THE CONCEPT OF "ONE AUSTRALIA" IN CONSTITUTIONAL LAW AND THE PLACE OF TERRITORIES

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This paper argues that there is a fundamental concept implicit in the interpretation of the Australian Constitution which postulates that that document should be approached from the perspective of what I have called for convenience "One Australia". It is a concept which suggests that the Australian courts should, where appropriate, take into account that Australia is one nation and one people operating under a "unitary" system of Australian domestic laws. It arises from the evolution of Australian nationhood and from the increasingly interdependent nature of Australian society. It is suggested that this concept is already exerting an influence on judicial decision-making in this country, to be balanced with other constitutional fundamentals, including that of the federal system. However it is also asserted that the full implications of "One Australia" have not as yet been determined. This is particularly so in relation to Commonwealth territories and their residents. The latter have in the past been generally regarded as being of little importance, both constitutionally and otherwise. Recent developments in some of these Territories, and their growing importance within the Australian nation, directly raise the question of the applicability of the concept of "One Australia" to them, particularly as it might be held to impinge on the constitutional place of such territories in Australia and on the constitutional rights of their residents. At present it can be said that there are two classes of Australians in constitutional terms, those in the territories and those in the States, with those in the former having an inferior position in this regard. The question raised is whether Australian courts will seek to address this constitutional form of disadvantage, in so far as it is within their capacity to do so, by having regard to the premise of "One Australia".

That there could be such an implication is not a novel concept. It is well established that there are certain fundamental concepts or principles inherent in or implied into the Australian Constitution which are not, or not fully, expressed in the written text. The concepts of responsible government,[1] and representative democracy,[2] are good

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1 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 146-148 per Knox CJ, Isaacs, Rich and Starke JJ, cited in *New South Wales v Commonwealth* (1932) 46 CLR 155 at 196-197 per Evatt J, and in *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 446-450 per Isaacs J; *Commonwealth v Kreglinger and Fernau Ltd* (1925) 37 CLR 393 at 411-413 per Isaacs J; *McGraw-Hinds (Aust) Pty Ltd v Smith*

examples. The doctrine of separation of powers has recently been given new life by the High Court to encompass a number of aspects not fully spelt out in the text.[3] The recent controversy as to the implied right of freedom of communication in political matters[4] illustrates the point that the existence and content of such implied principles is still very much an alive topic, and is capable of being influenced by Australia's changing national and international situation.

The courts also accept that the Constitution is to be interpreted in the light of the fact that Australia has achieved, by a gradual process, the status of a full member of the family of nations in its own right.[5] Despite some assertions to the contrary, this status was not achieved until well after the inauguration of federation. Australia is now a nation on an equal footing at international law with other nation-states, and Australians are citizens of such an independent nation-state, this process achieving some finality with the severance of British links by the enactment of the Australia Acts 1986 (other than the links with the Queen in person). It has not only provoked some rethinking in wider circles as to the question of what constitutes the Australian identity, but has also exercised an influence in certain ways on Australian judicial decision-making. It is perhaps not surprising that such a profound change in Australia's international status would also exercise a considerable influence on the internal constitutional and legal developments of this country.

As an illustration of this change, for purposes of the rules of jurisdiction and conflict of laws, Australian States were previously treated as if they were distinct and separate countries or "law areas", each with their own distinct legal system, subject only to the operation of the Constitution and legislation thereunder.[6] This perhaps reflected the

(1979) 144 CLR 633 at 668 per Murphy J; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 228-231 per McHugh J; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 147 per Brennan J; and *McGinty v Western Australia* (1996) 186 CLR 140 at 269 per Gummow J; and *Lange v Australian Broadcasting Corporation* (High Court of Australia, 8 July 1997, unreported); *Levy v Victoria* (High Court of Australia, 31 July 1997, unreported).

2 *Attorney-General (Commonwealth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 56-57 per Stephen J; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 47-50 per Brennan J, at 70-71 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 137-138 per Mason CJ, at 168 per Deane and Toohey JJ, at 210-212 per Gaudron J, at 228-231 per McHugh J; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 121 per Mason CJ, Toohey and Gaudron JJ, at 147 per Brennan J, at 199-201 per McHugh J; and *McGinty v Western Australia* (1996) 186 CLR 140 at 167-171 per Brennan CJ, at 221-222 per Toohey J; *Lange v Australian Broadcasting Corporation* (High Court of Australia, 8 July 1997, unreported).

3 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Kable v Director of Public Prosecutions* (1996) 70 ALJR 814; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 70 ALJR 743.

4 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and other cases, with the principles concerning this implied right recently re-argued in further litigation in the High Court; *Lange v Australian Broadcasting Corporation* (High Court of Australia, 8 July 1997, unreported); *Levy v Victoria* (High Court of Australia, 31 July 1997, unreported).

