, p. 1110; see also p. 1111.
- ⁴⁴ *Huddart, Parker and Co Pty Ltd v Moorehead* [1909] HCA 36; (1909) 8 CLR 330, 388. See also *Federated Sawmill Timberyard & General Woodworkers Employees Association of Australasia v James Moore & Sons Pty Ltd* [1909] HCA 43; (1909) 8 CLR 465, 486, 536-537.
- ⁴⁵ *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087 (HCA) 1164. See also HB Higgins 'McCulloch v Maryland in Australia' 18 (1905) Harvard L Rev 559.
- ⁴⁶ *Huddart, Parker and Co Pty Ltd v Moorehead* [1909] HCA 36; (1909) 8 CLR 330.
- ⁴⁷ *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087 (HCA) 1164, 1169-70.

- ⁴⁸ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers)* [1920] HCA 54; (1920) 28 CLR 129. The Court also rejected another doctrine that had been based on implication, called the doctrine of reserved state powers. This will not be discussed here.
- ⁴⁹ Ivi, p. 142 and p. 160 respectively.
- ⁵⁰ Ivi, p. 155.
- ⁵¹ Ivi, p. 151.
- ⁵² Ivi, pp. 151-152.
- ⁵³ Ivi, p. 142 and p. 145 respectively.
- ⁵⁴ RTE Latham, *The Law and the Commonwealth* (1937), London, Oxford University Press, 1949, p. 563; see also p. 56 and p. 567.
- ⁵⁵ W. Anstey Wynes, *Legislative and Executive Powers in Australia*, Sydney, Law Book Co of Australasia Ltd, 1936, p. 20; see also p. 23.
- ⁵⁶ Ivi, p. 76; see also p. 14 and pp. 42-43.
- ⁵⁷ *McGinty v Western Australia* (1996) 186 CLR 140, n 427 (McHugh J), quoting R. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, in «University of Chicago Law Review», vol. 59, 1992, p. 433.
- ⁵⁸ *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (McKinlay's case) (1975) 135 CLR 1, p. 17.
- ⁵⁹ *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* [1926] HCA 8; (1926) 37 CLR 393, p. 413.
- ⁶⁰ *West v Commissioner of Taxation (NSW)* [1937] HCA 26; (1937) 56 CLR 657, p. 681.
- ⁶¹ This abstract summary necessarily glosses over various complications, and possible differences, in the way that the states and the Commonwealth are protected.
- ⁶² Sawer, *Implication and the Constitution Part I* cit.; G. Sawer, *Australian Federalism in the Courts*, Melbourne, Melbourne University Press, 1967.
- ⁶³ M. Coper, *Encounters With The Australian Constitution*, Sydney, CCH Australia, 1988, p. 177.
- ⁶⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (the *Boilermakers' case*) (1956) 94 CLR 254.
- ⁶⁵ J.M. Finniss, *The Separation of Powers in the Australian Constitution*, in «Adelaide Law Review», vol. 3, 1968, p. 159; F. Wheeler, *Original Intent and the Doctrine of the Separation of Powers in Australia*, in «Public Law Review», vol. 7, 1996, p. 96; Sawer, *Australian Federalism in the Courts* cit., pp. 152-153.
- ⁶⁶ L. Zines, *The Present State of Constitutional Interpretation*, in A. Stone and G. Williams (edited by), *The High Court at the Crossroads: essays in Constitutional Law*. Sydney, Federation Press, 2000, p. 224 and p. 231.
- ⁶⁷ J.J. Doyle, *Constitutional Law: At The Eye of the Storm*, in «University Western Australia Law Review», vol. 23, 1993, pp. 20-21, and p. 27.
- ⁶⁸ E.g., Sir G. Barwick, *A Radical Tory*. Sydney, Federation Press, 1994, p. 24.
- ⁶⁹ H.P. Lee, *The Implied Freedom of Political Communication*, in H.P. Lee and G. Winterton (edited by), *Australian Constitutional Landmarks*, Cambridge Cambridge University Press, 2003, p. 391.
- ⁷⁰ *Kable v Director of Public Prosecutions for NSW* (1996) 189 CLR 51.
- ⁷¹ E. Handlsey, *Do Hard Laws Make Bad Cases? – The High Court's Decision in Kable v Director of Public Prosecutions (NSW)*, in «Federal Law Review», vol. 25, 1997, pp. 176-177; G. Taylor, *The Constitution of Victoria*, Sydney, Federation Press, 2006, p. 448.
- ⁷² See Heydon J in *Wainohu v NSW* [2011] HCA 24, para. 148 (Supreme Court judges' "actual impartiality as between the government and the governed has never been questioned... they have the touchy pride of Castilian aristocrats").
- ⁷³ G. Winterton, *Justice Kirby's Coda in Durham Holdings*, in «Public Law Review», vol. 13, 2002, pp. 165-170.
- ⁷⁴ G. Lindell, *The Australian Constitution: Growth, Adaptation and Conflict – Reflections About Some Major Cases and Events*, in «Monash University Law Review», vol. 25, 1999, pp. 276-277.
- ⁷⁵ G. Williams, *Human Rights Under the Australian Constitution*, Melbourne, Oxford University Press, 1999, pp. 242-243 and p. 246.
- ⁷⁶ Taylor, *The Constitution of Victoria* cit., p. 449 and p. 456.
- ⁷⁷ The most recent are *South Australia v Totani* (2010) 242 CLR 1, and *Wainohu v NSW* [2011] HCA 24.
- ⁷⁸ *Australian Capital Television v Commonwealth (ACTV)* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1.
- ⁷⁹ The legislation did not affect the discussion of political issues on news, current affairs, or talkback programs, or political advertising in the other mass media.
- ⁸⁰ J.J. Toohey, *Government of Laws, and Not of Men?*, in «Public Law Review», vol. 4, 1993, Public L Rev 158, p. 170.
- ⁸¹ [1992] HCA 29; (1991) 174 CLR 455.
- ⁸² Doyle, *Constitutional Law: At The Eye of the Storm* cit., p. 15; The Hon. Mr. Justice M. Kirby, *Courts and Policy: The Exciting Australian Scene*, in «Commonwealth Law Bulletin», vol. 19, 1993, p. 1794.
- ⁸³ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, p. 202.
- ⁸⁴ Ivi, p. 194.
- ⁸⁵ *McGinty v Western Australia* (1996) 186 CLR 140.
- ⁸⁶ Ivi, p. 232.
- ⁸⁷ Ivi, pp. 235-235.
- ⁸⁸ Ivi, p. 289.
- ⁸⁹ *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1987) 189 CLR 520.
- ⁹⁰ *Kruger v Commonwealth (Stolen Generation case)* (1996) 190 CLR 1.

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⁹¹ *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, p. 569 per Gibbs CJ, p. 579 per Mason J, p. 636 per Dawson J.

⁹² *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth (McKinlay's case)* [1975] HCA 53;

(1975) 135 CLR 1, pp. 23-24.

⁹³ *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1.

⁹⁴ For further details of this criticism, see J. Goldsworthy, *Constitutional Implications*

Revisited, in «University of Queensland Law Journal», vol. 30, 2011, pp. 9-34.

The Validity of Henry VIII Clauses in Australian Federal Legislation

GABRIËLA. MOENS, JOHN TRONE

1. *Introduction*

Under the usual type of regulation making power a regulation must be consistent with the empowering Act and other Acts¹. By contrast, a Henry VIII clause authorises the amendment of a statute by regulation². The High Court of England and Wales defined a Henry VIII clause as “a power granted by Parliament to the Executive to make subordinate legislation which itself counts as if it were primary legislation”³. By enacting a Henry VIII clause, Parliament “delegate[s] the power of amendment or repeal”⁴.

It appears that such clauses were named after King Henry VIII due to his autocratic reputation⁵. That monarch obtained parliamentary authority giving the force of law to his proclamations. Under the Statute of Proclamations of 1539⁶ royal proclamations were given “the force of statutes, but so that they should not be prejudicial to any person’s inheritance, offices, liberties, goods and chattels, or infringe the estab-

lished laws”⁷. However, proclamations issued under the Statute were able to infringe Acts of Parliament enacted after the Statute of Proclamations⁸.

In 1932 the Donoughmore Committee of the United Kingdom Parliament proposed that the use of Henry VIII clauses in statutes be “abandoned in all but the most exceptional cases”⁹. However, the use of such provisions has since flourished in the United Kingdom. In the absence of an entrenched Constitution embodying a separation of powers, there are now many United Kingdom examples of such provisions¹⁰.

In recent years the Australian federal Parliament has also enacted numerous Henry VIII provisions in a variety of statutes¹¹. For example, some of these provisions authorise amendment of the parent Act by regulation¹². Other provisions authorise amendment of another specific Act or Acts¹³. This paper considers the constitutional validity of such clauses under the Australian federal Constitution.

2. *Broad Delegations of Federal Legislative Power are Constitutionally Permissible*

In Australia the doctrine of the separation of powers has had a significant practical operation only in respect of the separation of the judicial power from the legislative and executive powers¹⁴. There is thus an 'asymmetry' between, on the one hand, the separation of the judicial power from those of the political branches, and on the other hand, the separation of power between the legislature and the executive¹⁵.

The High Court has upheld broad delegations of legislative power to the executive in the form of the power to make regulations. The conferral of legislative power upon the Parliament does not prevent that body from delegating part of its power to the executive¹⁶.

3. *Abdication of Federal Legislative Power is Constitutionally Impermissible*

Several national Constitutions expressly prohibit the legislature from abdicating or alienating its legislative power¹⁷. In Australia such a prohibition has arisen by judicial interpretation of the separation of powers between the legislature and the executive.

The Australian High Court has stated that the federal Parliament may not abdicate its legislative powers¹⁸. The State Parliaments also may not abdicate their legislative powers¹⁹, though their Constitutions are not entrenched in most respects²⁰ and do not embody a "formal separation of powers"²¹.

Several judgments have indicated that a law conferring an extraordinarily broad delegation might be beyond power as it may not be capable of characterization as a law with respect to a specific head of federal legislative power²². Some judges have seen failure of characterization as the reason why an abdication of power would be invalid²³.

The characterization limitation is not a useful test for the validity of a delegation as it is inconsistent with the Court's later decisions regarding the proper approach to characterization²⁴. Under the Court's modern precedents a law may be upheld as being with respect to a subject matter of federal legislative power even though it also concerns matters falling within State residuary power²⁵.

In 1931 the High Court upheld the validity of a Henry VIII clause in the *Dignan* case. The provision allowed the amendment of other Acts but not the empowering Act²⁶. Dixon J observed that the Henry VIII clause at issue "may be exercised in disregard of other existing statutes, the provisions of which concerning the same subject matter may be overridden"²⁷. A leading commentary on the federal Constitution cites the *Dignan* case for the proposition that "the Executive through a Henry VIII clause can override Acts of Parliament itself"²⁸.

The Court's concept of abdication is excessively formalistic. It only prohibits an abdication or renunciation of the power of the Parliament to repeal or amend a statute²⁹. As Mason CJ, Dawson and McHugh JJ pointed out in the *Capital Duplicators* case, "[s]o long as Parliament retains the power to repeal or amend the authority which it confers upon another body to make laws with respect to a head or heads of legislative power entrusted to the Parliament, it is not

easy to see how the conferral of that authority amounts to an abdication of power³⁰. The concept of abdication is so narrow that it has not proved to be a meaningful limitation in practice. The High Court has never invalidated a delegation of legislative power as an abdication of power³¹.

The High Court has not considered the constitutional validity of Henry VIII clauses since the *Dignan* case in 1931. The Court's narrow concept of abdication is ripe for reconsideration. It would be open to the Court to develop a more substantive notion of the abdication of legislative power³². The High Court is not bound by its own decisions³³. In recent years the Court has overruled a longstanding constitutional precedent and rejected the previously assumed understanding of the effect of a constitutional provision³⁴. The Court has also modified its test for infringement of the implied freedom of political communication³⁵.

A reconsideration of the Court's narrow concept of abdication would require a rather less dramatic modification of current doctrine so that a delegation of power to amend statute law by regulation would constitute an abdication of legislative power. Subordinate legislation must at least be subordinate to primary legislation (statute law). The delegation of regulation making power should not extend to the amendment of statute law any more than it would extend to the enactment of statute law – either case would be the exercise of primary rather than subordinate legislative power.

It would not be necessary to overrule the prior decisions, only to adopt a more substantive concept of abdication. All that would be required is to make a relatively narrow expansion of the effect of what is already recognised in the case law.

In relation to the use of Henry VIII clauses the following argument for a broader concept of abdication of power is persuasive:

the Constitution, in vesting legislative power in a Parliament chosen by the people, does not only give that Parliament powers; it also gives it duties. One of these duties is to guide the executive in the performance of its task, and an attempt to abdicate that responsibility is indeed unconstitutional. Abdication in this sense has nothing to do with [the] technical notion of abdication, namely, the transfer of an entire head of power to the executive. [...] Rather the impermissibility of Parliament's abdicating its legislative power derives from the purposes of the separation of powers doctrine. These are not confined to preventing one arm of government from unilaterally invading the territory of another. [...] the doctrine has another purpose, namely to vest the powers of government in the appropriate organ of government and this introduces a dimension of responsibility and constitutional obligation into the exercise of those powers. In the case of Parliament, the responsibility with which it has been entrusted is to settle the fundamental principles and policies of the law after due public deliberation among those who represent rival views³⁶.

4. *Comparative Case Law*

The High Court often has regard to foreign case law if it finds that the reasoning of the decision is persuasive³⁷. In the absence of recent Australian authority on point, foreign case law provides some instructive examples of the constitutional infirmities of Henry VIII clauses.

The text and structure of the United States federal Constitution in relation to the vesting of legislative power is very similar to that of the Australian federal



King Henry VIII (1491-1547): King Henry VIII Clauses were named after him due to his autocratic reputation. Henry VIII effectively bypassed the legislature with his clauses. (Photo from Wikipedia)

Constitution. The United States Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States”³⁸. The Australian federal Constitution provides that “[t]he legislative power of the Commonwealth shall be vested in a Federal Parliament”³⁹. Each Constitution separately vests the judicial and executive powers⁴⁰.

The United States Supreme Court has held that the vesting of the legislative power in Congress prohibits Congressional delegation of the power to make laws. To

avoid invalidity under this non-delegation doctrine, Congress must “lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform”⁴¹. However, the Court has not invalidated a delegation since 1935⁴².

