# FEDERAL CONSTITUTIONAL GUARANTEES OF THE STATES: SECTION 106 AND APPEALS TO THE PRIVY COUNCIL FROM STATE SUPREME COURTS

BY CHRISTOPHER D. GILBERT*

*The abolition of all appeals from the High Court to the Privy Council, coupled with the High Court's recent statement that it no longer regards itself as bound by Privy Council decisions, highlights the fact that appeals still lie, in many matters of State jurisdiction, from State Supreme Courts direct to the Privy Council. In this article, Mr Gilbert is primarily concerned to examine the extent to which section 106 of the Commonwealth Constitution may provide protection for these "direct" appeals. To this end, Mr Gilbert examines what case-law exists on section 106, and attempts to place the section in perspective in relation to the rest of the Constitution. The difficult (and largely unexplored) relationship between section 106 and section 51 is considered, to discover the possible reaches of Commonwealth legislative power with respect to the subject-matter protected by section 106. The position of "direct" appeals within the States' constitutional structures is looked at, in order to determine the possible ambit of whatever protection is offered by section 106, and finally, Mr Gilbert analyses the recent comments by Mr Justice Murphy that the abolition of Privy Council appeals from the High Court has meant the consequential demise of "direct" appeals from State courts.*

## I. INTRODUCTION

The combination of the respective effects of the Privy Council (Limitation of Appeals) Act 1968 (Cth) and the Privy Council (Appeals from the High Court) Act 1975 (Cth) has brought about the abolition of all appeals from the High Court to the Privy Council, irrespective of whether the appeal involves matters of Federal law or purely State law. The theoretical possibility of appeals remaining from the High Court to the Privy Council in *inter se* constitutional matters, pursuant to a High Court certificate granted under section 74 of the Commonwealth Constitution, may be ignored, for all practical purposes.[1] However, the Commonwealth Acts mentioned above have left untouched the right of appeal direct from a State Supreme Court to the Privy Council in matters where questions of purely State law are involved. The regulation of these appeals continues by way of a mixture of paramount Imperial

* B.A., LL.M. (Qld), Barrister-at-Law; Lecturer in Law, University of Queensland.

[1] St. John, "The High Court and the Privy Council; The New Epoch" (1976) 50 A.L.J. 389.

statutes, Imperial Orders in Council, and in some cases, enactments of local State legislatures.

Accordingly, the way is now open for the real possibility of the High Court and the Privy Council giving conflicting decisions on points of State law, or on points of general common law. As each Court is at the summit of its own particular hierarchy, neither subordinate to the other, the strange picture emerges of a State court being faced with conflicting High Court and Privy Council precedents. There has been no shortage of commentators to underline the embarrassment and confusion which could arise in the minds of lawyers, clients, and judges, if such a situation is allowed to continue over a long period.[2]

Consequently, the question has arisen of how these appeals from the State Supreme Courts direct to the Privy Council might be abolished. (For purposes of brevity, these particular appeals will hereinafter be referred to as "direct appeals".) There is no doubt that the United Kingdom Parliament could legislate to abolish direct appeals, and equally no doubt that the State Parliaments could not. The suggestion has been made that the Australian Federal Parliament, relying upon one or another of the *placita* of section 51 of the Federal Constitution, could validly legislate so as to abolish direct appeals. To date, the most-often suggested heads of power which the Commonwealth might use to effect this abolition are section 51(xxxviii),[3] and section 51(xxix).[4] Indeed, in 1975, the Whitlam Federal Government did attempt Commonwealth legislative abolition of direct appeals, in the shape of the Privy Council Appeals Abolition Bill, which however foundered upon the rock of the Senate's rejection. At least one commentator was apparently of opinion that, even if the Bill had been passed, it would have been invalid as being in contravention of, inter alia, section 106 of the Federal Constitution,[5] while Sawer was equivocal as to whether Commonwealth legislative action could destroy direct appeals.[6]

It is therefore the purpose of this article to examine section 106, and to consider to what extent, if at all, the section protects aspects of State constitutional structure, whether direct appeals comprise a portion of that structure, and whether, as a consequence, direct appeals are protected from Commonwealth legislative attack by the section.

---

[2] *Ibid.*; all justices of the High Court in *Viro* v. *R.* (1978) 18 A.L.R. 257; Murphy J. in *Commonwealth* v. *Queensland* (the *Queen of Queensland Case*) (1976) 50 A.L.J.R. 189, 203; and Blackshield, "Judges and the Court System" in Evans (ed.), *Labor and the Constitution 1972-1975* (1977) 108-109.

[3] Nettheim, "The Power to Abolish Appeals to the Privy Council from Australian Courts" (1965) 39 A.L.J. 39, 44-48.

[4] Bickovskii, "No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution" (1977) 8 F.L. Rev. 460, 466; Sawer, "The British Connection" (1973) 47 A.L.J. 113, 115 (although Sawer seems to change his mind on this issue: see *id.* 116).

[5] St. John, *op. cit.* 397-398, n. 40.

[6] *Op. cit.*

The full text of section 106 is as follows:

> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

It is submitted that, in any analysis of section 106, two issues stand out as being of paramount importance. First, how does one define the phrase "Constitution of (a) State", and secondly, what is the effect of the guarantee in section 106 being expressly "subject to this (that is, the Federal) Constitution"?

## II. "THE CONSTITUTION OF (A) STATE"

It is suggested that the phrase "Constitution of a State" is susceptible to at least two different modes of definition, and that, depending on which mode is adopted, the area of protection afforded by section 106 to the States' constitutional structures is correspondingly broad or narrow. What, then, does one mean when one uses the word "Constitution"?

One may adopt the English conception of a "Constitution": a conglomeration of formal Acts, unwritten conventions, customary rules, and common law principles, which, *in toto*, define and regulate the legislative, executive, and judicial elements which constitute the English national polity. On this approach, the laws, statutory and unwritten, State and Imperial, which establish the Privy Council as part of State judicial machinery, are part of the "Constitution of a State", can only be altered by the State's constitutional processes (which, in this case, will mean U.K. action), and are beyond the reach of Federal legislative power by virtue of section 106.

On the other hand, one may define "Constitution" in the more rigid U.S.—Australian sense: a formal, precise document which delimits with care the constituent elements of a particular national (or regional) polity. This, indeed, is probably the most common understanding of the term "Constitution" in Australia: each of the six States has a formal "Constitution Act", unlike the British model. Thus, "Constitution of a State", in section 106, may mean merely the individual *Constitution Acts* of the various States, so that anything *not included* in the various State Constitution Acts is not covered by the prohibition of the section. Therefore, as direct appeals are not generally provided for in State Constitution Acts,[7] the link might not be saved by section 106 from

[7] *E.g.*, in the Constitution Act 1867 (Qld), the Supreme Court, let alone the Privy Council, is hardly mentioned: ss. 15, 16, 17 and 38 deal merely with the tenure, salaries, and pensions payable to Supreme Court judges, while s. 33 merely confirms and continues the authority of colonial courts already established prior to 1867. The Privy Council is never mentioned.

possible federal action. Which interpretation of "Constitution of a State" in section 106 is the correct one? Sawer seems to take a narrow view of "State Constitution",[8] although his recent writings may indicate some re-thinking on the point.[9] By contrast, Lumb and Ryan appear to opt for a much wider definition of what is a State Constitution, in their discussion of section 106.[10]

So far as judicial statements on this matter are concerned, they are not conclusive on the point. Dicta most favourable to a broad interpretation of "State Constitution" are to be found in two High Court cases, *McCawley* v. *R.*,[11] and *Commonwealth* v. *Limerick Steamship Co. Ltd.*[12] In the former case, Isaacs and Rich JJ. clearly stated:

> The Supreme Court Acts of Queensland, though not contained in the document labelled "Constitution", are in a legal sense as much part of the Constitution of the State as the Acts relating to the State Parliament.[13]

Six years after *McCawley*, the same two justices, in 1924, in the *Limerick Case*,[14] reiterated these comments, in relation to the Constitution of New South Wales, being of opinion that the Colonial Laws Validity Act 1865 and the Australian Courts Act 1828 (both Imperial Acts) were both part of the N.S.W. Constitution.[15]

However, dicta restricting the States' Constitutions merely to the confines of their respective Constitution Acts are not lacking: see Barton J. in *McCawley* v. *R.*;[16] Powers J. in the same case also seems to subscribe to the Bartonian view.[17] Even more germane to the present question of whether direct appeals are part of the Constitution of a State is a dictum of Higgins J. in 1926, to the effect that the power of a

---

[8] Sawer, "Australian Constitutional Law in Relation to International Relations", in O'Connell (ed.), *International Law in Australia* (1966) 36.

