Social Conflict and Constitutional Interpretation

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It is a characteristic feature of democracies with fairly rigid constitutions such as ours that many social and political issues finish up as legal issues to be argued in the courts. Many of the conflicts of forces and interests that have been major features of Australia's twentieth century history have come before the High Court for resolution in the course of its ninety three years of existence. From that point of view, the 183 volumes of the Commonwealth Law Reports provide an historical cavalcade.

Just as the political pendulum has swung from left to right and back over this century, so there have been swings of judicial interpretation of the Constitution. But the dominant judicial mood has not always coincided with that prevailing in the political sphere.

For many decades, and still to some extent today, the questions that were at the centre of Commonwealth and state politics and which gave rise to central issues of constitutional interpretation were those involving terms and conditions of employment and industrial disputes. It was over these matters that many governments fell, elections were fought and the community was divided. It was in relation to these matters that judges of the High Court had to determine many of the main lines of constitutional interpretation.

All this would no doubt have surprised the delegates at the constitutional conventions of the 1890s. Issues of industrial employment were regarded primarily as domestic matters for the states. The only power of the Commonwealth which had a direct bearing on the matter was that in section 51(xxxv) which authorises laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.' It gives no power to Parliament to prescribe directly conditions of employment. It confines the Commonwealth to setting up tribunals of conciliation and arbitration and limits the disputes that such tribunals may deal with, namely, those extending beyond one state. The power was approved only after many failed attempts and, then, only by a narrow majority. It was intended to deal only with emergencies and matters of national magnitude.

The first decade of the Commonwealth saw the judicial defeat of many important policies pursued by the liberal protectionist government of Alfred Deakin with the support of Labor members of Parliament. Much of their legislative program, known as 'the new protection', was taken up with the determination of terms and conditions of employment, the strengthening of trade unions and the control of restrictive trade practices. By a process of interpretation which read down the powers of the Commonwealth, so as to ensure ample power in the states to control and regulate their domestic

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commerce and industry, the High Court brought this legislative structure crashing to the ground.[1]

In 1920 the High Court in a sharp reversal of its earlier decisions and doctrines proclaimed that the role of the court was merely to construe the powers of the Commonwealth, without regard to the question of how much exclusive power was left to the states. This was because the Constitution gave no express power to the states but merely the residue after federal powers had been properly interpreted.[2]

For a government with the same policies as those of the Deakinites and Labor in the 1900s this would have been the time to act. But the political climate of the Commonwealth, as distinct from some of the states, had by the 1920s changed.

For most of the 1920s Australian national government and politics were dominated by Stanley Melbourne Bruce who was Prime Minister of Australia from 1923 to 1929. Bruce was a wealthy anglicized businessman who was suave, determined and unflappable. For many he represented sound efficient government; for others he was the embodiment of the class war enemy. The policies of his government — a coalition of Nationalist and Country Party members — were based on the slogan 'men, money and markets'. For each of these Britain was, or would be, the major supplier. As the chief concern of the government was development and not the social engineering of the new protectionists, it was largely content to operate within the core of federal powers. Whereas the new protectionist policies involved governments concentrating at the very periphery of granted powers, Bruce's concern was with overseas trade and investment, fiscal policies and immigration. These were in the heartland of federal authority.

Yet from the start Bruce was plagued with industrial disputes which he believed were damaging the country and obstructing the pursuit of his economic policies. For six years much of his legislative program was directed towards dealing with them. Like his predecessors, but for different reasons, he believed that the Constitution exacerbated the difficulties he faced. The constitutional issues raised by his policies and legislation would continue into the next decade and establish judicially created constitutional principles that were to shape political policies well into the future. I propose to show, by examining a decade or so of Australian federal political history, the interaction of political and social events on the one hand and the Constitution and its interpretation on the other. I will then turn to the significance for our time of these events.[3]

In the 1920s there was major unrest in both the maritime and coal mining industries. Australia's export and import trade depended largely, of course,

[1] *R* v *Barger* (1908) 6 CLR 41; *Attorney-General (NSW)(Ex rel Tooth & Co Ltd)* v *Brewery Employee's Union of NSW* (1908) 6 CLR 469; *Huddart Parker & Co Pty Ltd* v *Moorehead* (1909) 8 CLR 330.

[2] *The Amalgamated Society of Engineers* v *The Adelaide Steamship Company Limited* (1920) 28 CLR 129.

[3] I wish to acknowledge my thanks to Mr G Lindell, reader in law at the University of Melbourne, for suggesting this topic and approach.

on seamen and waterside workers. Coal was the major source of energy and was, therefore, vital to the industrial progress that 'men, money and markets' would bring about.