The Supreme Court has not considered whether a Henry VIII clause would violate the non-delegation doctrine. However, a 1998 decision suggests that the Court would regard a Henry VIII clause as constitutionally invalid. The Court held that the Line Item Veto Act was unconstitutional. The statute had purported to empower the President to cancel items of expenditure in previously enacted Congressional statutes⁴³. The Court held that the Act was inconsistent with the President’s veto power⁴⁴, to which the Australian Constitution has no equivalent. The Court did not examine the applicability of the non-delegation principle⁴⁵. However, in considering the veto power the Court observed that “[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes”⁴⁶.

In relation to the delegation of legislative power the structure but not the text of the South African Interim Constitution was similar to that of the Australian Constitution. In each Constitution legislative, executive and judicial authority was expressly vested in the relevant branch⁴⁷.

Under the Interim Constitution the Constitutional Court held that a delegation to the President of a power to amend the empowering Act was invalid as it violated the separation of powers. The Court acknowledged that the conferral upon the executive of regulation making power was necessary in a modern legal system⁴⁸.

However, to uphold the validity of the conferral upon the executive of power to amend or repeal a statute would be “quite different”. That would be “subversive” of the constitutionally prescribed process of enacting and repealing statute law⁴⁹. The Court observed out that “[t]he authorisation of [such] legislation... allows control over legislation to pass from Parliament to the executive. Later this power could be used to introduce contentious provisions into what was previously uncontentious legislation”⁵⁰.

This decision was based upon an implication from the assignment of powers to the branches of government. As Sachs J pointed out in his concurring opinion, the interim Constitution imposed “no express limitation on the power of Parliament to pass a law delegating its legislative authority”. However, such a restriction was to be implied from “the design and structure of the Constitution as a whole”⁵¹.

In relation to the assignment of powers the text of the Irish Constitution is quite different from that of the Australian Constitution. However, the structure of the Irish Constitution in this context is broadly similar, with an express division of powers between the three branches⁵².

The Irish Constitution expressly declares that the legislature has exclusive power to make laws: “The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas [legislature]: no other legislative authority has power to make laws for the State”⁵³. Despite the broad nature of this prohibition, the Irish Supreme Court has held that a statute may validly confer regulation making powers upon the executive⁵⁴.

However, the Supreme Court has made clear that Henry VIII clauses infringe the vesting of legislative power in the Oireachtas. The court has held that “delegated legislation cannot make, repeal or amend any law and that, to the extent that the parent Act purports to confer such a power, it will be invalid having regard to the provisions of the Constitution”⁵⁵.

In another decision Finlay CJ stated: “The wide scope and unfettered discretion contained in the section [under consideration] can clearly be exercised by a Minister making regulations so as to ensure that what is done is truly regulatory or administrative only and does not constitute the making, repealing or amending of law in a manner which would be invalid having regard to the provisions of the Constitution”⁵⁶.

Legislative and executive acceptance of this clear authority has been uneven. A Henry VIII clause appears in recent financial rescue legislation⁵⁷. The President did not refer the Bill to the Supreme Court for its opinion regarding the proposed law’s validity⁵⁸. On the other hand, during the previous year a Minister had stated that an existing Henry VIII clause was invalid in the light of Supreme Court authority⁵⁹.

The position in Canada is less clear. During the First World War the Canadian Supreme Court upheld the constitutional validity of a Henry VIII clause in a *War Measures Act*⁶⁰. This decision was applied in another Supreme Court case during the Second World War⁶¹. The Supreme Court has not considered this issue since that time⁶². In the absence of contrary authority, the lower courts continue to apply these wartime decisions⁶³.

However, the text and structure of the Canadian Constitution in relation to the separation of powers is quite different from that of the Australian federal Constitution. The Canadian Constitution does not contain an express vesting of power in each branch of government⁶⁴, with the somewhat anomalous exception of the executive power⁶⁵. The textual source of the separation doctrine is thus entirely different from that in the other jurisdictions discussed herein. The Canadian Supreme Court has held that the Constitution embodies a separation of powers through its preambular statement that the Constitution is "similar in principle to that of the United Kingdom"⁶⁶.

Furthermore, the Canadian Constitution does not embody a "strict" separation of powers, even between the judiciary and the executive⁶⁷, so Canadian decisions regarding the separation of powers must be approached with caution. By contrast, the Australian Constitution enforces a strict separation of powers between the judiciary and the political branches⁶⁸.

The United Kingdom and New Zealand do not offer guidance regarding the constitutional validity of Henry VIII clauses as those jurisdictions do not have entrenched Constitutions embodying a separation of powers⁶⁹. In those nations there is no judicial review of constitutional validity⁷⁰.

5. *Questionable Status of a Henry VIII Clause as an Exercise of Legislative Power*

Latham CJ defined an exercise of legislative power as follows: "legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty,

whereas executive authority applies the law in particular cases"⁷¹. The current bench of the High Court has unanimously cited this definition⁷².

In the *Plaintiff S157* case five Justices of the High Court expressed considerable scepticism regarding an argument that the *Migration Act* could be validly redrafted so that effectively all of its provisions were no more than guidelines for the executive⁷³. These Justices considered that such a provision would be invalid as it was not an exercise of legislative power, since it did not "determine [...] the content of a law as a rule of conduct or a declaration as to power, right or duty"⁷⁴. There is a persuasive argument that the majority's reasoning in *Plaintiff S157* would be fatal for the validity of Henry VIII clauses, as such clauses generally permit the executive to modify all of the provisions of one or more statutes⁷⁵.

6. *The Rule of Law*

The High Court has often emphasized that the federal Constitution was framed upon the assumption of the rule of law⁷⁶. The Constitution provides textual and structural support for the rule of law. For example, the High Court's constitutionally entrenched jurisdiction to grant writs of "Mandamus or prohibition or an injunction [...] against an officer of the Commonwealth"⁷⁷ has been regarded as a guarantee of an important aspect of the rule of law⁷⁸. That aspect is the principle of the legality of governmental action⁷⁹.

The High Court has not used the rule of law as a separate test of the validity of federal legislation. However, the recognition

of an implied constitutional doctrine of the rule of law would be a logical consequence of the “text and structure” of the Constitution⁸⁰. The practice of the Supreme Court of Canada before the adoption of the Canadian Charter of Rights and Freedoms would support the recognition of such a doctrine. The Supreme Court regarded the rule of law as “implicitly recognized” by the *Constitution Act 1867* (formerly the *British North America Act*)⁸¹.

If the High Court declined to recognize an implied constitutional doctrine of the rule of law, the protection of the rule of law is likely to be a major influence upon the Court’s interpretation of the other constitutional limits of governmental power. The separation of powers should be no exception.

The rule of law includes the principle that “ordinary (substantive) law should possess certainty, generality and equality”⁸². The rule of law requires that “the law must be governed by general rules which are made in advance”⁸³ as “only certainty will be able to ensure that the law effectively guides human behaviour”⁸⁴.

Henry VIII clauses allow the executive to avoid the operation of “general rules which are made in advance” and are inconsistent with an important element of the rule of law. It has been said that in the United Kingdom “we are continually passing legislation which virtually permits Governments to make new laws as they go along”⁸⁵.

It is also difficult to readily determine what a statute actually provides if it has been amended by regulation⁸⁶. This situation is reminiscent of the former Weimar Constitution, which could be amended by a law passed by a special majority but with no requirement that the text of the

Constitution itself be expressly amended. As a result “no one could determine what the Constitution provided by reading it – a state of affairs scarcely compatible with the rule of law”⁸⁷. By contrast, the present German Constitution requires that constitutional amendments must expressly amend or supplement its text⁸⁸.

It is widely considered that Henry VIII clauses are undesirable for the rule of law⁸⁹. Courts look upon such clauses with suspicion. The New Zealand Court of Appeal described them as “in principle, undesirable”⁹⁰. The New Zealand Supreme Court described a Henry VIII clause as “a blank cheque”⁹¹. The Ontario Supreme Court described another clause as a “breathtaking power”⁹², “constitutionally suspect”⁹³ and “arbitrary”⁹⁴. Speaking extra-judicially, the Lord Chief Justice of England and Wales has suggested that “Henry VIII clauses should be confined to the basement of history” and that “[w]e must break what I believe to be a pernicious habit”⁹⁵.

Even a legislature has recognised that such provisions are problematic for the rule of law. The *Queensland Legislative Standards Act 1992* identifies “fundamental legislative principles”, which “are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law”⁹⁶. These principles require that “legislation has sufficient regard to [...] the institution of Parliament”⁹⁷, which depends upon whether it “authorises the amendment of an Act only by another Act”⁹⁸,

In any event the need for Henry VIII clauses is most dubious. Minor amendments to statutes can be enacted through miscellaneous provisions amendment Acts⁹⁹. The federal statute book con-

tains many recent examples of legislation making miscellaneous or consequential amendments to various Acts.

7. Conclusion

Over seventy years ago the Australian High Court upheld the validity of a Henry VIII clause in the *Dignan* case. The Court has stated that the federal Parliament may not abdicate its legislative powers. However, the Court's concept of abdication is excessively formalistic. It only prohibits an abdication or renunciation of the power of the Parliament to repeal or amend a statute.

The High Court's concept of abdication is so narrow that it has not proved to be a meaningful limitation in practice. The Court should modify its abdication doctrine so that a delegation of power to amend statute law by regulation would constitute

an abdication of legislative power. Subordinate legislation must at least be subordinate to primary legislation. A more modern approach to the separation of powers problems of Henry VIII clauses has been taken by other constitutional courts.

There is also a persuasive argument that the majority's reasoning in the *Plaintiff S157* case would be fatal for the validity of Henry VIII clauses, as such clauses generally permit the executive to modify all of the provisions of one or more statutes. Henry VIII clauses allow the executive to avoid the operation of "general rules which are made in advance" and are thus inconsistent with an important element of the rule of law. Such provisions are of questionable constitutional validity. At the very least it is widely considered that the use of such statutory provisions is constitutionally undesirable.

¹ *Laws of Australia*, para. 2.2.660; *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207 at p. 211 and p. 220.

² N.W. Barber and A.L. Young, *The Rise of Prospective Henry VIII Clauses and their Implications for Sovereignty*, in «Public Law», vol. 112, 2003, p. 112.

³ *Oakley Inc v Animal Ltd* [2005] RPC 30 (p 713), para. 79; [2005] EWHC 210 (Ch).

⁴ *Thoburn v Sunderland City Council* [2003] QB 151, para. 13; [2002] EWHC 195.

⁵ *Report of the Committee on Ministers' Powers* Cmd 4060 (1932), p. 36 (hereafter *Donoughmore*); *Waddell v Governor*

in Council (1983) 49 BCLR 305; 5 DLR (4th) 254 at p. 269 (hereafter *Waddell*); Queensland Law Reform Commission, *Henry VIII Clauses*, Report No 39, Brisbane: QLRC, 1990, p. 1; D. Malcolm, *The Limitations, if Any, on the Powers of Parliament to Delegate the Power to Legislate*, in «Australian Law Journal», vol. 66, 1992, p. 255; *Vanstone v Clark* (2005) 147 FCR 299 at para. 122; [2005] FCAFC 189.

⁶ 31 Henry VIII c 8 s 2. The text of the Act is reproduced in J.R. Tanner, *Tudor Constitutional Documents*, Cambridge, Cambridge University Press, 1922, p. 532. The Act was repealed in 1547 by 1 Edward VI c 12 s 4. See generally E.R. Adair,

The Statute of Proclamations, in «English Historical Review», vol. 32, 1917, p. 34. For examples of the operation of the Act, see R.W. Heinze, *The Pricing of Meat: A Study in the Use of Royal Proclamations in the Reign of Henry VIII*, in «Historical Journal», vol. 12, 1969, p. 583 at pp. 593-595. For another early example of such a provision, see P.R. Roberts, *The Henry VIII Clause: Delegated Legislation and the Tudor Principality of Wales*, in T.G. Watkin (edited by), *Legal Record and Historical Reality*, London: Hambledon, 1989, p. 37.

⁷ T.P. Taswell-Langmead, *English Constitutional History* (9th ed.), London, Sweet and Maxwell,