[9] Sawer, "The British Connection" *op. cit.* 113-114.

[10] Lumb and Ryan, *Constitution of the Commonwealth of Australia Annotated* (2nd ed. 1977) 344-346. A minor point to note: it has been consistent Queensland practice to indicate when domestic State statutes are to be read as "constitutional" statutes; *e.g.* the Constitution (Legislative Assembly) Act 1933. This practice has clearly not been followed with the Appeals and Special Reference Act 1973 (Qld), s. 2 of which survived the High Court decision in *Commonwealth* v. *Queensland* (the *Queen of Queensland Case*) (1976) 50 A.L.J.R. 189, and which re-enacts locally Imperial provisions regulating direct appeals from Queensland.

[11] (1918) 26 C.L.R. 9.

[12] (1924) 35 C.L.R. 69.

[13] (1918) 26 C.L.R. 9, 51-52.

[14] (1924) 35 C.L.R. 69, 101-102.

[15] *Ibid.* While Their Honours' views on State Constitutions are highly attractive, their interpretation of the Privy Council decision in *McCawley* v. *R.* [1920] A.C. 691, is rather misleading: the Privy Council did not attempt a definition of "State Constitution"; it was concerned only with whether a State Constitution Act was "controlled" or "uncontrolled". A similar criticism can be made of Their Honours' references, in the *Limerick Case, supra* n. 14, to the High Court decision in *McCawley's Case, supra* n. 11.

[16] (1918) 26 C.L.R. 9, 28, 31.

[17] *Id.* 82-83.

State Supreme Court to grant leave to appeal to the Privy Council from its own decision is *not* a "constitutional power of the State", as the power is granted not by the State Constitution, but by an Imperial Act.[18] It is arguable that this statement of Higgins J. is no longer applicable to, for example, the present Queensland situation, as Privy Council appeals from the Queensland Supreme Court no longer rest purely on an Imperial statutory basis, but now also derive their statutory validity from local Queensland legislation—section 2 of the Appeals & Special Reference Act 1973. On the other hand, it does seem probable that when Higgins J. spoke of the necessity of State powers stemming from a "State Constitution" before those powers can be classed as "constitutional powers", he intended "State Constitution" to be read as "Constitution Act of a State"—in which case, the powers relating to direct appeals, contained in the Queensland Act, would still not merit characterisation as "State constitutional powers".

To the present writer, the "narrow" interpretation of "State Constitution" implicit in the dicta of Barton, Powers, and Higgins JJ.[19] is unduly restrictive and somewhat unreal—at least where the States are concerned. In the case of the Commonwealth of Australia as a juristic entity, it indeed is the creature *solely of*, and strictly limited by, a "Constitution" in the narrow Barton-Powers-Higgins sense of the word. Not so with the States: as juristic entities, they more closely approximate to the United Kingdom style of Parliament and Constitution. Most of the States created their own present-day Constitution Acts, not vice versa as it is with the Commonwealth. The State Parliaments, except insofar as they are limited by Imperial paramountcy and the Federal Constitution, are legislatures of unlimited, unenumerated powers, unlike the Commonwealth Parliament. The State Constitution Acts, in general, do not possess the central, limiting qualities of a fundamental law *qua* the States as legal and political entities: that much was decided by the Privy Council in *McCawley* v. *R.*[20] Again, this is in contrast with the position of the Commonwealth in relation to its Constitution. In general, the Federal Constitution is anterior to the Commonwealth; but the States are anterior to their Constitution Acts: their "constitutions" are to be gathered, as Isaacs and Rich JJ. have recognised (correctly, it is submitted), from a mixture of Acts (State and Imperial), common law rules, and conventions—as is the case with the U.K. Constitution. On this analysis then, direct appeals from the State Supreme Courts should be classed as part of the State Constitutions for the purposes of section 106.

---

[18] See *Commonwealth* v. *Kreglinger and Fernau* (1926) 37 C.L.R. 393, 426.

[19] It should be noted that these various *dicta* by Isaacs, Rich, Barton, Powers and Higgins JJ., on what is meant by the expression "State Constitution", were not made in the context of any particular discussion of s. 106—the comments are, however, no less useful as a guide to possible High Court thinking on the question.

[20] [1920] A.C. 691.

As mentioned earlier, the interpretations of "State Constitution" discussed so far are, without exception, drawn from cases in which section 106 was not in issue. The section has been directly raised in few cases in the High Court, and in only one of those—*Stuart-Robertson* v. *Lloyd*[21]—was the question of the definition of "State Constitution" considered. Even then, it was considered by only one High Court justice (Evatt J.), but his comments on the point, although obiter and inconclusive, are worthy of note because they are perhaps the only recorded remarks by any High Court justice on the issue of the meaning of "State Constitution" in the context of section 106. Mr Justice Evatt's remarks are also noteworthy because they raise a third mode of approach to the definition of "State Constitution" which falls somewhat midway between the approaches already considered.

The facts and decision in *Stuart-Robertson* v. *Lloyd* (hereafter *Lloyd's Case*) will be analysed in more detail on another aspect of the section 106 conundrum in Part III of this article, and it will suffice for present purposes to say that the case concerned the purported application of a federal law otherwise valid under a section 51 *placitum* to burden a right provided for in a section of the Constitution Act of New South Wales. The High Court unanimously held that the federal law could validly so apply, but Evatt J. was the sole member of the bench to consider an argument that section 106 prevented the Commonwealth law from so applying. He held that section 106 did not so operate (for reasons which are germane to Part III of this article, and which will therefore be discussed there), but during his judgment asked a rhetorical question (to which unfortunately he gave no answer) which indicated a third view of the meaning of "State Constitution":

> does sec. 106 shield against the operation of Commonwealth legislation under sec. 51, every provision found in the Constitution Act of a State, or only *those provisions or terms, wherever found, which really define and describe the framework and scheme of its government?*[22]

It can readily be seen that Mr Justice Evatt's first-suggested definition accords with the so-called "narrow" interpretation, discussed earlier in this article. His second-suggested definition is at once broader and narrower. It is broader because it expands the concept of the "Constitution of a State" beyond that State's Constitution Act to include Acts and laws, not strictly part of the Constitution Act, which nevertheless define additional aspects of the State's constitutional make-up. Acts relating to the State's Supreme Court—its structure and jurisdiction—might be a good example. The definition is narrower because it confines the notion of the "Constitution of a State" only to those laws (whether part of a Constitution Act or not) which relate to elements of govern-

[21] (1932) 47 C.L.R. 482.
[22] *Id.* 491 (italics added).

mental structure which might be described as basic or fundamental. This then opens up the prospect of argument over whether any given State law, whether part of its Constitution Act or not, relates to a fundamental aspect of the State's constitutional structure. If one applies Mr Justice Evatt's second definition to the topic presently under consideration—direct appeals—it will be seen that, while it does not matter that the States' Constitution Acts do not, in general, provide for direct appeals, it matters greatly whether or not direct appeals can be characterised as fundamental or basic to the States' governmental structures. If they are regarded as basic to those structures, they will be part of the "State Constitution", for section 106 purposes, and will accordingly be protected. If they are not regarded as basic, they will be beyond the protection of section 106.

One would have thought that if the structure and jurisdiction of a State's judicial machinery is basic to an understanding of that State's governmental make-up—and it is submitted that the contrary is difficult if not impossible to maintain—then the structure of that State's judicial appellate system is equally important. Insofar as the Privy Council is the ultimate court of appeal (at least in non-federal matters) for the State Supreme Courts, an understanding of that fact is necessary for a proper appreciation of the State's judicial set-up, and can accordingly be described as "basic" to that State's governmental structure. Thus, if one adopts Mr Justice Evatt's second definition of "State Constitution", direct appeals should be included within its purview.