5 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338; *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Davis v Commonwealth* (1988) 166 CLR 79; *Victoria v Commonwealth* (1996) 70 ALJR 680.

6 *Laurie v Carroll* (1958) 98 CLR 310 at 331 per Dixon CJ, Williams and Webb JJ.

fact that Australia was originally comprised of an Island Continent of quite separate, self-governing British Colonies. It was by a process of consultation and referendum that these Colonies agreed to associate in a new federal constitutional structure, but otherwise preserved their Colonial institutions, powers and laws intact as part of the Original States in the new federation under the Constitution.[7] This view, which treats the States as if they were still separate and distinct political entities, which have only ceded certain limited powers to the national Parliament and Government, but which otherwise retain elements of separate State sovereignty, has, over time, undergone a profound change. It is now judicially accepted that

> Australia is one country and one nation. When an Australian resident travels from one State or Territory to another State or Territory he does not enter a foreign jurisdiction.[8]

As a consequence, for the purposes of Australian conflict of laws rules, and in the light of the provisions of s 5 of the Commonwealth of Australia Constitution Act (UK),[9] s 51(xxv) of the Constitution conferring legislative power on the Commonwealth Parliament with respect to the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States, and s 118 of the Constitution,[10] judicial views have been expressed that have qualified the earlier approach treating each Australian jurisdiction as if it were a foreign jurisdiction.[11]

It is submitted, however, that this is only an aspect of a more fundamental development in constitutional interpretation in this country, one that increasingly emphasises a premise that there is "One Australia", based on one nation and one people under one "unitary" system of Australian law and one Australian Constitution.[12] The Constitution, the Federal, State and Territory laws, and the

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7 Constitution, ss 106, 107 and 108.

8 *Breavington v Godleman* (1988) 169 CLR 41 at 78 per Mason CJ. See also *Victoria v Commonwealth* (1971) 122 CLR 353 at 396 per Windeyer J; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 485 per Mason CJ.

9 "5. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth." This section is discussed in *Lange v Australian Broadcasting Corporation* (High Court of Australia, 8 July 1997, unreported).

10 "118. Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State."

11 *Breavington v Godleman* (1988) 169 CLR 41, adopting a single *lex loci* test in tortious claims involving more than one Australian jurisdiction. Note the return to a modified "*Phillips v Eyre*" test in *McKain v RW Miller & Co (South Australia) Pty Ltd* (1992) 174 CLR 1 and *Stevens v Head* (1993) 176 CLR 433, although without a flexible exception of the kind applied in *Chaplin v Boys* [1971] AC 356. The provisions of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) and parallel State and Territory Acts, plus the Service and Execution of Process Act 1992 (Cth), have profoundly affected the jurisdictional relationships between Australian courts. State and Territory legislation on limitation periods has also affected conflict of law rules within Australia — see *Gardner v Wallace* (1996) 70 ALJR 113. Further, co-operative legislation on conflict of laws within Australia is proposed, following on from the Report of the Australian Law Reform Commission, *Choice of Law*, (Report No 58, 1992).

12 The word "unitary" is used without denying that there are State and Territory laws operating concurrently with Commonwealth laws, but together operating as one coherent and internally consistent system of Australian laws.

common law in Australia together constitute the law of this country and form "one system of jurisprudence".[13] There is an Australian federal system, but within that system, competing Commonwealth and State laws are said to be subsumed and reconciled in a system of national law, overlying the uniform system of inherited common law as judicially moulded to meet Australia-wide conditions.[14] Ultimate legal unity is achieved by preventing the citizen from being subjected to the requirements of contemporaneously valid but inconsistent Australian laws,[15] and by the provision of a final and conclusive appellate tribunal in the High Court of Australia.[16] Australian citizenship is itself a unitary concept, not admitting of State divisions, and signifying membership of the community of the Commonwealth of Australia as a whole. Any person born in Australia since 1948 is, with limited exceptions, automatically an Australian citizen irrespective of where he or she resides,[17] and is subject to that "unified" system of national law. Disabilities and discrimination between the residents of different States are expressly prohibited.[18] And the head of the executive government in Australia, currently the Queen, has the royal style or title of the head of the Commonwealth, that is, of the whole of Australia. She does not have a separate royal style or title for each of the federal units of Australia.[19]

The full implications of this developing approach towards a concept of "One Australia" are not yet fully apparent. It has manifested itself in one direction recently, when some members of the High Court enunciated a general doctrine, by implication from the Constitution, of the legal equality of the people who constitute the Commonwealth.[20] In doing so, they referred to the fact that the conceptual basis of the Constitution was the free agreement of "the people" of the federating Colonies to unite in the Commonwealth under the Constitution. It is the people, not the States themselves, together with the people of the Territories, that now constitute the Commonwealth.[21] Implicit in that free agreement of "the people" — all the people — was the notion of the inherent equality of the people as the parties to the compact.[22] The emphasis in this regard is on "the people" of the Commonwealth as a single unit, and not the people of each of the States/former Colonies.