- 1929, p. 343.
- ⁸ C.R. Elton, *Henry VIII's Act of Proclamations*, in «English Historical Review», vol. 75, 1960, p. 208 at p. 211; M.L. Bush, *The Act of Proclamations: A Reinterpretation*, in «American Journal of Legal History», vol. 27, 1983, p. 33 at 35.
- ⁹ *Donoughmore cit.*, p. 65; see also N. Morag-Levine, *Agency Statutory Interpretation and the Rule of Common Law*, in «Michigan State Law Review», 2009, p. 51 at p. 63.
- ¹⁰ s 10(2), *Human Rights Act 1998*; s 1(7), *Legislative and Regulatory Reform Act 2006*; s 12(2), *Banking (Special Provisions) Act 2008*; s 51(2), *Constitutional Reform and Governance Act 2010* (UK); C. Forsyth and E. Kong, *The Constitution and Prospective Henry VIII Clauses*, in «Judicial Review», vol. 9, 2004, p. 17 at pp. 18-21.
- ¹¹ It has been argued that Henry VIII clauses may be distinguished from provisions that confer a power to make regulations that modify the effect of a statute in particular cases without making a textual amendment. See S. Bottomley, *The Notional Legislator: The ASIC's Role as a Law-maker*, in «Federal Law Review», vol. 39, 2011, p. 1 at pp. 2-6 and pp. 23-24.
- ¹² ss 189A(3), 231A(3), *Trade Marks Act 1995*; Sch 1 s 100.7, *Criminal Code Act 1995*; ss 51(1), 200E(2C), 601YAB(1), 798L(1), 854B(1), 911A(5A), 985K(4), 1200F(2), 1492(2), 1513(2), *Corporations Act 2001*; s 6(7), *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*; ss 64(1), 78(4), 81(4), *Northern Territory National Emergency Response Act 2007*; s 18C(1), *Water Act 2007*; ss 118(5), 255(1), *Personal Property Securities Act 2009*; ss 14(3)(b), 15(5)(b), 110, 123(5), 124(5), 326, 333(2)(b), *National Consumer Credit Protection Act 2009*.
- ¹³ ss 44(3), 46(3), *Northern Territory National Emergency Response Act 2007*; s 14A(2), *Australian National Registry of Emissions Units Act 2011*; s 12(8), *Work Health and Safety Act 2011*.
- ¹⁴ C.A. Moens and J. Trone, *Lumb, Moens and Trone, The Constitution of the Commonwealth of Australia Annotated* (8th ed.), Sydney, LexisNexis Butterworths, 2012, p. 45 (hereafter Moens and Trone).
- ¹⁵ *Victorian Stevedoring & General Contracting Co Ltd v Dignan* (1931) 46 CLR 73 at p. 101 (hereafter *Dignan*).
- ¹⁶ *Dignan cit.*, pp. 83-84, p. 86, p. 101, p. 117; *Attorney-General (Cth) v R; Ex parte Boilemakers' Society of Australia* (1957) 95 CLR 529 at p. 545; *Radio Corporation Pty Ltd v Commonwealth* (1938) 59 CLR 170 at p. 179, p. 186, p. 193; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at para. 102 (hereafter *Plaintiff S157/2002*).
- ¹⁷ s 100(3), *Constitution of Papua New Guinea* (1975); Art 76(1), *Constitution of Sri Lanka* (1978); s 29, *Constitution of Argentina* (1994). For an historical example, see Art 45(1), *Constitution of Sri Lanka* (1972).
- ¹⁸ *Dignan cit.*, p. 121; *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at p. 373, p. 381.
- ¹⁹ *Gould v Brown* (1998) 193 CLR 346 at para. 287 (hereafter *Gould*); *Byrnes v R* (1999) 199 CLR 1 at para. 4, para. 92; *R v Hughes* (2000) 202 CLR 535 at para. 26, para. 94.
- ²⁰ *McCawley v R* [1920] AC 691 at pp. 704-705.
- ²¹ B. Selway, *The Constitution of South Australia*, Sydney, Federation Press, 1997, p. 120; A. Twomey, *The Constitution of New South Wales*, Sydney, Federation Press, 2004, pp. 203-204; G. Carney, *The Constitutional Systems of the Australian States and Territories*, Cambridge, Cambridge University Press, 2006, p. 342.
- ²² *Dignan cit.*, p. 101, pp. 119-21; *Crowe v Commonwealth* (1935) 54 CLR 69 at p. 94 (hereafter *Crowe*); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at p. 257 (hereafter *Communist Party*).
- ²³ *Dignan cit.*, pp. 119-121; *Crowe cit.*, p. 94.
- ²⁴ G. Winterton, *Parliament, the Executive and the Governor-General*, Melbourne, Melbourne University Press, 1983, p. 89.
- ²⁵ *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at p. 22; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at p. 154; *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at p. 184, pp. 193-194; *Commonwealth v Tasmania* (1983) 158 CLR 1 at p. 151, p. 270; *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at p. 279; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at para. 27, para. 92.
- ²⁶ *Dignan cit.*, p. 88; G. Ng, *Slaying the Ghost of Henry VIII: A Reconsideration of the Limits Upon the Delegation of Commonwealth Legislative Power*, in «Federal Law Review», vol. 38, 2010, p. 205, at p. 218 (hereafter Ng).
- ²⁷ *Dignan cit.*, p. 100.
- ²⁸ P.H. Lane, *Lane's Commentary on the Australian Constitution* (2nd ed.), Sydney, LBC Information Services, 1997, p. 429.
- ²⁹ *Gould cit.*, para. 287; *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388 at para. 77.
- ³⁰ *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248 at p. 265. See also *Gould cit.*, para. 287.
- ³¹ D. Meyerson, *Rethinking the Constitutionality of Delegated Legislation*, in «Australian Journal of Administrative Law», vol. 11, 2003, p. 45, at p. 46 (hereafter Meyerson).
- ³² For a Caribbean example of a more substantive notion of the abdication of legislative power, see *J Astaphan & Co (1970) Ltd v Dominica (Comptroller of Customs)* (1996) 54 WIR 153 at pp. 157-159.

- [1999] 2 LRC 569 at pp. 575-576.
- ³³ *Viro v R* (1978) 141 CLR 88 at p. 135; *Nguyen v Nguyen* (1990) 169 CLR 245 at p. 269; *Imbree v McNeilly* (2008) 236 CLR 510 at para. 45.
- ³⁴ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at p. 8, pp. 178-179, p. 320, p. 604; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at para. 86, para. 189, para. 287.
- ³⁵ *Coleman v Power* (2004) 220 CLR 1 at para. 93, para. 196, para. 211 (*Lange* test). The Court has also signalled the possibility of a modification to a test for validity: *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at paras. 85-100 (freedom of interstate trade (hereafter *Betfair*)).
- ³⁶ *Meyerson* cit., p. 54.
- ³⁷ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at paras. 13-19, paras. 100-101, paras. 163-165; *Betfair* cit., paras. 33-48.
- ³⁸ Art I, s 1, *Constitution of the United States* (1787).
- ³⁹ s 1, *Commonwealth of Australia Constitution* (1900).
- ⁴⁰ Art II, s 1, cl 1; Art III, s 1, *Constitution of the United States* (1787); ss 61, 71, *Commonwealth of Australia Constitution* (1900).
- ⁴¹ *J W Hampton Jr & Co v United States* 276 US 394 at p. 409 (1928); *Touby v United States* 500 US 160 at p. 165 (1991); *Loving v United States* 517 US 748 at p. 771 (1996); *Whitman v American Trucking Associations Inc* 531 US 457 at p. 472 (2001).
- ⁴² E. Chemerinsky, *Constitutional Law: Principles and Policies* (2nd ed.), New York, Aspen, 2002, p. 320. See *Panama Refining Co v Ryan* 293 US 388 at p. 430 (1935); *A L A Schechter Poultry Corp v United States* 295 US 495 at pp. 541-542 (1935).
- ⁴³ *Clinton v City of New York* 524 US 417 at p. 436 (1998) (hereafter *Clinton*).
- ⁴⁴ Art I, s 7, cl 2, *Constitution of the United States* (1787).
- ⁴⁵ *Clinton* cit., pp. 447-448.
- ⁴⁶ *Ivi*, p. 438.
- ⁴⁷ ss 37, 75, 96(1), *Interim Constitution of South Africa* (1993). The present Constitution effects a similar vesting of powers: ss 43(a), 85(1), 165(1). *Constitution of South Africa* (1996).
- ⁴⁸ *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 at para. 51, [1995] ZACC 8 (hereafter *Executive Council*).
- ⁴⁹ *Ivi*, para. 61.
- ⁵⁰ *Ivi*, para. 63.
- ⁵¹ *Ivi*, para. 204.
- ⁵² Arts 15.2.1, 28.2, 34.1, *Constitution of Ireland* (1937).
- ⁵³ Art 15.2.1, *Constitution of Ireland* (1937). A somewhat similar provision appeared in Art 12, *Constitution of the Irish Free State* (1922).
- ⁵⁴ *Laurentiu v Minister of Justice* [1999] 4 IR 26 at p. 46, pp. 70-71, pp. 83-44; *Kennedy v Law Society of Ireland* [2002] 2 IR 458 at p. 486; *Mulcreevy v Minister for Environment* [2004] 1 IR 72 at p. 87 (hereafter *Mulcreevy*).
- ⁵⁵ *Mulcreevy* cit., p. 87.
- ⁵⁶ *Harvey v Minister for Social Welfare* [1990] 2 IR 232 at p. 241.
- ⁵⁷ s 53, *Credit Institutions (Stabilisation) Act* 2010 (Ireland). In the lower house of parliament the Opposition unsuccessfully attempted to amend this provision. See *Parliamentary Debates. Dáil Éireann*, 15 December 2010, pp. 389-390, pp. 430-431.
- ⁵⁸ See Art 26, *Constitution of Ireland* (1937).
- ⁵⁹ *Parliamentary Debates. Dáil Éireann*, 27 May 2010, pp. 603-604, p. 667.
- ⁶⁰ *Re Gray* (1918) 57 SCR 150 at p. 157, p. 160, pp. 170-171, pp. 175-177; 42 DLR 1 at pp. 2-3, p. 5, pp. 11-13, pp. 16-17.
- ⁶¹ *Reference re Regulations in Relation to Chemicals* [1943] SCR 1 at p. 9, p. 16, p. 33; [1943] 1 DLR 248 at p. 253, p. 258, p. 275.
- ⁶² The case has been cited in passing; *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3 at p. 38; 88 DLR (4th) 1 at p. 23.
- ⁶³ *Waddell* cit., DLR 270; *Ontario Public School Boards' Association v Ontario (Attorney General)* (1997) 151 DLR (4th) 346 at paras. 54-55, reversed on different grounds (1999) 123 OAC 143; 175 DLR (4th) 609; leave to appeal refused [1999] 3 SCR v (hereafter *Ontario*); *Greater Essex County District School Board v International Brotherhood of Electrical Workers, Local 773* (2007) 83 OR (3d) 601 at paras. 76-78; leave to appeal refused by Ont CA 23 May 2007; leave to appeal refused [2007] 3 SCR ix.
- ⁶⁴ *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3 at para. 33. However, the Privy Council held that the separation of judicial power did not require an express vesting of power where pre-existing courts were vested with that power prior to the adoption of the Constitution: *Liyanage v R* [1967] 1 AC 259 at pp. 286-288 (hereafter *Liyanage*); *Hinds v R* [1977] AC 195 at p. 213.
- ⁶⁵ s 9, *Constitution of Canada* (1867).
- ⁶⁶ *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876 at para. 68; *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 at paras. 34-35, para. 69; *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at para. 21, para. 34. For a criticism of this use of the preamble, see *Singh v Canada* [2000] 3 FC 185 at para. 28; leave to appeal refused [2000] 1 SCR xxii.
- ⁶⁷ *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 at para. 52; *Cooper v Canada (Human Rights Commission)* [1996] 3 SCR 854 at paras. 10-11; *Reference re Secession of Quebec* [1998] 2 SCR 217 at para. 15.
- ⁶⁸ *Eg Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at p. 260, pp. 268-270; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at pp. 17-20.
- ⁶⁹ *Liyanage* cit., p. 288 (in relation

- to the United Kingdom).
- ⁷⁰ *Pickin v British Railways Board* [1974] AC 765 at pp. 789-790; but cp *R (Jackson) v Attorney-General* [2006] 1 AC 262 at para. 102, para. 120; [2005] UKHL 56; *Haliburton v Broadcasting Commission* [1999] NZAR 233 at p. 237; *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 at para. 13; *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 at para. 95.
- ⁷¹ *Commonwealth v Grunseit* (1943) 67 CLR 58 at p. 82.
- ⁷² *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at para. 56. This definition was also cited in *Thomas v Mowbray* (2007) 233 CLR 307 at para. 71 (hereafter *Thomas*).
- ⁷³ *Plaintiff S157/2002* cit., para. 101.
- ⁷⁴ Ivi, para. 102. An argument based upon this approach was rejected in *New South Wales v Commonwealth* (2006) 229 CLR 1 at paras. 400 ff.
- ⁷⁵ See also Ng cit., p. 222, pp. 224-225, p. 228.
- ⁷⁶ *Communist Party* cit., p. 193; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at para. 30; *Thomas* cit., para. 61; *South Australia v Totani* (2010) 242 CLR 1 at para. 61, para. 131, paras. 232-233, para. 423; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at para. 120.
- ⁷⁷ s 75(v), *Commonwealth of Australia Constitution* (1900).
- ⁷⁸ *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at para. 208; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at para. 64, para. 321; *Plaintiff S157/2002* cit., para. 5, para. 103; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at para. 113.
- ⁷⁹ M. Gleeson, *The Rule of Law and the Constitution*, Sydney, ABC Books, 2000, pp. 67-68.
- ⁸⁰ *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at para. 39, para. 171.
- ⁸¹ *Reference re Manitoba Language Rights* [1985] 1 SCR 721 at p. 750; *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 at para. 57; *British Columbia (Attorney General) v Christie* [2007] 1 SCR 873 at para. 19.
- ⁸² B. McLachlin, *Rules and Discretion in the Governance of Canada*, in «Saskatchewan Law Review», vol. 56, 1992, p. 167 at p. 169.
- ⁸³ *Workplace Relations Amendment (Work Choices) Bill 2005*, Bills Digest n. 66, 2005-06, p. 117 (hereafter *Bills Digest*).
- ⁸⁴ Ivi, p. 117.
- ⁸⁵ Lord Rippon of Hexham, *Henry VIII Clauses*, in «Statute Law Review», vol. 10, 1989, p. 205 at p. 206.
- ⁸⁶ G.S. Lindell, *Administrative Law: Henry VIII Clauses*, in «Australian Law Journal», vol. 78, 2004, p. 221 at p. 223; Ng cit., pp. 228-229. On an *ad hoc* basis the Attorney-General's Department has incorporated statutory amendments made by regulation into the reprints of some principal Acts. However, the texts of such amendments appear in a table at the end of the Act and are not incorporated alongside the affected provisions, where they would most readily come to the attention of readers. See *Bankruptcy Act 1966* (Repr 30 January 2012, C2012C00173), p. 67, p. 619; *Patents Act 1990* (Repr 3 May 2012, C2012C00423), p. 34, p. 250; *Life Insurance Act 1995* (Repr 27 March 2012, C2012C00334), p. 283. The modified provisions are annotated with the statement "see Table B" without indicating that their operation has been modified. The Notes to the *Trade Marks Act 1995* merely state that the Act has been modified by the Regulations, but those "modifications are not incorporated in this compilation" (Repr 30 January 2012, C2012C00161), p. 175.
- ⁸⁷ D.P. Currie, *The Constitution of the Federal Republic of Germany*, Chicago, University of Chicago Press, 1994, p. 7.
- ⁸⁸ Art 79(1), *Constitution of Germany* (1949).
- ⁸⁹ Administrative Review Council, *Rule Making by Commonwealth Agencies* (Report No 35, Canberra: AGPS, 1992), para. 2.33; Meyerson cit., p. 52.
- ⁹⁰ *Accident Compensation Corporation v Donaldson* [2009] NZCA 167 at para. 26.
- ⁹¹ *Reade v Smith* [1959] NZLR 996 at pp. 1003-1004.
- ⁹² *Ontario* cit., para. 50.
- ⁹³ Ivi, para. 51.
- ⁹⁴ Ivi, para. 53.
- ⁹⁵ Lord Judge, *Lord Mayor's Dinner for the Judiciary: Mansion House Speech*, 13 July 2010, p. 7.
- ⁹⁶ s 4(1), *Legislative Standards Act 1992* (Qld).
- ⁹⁷ s 4(2), *Legislative Standards Act 1992* (Qld).
- ⁹⁸ s 4(4)(c), *Legislative Standards Act 1992* (Qld). See also s 4(5)(d).
- ⁹⁹ Scrutiny of Legislation Committee, *The Use of 'Henry VIII Clauses' in Queensland Legislation*, Brisbane, Legislative Assembly of Queensland, 1997, para. 1.27.