However, the present writer is of the opinion that Mr Justice Evatt's second-suggested definition, in *Lloyd's Case*, may be productive of more problems than solutions, for the reason mentioned earlier; that different minds will differ over whether any given State law really defines a central aspect of a State's constitutional and governmental structure.

If one adopts the above-suggested broad interpretation of "Constitution of a State" in section 106, so that State judicial structures are included within the technical meaning of the phrase, the position of the Privy Council itself, as being included within the ambit of the "Constitution of a State", becomes somewhat more certain. This is because of the interpretation which has normally been placed in this century—usually by the Privy Council itself—on the Privy Council's role within the judicial hierarchy of a State or Dominion: this interpretation postulates that the Privy Council is the supreme and ultimate judicial tribunal *within* a particular jurisdiction; it is *not* an English or Empire court which hears appeals from jurisdictions independent from its own structure, such as Queensland or New Zealand; it is instead the ultimate court *within* the Queensland judicial system, or *within* the New Zealand judicial system. See the Privy Council decisions in ***British Coal Corpor-***

*ation* v. *R.*,[23] and *Ibralebbe* v. *R.*,[24] for clear illustrations of this conception by the Privy Council of its own role and function in the judicial structures of those jurisdictions which still recognise the Privy Council. This "intra-mural" definition of the Privy Council's role in the several jurisdictions which still utilise it, has received some measure of support in recent High Court dicta. Although the High Court decision in *Commonwealth* v. *Queensland*[25] added nothing to our understanding of section 106—the section was not in issue—nevertheless, the following comment by Gibbs J. (in a judgment concurred in by Barwick C.J., Stephen and Mason JJ.) could be construed as lending some support to the "intra-mural" view that the Privy Council has of itself. Speaking in relation to a Queensland statute which purported to confer an advisory jurisdiction upon the Privy Council, His Honour said:

> the judicial body to which such questions or matters may be referred is *the highest in the hierarchy of Australian courts*, the supreme tribunal by whose decisions . . . all Australian courts are bound.[26]

On the other hand, there can be no doubt that Murphy J., in the same case, regarded the Privy Council as being virtually a foreign tribunal, extraneous to the domestic Australian judicial systems, State and federal.[27]

Thus, so far as direct appeals and section 106 are concerned, *if* one adopts the "intra-mural" definition of the Privy Council's function in the Australian judicial system, and *if* one adopts the broad definition of "Constitution of a State" in section 106, there are at least prima facie arguments in favour of the proposition that direct appeals are shielded from possible federal legislative abolition because they can be characterised as being part of the relevant constitutional structures of the States, from the point of view of section 106.

But it cannot be predicated with any degree of certainty that the High Court will indeed adopt (if the matter is ever argued before it) any of the above-suggested expanded definitions of "Constitution of a

---

[23] [1935] A.C. 500.

[24] [1964] A.C. 900.

[25] (The *Queen of Queensland Case*) (1976) 50 A.L.J.R. 189.

[26] *Id.* 193 (italics added).

[27] *Id.* 202, 203. Murphy J. was however apparently prepared in *Viro* v. *R.*, *supra* n. 2, to countenance something very much like the "intra-mural" view of the Privy Council's role in the States' judicial systems, because, in characterising direct appeals as an aspect of State judicial power, direct appeals could then be contrasted with appeals to the High Court, the latter being an aspect of Federal judicial power. From this comparing and contrasting of the two types of appeals, one State, one Federal, Murphy J. suggested that the resulting question could be classified as an "inter se" matter, so that such matter (*i.e.* the continuance of two "ultimate" appellate tribunals—Privy Council and High Court) could be resolved only by the High Court under the terms of s. 74 of the Commonwealth Constitution: see (1978) 18 A.L.R. 257, 317.

State". It has already been shown that, first, what dicta do exist on the point are far from unanimous, and secondly, such dicta were generally not uttered in a section 106 context. The point must be regarded as still an open one. Another point to be kept in mind, when attempting to forecast the High Court's attitude towards the meaning of "Constitution of a State", in section 106, is that Court's traditional reluctance to give expansive and generous interpretations to those sections of the Commonwealth Constitution which are framed as *prohibitions* on federal legislative power, rather than as positive *grants* of such power. That section 106 is, in effect, a clear restriction upon the power of the Commonwealth to interfere with State constitutional structures, should be beyond doubt. It is a prohibition from exercising Commonwealth power in particular circumstances. In the case of other Federal Constitutional prohibitions on Commonwealth legislative power, and in particular, section 92, the High Court has made it very clear that these types of sections are not to be interpreted in the same spirit of generosity and amplitude that has attended the exposition of the positive grants of power in section 51, since the decision in the *Engineers' Case*.[28] The narrow interpretation of "trade and commerce" in section 92 (a prohibition) as against the broad interpretation of "trade and commerce" in section 51(i) (a grant of power) is an excellent example of the High Court's difference of approach to different provisions of the Federal Constitution, depending on whether they are prohibitions or grants of power.[29] If the technical objection be taken that section 106 is couched more as a guarantee than as a prohibition (although the effect of both is the same, namely a denial of power over a particular area), the High Court's record of placing narrow and technical restrictions of the most emasculating kind on so-called "guarantees", for example section 80,[30] section 116,[31] and section 117,[32] is hardly encouraging to those who opt for a broad approach to the question of what is a "State Constitution" for the purposes of section 106.

The truth is, as Sawer has commented,[33] that the High Court's conscious decision to define at least some of the Federal Constitution's "prohibitory" sections in a restrictive and technical fashion, has been motivated less by considerations of the semantic structures of consti-

[28] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.

[29] See *Wragg* v. *New South Wales* (1953) 88 C.L.R. 353, 386 *per* Dixon C.J.; and *Grannall* v. *Marrickville Margarine Pty Ltd* (1955) 93 C.L.R. 55, 77, 78, 79.

[30] See *e.g., R.* v. *Archdall* (1928) 41 C.L.R. 128, 139, 140; *Spratt* v. *Hermes* (1966) 114 C.L.R. 226, 244.

[31] *Krygier* v. *Williams* (1912) 15 C.L.R. 366; *Adelaide Company of Jehovah's Witnesses* v. *Commonwealth* (1943) 67 C.L.R. 116.

[32] *E.g., Davies and Jones* v. *Western Australia* (1904) 2 C.L.R. 29; *Henry* v. *Boehm* (1973) 128 C.L.R. 482.

[33] Sawer (ed.), *Cases on the Constitution of the Commonwealth of Australia* (3rd ed. 1964) 344.

tutional grants of power as opposed to constitutional prohibitions and/or guarantees, than by a pure policy choice. It might be put as follows: in the interests of greater governmental effectiveness, the Commonwealth's grants of power under the Federal Constitution should have as ample an effect as the Commonwealth's prohibitions from exercising power should have as narrow an effect. If the High Court, in any future case in which section 106 is at issue, wishes to minimise that section's impact upon Commonwealth power, one easy ploy, as suggested previously, is to restrict the section's protection to merely the Constitution *Acts* of each State. The precedents are there, if need be.

Another possibly effective limitation upon the protection offered by section 106, and indeed the second of the major problems which is raised by the section, is the fact that section 106 is expressed to be "subject to this [that is, the Federal] Constitution". It is to the possible meaning and effect of this proviso that attention must now be turned.

## III. "SUBJECT TO THIS CONSTITUTION"

The impact of those deceptively-simple words of limitation, namely "subject to this Constitution", upon the ambit of the guarantee apparently offered by section 106, is arguably great. As has been noted earlier,[34] it has been suggested that one or more of the heads of power in section 51 would provide the Commonwealth with sufficient legislative authority to abolish direct appeals. In this context, the words "subject to this Constitution" in section 106 may simply but devastatingly mean that the section's guarantee does not come into play until the Commonwealth's legislative powers, as granted to it by the Federal Constitution, have been given their full and ample effect. The analogy with the doctrine of the *Engineers' Case*[35] is close.