The "Commonwealth" in this sense has usually come to be regarded as referring to the whole of Australia, not just that portion now within the Original States. It is necessary in each case in which the word "Commonwealth" is used in the Constitution to decide whether this is intended to mean the separate body politic under the Crown known as the "Commonwealth of Australia" as brought into existence by the

13 *Lange v Australian Broadcasting Corporation* (High Court of Australia, 8 July 1997, unreported). As to the common law in Australia, see also *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 105 at 141-142 per Brennan J.

14 *Breavington v Godleman* (1988) 169 CLR 41 at 122-123 per Deane J.

15 *University of Wollongong v Metwally* (1983) 158 CLR 447 at 478-479 per Deane J.

16 *Breavington v Godleman* (1988) 169 CLR 41 at 123-124 per Deane J.

17 Australian Citizenship Act 1948 (Cth), Part III.

18 Constitution, s 117. It was said by Deane J in *Street v Queensland Bar Association* (1989) 168 CLR 461 at 522 that this section "constitutes a structural provision directed at the promotion of national economic and social cohesion and the establishment of a national citizenship".

19 Royal Style and Titles Act 1973 (Cth). See *Commonwealth v Queensland* (1975) 134 CLR 298.

20 *Leeth v Commonwealth* (1992) 174 CLR 455.

21 Ibid at 484 per Deane and Toohey JJ.

22 Ibid at 486.

Constitution, or whether it is the Commonwealth in a geographic sense that is intended. In several sections of the Constitution, at least, it seems clear that it is the latter.[23] In those sections, it would seem to be referring to the Commonwealth as a unitary geographical concept, capable of extending to at least include the whole of the mainland of Australia and Tasmania regardless of the current status of the various portions thereof.[24] It may well also extend to include Commonwealth territories external to the Australian mainland.[25] Alternatively, where it is the former sense that is intended, it may be capable of referring to the people of Australia comprised in the body politic, both in the States and all territories.[26]

A further manifestation of this "One Australia" approach is contained in judicial comments of the High Court that Commonwealth and State courts are all part of one, single Australian judicial system recognised by Chapter III of the Australian Constitution.[27] State Supreme Courts are constitutionally required to exist, are protected by that Constitution as an element of each State constitution, and must be taken by the Commonwealth as it finds them.[28] But these State Supreme Courts have a role and existence that transcends their status as courts of the States.[29] State Parliaments are not free to vest State jurisdiction in State courts where that would be repugnant to or incompatible with the exercise of federal jurisdiction by those courts.[30] The Commonwealth Parliament has the power to vest federal jurisdiction in any State court without the need for the consent of the State.[31] In such a scenario, it is not yet clear whether any co-operative Commonwealth/State/Territory legislative attempts to further integrate State, Territory and Federal Courts and their several jurisdictions, so

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23 Commonwealth of Australia Constitution Act (UK), Covering Clause 5; Constitution, ss 51(iii), (vi), (xx), (xxiv), (xxv) and 118.

24 As to Covering Clause 5, see *Lamshed v Lake* (1958) 99 CLR 132 at 148 per Dixon CJ; *Spratt v Hermes* (1965) 114 CLR 226 at 246-247 per Barwick CJ, at 252 per Kitto J, at 270 per Menzies J and *Munn v Argus*, (Northern Territory Court of Appeal, 17 January 1997, unreported). As to s 51(iii), see *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248 at 279 per Brennan, Deane and Toohey JJ, at 289-290 per Gaudron J. As to s 51(vi), see *Lamshed v Lake* (1958) 99 CLR 132 at 143 per Dixon CJ. As to s 51(xx), see *New South Wales v Commonwealth* (1990) 169 CLR 482 at 504, 508 per Deane J. As to s 51(xxiv), see *Aston v Irvine* (1955) 92 CLR 353 at 364 per Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ; *Lamshed v Lake* (1958) 99 CLR 132 at 151 per Williams J. As to s 51(xxv), see *Breavington v Godleman* (1988) 169 CLR 41 at 149 per Dawson J. As to s 118, see *Lamshed v Lake* (1958) 99 CLR 132 at 142 per Dixon CJ; *Breavington v Godleman* (1988) 169 CLR 41.

25 *Berwick v Gray* (1976) 133 CLR 603 at 605 per Barwick CJ and at 608 per Mason J; JQ Ewens, "Norfolk Island as Part of the Commonwealth" (1980) 54 *ALJ* 68.

26 R D Lumb, "'The Commonwealth of Australia' — Constitutional Implications" (1979) 10 *F L Rev* 287.

27 *Kable v Director of Public Prosecutions (NSW)* (1996) 70 ALJR 814 at 839 per Gaudron J, at 844-847 per McHugh J, at 860 per Gummow J.