Australian State Courts and Chapter III of the Commonwealth Constitution – Interpretation and Re-Interpretation and the Creation of Australian Constitutional “Orthodoxy”

SARAH MURRAY

Introduction

In his classic novel, *Nineteen Eighty-Four*, George Orwell wrote that “[o]rthodoxy means not thinking--not needing to think. Orthodoxy is unconsciousness”¹. Applied to constitutional interpretation or constitutional reasoning this seems almost paradoxical as constitutional exegesis is typically associated with logical, articulate, black-letter thinking. However, it is clear that as constitutional principles or approaches become generally well-accepted, or orthodox, they can become so habitual and sometimes unthinkingly applied as to shift into a state of constitutional unconsciousness. This, of course, does not mean that concepts cannot be contested, but that assailing them requires a degree of iconoclasm.

This paper will explore the process by which constitutional readings relating to State courts within the Australian federation have been interpreted and re-interpreted. Part 1 will reflect on the historical

framing of the role of the “Courts of a State” in the *Commonwealth Constitution* (the *Constitution*) by Australia’s constitutional founders in the 1890s and in early interpretations by the High Court of Australia. Part 2 explores the seismic decision of *Kable*, the implications of its radical interpretation of Chapter III and the track-record of subsequent challenges to the decision. Part 3 reflects on the High Court’s imbuing of new meaning into key state constitutional phrases in Chapter III and how these have risen into the Australian constitutional consciousness.

Part 1

1.1. History and Constitutional Framing of State Courts

In the drafting of the first three chapters (Chs I, II and III) of Australia’s *Commonwealth Constitution* in the 1890s, the in-

dependence and separation of the federal judiciary from the legislative and executive governmental arms was almost received wisdom². The High Court was conceived by the framers as the “bedrock” of this independent federal judicial structure³.

Australian State courts, unlike in the United States⁴, were to be vested with federal jurisdiction by the *Commonwealth Constitution* for “economical” reasons⁵. Sections 71 and 77(iii) contemplate this vesting in State courts with the latter providing that the Commonwealth Parliament can make laws “investing any court of a State with federal jurisdiction”. This unique attribute of Australia’s judicial system has come to be known as the “autochthonous expedient”⁶.

Whilst the autochthonous expedient gives State courts a role to play within the integrated national court structure, the “court[s] of a State” were regarded as self-governing institutions within what was traditionally the colonies’ domain. State legislatures and State constitutions were therefore able to independently regulate the operation of the State courts and the appointment of State judges. Consistently with this, Sir William Downer referred at the 1898 Melbourne Constitutional Convention to the fact that the “the Federation has no control over the state courts, and no right to dictate to the state courts”⁷.

1.2. *Attempts to Re-Frame the Interpretation of State Courts*

For nearly 100 years the High Court of Australia did not impose significant federal limits on State legislation regulating courts within the State court hierarchy and con-

tinued to recognise the constitutional independence of the “court[s] of a State”⁸. In *Le Mesurier v Connor* Knox CJ, Rich and Dixon JJ explained that⁹:

The Parliament may create Federal Courts, and over them and their organization it has ample power. But the Courts of a State are the judicial organs of another Government. They are created by State law; their existence depends upon State law.

Although s 77(iii) allowed federal jurisdiction to be vested in such courts, this did not mean that the Commonwealth Parliament was able to “affect or alter the constitution of the Court itself”¹⁰. Even 50 years later Mason J confirmed in the *Hospital Contribution Fund* case that State parliaments have the “legislative competence to alter the structure and organization of State Courts”¹¹. His Honour continued that¹²:

Chapter III of the Constitution contains no provision which restricts the legislative competence of the States in this respect. Nor does it make any discernible attempt to regulate the composition, structure or organization of the Supreme Courts as appropriate vehicles for the exercise of invested federal jurisdiction.

At the State level this position was affirmed. In *S (A Child)*, the Supreme Court of Western Australia rejected an argument that any implied federal constitutional limit, or s 106 in the *Commonwealth Constitution*, could invalidate a State law which empowered the Supreme Court of Western Australia to keep a juvenile in prison after the conclusion of the juvenile’s term of imprisonment¹³. This meant that coupled with the consistent recognition of the absence of a separation of power in State constitutions¹⁴, State parliaments were granted considerable legislative freedom in relation to the operations of their courts.

Part 2

2.1. *The Earthquake of Kable*

The well-established constitutional position of State courts was shattered by the High Court in *Kable*¹⁵. This iconoclastic decision departed from what had, for nearly a century, been accepted constitutional doctrine, namely that the *Constitution* did not impede legislation regulating State courts. It did not find that Australian State courts are subject to a formal separation of powers, like Australian federal courts. However, the decision was a significant foil to the relative sovereignty of parliaments of the State.

Kable concluded that, even without a separation of powers doctrine, the New South Wales Parliament could not empower the State's Supreme Court to order the ongoing preventative detention of Gregory Wayne Kable, on an ad hominem basis, after the conclusion of his sentence. A majority of the High Court concluded that such State legislation was incompatible with the *Constitution* as it undermined the integrated Australian court system and the ability of the New South Wales Supreme Court to continue to be vested with Commonwealth judicial power under s 77(iii) of the *Constitution*¹⁶. The order thwarted this ability by compromising "public confidence in the impartial administration of the judicial functions of the Supreme Court" through making the court appear as no more than an instrument of government policy¹⁷. As McHugh J explained¹⁸:

State courts have a status and a role that extends beyond their status and role as part of the State judicial systems. They are part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as

State judicial power... It is axiomatic that neither the Commonwealth nor a State can legislate in a way that might alter or undermine the constitutional scheme set up by Ch III of the *Constitution*... Because the State courts are an integral and equal part of the judicial system set up by Ch III, it also follows that no State or federal parliament can legislate in a way that might undermine the role of those courts as repositories of federal judicial power.

For Brennan CJ and Dawson J in dissent, the majority's approach represented a too radical interpretation of Chapter III of the *Constitution*. Brennan CJ contended that there was no "textual or structural foundation for the submission" of the plaintiff and that it is well-established that the Commonwealth Parliament must take State courts as it finds them¹⁹. His Honour further indicated that should such limitations apply to State courts then it would "surely have provoked debate" amongst the framers in the 1890s²⁰. Dawson J agreed. He concluded that Chapter III did not require State courts to take on the attributes of federal courts²¹, when the *Constitution* conceived them as "existing institutions"²².

The fretfulness caused by the decision cannot be underplayed. The late Professor George Winterton referred to it as having "enormous implications" which the States were powerless to stop²³. Its significance stemmed from what Dawson J described as rendering "a quasi-separation of powers" for the Australian States, in spite of the fact that the High Court had consistently shied away from this finding in the past. For Winterton, the majority's position was unpersuasive²⁴. He concluded that the *Commonwealth Constitution* does not force the Commonwealth Parliament to vest jurisdiction in a State court which is not fit to act as a repository, that the Supreme Court

of New South Wales had, in fact, been sufficiently independent to refuse to renew Kable's detention order²⁵ and that it was more appropriate that the courts undertake the functions contemplated by the *Community Protection Act 1994* (NSW) than such roles being administered by the executive alone²⁶. The criticism of the decision was not reserved to the academy and it has been noted that sitting and future members of the High Court also received it unwelcomely²⁷.

Remarkably, and contrary to predictions, the aftershocks of *Kable* were hardly felt at all. Consistently, the High Court refused to re-apply the decision's reasoning. The facts in *Kable* were repeatedly cited as "exceptional"²⁸ and "unlikely to be repeated"²⁹ such that cases such as *Fardon v Attorney-General for the State of Queensland*³⁰, *Forge v Australian Securities and Investment Commission*³¹, *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police*³² and *K-Generation Pty Ltd v Liquor Licensing Court*³³ saw appeals on *Kable* grounds fail. In *Fardon*, McHugh J explained³⁴:

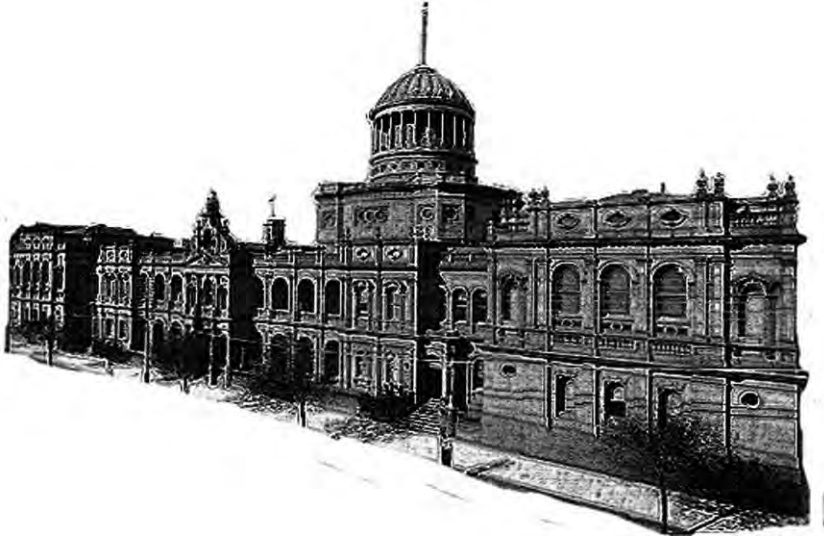
Kable is a decision of very limited application. That is not surprising. One would not expect the States to legislate, whether by accident or design, in a manner that would compromise the institutional integrity of their courts.

The constitutional reality of this was captured by Kirby J's reference to *Kable* as "the constitutional guard-dog that would bark but once"³⁵. Ever since, this canine allusion has become the almost trite way of referring to the decision³⁶. With some rare exceptions³⁷, courts within the State court hierarchy were also very reticent to hear the dog bark again³⁸.

Subsequent attempts to apply *Kable* prior to 2009, although ultimately unsuccessful

did result in considerable refinement of the newfound doctrine. First, the High Court clarified that the principle in *Kable* did not mean that State courts are required to operate in accordance with federal court stringencies. Rather, the *Constitution* imposes on State courts some limits while allowing greater flexibility than are possible within the federal court hierarchy. The upshot of this greater legislative freedom at the State level is that if a function would be considered constitutional at the federal level its constitutional acceptability at the State level is likely to be assured³⁹.

Second, the High Court has come to denounce the assumption, drawn from the majority judgments in *Kable*, that the constitutional test to be applied is the impact of a law on public confidence⁴⁰. In its place, the High Court emphasised that the impact of state legislation on "institutional integrity" is the appropriate gauge⁴¹. For example, in *Fardon*, Gummow J referred to "repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system"⁴². In the same case Gleeson CJ referred to the State legislation as invalid if it bestows on a State court "a function which substantially impairs its institutional integrity" so as to be "incompatible with its role as a repository of federal jurisdiction"⁴³. "Institutional integrity", a phrase initially used by the United States Supreme Court⁴⁴, has therefore become the key State constitutional criterion, with the focus being on whether a State law substantially impairs a State court's institutional integrity so as to compromise the investiture of federal judicial power in that body. This criterion ultimately operates to qualify the



A drawing of the building of the Supreme Court of Victoria. The Court was established by an Act of the Victorian Parliament in 1852. (Source: Supreme Court of Victoria)

general principle that the Commonwealth Parliament, in investing its jurisdiction, must take a State court "as it finds it"⁴⁵.

The concept of "institutional integrity" has not, however, been uniformly or definitively described. Nevertheless, the courts have tended to relate it to the fundamental attributes of a court and particularly to the retention of a State court's "institutional independence" and "integrity"⁴⁶. For example, in *Forge*, Gummow, Hayne and Crennan JJ explained, in relation to "institutional integrity", that⁴⁷:

the relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining char-

acteristics which mark a court apart from other decision-making bodies.

It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal.

Third, after *Kable*, there was some doubt about whether a State court had to be in the process of exercising federal jurisdiction for the doctrine to apply⁴⁸. It now seems clear that it applies if the court is capable of exercising federal jurisdiction even if it is not actually being exercised by the court at that particular point in time⁴⁹.

Fourth, *K-Generation* has clarified that a body does not cease to be a "court of a State"

if its institutional integrity is called into question⁵⁰. In that case, Queensland and Western Australia quite shrewdly submitted that, while not applicable to a Supreme Court, if the Licensing Court was constitutionally tainted by the functions conferred upon it by the *Liquor Licensing Act 1997* (SA), it would simply cease to be a “court of a State” capable of being a repository of federal jurisdiction under s 77(iii) of the *Constitution*. This submission was rejected on the basis that it would subvert s 77(iii) and render the “*Kable* principle impotent”⁵¹. The outcome of this approach was that “the States may not establish a ‘court of a State’ within the constitutional description and deprive it, whether when established or subsequently, of those minimum characteristics of [...] institutional independence and impartiality”⁵². Consequently, a court vested with incompatible functions “retains its character as a ‘court of a State’” capable of being vested with federal jurisdiction but the legislation vesting those incompatible functions is invalidated.

In spite of its rarity of application, the *Kable* principle continued to exist in constitutional consciousness. The High Court refrained from overruling it and was not requested to do so⁵³. Meagher commented that, whatever reservations one might formulate there was little “sense” in calling for a “reconsideration of the correctness of the *Kable* principle” as it has become “a settled feature of Australian constitutional law” and even failed attempts to re-activate the decision still sanctioned it⁵⁴. Appeals to the Court continued, albeit courageously, to present arguments calling for State legislation to be struck down in *Kable* grounds. It was not, however, until French CJ’s appointment to the position of Chief Justice

that the doctrine was again resuscitated to invalidate functions conferred by State legislation on a State court.