However, the realisation that "subject to this Constitution" in section 106 *may* expose the section's guarantee to the full blast of an *Engineers*-strengthened section 51, immediately raises a difficult point of construction which needs to be explored before the implications of the preceding paragraph are more fully dealt with—namely, that section 51 is *itself* expressed to be "subject to this Constitution". The difficulty is this: if *both* section 106 and section 51 are (in effect) expressed to be subject to each other, *which section has paramount force*? In the context under discussion (the abolition by federal legislation of direct appeals), the point acquires substance: if section 106 is subject to the reach of the various legislative powers in section 51, then any protection afforded direct appeals by section 106 may wither in the face of an exercise of the legislative power of for example,

---

[34] *Supra* nn. 3, 4 and accompanying text.

[35] *Supra* n. 28. Isaacs J. makes this point concerning s. 106 and State *legislative* powers in *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (1915) 20 C.L.R. 148, 172.

section 51(xxix). Conversely, if section 51 is subject to the limitation encompassed in section 106, then any exercise of section 51(xxix)—or any other relevant head of power—is subject to the possibility that relations between the State Supreme Courts and Privy Council are part of the States' Constitutions, and as such, are withdrawn from the ambit of federal legislative power by the prohibition contained in section 106. Should then section 106 be interpreted as being subject to section 51, even though section 51 is itself subject to the rest of the Federal Constitution, or should the reverse be the case?

The first thing to notice is that the phraseology of section 106 is different from that of the classic, better-known prohibitions in the Federal Constitution. If one examines sections 92, 99, 100, 114 and 116, all of which prohibit power to the Commonwealth in one respect or other, none of them is "subject to this Constitution". The command in each and all of these prohibitions is peremptory; none of them contains any hint that it may, in certain circumstances, yield to contrary provisions. Clearly, if these provisions collide with section 51, then the words "subject to this Constitution" in the latter section ensure that the prohibitory commands in the above-listed provisions will prevail. It is as if all the *placita* in section 51 granted powers to enact laws "unless provisions of this Constitution state the contrary"—which is precisely what sections like 92, 99, 100, 114 and 116, do. But the language of section 106 is significantly different. It is subject to a reservation; it shows that in certain circumstances the guarantee it contains *will* yield. But to what? Either to an express provision elsewhere in the Federal Constitution, *or to an exercise of legislative power sanctioned by the Constitution.* Section 51 sanctions exercises of legislative power *unless* constitutional provisions stand in the way; sections such as 92, 99, and so forth, indicate a clear indication to stand in the way, thus they prevail. However, section 106 does indicate that it is prepared to give way; and since the legislative force of section 51 will not be interrupted unless other constitutional provisions manifest a clear contrary will, the language of section 106 clearly shows that the guarantee of the section is not to stand as an immoveable dam against the legislative tide of section 51. The words "subject to this Constitution" in section 106 are a breach in the wall of the section's safeguard of State Constitutions, and the legislative waters of section 51 can flow through that breach, because the words "subject to this Constitution" in section 51 indicate that only a clear expression of contrary intention will dam up the force of section 51, and section 106 is not a clear expression of such contrary intention; rather the reverse. In this way, section 106 is subject to section 51.

This seemingly-convincing argument suffers from a fatal flaw: it can just as easily be reversed and applied so that the protective force of the guarantee in section 106 attains a dominance over the legislative force

of section 51. Witness the following: the legislative force of the guarantee in section 106 displays a prima facie intention not to yield to any other provision unless the latter evinces a clear intention that it (that is, the latter) is to be supreme and yield to nothing. If the section 106 guarantee collides with a law prima facie sanctioned by section 51, does the section 51—sanctioned law indicate an intention to prevail over all comers? No; the section 51—sanctioned law is conditioned by section 51 which contains a loop-hole, namely that section 51 is "subject to this Constitution". Therefore, the force of the section 106 guarantee collides with a contrary law (the law sanctioned by section 51) which does *not* indicate an intention to prevail, come what may; rather the reverse—the gap or loop-hole in the legislative power of section 51 constituted by the words "subject to this Constitution" allows the guarantee in section 106 to prevail. Thus, section 51 is subject to section 106.

This style of semantic interpretation obviously leads nowhere, and the solution to the difficulty must be sought elsewhere.

Are clues as to a possible solution to be garnered from a perusal of section 106 and the place it occupies in the general *schema* of the Federal Constitution? A very plausible and possible explanation of the section's proviso is that it draws its meaning from the fact that, upon the establishment of the Commonwealth of Australia and the coming into force of the Commonwealth Constitution, the latter expressly modified the constitutional structures of the six Australian Colonies that became the six original States. For example, certain legislative powers were withdrawn from the six Colonies and conferred *exclusively* upon the Commonwealth—for example, customs and excise (section 90), and the maintenance of Armed Forces (section 114). Certain departments of the Colonial governments were divested from them and transferred to the Commonwealth's exclusive control—section 69. The powers of the Colonial (now State) Governors were expressly diminished in some areas by the Federal Constitution (for example, section 70), while in other areas, the powers of the State Governors were expressly extended by the Federal Constitution—for example, the issuing of writs for Senate elections (section 12), and the appointment, in certain circumstances, of replacements for deceased senators (section 15). Thus, insofar as it was necessary for the Federal Constitution to make particular *express* alterations to aspects of the States' constitutional structures to pave the way for the birth of that new polity, the Commonwealth, it may be that when section 106 guarantees the continuation of the States' Constitutions "subject to this Constitution", the latter proviso is to be interpreted as merely a reminder that the Constitutions of the States have not continued unchanged after the establishment of the Commonwealth, but have undergone certain *express* changes at the hands of the Federal Constitution, and that the latter's guarantee (in

section 106) of State Constitutions must be read subject to the changes expressly introduced into the latter by the Federal Constitution.

The narrower interpretation, namely that "subject to this Constitution" in section 106 merely refers to the express changes introduced by the Federal Constitution, gains further likelihood, it is submitted, if the closing words of section 106 are taken into account. The section guarantees the continuation of the State Constitutions (subject of course to the Federal Constitution) "until [the States' Constitutions are] altered in accordance with *the Constitution of the State*".[36] If the drafters of the Commonwealth Constitution intended the words "subject to this Constitution" in section 106 to mean that aspects of the States' Constitutions could be altered at will by the Commonwealth Parliament, merely by passing a federal law under whatever head or heads of power that might be relevant in section 51, why then did they include the significant words at the end of section 106, "until altered in accordance with the Constitution of the State"? If the intention had been to render the guarantee in section 106 subject to the legislative winds of section 51, would it not have been more appropriate to conclude section 106 with some such wording as "until altered in accordance with the law", or "until altered by law"—that is, a formula which indicated that the State Constitutions were liable to be altered by *any* valid law, State or Commonwealth? Does not the choice of such a specific formula as "altered in accordance with the Constitution of the State" show that the intention was that, after the *express* State Constitutional changes had been effected by the Federal Constitution, the remainder of the State structures could be altered *only by the States' own established constitutional processes*? That any other result would have been contemplated by the Australian colonial politicians and lawyers of 1900, all seeking the maximum safeguards for their respective Colonies, seems highly unlikely.[37]

Another strong reason for rejecting the view that the proviso to section 106, namely "subject to this Constitution", should mean that the guarantee in section 106 is subject to possibly radical amendment or even abolition pursuant to an otherwise-valid law under section 51, is that this broad interpretation of the proviso would render the guarantee virtually otiose. A so-called Constitutional guarantee which is liable to be circumvented by any relevant law passed under section 51 is no guarantee at all, and the protection of section 106 (whatever may be the ambit of the phrase "Constitution of a State")[38] would be, in effect, quite meaningless. Where a provision in a Constitution (or any

[36] Italics added.

[37] Quick and Garran, writing in 1901, appear to lend support to this view of the Founding Fathers' intention in this matter: see Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 929-932.