28 Ibid at 838-839 per Gaudron J, at 843 per McHugh J and the cases cited at footnote 186, at 858 per Gummow J.

29 Ibid at 846 per McHugh J.

30 *Kable v Director of Public Prosecutions (NSW)* (1996) 70 ALJR 814.

31 Constitution, s 77(iii).

as to avoid contests as to Commonwealth/State jurisdiction, will be judicially struck down as being invalid.[32]

Australian courts have had little difficulty in upholding a variety of co-operative Commonwealth/State/Territory legislative schemes on other matters. There is no express provision in the Constitution, and no principle of constitutional law, that would prevent the Commonwealth and the States from acting in co-operation so that each, acting in its own field, supplies the deficiencies under the federal system in the power of the other, and so that together they may achieve a uniform and complete legislative scheme.[33] This is subject to certain limitations such as are provided in s 92 of the Constitution.[34] Co-operative federalism is therefore a judicially approved method of achieving legal uniformity across the Australian federal divide and extending to Australia as a whole, including all territories, although depending on the exercise of political will at both federal levels of government.

But to what extent is this emphasis on Australian unity reflected in specific text of the Australian Constitution? It is said that implications in the Constitution can only exist in the text and structure of the Constitution, as revealed or uncovered by judicial exegesis — they are not otherwise judicially devised.[35] The Constitution itself was drafted against the background of the existing self-governing Australian Colonies and did not attempt to set out comprehensively all relevant constitutional provisions affecting both the Commonwealth and the Original States. As noted above, State constitutions, powers and laws were simply continued, subject to the new Constitution.[36] The notion of federalism, which emphasises the division of power and function between different levels of government, was, and still is, central to the Australian Constitution, and of course a considerable number of the provisions of that Constitution are concerned with the incidence of that federal system, comprising as it does the Commonwealth and the States. This tends to detract from any concept of "One Australia". In addition, the Founding Fathers rejected any idea of incorporating a Bill of Rights in the new Constitution, and as a result, the Constitution has few provisions dealing with the rights of the citizen generally. In so far as it does have such provisions, it deals with them in a manner that in some cases limits their application to the Commonwealth body politic.[37] Some sections, such as 92 and 117, are of wider application to both the Commonwealth and the States. There has been an attempt to extend some of the existing express Constitutional rights, presently directed at the Commonwealth only, to include the States and territories and their residents by

32 The Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) and complementary State and Territory Acts, plus the Corporations Act 1989 (Cth), Part 9, and complementary State and Territory Acts, currently provide schemes for cross-vesting of superior court jurisdiction in Australia. The validity of these schemes was upheld in *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451, with special leave to appeal to the High Court having been granted, the case now being entitled *Gould v Brown*. There may, however, be some constitutional limits on the capacity of States to vest State jurisdiction on Federal courts.

33 *The Queen v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1985) 158 CLR 535 at 552 per Gibbs CJ.

34 Section 92 provides that trade, commerce and intercourse among the States shall be absolutely free.

35 *McGinty v Western Australia* (1996) 186 CLR 140 at 168 per Brennan CJ.

36 Constitution, ss 106, 107 and 108.

37 For example, s 51(xxxi) of the Constitution as to just terms and ss 80 and 116.

Constitutional amendment. It did not succeed, perhaps for a variety of reasons unconnected with the merits of this aspect of the referendum proposals.[38] In no cases do those existing Constitutional provisions on rights expressly extend to territories (apart, perhaps, from the amendment by national referendum to s 128, referred to below). However, as noted above, by the use of the term "Commonwealth" in a geographic sense, some Constitutional provisions are capable of having an application Australia-wide, including in and to all territories, or at least to mainland Territories. Thus, in some respects, the express terms of the Constitution do not fully reflect the new emphasis on Australian unity. This no doubt reflects in turn the great influence that the former self-governing Colonies and their politicians had on the process of Constitution-making, as well as the fact that Australia did not at the time of federation achieve separate international status as a nation.

Against these historical facts, the more recently developed implied constitutional freedom of communication in political matters has been held by a majority of the High Court to apply both to Commonwealth and State parliamentarians and officers,[39] and probably also to those of the mainland Territories,[40] and it is capable of limiting or qualifying the operation of both Commonwealth, State and probably Territory legislation. This might, on one view, be seen as a further example of a more contemporary quest for some underlying constitutional unity in Australia.