2.2. *Kable* – *Alive and Kicking?*

In 2008, French CJ became the Chief Justice of the High Court, following Gleeson CJ’s retirement. In the next year, *International Finance Trust*⁵⁵ heralded, for the first time, an increased willingness by the High Court to apply *Kable*, this time in the context of New South Wales assets forfeiture legislation which applied to those suspected of serious criminal activity. The legislation was struck down by a majority of the Court as “repugnant to the judicial process in a fundamental degree”⁵⁶ because it could require the Supreme Court to hear an application ex parte. Soon after, the principle was again resuscitated in *Totani*⁵⁷. By 6:1, the High Court found s 14 of the *Serious and Organised Crime (Control) Act 2008* (SA) was substantially incompatible with the South Australian Magistrate Court’s institutional integrity and placement within the integrated court structure. It was in this case that French CJ also clearly began to map out his “list” of the “defining characteristics” of State courts including “independence, impartiality, fairness and adherence to the open-court principle”⁵⁸.

The principles in *Kable* were further built upon, albeit silently⁵⁹, in the decision in *Kirk Industrial Relations Commission of New South Wales*⁶⁰. In *Kirk* it was determined that, by virtue of s 73 of the *Constitution*, Parliaments could not deprive a State of a Supreme Court, or, remove a Supreme Court’s ability to review and provide re-

rief for decisions tainted by jurisdictional error. The joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ argued that not only does s 73 require an avenue of appeal from Supreme Courts to the High Court (subject to exceptions enacted by the Commonwealth Parliament) but also the continuation of the “Supreme Courts” as institutions which retain the essence of what a “Supreme Court” necessitates⁶¹. Accordingly, the Supreme Courts’ supervisory jurisdiction for jurisdictional error was determined to be unassailable as it amounted to a “defining characteristic” of a “Supreme Court of a State”⁶². This conclusion was based on the historical status of such Courts prior to federation⁶³ but is probably more readily explainable by the nature of the integrated constitutional and court system developed in *Kable*⁶⁴. For example, in *Kable* McHugh J commented that⁶⁵:

a State law that prevented a right of appeal to the Supreme Court from, or a review of, a decision of an inferior State court, however described, would seem inconsistent with the principle expressed in s 73 and the integrated system of State and federal courts that covering cl 5 and Ch III envisages.

While, in *Hogan v Hinch*⁶⁶, the successful *Kable* run stalled. *Kable*’s re-emergence continued in *Wainohu* where a six judge High Court majority invalidated organised crime legislation as compromising the institutional integrity of New South Wales Supreme Court⁶⁷. The impugned legislation, the *Crimes (Criminal Organisations Control) Act 2009* (NSW), conferred administrative powers on Supreme Court judges without requiring reasons to be given in relation to the exercise of those powers. French CJ and Kiefel J commented that⁶⁸:

The term ‘institutional integrity’, applied to a court, refers to its possession of the defining or essential characteristics of a court. Those characteristics include the reality and appearance of the court’s independence and its impartiality. Other defining characteristics are the application of procedural fairness and adherence, as a general rule, to the open court principle. As explained later, it is also a defining characteristic of a court that it generally gives reasons for its decisions. In the case of the Supreme Courts of the States, that characteristic has a constitutional dimension by reason of the appellate jurisdiction conferred on this Court by s 73 of the Constitution.

The continuity of the *Kable* principle was again solidified in a significant High Court case on the constitutionality of the Victorian statutory rights charter (the *Charter of Human Rights and Responsibilities Act 2006* (Vic)), *Momcilovic v The Queen*⁶⁹.

Ultimately, under the current High Court approach, the role of a State court as a “court” referred to in Chapter III operates as a limiting factor. Certainly, State courts can adapt to new circumstances and reform agendas but there are, by virtue of Chapter III, “limits upon permissible departures from the basic character and methodologies of a court”⁷⁰. Further, French CJ has recently indicated that it is not necessarily possible to argue that these departures are “confined” or “limited” in nature when these can combine to result in the “death of the judicial function by a thousand cuts”⁷¹.

Part 3

3.1. *Reflections on the imbuing of meaning to “Court of a State”*

There are two apparent aspects to the creation of constitutional orthodoxy. First,

the establishment by a court of a doctrine or principle. Second, the widespread acceptance of that doctrine as a durable, legitimate and convincing statement of legal principle. It is the latter which has proven the most interesting in the refinement of *Kable*.

The post-2009 rejuvenation of *Kable* has coincided with much greater emphasis upon the text of Chapter III of the *Constitution*. This move began with the shift in language after *Kable* from "public confidence" to "institutional integrity" and has become much more closely tethered to Chapter III phrases such as "court of a State" in s 77(iii) or "Supreme Court of any State" in s 73(ii). Chief Justice Spigelman, as he then was, has noted that this textual focus is particularly evident in *Kirk* where the Court has sought to instil substantive constitutional content or essential characteristics in such constitutional phrases⁷². His Honour explained that⁷³:

the contemporary jurisprudence of the court exhibits a proclivity to clearly anchor significant constitutional developments in the text and structure of the Constitution. The concept of a 'constitutional expression' provides a textual basis for and, therefore, an aura of orthodoxy to, significant changes in constitutional jurisprudence. That aura dissipates when the court undertakes the unavoidably creative task of instilling substantive content to the constitutional dimension of a constitutional expression by identifying its 'essential' features or characteristics.

The accuracy of this is evident. In *Kirk*, quoting *Forge*, the majority note that it is imperative⁷⁴:

to take account of the requirement of Ch III of the Constitution that there be a body fitting the description 'the Supreme Court of a State', and the constitutional corollary that 'it is beyond the

legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description'.

The High Court's shift towards a focus on the meaning of the constitutional phrase, "court" was not entirely unexpected. Wintererton impliedly predicted this shift back in 2002 in highlighting that the Commonwealth Parliament could decide in which State bodies it vested its power, "provided, of course, that the State body in which jurisdiction is to be vested is sufficiently judicial to be characterised as a 'court' within Ch III of the Constitution"⁷⁵. Similarly, the Court is, as earlier favoured by Meagher, drawing upon comments made by Dawson J in dissent in *Kable* that s 77(iii) "treats State courts as existing institutions... so long as they are in fact courts"⁷⁶. Meagher⁷⁷ also linked this with comments made by the majority judges in *Kable* concerning the "identity" of a body as a "court"⁷⁸ and the "constitutional expression" of a "Supreme Court" in s 73⁷⁹.

It is submitted that, while such an approach does not necessarily draw a clear or definitive boundary around what amounts to a "court", it provides a conceptual tool which can be fleshed out on the basis of the surrounding constitutional provisions in Chapter III and how these interplay with the curial role. This ensures that the attributes identified derive from the *Constitution's* text and structure as 'a starting point'⁸⁰, rather than being entirely 'free-standing'⁸¹. While the High Court has indicated that the core characteristics of a 'court' cannot be exhaustively set down⁸² it has accepted that some fundamental curial attributes flow from the constitutional expectations and functions conferred on the judicature.

The Court has also brought the focus to State courts' constitutionally contemplated role within the wider Australian court structure. This is evident within s 73(iii)'s reference to an appellate pathway from Supreme Courts to the High Court as well as ss 71 and 77(iii)'s express reference to federal judicial power being vested in sub-national courts.

Further, the Court has increasingly sought to ground its constitutional reasoning in this context in history to try to avoid the perceived "creativity" eluded to by Chief Justice Spigelman. In *Kirk*, although heavily criticised, the majority argued that, "[t]he supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power"⁸³. In *Totani*, French CJ stated that the⁸⁴:

Ch III of the *Constitution* rests upon assumptions about the continuing existence and essential characteristics of State courts as part of a national judicial system and the implications that this Court has drawn from those assumptions. The assumptions are historical realities and not the product of judicial implication.

His Honour sought to connect this "assumption" with the Framers' conceptions pre and post-Federation⁸⁵, these included the "rule of law", the competence assumed by ss 71 and 77(iii) of State courts as repositories of federal jurisdiction and that the State judiciary "continue to bear the defining characteristics of courts and, in particular, the characteristics of independence, impartiality, fairness and adherence to the open-court principle". These characteristics do not however amount to a closed list⁸⁶. The Chief Justice makes it clear that retention of these assumptions in

the *Commonwealth Constitution's* formulation is also evident in other constitutional provisions such as ss 106, 108 and covering clause 5. His Honour stated⁸⁷:

The absence of an entrenched doctrine of separation of powers under the constitutions of the States at Federation and thereafter does not detract from the acceptance at Federation and the continuation today of independence, impartiality, fairness and openness as essential characteristics of the courts of the States. Nor does the undoubted power of State Parliaments to determine the constitution and organisation of State courts detract from the continuation of those essential characteristics. It is possible to have organisational diversity across the Federation without compromising the fundamental requirements of a judicial system.

Similarly, in *Kirk*, the joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ relied heavily on the characteristics of a "Supreme Court of a State" at federation which State parliaments were not able to stray from, most notably their ability to review decisions on the ground of jurisdictional error⁸⁸.

In the context of United States' constitutional jurisprudence, Kahn and Kersch have referred to the "backward-looking, after-constructed 'constitutive stories' of constitutional development" as an "important form of constitutional construction"⁸⁹. However, the authors do not see this constructive process as one undertaken by the courts alone. Instead, they refer to the role of the "interpretive community" as "an active participant in the process of constructing authoritative constitutional stories"⁹⁰. The process is an ongoing and organic one which is "taken into the interpretive and advocacy community, to be accepted, contested, or reworked"⁹¹. Further, the process cannot be considered without an ap-

preciation of the “Court’s unique needs as an institution”⁹².

Kahn and Kersch’s work is highly relevant in the Australian constitutional setting of *Kable*. In the *Kable* context the “interpretive community” is a rich one; judges, barristers, academics, students, politicians and other government actors and the public at large. For the courts the question is how their fashioning of constitutional doctrine can resonate with the interpretive community. This is particularly pertinent in the Chapter III context when there is the potential for constitutional doctrine to be perceived as self-interested and as “the courts protecting the courts”.

The *Kable* principle, in applying a quasi-separation of powers principle to State courts, and in turn restricting the sovereignty of State Parliaments, is prone to a criticism of feather-bedding and as being strategically self-determining. A focus upon interpreting the constitutional text within a historical and broader constitutional context defends the Court to some extent from criticisms of arbitrariness by mooring it within the *Commonwealth Constitution*, and within Spigelman’s “aura of orthodoxy”⁹³. Ironically though, through interpreting the text, it also has the potential to provide the Court with some malleability to continue to shape constitutional doctrine.

For example, take the risk in the State sphere that, if courts become too prescriptive, State legislatures will choose to confer functions on non-curial bodies instead and vest “dangerous” functions in the executive, away from unwanted interference by the courts. In earlier cases, like *Fardon*, the constitutionality of this was accepted by members of the High Court⁹⁴. The con-

stitutional focus upon the text and phrases such as “court of a State” and “Supreme Court of a State” is particularly beneficial because it allows the identity and characteristics of courts to develop such that certain functions, such as criminal determinations, have instead begun to be classed as reserved for curial exercise⁹⁵. What is evident is that the creation of constitutional orthodoxy is being influenced by and is influencing the relationship of the courts with the other branches of government⁹⁶. The process is delicate and dynamic and is an inevitable part of the creation of constitutional consciousness.

It is submitted that, criticisms aside, the ‘interpretive community’ at the time of *Kable* were well placed to receive the High Court’s new interpretation of Chapter III. There are three key reasons for this. First, the legal community had consistently failed to find alternative constitutional means by which to restrict the activity of State legislatures. The absence of a separation of powers within State constitutions had been consistently re-affirmed and the restrictions that trickled down from the *Commonwealth Constitution*, such as ss 92 or 109 were not broadly applicable. *Kable*’s potential limit on State parliamentary sovereignty was therefore able to very quickly capture the profession’s constitutional imagination.

Second, the persuasive influence of counsel in *Kable*, Sir Maurice Byers QC, cannot be ignored. Byers had ‘penned’ and eloquently made the argument in *Australian Capital Television Pty Ltd v Commonwealth* “which... in a slightly edited form”⁹⁷ became the focus of the High Court’s “discovery” of an implied freedom of political communication in the *Commonwealth Constitution* in 1992. Byers’ innovative ar-

gument in *Kable* was made to the Court at a point when the barrister's "influence... was at its height"⁹⁸. His submission in *Kable*, very much resembles the approach now taken by the Court nearly 16 years later⁹⁹:

Chapter III of the *Constitution* applied to State courts from 1 January 1901; they were impressed with the characteristics necessary for the possession and exercise of Commonwealth judicial power. No legislature, State or federal, might impose on them jurisdiction incompatible with the exercise of that judicial power. Nor could it control the manner of the exercise of judicial power whether conferred by the Commonwealth or States. Since Ch III envisages State courts as being capable of investiture with and exercise of the judicial power of the Commonwealth, it grants to them or prevents their deprivation of those characteristics required of recipients of that power. A State law which controlled the State court in the exercise of jurisdiction granted by the State is invalid if it is inconsistent with the court's possession of the constitutional characteristics.

Third, the legal abhorrence of the legislation encountered in *Kable* also played a significant part. Section 3(3) of the *Community Protection Act 1994* (NSW) contained the extraordinary ad hominem provision that 'This Act authorises the making of a detention order against Gregory Wayne Kable and does not authorise the making of a detention order against any other person'. Kable was to be preventatively detained by the Court beyond the end of his sentence without being found guilty of further criminal conduct. The High Court, although emphasising the rarity of such an enactment, were going to be more inclined to accept pioneering arguments so as to find a means to invalidate it. Certainly, the exceptional nature of the legislation in *Kable* made it more difficult for the facts in subsequent cases to approach its severity. However, the pro-

gressive re-interpretation of the principle by the Court, and emphasis upon essential characteristics of a court as relevant to its institutional integrity, have meant that the essence of *Kable* has been more readily applied by the Court in recent years, particularly when, like in *Kable*, the State court's independent judicial role is compromised by becoming a mere puppet of the executive or legislative arms.

Conclusion

The *Kable* principle has become an accepted part of the Australian constitutional orthodoxy. The process of interpretation and re-interpretation of the principle has been an iterative constitutional "story" by which the initial ratio decidendi and reasoning has been re-imagined and re-fashioned as new factual scenarios have been presented to the High Court. The *Kable* principle's journey is incomplete and the Court's tools of "institutional integrity" and "essential curial characteristics" provide sufficient malleability to allow the concept to evolve further through an ongoing dialogue with the legal profession, the academy, the community and the other governmental arms.