[38] Discussed previously, in Part II of this article.

statute) is susceptible to two meanings, one of which renders the provision virtually ineffective, the other of which leaves the provision with some effect which is reconcilable with the structure of the rest of the Constitution or statute, then the latter is to be preferred. The suggested "broad" interpretation of the proviso to section 106 has the result of turning a guarantee of State Constitutions into a mere continuation of them until such time as the Commonwealth Parliament otherwise provides, that is, no guarantee at all, but merely a transitional provision; while the suggested "narrow" interpretation of the proviso gives the guarantee some real effect while providing a workable and plausible reconciliation of the guarantee with the general *schema* of the Commonwealth Constitution. As Gibbs J. said of similarly-competing interpretations of the apparently irreconcilable conflict between sections 7 and 122 of the Federal Constitution:

> the fact that one suggested construction would deprive of any real efficacy what was apparently intended to be an important safeguard is relevant to be considered in deciding whether that construction is correct.[39]

Yet a further point in favour of the "narrow" interpretation of the proviso to section 106 is that the explanation suggested previously, namely that the proviso merely intended to underline the fact that the Commonwealth Constitution expressly altered the State Constitutions in certain particulars, indicates why the prohibition/guarantee in section 106 is expressed to be "subject to this Constitution", whereas so many of the prohibitions in the Federal Constitution are absolute.

So much for possible interpretations. One must next ask: what do the cases say? One is met with the unfortunate fact that section 106 has scarcely featured in decisions of the High Court; indeed there would seem to be only two cases in which section 106 has received some (not very substantial) mention: *Australian Railways Union* v. *Victorian Railways Commissioners* (hereafter the *A.R.U. Case*),[40] and *Stuart-Robertson* v. *Lloyd* (hereafter *Lloyd's Case*).[41]

In the *A.R.U. Case*, the issue in respect of which section 106 was briefly adverted to concerned the legislative power of the Commonwealth under section 51(xxxv) to enforce, as against a State, financial obligations arising under a Commonwealth arbitration award which affected State as well as private employers, without a State parliamentary appropriation of moneys necessary to satisfy the award. The basic argument was that section 51(xxxv) provided the Commonwealth with a legislative means of circumventing the fundamental rule in all the State Constitutions that moneys cannot be appropriated out of State

[39] *Queensland* v. *Commonwealth* (the *Second Territory Senators Case*) (1978) 16 A.L.R. 487, 496.
[40] (1930) 44 C.L.R. 319.
[41] (1932) 47 C.L.R. 482.

Consolidated Revenues without State Parliamentary appropriation. The counter-argument involved, inter alia, the proposition that this State Constitutional rule was protected from Commonwealth legislative interference by section 106. Isaacs C.J., Starke, Rich and Dixon JJ. dealt briefly with the section 106 argument.

Isaacs C.J. denied that the "State parliamentary appropriation" rule could be affected by federal legislation. Although, in his opinion, State Constitutions were subject to the Federal Constitution by virtue of section 106,[42] there was "nothing in the Federal Constitution which interferes with the State constitutional provisions as to State parliamentary appropriation of State Consolidated Revenue Funds before payment out of those funds".[43] His Honour appears to be saying that, although State Constitutions are subordinate to the Federal Constitution by virtue of section 106, the subordination is only to the extent that the Federal Constitution *expressly* modifies State constitutional structures. The mere fact that a federal head of power might authorise a law which had the consequential effect of altering a rule of the States' Constitutions was not a sufficiently express modification of the States' Constitutions by the Federal Constitution. On this approach, Isaacs C.J. seems to favour the "narrow" interpretation of the proviso to section 106, outlined earlier.

Starke J. took an almost identical approach to that of the Chief Justice. His apparent endorsement of the "narrow" interpretation of the proviso to section 106 can be clearly gathered from the following extract from his judgment:

> It would require, I agree, the clearest words in the Constitution to interfere with or impair this constitutional principle [that is the "Parliamentary appropriation" rule] embedded in the Constitution of the States, and I can find nothing in sec. 51, pl. xxxv. or pl. xxxix., which warrants any such conclusion. And, *in the absence of any such provision in the Constitution, sec. 106 is conclusive.*[44]

It is submitted that this passage from Mr Justice Starke's judgment can be interpreted only in the sense outlined in the previous paragraph.

Dixon J. was rather more cautious. He took the view that since the *validity* of the awards in question (as distinct from their efficaciousness) did not depend upon a State Parliament actually having appropriated money to satisfy the awards (a view shared by his brother justices), the section 106 point did not strictly arise for decision since no federal law in issue expressly purported to impose an obligation of Parliamentary appropriation upon a State. In relation to the argument that the appropriate *placitum* of section 51 might be used to override a provision

---

[42] *Supra* n. 40, 353.
[43] *Ibid.*
[44] *Id.* 389 (italics added).

in a State Constitution, in defiance of section 106, Dixon J. would commit himself no further than the following:

> It may be that sec. 106 provides the restraint upon the legislative power over States which differentiates it from the power over the subject and that no law of the Commonwealth can impair or affect the Constitution of a State.[45]

Alone of the judges who considered section 106, Dixon J. gave a fleeting indication that he was aware that a problem of interpretation is caused by the fact that sections 51 and 106 are expressed to be, in effect, subject to each other. In the very next sentence after the extract quoted above, he says: "No doubt, sec. 106 is conditioned by the words 'subject to this Constitution' but so too is sec. 51".[46] Unfortunately, His Honour did not see fit to further explore this difficulty of interpretation, which has been dealt with in the earlier portion of Part III of this article. Rich J. simply agreed with the reasons of Dixon J.[47]

Thus, it would seem that, insofar as the *A.R.U. Case* considered the ramifications of section 106 at all, it stands as qualified (in the case of Rich and Dixon JJ. anyway) support for a narrow interpretation of the proviso "subject to this Constitution" in section 106, and, consequently, as support for an extended ambit for the protection offered by section 106. Perhaps significantly, the above-discussed comments on section 106 were discussed by the High Court in a post-*Engineers*[48] context; indeed the *Engineers Case* was cited to and discussed by the High Court in *A.R.U.*

The only other decision in which section 106 has received some small measure of comment from a member of the High Court is *Lloyd's Case*.[49] This case is doubly interesting because, apart from some dicta by one High Court justice—and one only—on the question of the meaning of section 106, it is an instance of a law of the Commonwealth, valid under section 51, being held to be valid in its application to a provision in a State Constitution Act.

In *Lloyd*, the estate of a member of the Legislative Assembly of New South Wales was sequestrated pursuant to bankruptcy proceedings brought against that member. Under section 28 of the Constitution Act of New South Wales, the member was entitled to a monthly expense allowance. Section 101 of the Bankruptcy Act 1924 (Cth) provided that the trustee in bankruptcy should receive for distribution amongst creditors various types of emoluments receivable by the bankrupt, unless such emolument was exempted from such attachment by any State or Commonwealth Act. There was no such exemption in any such Act

---

[45] *Id.* 391-392.
[46] *Id.* 392.
[47] *Id.* 387.
[48] *Supra* n. 28.
[49] *Supra* n. 41.

relating to the expense allowance receivable by the member. An order was made by a Court of Bankruptcy attaching portion of the member's expense allowance, and the question for the High Court was, inter alia, whether section 101 of the Bankruptcy Act (Cth) could validly apply to the allowance received by the member under section 28 of the Constitution Act. It should be noted in passing that section 28 was not affected by any special amendment or repeal provisions—it could be amended or repealed in the normal way.

The High Court held unanimously that, primarily because of the overthrow of the "implied prohibitions" doctrine by the *Engineers Case*, section 101 of the Commonwealth law in its application to an allowance under section 28 of the New South Wales Constitution Act was a valid law under the bankruptcy *placitum*, section 51(xvii), of the Federal Constitution. Only one judge, Evatt J., saw fit to consider the possible application of section 106 to this fact situation.