There are at least some provisions in the Constitutional text that point to the need for a more unified, Australia-wide approach to constitutional interpretation, one that was contemplated from the inception of the federation. Thus, for example, Covering Clause 5 in the Constitution Act provides that that Act, and all laws made by the Commonwealth Parliament "shall be binding on the courts, judges and people of every State and of every part of the Commonwealth", thereby clearly indicating an application beyond the area of the States. The making of the Constitution itself was an action directed by a will to unify the Colonies, as expressed in the first Preamble to the Constitution Act. The express provisions relating to Commonwealth territories,[41] the possibility of those Territories and other entities becoming new States,[42] plus the requirement for the seat of government of the Commonwealth to be within a Commonwealth territory,[43] in themselves indicate that the Commonwealth of Australia is intended to be more than simply a federation of States. It is a broader concept both in a geographical sense and in a political sense.

In one respect in particular, there is one form of underlying constitutional unity that has existed since the beginning of federation in 1901. It is said that the Australian

38 National referendum of 3 September 1988, the results of which are summarised in Blackshield, Williams and Fitzgerald, *Australian Constitutional Law and Theory: Commentary and Materials* (1996) at 974-975.

39 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

40 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 162 per Brennan J, at 176-177 per Deane and Toohey JJ, at 215-216 and 221-224 per Gaudron J, but see at 245-246 per McHugh J; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 156 per Brennan J, at 164 per Deane J.

41 Constitution Act, s 6, definitions of "The States"; Constitution, ss 111 and 122.

42 Constitution, s 121.

43 Constitution, s 125.

Constitution was designed to create a free trade area throughout the Commonwealth and to deny to the Commonwealth and the States alike a power to prevent or obstruct the free movement of people, goods or communications across State borders.[44]

This concept was envisaged as extending to the whole Australian mainland and Tasmania, that area comprising the total area of the former self-governing Colonies that became the Original States. The concept was expressed through ss 51(i), (ii) and (iii), 88, 90, 92, 99 and 102 of the Constitution. Not altogether surprisingly, some of these sections are expressed in terms by reference to the States only (for example, ss 51(i), (ii), 92, 99 and 102), that is, "the States" from time to time rather than the "Original States". This includes new States (if any), but excludes Commonwealth territories.[45] The remaining sections of the Constitution that are relevant to free trade are not explicit on this point. As will be seen below, at least one of those sections has recently been given a more expansive interpretation to include mainland territories, making it clear that the reach of the free trade concept was based on fixed geography, and not on merely the area of the States from time to time.

The practical expression of this Australia-wide unified concept as to trade and commerce, described above, has of course become more and more marked as the current century has unfolded. Australia has for some time had a largely integrated economy,[46] which is now being increasingly extended to enable Australia to participate in the greater global economy. Accompanying this Australia–wide integration in trade and commerce have been other forms of integration and unification — in the extension and scope of Commonwealth laws of Australia-wide application, in co-operative schemes mentioned above, in the development of national industry, in transport and communications, in travel and mobility, in labour relations and the professions, in educational, social and cultural links, in sport and recreation, in inter-governmental relations, and in many other spheres of activity. The Australia of today is vastly changed from the Australia that existed at the turn of the century. It seems fair to conclude that internal Australian borders, although still important, are of much less significance today than they were at 1901. The extension of these internal links between different Australian jurisdictions now seems to be less affected by questions of the particular location within Australia.

This leads directly to a consideration of the application of national Constitutional provisions to Commonwealth territories, and the extent to which the concept of "One Australia", spoken of above, can now be properly utilised to influence the approach to such territories in matters of Constitutional interpretation and application. The concept of "free trade" throughout mainland Australia was originally viewed as synonymous with "free trade" between the constituent States of the federation. At the time of federation, there were no Commonwealth territories, and very limited attention was given by the Founding Fathers to the possibility of future territories of the Commonwealth being created or being able to influence the "free trade" design of the Constitution. To the extent that express provision was made for such territories in the

44 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 274-275 per Brennan, Deane and Toohey JJ; *Cole v Whitfield* (1988) 165 CLR 360 at 391 per Mason CJ Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

45 Commonwealth of Australia Constitution Act (UK), s 6, definition of "The States".

46 Sir Anthony Mason, "The Australian Constitution 1901-1988" (1988) 62 *ALJ* 752 at 755.

Constitutional text, it was, and still is, brief.[47] The subject of Commonwealth territories continued to be treated as of little significance in the first few decades after 1901, even after the first such territories were established.[48] This was reflected in the High Court's "disparate" approach to territories in the Constitution, they being treated as if "disjoined" from the federal system and hence from Australia in the fullest sense.[49] They were not generally considered as being important in national affairs, even though the largest of them, the Northern Territory, occupied one-sixth of the Continent. They were seen as remote, and compared to the rest of Australia had few inhabitants at that time. They had little impact on Australian trade and commerce. The Northern Territory, for example, only became a Commonwealth territory as a result of its surrender by the State of South Australia, largely because it was such a financial drain on that State and because of the economic stagnation of the Territory.[50] The Australian Capital Territory came into existence as a result of the express requirements of the Constitution,[51] and for many years was not greatly developed, the federal Government being based in Melbourne.[52]