As Kahn and Kersch explain, the shape of the doctrine is not set purely by the constitutional text, and although this is being increasingly relied upon by the Court, different available interpretations mean that the ultimate principle is collaboratively "built" by influences both "inside and outside the Court"¹⁰⁰. The acceptance or legitimacy of this process is determined by a number of factors. However, the High Court has to find ways to respond to de-

developments within the executive or legislative arms, while retaining legitimacy and not being accused of jeopardising the democratic process through overly interventionist forms of judicial review¹⁰¹. *Kable* provides an interesting example of this dynamic process, by which the Court has institutionalised a means of drawing a con-

stitutional line in the sand for State legislation, by reconceptualising the import of Chapter III of the *Constitution* and its implications for the operations of 'courts of a State'.

¹ George Orwell, *Nineteen Eighty-Four*, Pt 1, Ch 5, London, Penguin Books, 1949, p. 46.

² *Official Report of the National Australasian Convention Debates*, Sydney, 11 March 1891, p. 257 (Inglis Clark); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, p. 268 (Edmund Barton); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, p. 313 (Charles Kingston); 1 February 1898, p. 363 (Josiah Symon), p. 371 (William McMillan), pp. 365-366 (Bernhard Wise).

³ *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, p. 950 (Josiah Symon); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, p. 343 (Josiah Symon).

⁴ J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth Part 2* (1901), Kessinger Legacy Reprints, p. 727.

⁵ *South Australia v Totani* (2010) 85 ALJR 19, pp. 48-50, per French CJ.

⁶ *R v Kirby: Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, p. 268, per Dixon CJ, McTiernan, Fullager and Kitto JJ.

⁷ *Official Record of the Debates of the Australasian Federal Convention*,

Melbourne, 28 January 1898, p. 276.

⁸ *The King v Murray; Ex Parte the Commonwealth* (1916) 22 CLR 437, p. 452, per Isaacs J.

⁹ (1929) 42 CLR 481, p. 495.

¹⁰ Ivi p. 496. See also *Kotsis v Kotsis* (1970) 122 CLR 69, p. 88 per Menzies J, 109, per Gibbs J. Gibbs J although in dissent in *Kotsis* was later accepted as correct in *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49.

¹¹ *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, p. 61.

¹² *Ibidem*. See also 56-57 (Gibbs CJ). See also L. Zines, *The High Court and the Constitution* (5th ed.), Sydney, Federation Press, p. 268.

¹³ (1995) 12 WAR 392.

¹⁴ *JD & WG Nicholas v Western Australia* [1972] WAR 168, p. 173, per Jackson CJ, p. 175, per Burt J; *Gilbertson v South Australia* (1976) 15 SASR 66, p. 85, per Bray CJ; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, p. 381, per Street CJ, p. 400, p. 401 per Kirby P, p. 412 per Mahoney JA; *City of Collingwood v Victoria (No 2)* [1994] 1 VR 652, p. 663 (Brooking J, Southwell and Teague JJ agreeing).

¹⁵ *Kable v Director of Public*

Prosecutions (1996) 189 CLR 51.

¹⁶ The majority comprised Gaudron, McHugh, Gummow and Toohy JJ with Dawson and Brennan CJ dissenting.

¹⁷ Ivi, p. 107 per Gaudron J, p. 124 per McHugh J, p. 133 per Gummow J.

¹⁸ Ivi, pp. 114-116.

¹⁹ Ivi, p. 67.

²⁰ Ivi, p. 68.

²¹ Ivi, p. 80.

²² Ivi, p. 83.

²³ B. Lane, *Separation of Powers for States Inevitable*, *The Australian*, 17 September 1996, p. 6.

²⁴ See also D. Meagher, *The Status of the Kable Principle in Australian Constitutional Law*, in «Public Law Review», vol. 16, 2005, pp. 182, at p. 183.

²⁵ See eg. *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 64 per Brennan CJ.

²⁶ G. Winterton, *Justice Kirby's Coda in Durham*, in «Public Law Review», vol. 13, pp. 165-168.

²⁷ H.P. Lee, *The Kable Case: A Guard-Dog that Barked But Once?*, in G. Winterton (edited by), *State Constitutional Landmarks*, Sydney, The Federation Press, 2006, pp. 390, 411 referring to Callinan J in *APLA Ltd v Legal Service Commissioner (NSW)*, 2005, p. 469; *R v Moffatt* (1997) 91 A Crim R 557, p. 577 (Hayne JA, as he then was).

²⁸ *Kable v Director of Public Prosecutions* (1996) 189 CLR

51. p. 134 per Gummow J, p. 98 per Toohy J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, p. 33, p. 37 (McHugh J), p. 144 per Kirby J.
- ²⁹ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, p. 43, per McHugh J.
- ³⁰ (2004) 223 CLR 575.
- ³¹ (2006) 228 CLR 45.
- ³² (2008) 234 CLR 532.
- ³³ (2009) 237 CLR 501.
- ³⁴ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, p. 43.
- ³⁵ *Baker v The Queen* (2004) 223 CLR 513, p. 54 per Kirby J.
- ³⁶ See eg. Transcript of Proceedings, *Forge v ASIC* [2006] HCA-Trans 25 (8 February 2006) (Mr Gageler SC); Justice Brian Preston, *Commentary on paper by Dr M Groves: "Federal Constitutional Influences on State Judicial Review"*, ACL Seminar, Sydney, 26 August 2010, p. 5; Chief Justice Marilyn Warren, *The Dog That Regained its Bark: A New Era of Administrative Justice in the Australian States*. Speech delivered to the Australian Institute of Administrative Law Conference, Sydney, 23 July 2010, pp. 14-15.
- ³⁷ See *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40.
- ³⁸ See eg. *Moffatt* (1997) 91 A Crim R 557; *R v England* (2004) 89 SASR 316; *McGarry v Western Australia* (2005) 32 WAR 69.
- ³⁹ *Gypsy Jokers Motorcycle Club v Commissioner of Police* (2007) 33 WAR 245, p. 85 per Steytler P; *Baker v The Queen* (2004) 223 CLR 513, p. 51 per McHugh, Gummow, Hayne and Heydon JJ; *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 87 per McHugh J; *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181, p. 11 per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.
- ⁴⁰ *Baker v The Queen* (2004) 223 CLR 513, p. 79 per Kirby J; *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 23 per Gleeson CJ, p. 102 per Gummow J, p. 144 per Kirby J; *Forge v Australian Securities Investments Commission* (2006) 228 CLR 45, p. 194 per Kirby J; *South Australia v Totani* (2010) 85 ALJR 19, p. 73 per French CJ.
- ⁴¹ G. Carney, *The Constitutional Systems of the Australian States and Territories*, Melbourne, Cambridge University Press 2006, p. 250.
- ⁴² *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 101.
- ⁴³ Ivi, p. 15.
- ⁴⁴ *Commodity Futures Trading Commission v Schor* 478 US 833, p. 851 (1986).
- ⁴⁵ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 102 per Gaudron J; *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 37 per McHugh J; *Forge v Australian Securities Investments Commission* (2006) 228 CLR 45, p. 61 per Gummow, Hayne and Crennan JJ. See also *South Australia v Totani* (2010) 85 ALJR 19, pp. 67-68 per French CJ.
- ⁴⁶ See for example *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, pp. 255-256 per Kirby J; *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 219 per Callinan and Heydon JJ.
- ⁴⁷ *Forge v Australian Securities Investments Commission* (2006) 228 CLR 45, pp. 63-64.
- ⁴⁸ This confusion stemmed from the judgment of Toohy J in *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 96.
- ⁴⁹ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, p. 86 per Gummow and Bell JJ; *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 37 per McHugh J; *Re Crinter: Ex parte Hall* (2004) 28 WAR 427, p. 41 per Malcolm CJ; *H.A. Bachrach Pty Ltd v. State of Queensland* (1998) 195 CLR 547, 561; *R v Moffatt* [1998] 2 VR 229, p. 248 per Hayne JA. See also P. Johnston and R. Hardcastle, *State Courts: The Limits of Kable*, in «Sydney Law Review», vol. 20, 1998, p. 214 at p. 227; Carney, *The Constitutional Systems of the Australian States and Territories* cit., p. 356.
- ⁵⁰ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, p. 99 per French CJ, p. 154 per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, pp. 236-244 per Kirby J.
- ⁵¹ *Ibidem*.
- ⁵² Ivi, p. 53 per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ. See also p. 99 per French CJ and pp. 236-237, p. 243 per Kirby J.
- ⁵³ *South Australia v Totani* (2010) 85 ALJR 19, p. 245 per Heydon J (in dissent).
- ⁵⁴ Meagher, *The Status of the Kable Principle in Australian Constitutional Law* cit., p. 183.
- ⁵⁵ (2009) 240 CLR 319.
- ⁵⁶ Ivi, p. 96 per Gummow and Bell JJ, p. 136 per Hayne, Crennan and Kiefel JJ, p. 140 per Heydon J.
- ⁵⁷ (2010) 85 ALJR 19.
- ⁵⁸ Ivi, p. 62.
- ⁵⁹ Although not mentioned in the judgment it was discussed during argument: see detailed discussion of this in S. Young and S. Murray, *An Elegant Convergence? The Constitutional Entrenchment of Jurisdictional Error Review in Australia*, in «Oxford University Commonwealth Law», vol. 11, n. 2, 2011, p. 117.
- ⁶⁰ (2010) 239 CLR 531.
- ⁶¹ Ivi, p. 96.
- ⁶² Ivi, p. 98.
- ⁶³ For criticisms of this historical reasoning see C. Finn, *Constitutionalism Supervisory Review at State Level: The End of Hickman?*, in «Public Law Review», vol. 21, 2010, p. 92, p. 99; N. Gouliaditis, *Privative Clauses: Epic Fail*, paper presented at the Gilbert & Tobin Centre for Public Law 2010 Constitutional Law Conference, Sydney, 19 February 2010, p. 7. L. Zines, *Recent Developments in Chapter III: Kirk v Industrial Relations Commission of New South*

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- ⁶⁴ *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, p. 93; Zines, *Recent Developments in Chapter III* cit., pp. 10-11; Williams and Lynch, *The High Court on Constitutional Law: The 2010 Term* cit., p. 8.
- ⁶⁵ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 114. See also *South Australia v Totani* (2010) 85 ALJR 19, p. 4 per French CJ.
- ⁶⁶ (2011) 85 ALJR 398.
- ⁶⁷ *Wainohu* (2011) 85 ALJR 746, p. 69 per French CJ, p. 109 per Gummow, Hayne, Crennan and Bell JJ.
- ⁶⁸ Ivi, p. 44.
- ⁶⁹ (2011) 85 ALJR 957.
- ⁷⁰ *Gypsy Jokers Motorcycle Club Incorporated v Commissioner for Police* (2008) 234 CLR 532, p. 103 per Kirby J, although in dissent.
- ⁷¹ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, p. 57.
- ⁷² For a further discussion of this in the *Kirk* context see *Ibidem*.
- ⁷³ Hon J.J. Spigelman, *The Centrality of Jurisdictional Error*, in «Public Law Review», vol. 21, 2010, p. 77, p. 80.
- ⁷⁴ *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, p. 96.
- ⁷⁵ G. Winterton, *Justice Kirby's Coda in Durham*, in «Public Law Review», vol. 13, 2002, p. 165, at p. 168.
- ⁷⁶ Meagher, *The Status of the Kable Principle in Australian Constitutional Law* cit., p. 186 quoting Dawson J at *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 83.
- ⁷⁷ Meagher, *The Status of the Kable Principle in Australian Constitutional Law* cit., p. 186.
- ⁷⁸ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 117 per McHugh J.
- ⁷⁹ Ivi, p. 141 per Gummow J.
- ⁸⁰ *McGinty v Western Australia* (1996) 186 CLR 140, p. 231 per McHugh J.
- ⁸¹ Ivi, p. 232.
- ⁸² *Forge v Australian Securities Investments Commission* (2006) 228 CLR 45, pp. 63-64 per Gummow, Hayne and Crennan JJ; *South Australia v Totani* (2010) 85 ALJR 19, p. 62 per French CJ.
- ⁸³ *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, p. 98.
- ⁸⁴ *South Australia v Totani* (2010) 85 ALJR 19, p. 47.
- ⁸⁵ Ivi, pp. 48-52 and pp. 59 ff.
- ⁸⁶ Ivi, p. 62.
- ⁸⁷ Ivi, p. 66.
- ⁸⁸ *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, p. 96, p. 98.
- ⁸⁹ R. Kahn and K.I. Kersch, *Conclusion – Supreme Court Decision Making and American Political Development*, in R. Kahn and K.I. Kersch (edited by), *The Supreme Court & American Political Development*, University Press of Kansas, 2006, pp. 443, 457.
- ⁹⁰ Ivi, p. 458.
- ⁹¹ *Ibidem*.
- ⁹² *Ibidem*.
- ⁹³ Spigelman, *The Centrality of Jurisdictional Error* cit., p. 80.
- ⁹⁴ *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 40 per McHugh J.
- ⁹⁵ Statements by the High Court in cases like *Totani* demonstrate that members of the bench are increasingly gravitating towards this conception: see *South Australia v Totani* (2010) 85 ALJR 19, p. 76, p. 82 per French CJ, pp. 146-147 per Gummow J.
- ⁹⁶ B. Friedman, *The Politics of Judicial Review*, in «Texas Law Review», vol. 84, n. 2, 2005, p. 257, at p. 308.
- ⁹⁷ S. Gageler, *Beyond the Text: A Vision of the Structure and Function of the Constitution*, in «Australian Bar Review», vol. 32, 2009, p. 138, at p. 139.
- ⁹⁸ *Ibidem*.
- ⁹⁹ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 54.
- ¹⁰⁰ Kahn and Kersch, *Conclusion – Supreme Court Decision Making and American Political Development* cit., p. 450.
- ¹⁰¹ See eg. J.H. Ely, *Democracy and Distrust – A Theory of Judicial Review*, Harvard University Press, 1980.