First, His Honour noted the suggestion that none of the Commonwealth's enumerated powers in section 51 were capable of exercise so as to trench upon provisions of State Constitutions, because of the protection said to be afforded by section 106. He then went on to make the comment regarding the definition of "State Constitution", which was discussed in Part II of this article. Next, he expressed the following opinion with respect to the fact situation before him:

> an enactment such as sec. 101, which applies to all bankrupts and does not discriminate against members of the Parliaments of the States, is valid, although it applies to allowances established by a provision contained in the *Constitution Act* of a State.[50]

Thus, according to His Honour, it is apparently only laws of the Commonwealth which *single out* the State constitutional structures (or aspects of them) for discriminatory treatment which may be invalid, presumably as being in breach of section 106. Two criticisms can be made of this suggestion. First, there is nothing in the text of section 106 to lead one to think that the section was only intended to guard against discriminatory Commonwealth laws, and secondly, Mr Justice Evatt's caveat as to discriminatory Commonwealth laws does nothing more than convert section 106 into an almost-perfect reflection of the principle embodied in the High Court's decision in *Melbourne Corporation* v. *Commonwealth*[51]—or, to be strictly accurate, the principle embodied in the judgment of Dixon J. in the latter case.

*Lloyd's Case*, in terms of the High Court's approach (what little of it exists) to the meaning and ambit of section 106, represents something of a shift away from the slightly more liberal view of the protection afforded by section 106 which had marked at least some of the judgments

[50] *Id.* 491-492.
[51] (1947) 74 C.L.R. 31.

in the *A.R.U. Case*. Although only one justice expressly considered section 106 (albeit briefly) in *Lloyd's Case*, the case stands as an example that, at least to some extent, the Commonwealth can, by way of general, non-discriminatory laws passed under a relevant *placitum* of section 51, impose some burdens upon some aspects of a State's constitutional structure, even when that aspect is provided for in a State's Constitution Act, and section 106 will not be infringed. Apart from the (no longer novel, after the *Melbourne Corporation Case*) suggestion that only discriminatory Federal laws will breach section 106, there is the strong hint that only State laws defining the fundamental structure (however "fundamental" is defined) of the State's constitutional make-up will be protected by section 106. This is a clear retreat from the apparent position in the *A.R.U. Case* that section 106 protected those features of the State Constitutions that had not been expressly and directly modified by the force of the Commonwealth Constitution itself.[52]

The difficulties inherent in trying to accommodate direct appeals with Mr Justice Evatt's suggestion, namely that only laws defining the essential governmental structure of the State will come under the umbrella of section 106, have already been adverted to. However, in the context of direct appeals, Mr Justice Evatt's comment that only Commonwealth laws discriminating against the States' constitutional structures will offend section 106 is certainly helpful to the cause of those supporting the retention of direct appeals: by its very nature and subject-matter, a Commonwealth law abolishing direct appeals could arguably be stigmatised as discriminatory, because the abolition of the States' right to retain direct appeals as part of their judicial appellate structure would be (presumably) the sole subject of such a law. On the other hand, it might perhaps be argued that Mr Justice Evatt's "discrimination" test for invoking section 106 would not come into play unless the Commonwealth law restricted itself to abolishing direct appeals *in which the States were themselves parties to the litigation*, while leaving untouched rights of direct appeal involving private persons or bodies other than the State itself. Yet, such a law of narrow effect is unlikely; the Commonwealth would be more likely to attempt the abolition of all direct appeals—in which case it is arguable that a law applying to *all* direct appeals is no different from a law such as section 101 of the Commonwealth Bankruptcy Act in *Lloyd's Case* which burdened *all* such allowances.

Unfortunately, even if one assumes the situation most favourable to the protection of direct appeals by section 106, namely that such appeals are part of the State Constitutions, the application to direct appeals of the problem posed by sections 51 and 106 being subject to

[52] See nn. 43, 44 and accompanying text.

each other is not made any clearer by the decisions in *A.R.U.* and *Lloyd*. The former suggests that section 106 is, to some appreciable extent, the dominant section; thus the supporters of direct appeals are comforted. But the decision in *Lloyd*, and the remarks on section 106 by Evatt J., show a marked swing back towards a position where section 51 may be the controlling section after all, at least in relation to section 106—and the proponents of retaining direct appeals, feeling the potentially chill winds of—possibly—section 51(xxix), may thus commence serious worry at the prospects of catching cold.

## IV. DIRECT APPEALS AND THE CONSTITUTION

Since section 106 does *ex facie* continue State Constitutions in existence subject to any modifications made by the Commonwealth Constitution, it thus behoves one to consider whether, assuming direct appeals to have been part of the States' constitutional fabric immediately prior to Federation, the Commonwealth Constitution effected, upon its coming into force, any change in the status of direct appeals. It may be that the Constitution, upon its proper interpretation, recognises and continues direct appeals; in that event the possible protective effect of section 106 would be superfluous, as only action under section 128 would be able to remove that which is entrenched by the Constitution. On the other hand, it might well be that direct appeals are expressly or impliedly abolished by the Constitution, in which case there is nothing (in the Privy Council context, anyway) for section 106 to operate upon.

In relation to the first possibility mooted in the previous paragraph, at least one commentator is on record[53] as suggesting that the existence of section 73(ii) and the two final paragraphs of section 73 in the Federal Constitution has the effect of guaranteeing the continuance of direct appeals by force of the Constitution. So far as is relevant, the section provides:

> The High Court shall have jurisdiction . . . to hear and determine appeals from all judgments . . .
>
> > (ii) . . . of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:
> >
> > . . .
>
> But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.
>
> Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme

[53] St. John, *op. cit.* 397-398, n. 40.

> Courts of the several States shall be applicable to appeals from them to the High Court.

While one interpretation of these provisions is that, inter alia, they recognise and perhaps continue direct appeals, it is suggested that another equally plausible interpretation of the reference to direct appeals in the above-quoted sections is that the reference is merely a legislative "short-hand" device for identifying a particular *class* of subject-matter: for instance, the reference in section 73(ii) is merely a way of identifying a particular class of State court from which an appeal may lie to the High Court. Similarly, in the penultimate paragraph of section 73, the reference is just for the purpose of indicating which classes of matters of appeal may not be excepted by the Federal Parliament from the High Court's appellate jurisdiction; and in the final paragraph of the section, the reference to direct appeals simply identifies the conditions which shall attach to appeals to the High Court. In other words, direct appeals are used in these provisions merely to select *other topics* for legislative treatment; the direct appeals are not themselves thereby continued or guaranteed.

Conversely, there is the second possibility, namely that direct appeals have been, either expressly or impliedly, abolished by the Federal Constitution. The argument runs that section 74 of the Commonwealth Constitution, taken in conjunction with the Privy Council (Limitation of Appeals) Act 1968 (Cth) and the Privy Council (Appeals from the High Court) Act 1975 (Cth), has evinced the intention that direct appeals shall no longer be compatible with the implicit idea of the Constitution that the High Court should be the ultimate court of appeal for Australia in matters both Federal and State. The continuance of direct appeals is thus prohibited, impliedly, by the Commonwealth Constitution. This suggested possibility has gained some currency because of an obiter dictum to this effect by Murphy J. in *Commonwealth* v. *Queensland*,[54] which has been repeated by His Honour in *Viro* v. *R.*[55] The idea has also been supported by several commentators.[56] If correct, the notion would render any consideration of section 106 otiose in respect of direct appeals.

However, is it correct? The reasoning behind this idea is best put in the words of its chief supporter, Murphy J.:

> The scheme of the Constitution (embodied in s 74) is that the High Court is to be the final arbiter on *inter se* questions (in the absence of a certificate) and in all matters in respect of which Parliament has by a limitation Act excluded an appeal by special leave to the Privy Council. If the exclusion by s 74 of appeals from the High Court to the Privy Council on *inter se* questions means

[54] (The *Queen of Queensland Case*) (1976) 50 A.L.J.R. 189, 202-203.
[55] (1978) 18 A.L.R. 257, 317.
[56] Bickovskii, *op. cit.* 463-464; and Blackshield, *op. cit.* 107-109.