This position of Commonwealth mainland Territories has changed in a number of respects in more recent decades. These Territories of the Commonwealth now play a significant role in Australian affairs, including but not limited to matters of trade and commerce. This growing significance was reflected in the national referendum of 1977, giving express voting rights in future national referendums to qualified electors of Territories which had representation in the House of Representatives.[53] The facility for a grant of representation to the Territories had already been judicially recognised in the two Territories Representation cases,[54] allowing the election of Senators and members of the House of Representatives with full voting rights from the Territories by Commonwealth legislation. Even before this time, the High Court had already abandoned its "disparate" approach to the Territories, in favour of a more flexible approach in matters of Constitutional interpretation and application to the Territories. The prevailing judicial view became that of treating s 122 of the Constitution as a source of national legislative power rather than just some limited, local source of power

47 Commonwealth of Australia Constitution Act (UK), s 6, definitions of "The States"; Constitution, ss 111 and 122.

48 The first Commonwealth territory to be established was that of Papua, effective on 1 September 1906 under the Papua Act 1905 (Cth). The Northern Territory became a Commonwealth territory on 1 January 1911 under the Northern Territory Acceptance Act 1910 (Cth). The Australian Capital Territory was proclaimed as a territory on the same day under the Seat of Government Acceptance Act 1910 (Cth).

49 *Buchanan v Commonwealth* (1913) 16 CLR 315; *R v Bernasconi* (1915) 19 CLR 629.

50 P F Donovan, *A Land Full of Possibilities* (1981), Chs 9 and 10; Alan Powell, *Far Country* (1982) Ch 7.

51 Constitution, s 125.

52 H Zelling, The Territories of the Commonwealth, in the Hon Justice Else Mitchell (ed), *Essays on the Australian Constitution* (2nd ed 1961) at 338.

53 Constitution Alteration (Referendums) 1977 (Cth), the referendum being held on 21 May 1977, and resulting in the third highest affirmative vote in all referenda.

54 *Western Australia v Commonwealth* (1975) 134 CLR 201; *Queensland v Commonwealth* (1977) 139 CLR 585.

separate from the rest of the Constitution.[55] Further, it became a question of construction as to whether s 122 was controlled in any respect by other parts of the Constitution, the construction being resolved upon a consideration of the text and of the purposes of the Constitution as a whole.[56] In practice, a number of the Constitutional provisions, when they were litigated, were held not to be applicable to the Territories,[57] although the possibility of a more expansive approach to the place of the Territories in the Constitution was now open. Some contemporary indication as to where the High Court may be heading in this regard may be forthcoming in the case of *Newcrest Mining v Commonwealth*,[58] which raises the question of whether the constitutional requirement of just terms on the acquisition of property under Commonwealth law extends to an acquisition of property under Commonwealth legislation enacted in reliance in whole or part on s 122 of the Constitution.

It is clear that the position of three Commonwealth Territories in particular has changed in recent years in significant respects, both politically, socially and economically. This is evidenced by the statutory grants of forms of self-government to three Territories, namely the Northern Territory,[59] the Australian Capital Territory,[60] and to a more limited degree Norfolk Island,[61] involving in each case a judicially accepted grant of their own legislative and executive institutions and powers separate from the Commonwealth.[62] Whereas previously these Territories came within the umbrella of the Crown in right of the Commonwealth, once self-government was granted they acquired a measure of autonomy and legal separation from the Commonwealth and the Crown in right of the Commonwealth.[63] And whereas in earlier decades the combined population of these Territories was low, they now have a significant population. Mainland Territories now have about half a million residents, more than the State of Tasmania,[64] and they receive many more visitors every year. They have become important elements of the Australian nation and can no longer be simply ignored or treated as unimportant. The recent debate on whether the

55 *Lamshed v Lake* (1958) 99 CLR 132; *Spratt v Hermes* (1965) 114 CLR 226; *Attorney-General (WA); Ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492.

56 *Spratt v Hermes* (1965) 114 CLR 226 at 242 per Barwick CJ; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 288 per Gaudron J.

57 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 287-288 per Gaudron J; G R Nicholson, "Constitutionalism in the Northern Territory and Other Territories" (1992) 3 *PLR* 50 at 55 and footnote 39.

58 *Newcrest Mining (WA) Ltd v Commonwealth* (1993) 46 FCR 342; *Commonwealth v Newcrest Mining (WA) Ltd* (1995) 58 FCR 167, on appeal to the High Court at the time of writing, and in which it was argued that *Teori Tau v Commonwealth* (1969) 119 CLR 564 should be overruled.

59 Northern Territory (Self-Government) Act 1978 (Cth) and Regulations.

60 Australian Capital Territory (Self-Government) Act 1988 (Cth) and the ACT Self-Government (Consequential Provisions) Act 1988 (Cth).