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Abstracts

Nicholas Aroney, *'Una società di società': Why Australia is a Federation / "Una società di società": perché l'Australia è una federazione*

Although the Australian federation came into being in 1901 under the authority of the British Imperial Parliament in London, the decision to federate, and the terms and conditions upon which it occurred, were all negotiated and agreed to by elected representatives of the several constituent states. The constituent states of the federation had secured independent powers of local self-government and constitutional self-determination in the 1850s, and when considering the possibility of forming a federation, they were not willing to give up those powers to a consolidated central government. In this respect, they looked to the examples of other historic federations, such as Switzerland and the United States, as models of government in which the constituent states agreed to form a federal level of government for certain 'national' purposes, while retaining a fundamental capacity to govern themselves independently in all other respects. The design of the Australian Constitution reflected this fundamental principle, particularly in the specifically limited competences conferred upon the federal institutions of government, the reservation of all other powers to the states, the representation of the states as equals within one of the houses of the federal parliament, and the requirement that any additional changes to the federal compact would have to be agreed to by a majority of people in a majority of states. Since the formation of the Australian federation, the High Court of Australia has not consistently interpreted the Constitution in a manner that gives effect to the intentions of its framers. Although the Constitution was designed to maintain a kind of balance between the federal and state levels of government, the general trend in Australia has been to towards increasing centralisation. There are several strategies that might be adopted to attempt to reverse this trend. One of the most radical would involve the state governments initiating a process whereby the state constitutions would be submitted to their respective peoples for ratification and approval by referendum. Such an initiative has the potential to reinvigorate the role and constitutional standing of the states within the federation. This is because, at present, only the federal constitution has been popularly ratified, and the democratic foundations of the federation

have been one of the underlying reasons why the High Court has given interpretive priority to the powers of the federation in preference to those of the states. While the practical implications of such a change cannot be predicted with absolute certainty, if the state constitutions were ratified by their respective peoples, it would give the Court reason to consider the states as locations of constitutional, democratic self-governance at least as fundamental to the federation as the government of the federation as a whole, just as the framers had originally intended, and to interpret the federal Constitution in that light.

Sebbene la federazione Australiana venne costituita nel 1901 sotto l'autorità del Parlamento Imperiale Britannico a Londra, la decisione di confederarsi e i termini e le condizioni in base alle quali avvenne furono tutti negoziati e concordati dai rappresentanti eletti dei numerosi Stati costituenti. Gli Stati costituenti della federazione si erano assicurati poteri indipendenti di autogoverno locale e di autodeterminazione costituzionale negli anni 50 del Milleottocento, e nel considerare la possibilità di formare una federazione, essi non desideravano rinunciare a questi poteri a favore di un governo consolidato centrale. A questo riguardo, essi guardavano agli esempi di altre federazioni storiche, come Svizzera e Stati Uniti, come modelli di governo sulla base dei quali gli Stati costituenti concordarono di formare un livello federale di governo per alcuni 'scopi' nazionali, conservando una capacità fondamentale di governare se stessi in modo indipendente per altri versi. L'assetto della costituzione australiana rifletteva questo principio fondamentale, particolarmente nelle specificamente limitate competenze conferite alle istituzioni federali del governo, la riserva di tutti gli altri poteri agli Stati, la rappresentazione degli Stati come uguali all'interno di una delle Camere del Parlamento Federale, e il requisito che ogni cambiamento addizionale alla normativa federale dovesse essere concordato da una maggioranza di persone in una maggioranza di Stati. Fin dalla formazione della Federazione australiana, l'High Court of Australia (Alta Corte d'Australia) non ha coerentemente interpretato la costituzione in una maniera che renda effettive le intenzioni dei suoi estensori. Sebbene la Costituzione fu disegnata per mantenere una sorta di equilibrio tra livello federale e statale di governo, la tendenza generale in Australia è andata verso una centralizzazione crescente. Ci sono diverse strategie che potrebbero essere adottate per tentare di invertire questa tendenza. Una delle più radicali comporterebbe che i governi degli Stati inizino un procedimento in cui le costituzioni degli Stati sarebbero sottoposte alla ratifica ed approvazione mediante referendum da parte dei rispettivi cittadini. Tale iniziativa ha il potenziale di rinvigorire il ruolo e la posizione costituzionale degli Stati all'interno della Federazione. Questo perché, al momento, solo la Costituzione federale è stata ratificata popolarmente, e i fondamenti democratici della Federazione sono stati una delle ragioni sottostanti il fatto che la High Court (Alta Corte) ha dato priorità interpretativa ai poteri della federazione con preferenza su quelli degli Stati. Mentre le implicazioni pratiche di un tale cambiamento non possono essere predette con assoluta certezza, se le costituzioni degli Stati fossero ratificate dai rispettivi cittadini, ciò darebbe alla Corte ragione di considerare gli Stati come sedi di autogoverno costituzionale e democratico almeno altrettanto fondamentali per la federazione quanto il governo della federazione nel suo insieme, proprio come gli estensori avevano originalmente inteso, e di interpretare la Costituzione federale in questo senso.

Keywords / Parole chiave: Federalism, Constitutionalism, Self-Government, Localism, Centralisation, Federal Balance, Judicial Review / Federalismo, Costituzionalismo, Autogoverno, Localismo, Centralizzazione, Equilibrio Federale, Revisione Giudiziale.

James Allan, *Why Australia Does Not Have, and Does Not Need, a National Bill of Rights / Perché l'Australia non ha, e non ha bisogno di avere, un Bill of Rights nazionale*

In this article the author explains why Australia does not have a national *Bill of Rights* while also arguing that is a good thing, that Australia does not need one. He also considers the recent failed attempt to enact a statutory *Bill of Rights* and how these non-constitutionalised models also make inroads into democratic decision-making. The author finishes by considering what Australia does have that falls broadly under this aegis, namely the statutory *Bill of Rights* of the one and only State that has one (Victoria) and the so-called 'implied rights' jurisprudence that gives the top judges a not-often-used power to invalidate legislation.

In questo articolo l'autore spiega perché l'Australia non ha un *Bill of Rights* (Carta dei diritti), argomentando anche che questa è una buona cosa in quanto l'Australia non ha bisogno di averne uno. Egli considera anche il recente tentativo fallito di promulgare un *Bill of Rights* (Carta dei diritti) legale e come questi modelli non costituzionalizzati facciano irruzione in processi decisionali democratici. L'autore conclude considerando quanto posseduto dall'Australia che possa ricadere ampiamente sotto questa egida, precisamente il *Bill of Rights* (Carta dei diritti) legale del solo e unico Stato (Victoria) che ne ha uno e la cosiddetta giurisprudenza degli "implied rights" (diritti implicati) che dà agli alti magistrati un potere, non usato spesso, di invalidare la legislazione.

Keywords / Parole chiave: Australian Constitution, Bill of Rights, Human Rights, Judicial Review / Costituzione Australiana, Bill of Rights (Carta dei diritti), Diritti Umani, Revisione Giudiziale.

Jürgen Bröhmer, *The External Affairs Power in Australia and in Germany: Different Solutions, Similar Outcome? / Il potere degli Affari esteri in Australia e in Germania: diverse soluzioni, analogo risultato?*

Australia and Germany are both constitutionally organized federal states. The Commonwealth Constitution and the German Basic Law approach the distribution of power between the centre and the constituent entities in external affairs matters from opposite directions. In the end, in both cases an institutional *modus vivendi* has been found in trying to balance the interests of the federation with those of the constituent entities by improving information and communication between the two levels and by involving and listening to the constituent entities. However, the position of the German *Länder* in external affairs is considerably stronger than that of their Australian counterparts. Whereas Article 23 of the Basic Law indicates the potentially strong position of the *Länder* in external affairs, it is also an indication of the degree to which European Union matters have evolved into a *sui generis* relationship and which can no longer be regarded as merely a subset of traditional external affairs even if they cannot be regarded as domestic affairs either.

Australia e Germania sono entrambi Stati federali organizzati costituzionalmente. La Costituzione del Commonwealth e la Costituzione (Grundnorm) tedesca affrontano la distribuzione del potere tra centro e le entità costituenti negli affari esteri da punti di vista opposti. Alla fine, in entrambi i casi un *modus vivendi* istituzionale è stato trovato nel cercare di equilibrare gli interessi della federazione con quelli delle entità costituenti migliorando informazione e comunicazione tra i due livelli e coinvolgendo e ascoltando le entità costituenti. Comunque, la posizione dei *Länder* tedeschi negli affari

esteri è considerevolmente più forte di quella delle loro controparti australiane. Mentre l'articolo 23 della Costituzione (Grundnorm) indica la posizione potenzialmente forte dei *Länder* negli affari esteri, è anche un indicatore del grado di evoluzione delle questioni dell'Unione Europea in una relazione *sui generis*, che non può più essere considerata come meramente un sottoinsieme di affari esteri tradizionali anche se essi non possono essere considerati neanche affari interni.

Keywords / Parole chiave: Australian Constitution, German Basic Law, Australian federalism, German federalism, Sovereignty, External Affairs, European Union, Treaty making and Implementation / Costituzione Australiana, Costituzione tedesca (Grundnorm), Federalismo Australiano, Federalismo Tedesco, Sovranità, Affari Esteri, Unione Europea, Elaborazione e applicazione dei Trattati.

Michelle Evans, *Engineers: The Case that Changed Australian Constitutional History / Engineers: il caso che cambiò la storia costituzionale australiana*

Australia's federal system of government is established by the Commonwealth Constitution which provides for a central Commonwealth government with limited powers and six state governments with plenary powers. When the Constitution was originally drafted, the framers sought, in the provisions and structure of the Constitution, to retain the powers of the states as much as possible. After Australia became a federation in 1901, the High Court of Australia, in its early decisions, sought, in the method of constitutional interpretation they utilised (originalism), to give effect to the framers' intention to protect the federal nature of the Constitution. However, in 1920 in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers*'), the High Court rejected this approach. Instead, the High Court advocated a method of constitutional interpretation (literalism) which favoured a broad interpretation of Commonwealth powers, and which compromised the federal balance thereafter. This paper provides an overview and critique of the decision in *Engineers*, explaining its significance for Australian federalism. This paper concludes with some observations about the role of precedent in Australian constitutional interpretation and seeks to offer some suggestions as to why a decision that was so ill-founded has proven to be so enduring.

Il sistema federale australiano di governo è stabilito dalla Costituzione del Commonwealth che prevede un governo centrale del Commonwealth con poteri limitati e sei governi di Stati con pieni poteri. Quando la Costituzione venne originariamente stesa, gli estensori cercarono, nelle norme e nella struttura della costituzione, di mantenere i poteri degli Stati, per quanto possibile. Dopo che l'Australia divenne una federazione nel 1901, la High Court of Australia (Alta Corte d'Australia), nelle sue prime decisioni, tentò, con il metodo di interpretazione costituzionale che utilizzarono (originalism), di dare effettività all'intenzione degli estensori di proteggere la natura federale della Costituzione. Comunque, nel 1920 nel processo *Amalgamated Society of Engineers* contro *Adelaide Steamship Co. Ltd* ('*Engineers*'), la High Court (Alta Corte) rigettò questo approccio. Invece, la High Court (Alta Corte) sostenne un metodo di interpretazione costituzionale (literalism) che favoriva un'interpretazione ampia dei poteri del Commonwealth, e che comprometteva l'equilibrio federale successivo. Questo paper fornisce una panoramica e una critica della decisione nel processo *Engineers*, spiegando il suo significato per il federalismo australiano. Questo paper conclude con alcune osservazioni sul ruolo del precedente nell'interpretazione australiana e tenta di offrire alcune indicazioni sul perché una decisione che fu così mal fondata ha dato prova di essere così duratura.

Abstracts

Keywords / Parole chiave: Australian Constitution, Engineers, Federalism, High Court Of Australia, Centralisation, Constitutional Interpretation, Precedent / Costituzione Australiana, Engineers, Federalismo, Alta Corte d'Australia, Centralizzazione, Interpretazione costituzionale, Precedente.

Lorraine Finlay, *The Power of the Purse: An Examination of Fiscal Federalism in Australia / Il potere della borsa: un esame del federalismo fiscale in Australia*

This paper will trace the growing financial dominance of the Commonwealth government over the past century and its implications for the federal balance in Australia. It will argue that such an economically dominant central government was never intended by the Founding Fathers, and indeed that it undermines many of the protections they sought to establish through the adoption of a federal structure in the *Constitution*. Finally, it will go on to briefly highlight a number of possible reforms that, if introduced, would go some way to restoring the fiscal position of the States relative to the Commonwealth government.

Questo paper seguirà le tracce della crescente dominazione finanziaria del governo del Commonwealth durante il secolo scorso e le sue implicazioni per l'equilibrio federale in Australia. Sosterrà che tale governo centrale economicamente dominante non fu mai nelle intenzioni dei Padri Fondatori, e che senz'altro erode molte delle tutele che essi cercarono di stabilire attraverso l'adozione di una struttura federale nella *Costituzione*. Infine evidenzierà brevemente un numero di possibili riforme che, se introdotte, potrebbero restaurare la posizione fiscale degli Stati in relazione al governo del Commonwealth.

Keywords / Parole chiave: Fiscal Federalism, Australian Constitutional History, Reform / Federalismo Fiscale, Storia Costituzionale Australiana, Riforma.

Eric Ghosh, *The Australian Constitution and Expressive Reform / La Costituzione Australiana e la qualità espressiva della riforma*

The Australian Constitution is relatively old and this has led to some tension between the values it expresses and contemporary values. The paper refers to some historic landmarks in the life of the Constitution and these form the basis for an exploration of the expressive quality of the Constitution, with particular attention given to expressive reform. This exploration draws more generally on political, legal, philosophical, and sociological literature. It sounds a note of caution in pursuing expressive constitutional reform. On the other hand, it concludes with discussion of how the symbolic charge of the Constitution could be increased. This would be achieved through reform of the constitutional amendment process aimed at furthering popular sovereignty.

La Costituzione Australiana è relativamente vecchia e questo ha portato a qualche tensione tra i valori che esprime e valori contemporanei. Il paper fa riferimento ad alcune pietre miliari storiche nella vita della Costituzione e queste formano la base per un'esplorazione della qualità espressiva della Costituzione, con un'attenzione particolare data alla riforma espressiva. Questa esplorazione

fa ricorso più generalmente alla letteratura politica, legale, filosofica e sociologica. Produce una nota di cautela nel perseguire la riforma costituzionale espressiva. D'altra parte, conclude col discutere come il cambiamento simbolico della Costituzione potrebbe essere aumentato. Questo potrebbe essere raggiunto attraverso una riforma della procedura di revisione costituzionale diretta a favorire la sovranità popolare.