> that no such question is to reach the Privy Council by way of appeal from any other court, then, by the same reasoning, when Parliament excluded appeals from the High Court to the Privy Council *in other matters* (exercising the power under s 74 by the Limitation Acts of 1968 and 1975), no appeal in those matters lies to the Privy Council (as of right or by leave) *from any other court.*[57]

The reasoning is at least *prima facie* attractive, *if* one accepts the analogy based on the effect of section 74. It is true that, for many years now, *inter se* appeals have not been able to reach the Privy Council by way of any court other than the High Court, but it is just as true to say that this position has come about perhaps more by way of section 39(2)(a)[58] of the Judiciary Act 1903 (Cth), as amended, being upheld by the High Court on at least two occasions[59] as being a valid exercise of the Commonwealth's power under section 77 to invest State courts with federal jurisdiction subject to conditions. To say that section 74, unaided, stopped *inter se* appeals from Australian courts other than the High Court is, with respect, very misleading. Admittedly, in *Commonwealth* v. *Queensland*,[60] the High Court did clearly recognise that, by implication, the structure of Chapter III of the Constitution, and section 74 in particular, prevented any State from legislating to permit any matters involving *inter se* or federal jurisdiction questions to reach the Privy Council other than from the High Court: yet the majority of the High Court (with the signal exception of Murphy J.) clearly limited this "implied prohibition" effect of Chapter III and section 74 to matters of *federal* jurisdiction.

Apart from the fact that the "Murphy principle" makes an extremely long jump from the established position that section 74 (and Chapter III) impliedly prevent appeals in any federal matter reaching the Privy Council from any Australian court other than the High Court, to the novel proposition that *any* appeals in matters federal or State are stopped from reaching the Privy Council from any Australian court,

---

[57] *Viro* v. *R.*, (1978) 18 A.L.R. 257, 317 (italics added).

[58] In conjunction, of course, with ss. 38A and 40A of the pre-1976 Judiciary Act.

[59] *Commonwealth* v. *Limerick Steamship Co. Ltd* (1924) 35 C.L.R. 69; and *Commonwealth* v. *Kreglinger and Fernau* (1926) 37 C.L.R. 393. It should also not be entirely forgotten that High Court decisions such as *Limerick* and *Kreglinger* upholding Judiciary Act, s. 39(2)(a) on the basis of the legislative power in s. 77 of the Constitution, were motivated to a substantial extent by an understandable desire to circumvent the Privy Council decision in *Webb* v. *Outrim* [1907] A.C. 81—understandable, because their Lordships had inconveniently held that s. 74 of the Constitution, because it did not mention the State Supreme Courts, conferred no power upon the Commonwealth to abolish direct appeals in Federal matters, let alone State matters: see [1907] A.C. at 91-92. Although the decision in *Webb* has been a dead letter in Australia for many years, it does no harm to keep in mind, when attempting to construe s. 74, that the section does refer *only* to appeals from the *High Court* to the Privy Council.

[60] (The *Queen of Queensland Case*) (1976) 50 A.L.J.R. 189.

the suggested principle fails to take account of at least two other criticisms: the fact that direct appeals are at least mentioned in section 73; and the possible effects upon direct appeals of section 106.

In neither *Commonwealth* v. *Queensland*[61] nor *Viro* v. *R.*[62] was the Murphy dictum germane to the decision: in the former case, the High Court was concerned with Privy Council advisory opinions, not direct appeals *stricto sensu*; while in *Viro* the High Court was not concerned with appeals to the Privy Council from any Australian court at all, but with the question of what the High Court should do when faced with conflicting precedents of itself and the Privy Council. Nevertheless, while Murphy J. was the only justice to be seriously concerned with direct appeals in *Commonwealth* v. *Queensland*, every justice in *Viro* adverted to the issue in one way or another.

The Murphy view has already been discussed, and need not be repeated; the opinions of the other justices in *Viro* should now be looked at. At the outset, it may perhaps be fairly said, as did one commentator writing of the "Murphy principle" in pre-*Viro* days,[63] that the suggestion was unlikely to find general support, at least among High Court justices—and so it has been, even after *Viro*. Gibbs, Stephen, and Aickin JJ. all expressly recognised the continued existence of direct appeals and cast not a scintilla of constitutional doubt on them;[64] Mason J. while not expressly adverting to direct appeals, seems to have impliedly recognised their continued existence in his reasoning on the question of a State court's options when faced with conflicting Privy Council and High Court decisions;[65] while Barwick C.J., recognising that the Privy Council (Appeals from the High Court) Act 1975 (Cth) "effected a very radical change in the relationship of the State court to the decisions of the Privy Council",[66] nowhere suggested that direct appeals were now unconstitutional.

The one possible exception to this catalogue of apparently-clear rejections of the Murphy view on direct appeals, is the difficult (on this point, anyway) judgment of Jacobs J. in *Viro*. The *Australian Law Reports* headnote to the case associates Jacobs J. with Murphy J. in support of the proposition that "(t)here is now no constitutional authority for appeals from State Supreme Courts to the Privy

---

[61] *Ibid.*

[62] (1978) 18 A.L.R. 257.

[63] St. John, *op. cit.* 398, n. 40.

[64] *Viro* v. *R.* (1978) 18 A.L.R. 257, 281-282 *per* Gibbs J.; 290 *per* Stephen J.; 324, 325 *per* Aickin J.

[65] *Id.* 295.

[66] *Id.* 261. Since His Honour referred to the relationship of State courts to the *decisions* of the Privy Council, rather than the relationship of State courts to the Privy Council, *per se*, this writer would submit that the Chief Justice was referring to a "radical change" in the status of Privy Council *precedents* vis-à-vis Australian State courts, and not a change to the continuation of direct appeals in non-Federal matters.

Council".[67] This is an undoubtedly accurate summary of the views of Murphy J.; whether it is a correct interpretation of Mr Justice Jacobs' judgment is highly debatable, as will now be considered.

The headnote summary of Mr Justice Jacobs' judgment on this issue is at once compromised by the following statement of Jacobs J.:

> Since the passing of the *Privy Council (Appeals from the High Court) Act 1975* (Com) it is clear that there are now two co-ordinate tribunals to which an appellant from the Supreme Court of a State (not exercising federal jurisdiction) can appeal.[68]

This seems to be a clear recognition that direct appeals (in non-federal matters) survive. However, very shortly afterwards there appears the following passage which seems to have been the source of the headnote proposition on this point. Prima facie, it does appear to be quite contradictory to the passage just quoted, and must needs be set out in full:

> But since the 1975 Act, they [that is, the State Supreme Courts] ought in my view to follow a decision of this court [that is the High Court] in preference to a conflicting decision of the Privy Council. The High Court is the court of appeal from the Supreme Courts of the States (Constitution s. 73(ii)). There is no right of appeal conferred in the Constitution from the Supreme Court of a State to the Privy Council. The Constitution being silent on the prerogative to receive appeals from the Supreme Courts of the States it has throughout the years been accepted that there remained intact the Royal Prerogative to allow an appeal to the Council from the Supreme Court of a State. The *Judicial Committee Act 1833* (Imp) could therefore apply. The Royal Prerogative to grant special leave to appeal to the Privy Council from this court was preserved with one exception in s 74. The Privy Council therefore remained in all matters (subject to s 74) the appellate tribunal from this court. That is no longer so. Now in all matters the High Court is, without the Privy Council as the appellate tribunal from it, the court of appeal in the hierarchy of precedent. The express constitutional provision governing Australia in particular prevails over the generality of the 1833 Act and of the Prerogative power.[69]

This passage is clearly susceptible to the interpretation that the combined effects of section 74 and the Act of 1975 are to displace the prerogative power permitting direct appeals (as regulated by, inter alia, the Act of 1833), thus rendering such appeals no longer constitutionally supportable. And so the *Australian Law Reports* headnote writer has, not unreasonably, interpreted it. Yet, unless Jacobs J. simply changed his mind from what he had written in the previous paragraph (when he

---

[67] (1978) 18 A.L.R. 258, lines 11-13.
[68] *Id.* 306.
[69] *Id.* 306, 307.

acknowledged the "two co-ordinate tribunals"), the two quoted passages are apparently irreconcilable. Does Jacobs J. mean something different from what he *appears* to say?