61 Norfolk Island Act 1979 (Cth).

62 *Berwick v Gray* (1975) 133 CLR 603; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 183-186 per Gibbs CJ, at 265-266 per Aickin J, at 278-280 per Wilson J; *Capital Duplicators v Australian Capital Territory* (1992) 177 CLR 248.

63 *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212; *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 25 FCR 345; *Waters v Acting Administrator of the Northern Territory* (1993) 46 FCR 462.

64 Australian Demographic Statistics, ABS Catalogue No. 3101.0, March Quarter 1996 at 8.

Commonwealth Parliament should unilaterally override an existing Northern Territory law on euthanasia has highlighted this change in position, raising a question of a breach of the conventions of self-government.[65]

It may not be without significance that these developments with respect to Territories have intensified at approximately the same time as the more recent approach has emerged to constitutional interpretation, spoken of earlier in this paper, namely, the increasing importance being attached to the concept of "One Australia". The perspective of Australia as one nation and one people under one system of laws and one Constitution must, by definition, be capable of embracing all the peoples of Australia irrespective of their place of residence. It is a concept that, unlike the federal principle, is not so much concerned with the question of exactly where a person resides within Australia from time to time, whether it be in a State or in a Territory.

There are indications that the High Court has, to some extent at least, already been influenced by this developing concept of "One Australia" in its application to mainland Territories. Thus in *Capital Duplicators Pty Limited v Australian Capital Territory*,[66] a majority of the Court held, in relation to s 90 of the Constitution,[67] that the power of the Commonwealth Parliament to impose duties of excise was not only exclusive of the States but also mainland Territories. Three of the majority justices in that case based their decision on the reasoning that such an interpretation was necessary for the maintenance of the free trade area throughout the Continent of Australia and Tasmania, a central objective of the federal compact that should not be able to be defeated by a Territory legislature.[68] Gaudron J took a more expansive approach in arguing that internal Territories were a constituent part of the geographical area of Australia, and that s 122 of the Constitution should be interpreted in a way that secures to Territorians the same basic rights as other Australians, unless the contrary was clearly indicated. She added that arguably, upon a grant of self-government to a territory under s 122, the territory was subject to the same restraints as the Constitution imposes on the States.[69]

The extent to which Commonwealth territories and their residents are in the same position with respect to constitutional rights and obligations as States and State residents remains an outstanding constitutional issue. The question can perhaps be viewed, in part at least, against the background of the development of universal human rights in the international arena, a development which in most respects pays no regard to the location where a person resides. By their very nature, such human rights are said to be universal and indivisible.[70] While these international human rights do

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65 Euthanasia Laws Act 1996 (Cth), overriding the Rights of the Terminally Ill Act 1995 (NT), the latter Act having been held to be valid in *Wake and Gondarra v Northern Territory* (1996) 109 NTR 1, and following the Report of the Senate Legal and Constitutional Committee, *Euthanasia Laws Bill* 1996 (March 1997).

66 (1992) 177 CLR 248.

67 Section 90 provides that the power of the Commonwealth Parliament to impose duties of customs and excise, and to grant bounties on the production or export of goods, is exclusive.

68 (1992) 177 CLR 248 at 278-279 per Brennan, Deane and Toohey JJ.

69 Ibid at 288-289 per Gaudron J.

70 The concept of universalism in human rights is spelt out in the *Universal Declaration of Human Rights* of 1948 and in other international human rights instruments. The Vienna Declaration, adopted at the Second World Conference on Human Rights, provides in s I,

not have a direct operation on Australian domestic law unless implemented by domestic legislation,[71] it is clear that increasingly they are exerting some influence in domestic Australian judicial decision-making.[72] Basic notions of justice in a free and open society would suggest that, to the extent that the rights of the citizen are recognised by the law, those rights should extend to all citizens irrespective of their place of residence from time to time.

Within a federal system, it is clear that the merits of a unified, national approach such as has been suggested above in the concept of "One Australia" have to be balanced against the need to maintain the federal system and the divisions it necessarily imports. Federalism involves a tension or balance between the forces for cohesion and the forces for devolution. It usually involves some constitutional division of power and function between the centre and the component units of the federation, a divide which cannot easily be abrogated by unilateral Act, and a guarantee of a right of self-government with respect to the matters allocated to the component units. If this was not so, the federal system would tend to be weak and be left at the mercy of political forces. And as has been noted, many of the express and implied provisions of the Australian Constitution are limited in their operation to the Commonwealth body politic only, or to that Commonwealth and to the States and their residents only, in some cases at least for reasons connected with the maintenance and preservation of the federal principle in this country. Where so expressly limited, then unless the High Court were to engage in some new form of constitutional interpretation to stretch the language of the constitutional text to extend these provisions to territories and/or to territory residents notwithstanding any such express limitation, or unless the High Court were prepared in some way to imply into Australian law parallel provisions for territories and/or territory residents,[73] there seems to be no way in which the benefit of these sections could be extended to territories and their residents short of express constitutional change by national referendum.