Keywords / Parole chiave: Constitutionalism, Symbolism, Constitutional Amendment, Constitutional Referendum, Deliberative Democracy, Indigenous Recognition, National Identity / Costituzionalismo, Simbolismo, Revisione costituzionale, Referendum costituzionale, Democrazia deliberative, Riconoscimento degli Indigeni, Identità Nazionale.

Jeffrey Goldsworthy, *Interpreting the Australian Constitution: Express Provisions and Unexpressed General Principles / Interpretare la Costituzione Australiana: provvedimenti espressi e principi generali inespressi*

Disagreement within the High Court of Australia concerning the proper method for interpreting the Constitution initially concerned the legitimacy of enforcing general unexpressed principles that could arguably be inferred from express provisions. This was perceived at the time to involve a disagreement between British and American approaches to interpretation. This article describes that initial disagreement, how it was resolved in the landmark *Engineers'* case (1920), and how the disagreement re-emerged in later cases, particularly ones decided over the last twenty years.

Il disaccordo all'interno della *High Court of Australia* (Alta Corte d'Australia) concernente il metodo corretto per interpretare la Costituzione concerneva inizialmente la legittimità di attuare principi generali inespressi che potevano probabilmente essere dedotti dai provvedimenti espressi. Questo al tempo fu percepito come comportante un disaccordo tra gli approcci britannici e americani all'interpretazione. Questo articolo descrive quell'iniziale disaccordo, come venne risolto nel caso epocale *Engineers'* (1920), e come il disaccordo riemerse in casi successivi, particolarmente in quelli decisi negli ultimi venti anni.

Keywords / Parole chiave: Australian Constitution, Interpretation, Implications, Unwritten Principles / Costituzione Australiana, Interpretazione, Implicazioni, Principi non scritti.

Gabriël A. Moens, John Trone, *The Validity of Henry VIII Clauses in Australian Federal Legislation / La validità delle Clausole di Enrico VIII nella legislazione federale australiana*

The Australian High Court has stated that the federal Parliament may not abdicate its legislative powers. However, the Court's concept of abdication only prohibits an abdication or renunciation of the power of Parliament to repeal or amend a statute. This concept of abdication is so narrow that it has not proved to be a meaningful limitation in practice. This paper argues that the Court should modify its abdication doctrine so that a delegation of power to amend statute law by regulation would constitute an abdication of legislative power. Subordinate legislation must at least be subordinate to primary legislation.

L'*High Court* (Alta Corte) australiana ha deciso che il Parlamento federale può non abdicare i suoi poteri legislativi. Comunque, il concetto di abdicazione della Corte proibisce solamente una abdicazione o rinuncia del potere del Parlamento di respingere o emendare una legge. Questo concetto di abdicazione è così stretto che ha dato prova di non essere una limitazione significativa in pratica. Questo paper dibatte che la Corte dovrebbe modificare la sua dottrina sull'abdicazione in modo che una delega di potere a emendare la legge mediante regolamenti costituirebbe una abdicazione del potere legislativo. La legislazione subordinata deve almeno essere subordinata alla legislazione primaria.

Keywords / Parole chiave: Separation of Powers between Executive and Legislature, Abdication and Delegation of Legislative Power, Power to Amend Statute Law by Regulation / Separazione di Poteri tra Esecutivo e Legislativo, Abdicazione e Delega di Potere Legislativo, Potere di Emendare la Legge mediante Regolamento.

Sarah Murray, *Australian State Courts and Chapter III of the Commonwealth Constitution – Interpretation and Re-Interpretation and the Creation of Australian Constitutional “Orthodoxy”* / I Tribunali di Stato australiani e il Capitolo III della Costituzione del Commonwealth – Interpretazione e re-interpretazione e la creazione della “Ortodossia” costituzionale australiana

This article will provide a historical gaze over the High Court of Australia’s interpretation and re-interpretation of Chapter III of the Commonwealth Constitution in terms of its implications for State Courts. Beginning with the framing of the constitutional text, it will survey the Court’s approach to Chapter III leading up to the seismic decision in *Kable* and the Court’s ongoing provision of meaning to constitutional phrases such as “Court of a State” and “Supreme Court of any State”. With some comparative discussion, it will reflect on the constitutional process by which radical interpretations can become commonplace and accepted orthodoxy.

Questo articolo provvederà uno sguardo storico sull’interpretazione e reinterpretazione del capitolo III della Costituzione del Commonwealth da parte dell’High Court of Australia (Alta Corte D’Australia) relativamente alle sue implicazioni per le Corti statali. Iniziando con un quadro generale del testo costituzionale, analizzerà l’approccio della Corte al capitolo III che porta alla decisione devastante in *Kable* e il provvedimento in corso della Corte significativo per le frasi costituzionali come “Corte di uno Stato” e “Corte Suprema di uno Stato”. Sulla base di alcune discussioni comparative, rifletterà sul processo costituzionale attraverso il quale interpretazioni radicali possono diventare luoghi comuni e ortodossia accettata.

Keywords / Parole chiave: Constitutional orthodoxy, High Court of Australia, Commonwealth Constitution, *Kable* and Australian State Courts / Ortodossia costituzionale, Alta Corte d’Australia, Costituzione del Commonwealth, *Kable* e le Corti Statali Australiane.

In the next issues / Nei prossimi numeri

n. 25 – I semestre / 1st semester 2013

Special Issue

Dimensioni costituzionali ed esperienze coloniali

Contributi di/articles by: GIULIO ABBATE, GIANLUCA BASCHERINI, ANTONELLA BETTONI, BERNARD DURAND, SANDRO GUERRIERI, ANTONIO-FILIU FRANCO, MARCO FIORAVANTI, LUIGI NUZZO, MARÍA NIEVES SALDAÑA DÍAZ, JULIA SOLLA SASTRE, GIORGIO STAMBOULIS, ELIO TAVILLA, GIAN PAOLO TRIFONE.

n. 26 – II semestre / 2nd semester 2013

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R.D. Edwards, *The Best of Bagehot*, London, Hamish Hamilton, 1993, p. 150.

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G. Bonacina, *Storia e indirizzi del conservatorismo politico secondo la dottrina dei partiti di Stahl*, in «Rivista storica italiana», CXV, n. 2, 2003.

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S. Vassallo, *Brown e le elezioni. Il dietrofront ci insegna qualcosa*, in «Il Corriere della Sera», 9 ottobre 2007, p. 42.

G. Doria, *House of Lords: un nuovo passo sulla via della riforma incompiuta*, in «www.federalismi.it», n. 4, 2007, <<http://www.federalismi.it>>, settembre 2010.

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Pegoraro, Rinella, *Le fonti del diritto* cit., p. 200.

King, *The British Prime Minister* cit., p. 195.

Benjamin, *Über den Begriff* cit. tr., pp. 15-20, 23.

Bonacina, *Storia e indirizzi del conservatorismo politico* cit., p. 19.

Ferrara, Rosati, *Repubblicanesimo* cit., pp. 11 and following pages.

Doria, *House of Lords* cit.

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F. Jahn, *Deutsches Volksthum*, Lübeck, Niemann & Co, 1810.

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R.D. Edwards, *The Best of Bagehot*, London, Hamish Hamilton, 1993, p. 150.

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G. Miglio, *Mosca e la scienza politica*, in E.A. Albertoni (a cura di), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, Milano, Giuffrè, 1987, pp. 15-17.

O. Hood Phillips, *Conventions in the British Constitution*, in AA.VV., *Scritti in onore di Gaspare Ambrosini*, Milano, Giuffrè, vol. III, pp. 1599 s.

– se si tratta di un **contributo che compare in una pubblicazione periodica**: nome dell'autore e titolo dell'articolo (riportati come in tutti gli altri casi); testata del periodico tra virgolette caporali preceduta da 'in'; (ove presenti) indicazione dell'annata (in numeri romani) e numero del fascicolo preceduto da 'n.' (e non da n°, N., num. ecc.); anno di pubblicazione; numero pagina/e. Nel caso di citazione da un quotidiano, dopo il titolo della testata si metta la data per esteso. Nel caso si faccia riferimento ad articoli pubblicati in riviste on line, si dovrà fornire l'indirizzo esatto del testo (o, in alternativa, della pagina principale del sito che lo rende disponibile) e la data di consultazione. Esempi:

G. Bonacina, *Storia e indirizzi del conservatorismo politico secondo la dottrina dei partiti di Stahl*, in «Rivista storica italiana», CXV, n. 2, 2003.

A. Ferrara, M. Rosati, *Repubblicanesimo e liberalismo a confronto. Introduzione*, in «Filosofia e Questioni Pubbliche», n. 1, 2000, pp. 7 ss.

S. Vassallo, *Brown e le elezioni. Il dietrofront ci insegna qualcosa*, in «Il Corriere della Sera», 9 ottobre 2007, p. 42.

G. Doria, *House of Lords: un nuovo passo sulla via della riforma incompiuta*, in «www.federalismi.it», n. 4, 2007, <<http://www.federalismi.it>>, settembre 2010.

I dati bibliografici dovranno essere completi solo per il primo rimando; per i successivi si procederà indicando solo il cognome dell'autore/curatore; il titolo (o una parte) in corsivo e seguito dall'abbreviazione 'cit.' o 'tr. cit.' (nel caso di opere tradotte); l'indicativo delle pagine. Di seguito gli esempi per le diverse tipologie di:

Jahn, *Deutsches Volksthum* cit., pp. 45, 36.

Pegoraro, Rinella, *Le fonti del diritto* cit., p. 200.

King, *The British Prime Minister* cit., p. 195.

Benjamin, *Über den Begriff* tr. cit., pp. 15-20, 23.

Bonacina, *Storia e indirizzi del conservatorismo politico* cit., p. 19.

Ferrara, Rosati, *Repubblicanesimo* cit., pp. 11 ss.

Doria, *House of Lords* cit.

Nel caso si rimandi alla stessa opera e alla stessa pagina (o pagine) citate nella nota precedente si può usare 'Ibidem' (in corsivo), senza ripetere nessuno degli altri dati; se invece si rimanda alla stessa opera citata nella nota precedente, ma a un diverso numero di pagina, si usi 'Ivi', seguito dal numero di pagina.

ULTERIORI INDICAZIONI PER LA REDAZIONE DEL TESTO

RIMANDI INTERNI AL VOLUME. Non debbono mai riferirsi a numeri di pagina; si può invece rimandare a sezioni di testo, interi contributi e paragrafi o immagini (opportunamente numerati).

PAGINAZIONE. Nei riferimenti bibliografici, il richiamo al numero o ai numeri di pagina deve essere sempre preceduto (rispettivamente) da p. o pp. e riportato per intero; quindi, ad es., pp. 125-129 e non pp. 125-9. Qualora non si tratti di pagine consecutive, i numeri vanno separati dalle virgole; per es. pp. 125, 128, 315. Per indicare anche la pagina seguente o le pagine seguenti si utilizzi rispettivamente s. o ss. (quindi senza 'e' precedente) e non sgg., seg. o formule analoghe.

DATE. Riportando le date, l'autore può adottare il criterio che ritiene più adeguato, purché rispetti rigorosamente l'uniformità interna all'articolo. Nel caso vengano utilizzate forme abbreviate, il segno per l'elisione è l'apostrofo e non la virgoletta alta di apertura (per es. '48 e non '48).

SIGLE E ACRONIMI. Le sigle devono sempre comparire senza punti tra le lettere e, la prima volta in cui sono citate, vanno fatte seguire dalla dicitura per esteso e dall'eventuale traduzione tra parentesi. Non occorre l'esplicitazione delle sigle di uso comune (come USA, NATO, ONU, UE, ecc.).

PUNTI DI SOSPENSIONE O ELISIONE. Sono sempre 3, quindi non si rendono digitando tre volte il punto sulla tastiera ma inserendo l'apposito simbolo. Quando indicano sospensione – come ogni segno di punteggiatura – vanno staccati dalla parola che segue e attaccati alla parola che li precede (ad esempio ... *non mi ricordo più...*). Non richiedono il punto finale. Quando indicano elisione, quindi un taglio o una lacuna nel testo, il simbolo viene incluso tra parentesi quadre, in questo modo [...].

TRATTINI. Il trattino medio viene usato, seguito e preceduto da spazio, per aprire e chiudere gli incisi. Quando il trattino di chiusura dell'inciso coincide con la chiusura della frase, si omette e si inserisce solo il punto fermo. Ad es. ... *testo – inciso che chiude anche la frase.*

Il trattino breve si usa solo per i termini composti formati da parole intere (ad es. centro-sinistra) e per unire due quantità numeriche (ad es. pp. 125-148); sempre senza spazi prima e dopo.

VIRGOLETTE. Le virgolette basse « » (caporali) si usano per indicare il discorso diretto, le citazioni brevi e, nei riferimenti bibliografici, per i titoli delle pubblicazioni periodiche. Le virgolette alte " ", invece, per le parole di uso comune a cui si vuole dare particolare enfasi (o assunte prescindendo dal loro significato abituale). Inoltre, nelle citazioni di titoli di quotidiani, periodici, riviste oppure di capitoli e sezioni di paragrafi di un libro (ad es. ... come indicato nel paragrafo "La Germania assassinata" della *Storia dell'età moderna...*). Infine, quando è necessario fare uso delle virgolette all'interno di un discorso già tra caporali. La gerarchia è la seguente: «... "... '...' ..." ...». I segni di punteggiatura (salvo il punto esclamativo o interrogativo quando fanno parte della citazione) vanno sempre posposti alla chiusura delle virgolette.

RIMANDI AL WEB. Quando si fa riferimento a contenuti on line, bisogna sempre indicare in maniera completa l'indirizzo (compreso il protocollo http:// o ftp:// ecc.; possibilmente senza spezzarlo) e racchiuderlo tra i segni minore e maggiore; va indicata sempre anche la data di consultazione o di verifica (dell'indirizzo). Altro dato indispensabile è il titolo (o nome) del sito/pagina o una breve descrizione dei contenuti che si troveranno all'indirizzo riportato. Quindi, ad esempio, un riferimento corretto può essere così formulato: Sezione novità delle Edizioni Università di Macerata, <http://eum.unimc.it/novita>, giugno 2010.

CODICE ETICO

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