Apart from the seeming conflict between the two quoted passages, the second-quoted extract is open to several preliminary criticisms. First, when Jacobs J. states that there is no right of direct appeal conferred by the Constitution, he is arguably partially wrong: as was pointed out earlier, section 73 of the Constitution refers to direct appeals three times. It may be that the mention of direct appeals in section 73 does not amount, perhaps, to the "conferment" of a "right" of direct appeal; nevertheless the mention of such appeals in the section probably deserved something more than the complete omission that it received by Jacobs J. Secondly, as has already been remarked upon when considering the comments of Murphy J., the judgment of Jacobs J. completely overlooks the possible impact of section 106 upon the whole issue of direct appeals.

However, to return to the central difficulty of Mr Justice Jacobs' judgment: the apparent internal conflict. Does he really agree with Murphy J. on the issue of direct appeals, or does he not? If he does, it represents a significant addition of High Court strength to the radical view of Murphy J.—on this point at least. An alternative interpretation of the second Jacobs extract quoted above, is however suggested by placing the passage in the context of what His Honour was discussing at that particular point in his judgment. When uttering the above two statements, Jacobs J. was primarily concerned with a question of *precedent*—not the *availability or otherwise of direct appeals.* He had posed, and was then proceeding to answer, the question: what does a State court do when faced with a conflict between a Privy Council decision and a High Court decision? He had answered, in effect: in all cases, the State courts *must* follow a High Court precedent in preference to a Privy Council one. In then saying *why* a State Court should so act, he points to the fact that the Federal Constitution expressly permits the High Court to act as a general court of appeal from the States in all matters, not just federal ones. The Constitution thus expressly provides for the place of the High Court in the hierarchy of Australian courts. Before the Acts of 1968 and 1975, the Constitution (section 74 in particular) allowed the Privy Council to act, in certain matters, as the ultimate appellate tribunal in the Australian court hierarchy. Thus, in those matters, State courts were bound by Privy Council decisions, presumably even those in conflict with High Court decisions. Now, however, after the combined effects of the 1968 and 1975 Acts, the Constitution, pursuant to section 74, recognises only the High Court as the ultimate court in the Australian hierarchy, *from the point of view of precedent.* It is not that section 74 and the Acts of 1968 and 1975 destroy direct appeals to the Privy Council; it is simply that

section 74 and the two Acts mentioned, together provide that High Court decisions *alone* shall constitute *the ultimate binding precedent in the Australian hierarchy*. On this narrower interpretation of Mr Justice Jacobs' second-quoted dictum, it is still constitutionally proper to take direct appeals in non-federal matters to the Privy Council from State Supreme Courts; but if a State court is faced with conflicting Privy Council and High Court decisions, *then* the Constitution (aided by the Acts of 1968 and 1975) compels that the High Court decision be followed as the *ultimately binding precedent* in the Australian hierarchy. The utility of this more restricted interpretation of Mr Justice Jacobs' second-quoted dictum is that it now becomes quite reconcilable with the first-quoted Jacobs dictum about "two co-ordinate tribunals". Also, if this narrower interpretation is indeed correct, then Murphy J. still remains as the sole High Court voice maintaining that direct appeals in non-federal matters are constitutionally barred.

Whatever be the correct view of Mr Justice Jacobs' puzzling comments in *Viro*, enough will have been said to demonstrate that it is not so easy to group Jacobs J. with Murphy J. in support of the proposition of constitutional abolition of direct appeals, as the *Australian Law Reports* headnote writer would have one believe. While the comments of the various High Court justices (particularly Jacobs and Murphy JJ.) who adverted to the issue of direct appeals are interesting, the lack of reference to the possible effects of section 106 and failure to explore the consequences of the references in section 73 to direct appeals, combine to characterise *Viro* v. *R.* as being hardly decisive of the great questions surrounding the relationship between section 106 and direct appeals to the Privy Council in non-federal matters.

## V. CONCLUSION: GREAT CONSTITUTIONAL UNCERTAINTY

The object of this article has been to examine the extent to which section 106 may provide a shield with which to ward off possible federal attempts to legislate direct appeals out of existence, using *placitum* xxix, or *placitum* xxxviii, or any other *placita* of section 51 of the Constitution that might be relevant for the purpose. It has not been the purpose of this article to determine whether or not a law of the Commonwealth passed under, for example, section 51(xxix), for the purpose of abolishing direct appeals, could be characterised as a law with respect to external affairs. That characterisation difficulties of a substantial nature might indeed be raised by such a law is readily apparent, but the point cannot be pursued here. This article has been concerned with the potential scope of a *prohibition* on the possible use of federal legislative power, rather than with the ambit of the Commonwealth's positive power (if any) to abolish direct appeals. Also, attention has been directed at the cognate point of the extent to which the Commonwealth Constitution, as presently established, might *itself*

either directly entrench or abolish direct appeals, irrespective of the operation of section 106.

In relation to section 106 itself, this article has been concerned to show that it is no easy matter to safely conclude that the section operates to protect direct appeals from Commonwealth interference. The two major problems with section 106 are, first, what comprises the "Constitution of a State", and secondly, how does one reconcile the conflict of sections 51 and 106 being subject to each other, in effect. The author has sought to show that on both these issues there are a number of possible interpretations, broad and narrow, and that a choice of one interpretation on either or both issues will result in a narrowing of the protection offered State Constitutions and direct appeals by section 106, while the choice of another will extend the ambit of the guarantee in section 106 considerably. The observer who is a Federalist or "States' Righter" will opt for the approach which most widens the effect of section 106, while the centralist-minded observer will choose the interpretation that imposes the least restraint upon federal legislative power.

For, in truth, no particular interpretation of section 106 can be said to be manifestly "right" or manifestly "wrong". A narrow view of the section is just as legally tenable as is a wide or liberal view. The ultimate choice must rest upon considerations of policy—whether one is a friend of expanded Commonwealth power or expanded State rights —and not of law *simpliciter*. The law, what little of it exists in this area, provides support for both views. On a matter of interpretation of this kind, one may well bear in mind the remarks of Stephen J., when considering the clash of views as to how to resolve the conflict between sections 7 and 122 of the Commonwealth Constitution in *Queensland* v. *Commonwealth*:

> The case [is] very much one upon which different minds might reach different conclusions, no one view being inherently entitled to any pre-eminence as conforming better than others to principle or to precedent. In such a context phrases such as "plainly wrong" and "manifest error " . . . are merely pejorative.[70]

Yet, perhaps the most interesting development in the debate on direct appeals is one which is occurring (unfortunately, in the author's opinion) quite independently of any consideration of the possible effects of section 106: the strand of authority represented by Murphy J. in both *Commonwealth* v. *Queensland*[71] and *Viro* v. *R.*[72] (and perhaps also by Jacobs J. in *Viro*) to the effect that direct appeals have been abolished by implication stemming from a combination of section 74 and the two Federal Acts of 1968 and 1975. The present writer is of

[70] (The *Second Territory Senators Case*) *supra* n. 39, 500.
[71] (The *Queen of Queensland Case*) *supra* n. 54.
[72] *Supra* n. 55.

the opinion that, while it is one thing to coax an implication from section 74 and Chapter III to the effect that the States may not legislate so as to interfere with the distribution of federal judicial power as effected by Chapter III (as did the High Court in *Commonwealth* v. *Queensland*),[73] it is a vastly different matter to extract from section 74 and the Acts of 1968 and 1975 a prohibition that relates to direct appeals in *non*-federal matters. However, the first judicial straws of such an interpretation are blowing in the wind, and it might just well be that, if some kind of co-operative action is not forthcoming from the Commonwealth and States in the not too far distant future to remedy the confusion and embarrassment caused by the present existence of two co-ordinate ultimate tribunals of appeal from the State Supreme Courts, then a sufficient number of High Court justices might be so persuaded by the stupidity of the current situation concerning High Court and Privy Council appeals to provide a majority one day in support of Mr Justice Murphy's intriguing exercise in judicial legislation. Even on a narrow view of Mr Justice Jacobs' rather delphic dicta in *Viro*, His Honour has already commenced a journey toward the position of Murphy J. in the debate on direct appeals; and a mere two further recruits to the Murphy cause on this issue will provide an imposed judicial solution to one of the perhaps less dramatic, but no less thorny, constitutional difficulties facing Commonwealth-State relations in Australia at the present time.

[73] (The *Queen of Queensland Case*) (1976) 50 A.L.J.R. 189.