But leaving to one side those constitutional provisions which must, because of the express wording of the Constitution or for reasons of the federal principle, be confined in their operation to States and their residents, there remains a number of other Constitutional provisions which could be judicially extended to Commonwealth territories and their residents without any direct distortion of the language of the text.[74] It is in this area that there is room for an Australian court, if so minded, to have regard to fundamental concepts, including the concept of "One Australia", spoken of above. It is not suggested that this concept should be the only, or even the primary, influence on judicial decision-making when considering the place of territories under

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paragraph 5 that all human rights are universal, indivisible, and interdependent and interrelated.

71 For example, in the Human Rights and Equal Opportunity Commission Act 1986 (Cth).

72 There are many recent examples of this in Australian judicial decisions, for example, *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. For a discussion, see Sir Anthony Mason, "The Influence of International and Transnational Law on Australian Municipal Law" (1996) 7 *PLR* 20.

73 For example, *Breavington v Godleman* (1988) 169 CLR 41 at 98 per Wilson and Gaudron JJ adopting a common law rule for events occurring in a Commonwealth territory equivalent to that in s 118 of the Constitution.

74 Existing constitutional provisions that warrant consideration in this regard include ss 51(xxxi), 80 and 116.

the Constitution. Obviously the factors to be taken into account in constitutional interpretation will vary from case to case, depending on the background facts and the relevant constitutional and legal provisions applicable. The correct test, it would appear, remains one of construction, to be resolved upon a consideration of the particular text and of the purposes of the Constitution as a whole.[75] But within such a test, and assuming that no other relevant factors strongly point to a particular judicial result, there is arguably room for application of the concept of "One Australia". It is an approach that leans towards a result that would constitutionally treat territories and territory residents, and in particular those in the self-governing Territories and their residents, in a manner that more closely approximates the treatment of the States and State residents. In this way, any discrimination in constitutional terms that presently exists purely on the basis of location within Australia can be reduced and, in some respects, can be eliminated. By doing so, the unity of the Australian nation can be enhanced, while still preserving the federal system. The significance of State borders would remain, but only in so far as is necessary to maintain the federal principle and its necessary incidence.

It remains to be seen whether the High Court will fully embrace this approach. The matter is one of increasing interest generally, and particularly in the Northern Territory, where proposals for constitutional development are emerging that could lead to a grant of Statehood within the federation in the foreseeable future,[76] thus terminating the status of the Northern Territory as a Commonwealth Territory. Such proposals could be affected one way or the other by any future judicial developments that relate to the constitutional place of territories under the Constitution. If national constitutional rights are not to be judicially extended to the Northern Territory and its residents, then this will no doubt provide added incentives for seeking a grant of Statehood. The possibility of the entrenchment of appropriate rights in a new home grown Northern Territory Constitution, protected by the Australian Constitution,[77] and perhaps conferring express rights on the Aboriginal residents of the Territory,[78] is now a real prospect. The matter is more problematical in the Australian Capital Territory, where a grant of Statehood is not an option,[79] at least as to the "seat of government" of the Commonwealth.[80] Other Commonwealth territories, being much smaller in size and population, cannot look forward to a future grant of Statehood with any likelihood, and, unless incorporated into an existing State, face the prospect of a continuation of inferior territorial status under the Constitution for a long time to come.

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75 Above n 54.

76 Northern Territory Statehood Working Group, *Final Report* (Northern Territory edition, May 1996), prepared for the Council of Australian Governments (COAG); Legislative Assembly of the Northern Territory, *Foundations for a Common Future, Report on Paragraph 1(a) of the Sessional Committee on Constitutional Development's Terms of Reference on a Final Draft Constitution for the Northern Territory* (November 1996).

77 Constitution, s 106, and note Select Committee of the Legislative Assembly of the Northern Territory on Constitutional Development, *Entrenchment of a New State Constitution*, Information Paper No. 2, undated.

78 *Foundations for a Common Future*, Volume 1, at 5.11-5.13 and note the Final Draft Constitution for the Northern Territory at Appendix 8 of that Volume, Preamble 1 plus Clause 2.1.1, Part 7 and Part 8.

79 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 272 per Brennan, Deane and Toohey JJ.

80 Constitution, ss 52(i) and 125.

It has to be asked whether, in these circumstances, given the evolution of the Australian nation and its peoples described above, and the developing integration of Australia and its component States and territories in trade, commerce and in other respects, there can be any reasonable justification for the continued form of discrimination against Commonwealth territories and their residents in constitutional terms beyond that necessary to preserve the federal system.