In 1925 there were many strikes and disturbances by seamen, who were led by the general secretary of the union, Tom Walsh. The export trade was, in the government's view, in danger.

Bruce had a strong belief that much of Australia's industrial troubles were due to foreign born agitators. He said in Parliament that it was essential that the Commonwealth have power to deal with men who came from abroad to inflame the minds of the Australian people by teaching foreign doctrines. The disturbances, he declared, were not caused by those who were Australian-born but were due to the doctrines and atmosphere introduced by aliens.[4] During an election campaign that year he referred to industrial radicals as puppets of men overseas and said 'no dirty greasy foreigner' would impair Australia's industrial system.[5] Industrial troubles were thus linked in the government's mind with activities of a subversive, seditious and treasonable kind. It was resolved, therefore, to pursue a policy of deportation of overseas-born trouble makers.

Two years earlier, the government had, under a provision of the *Immigration Act* 1920, successfully deported two Irish Republican Army supporters, O'Flanagan and O'Kelly, who had come to Australia to solicit funds. The provision empowered the Minister to deport a person not born in Australia, after receiving a report from the board of inquiry, if the Minister was satisfied that that person had advocated subversive doctrines within three years of arrival. The Minister's order was upheld by the High Court and the provision declared to be a valid law with respect to immigration.[6] The Commonwealth, it seems, could deport any immigrant, on any ground that it wished.

Bruce had the *Immigration Act* amended to extend the power of deportation to cover the circumstances of the current seamen's strike. Under the new provision the Minister could, on the recommendation of the board, deport any person not born in Australia if satisfied that, among other alternatives, he was hindering or obstructing the transport of goods or passengers in interstate or overseas trade or commerce.

Orders of deportation were made against Tom Walsh and another official of the Seamen's Union, Jacob Johnson. They were arrested and held at Garden Island. (Walsh was married to the famous active feminist Adela Pankhurst, daughter of the more famous English suffragette Emmeline Pankhurst. Adela had been the appellant in a reported constitutional case in 1917 related to the defence power.[7]) Tom Walsh had arrived in Australia from Ireland in 1893. Johnson (known otherwise as Johansen) had arrived from Holland in 1910 and had been naturalised in 1913. They applied to the High

[4] *Parliamentary Debates*, House of Representatives (Cth), 25 June 1925, 461.
[5] I M Cumpston, *Lord Bruce of Melbourne* (1989) 59.
[6] *R* v *MacFarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518.
[7] *Pankhurst* v *Kiernan* (1917) 24 CLR 120.

Court for a writ of habeas corpus to prevent their deportation, and they won.[8]

So far as the power with respect to immigration was concerned, *R* v *McFarlane; Ex parte Walsh and Johnson*[9] ('the *Irish Envoys* case') was held to be inapplicable because, although Walsh had come from Ireland and Johnson from Holland, they were no longer immigrants. That was because they had made their homes in Australia and had become part of the Australian community - the people of the Commonwealth.

However, as the law was obviously directed to preventing injury to interstate and overseas shipping, could it not be upheld as a law with respect to trade and commerce with other countries and among the states — the first legislative power of the Commonwealth? The Court rejected that argument because the law didn't lay down any rule related to trade and commerce and then provide for a sanction for those who breached it. Deportation followed on the *Minister's opinion* that a person had been concerned in acts that hindered or obstructed interstate or overseas transport. The Chief Justice said it was for the Court, not the Minister or even the Parliament, to determine whether an activity came within Parliament's constitutional power to control. It was for Parliament to prescribe a rule within its constitutional power and for the court to decide whether any person or activity came within that general rule. For the moment at any rate, Bruce was thwarted in his attempts to rid Australia of foreign-born agitators as a step to industrial peace.

Before the board had advised the Minister on Walsh and Johnson, Bruce, in November 1925, conducted a federal election on the slogan of 'law and order'. The streets were littered with posters showing Tom Walsh trampling on the Union Jack.[10] The Coalition won a great victory. The Government parties had 52 seats and Labor 23.

After the election, the government introduced amendments to the *Crimes Act* 1914, aimed at communists, anarchists and other subversives. The provisions made illegal voluntary associations with subversive or treasonable objects. Two provisions were concerned specifically with industrial matters. It was an offence, among other things, to take part in a strike relating to interstate or overseas transport or any boycott interfering with such transport. Again, there were provisions for the deportation of convicted persons not born in Australia. This time the reliance was squarely based, not on the immigration power, but the commerce power and, unlike the position in *R* v *Yates; Ex parte Walsh and Johnson*,[11] it would be for a court and not the Minister to determine conclusively whether the accused had injured interstate or overseas trade. Deportation was the sanction for breach of the law in addition to the other penalties. On this argument, as advanced by the Attorney-General, John Latham, it mattered not whether the accused was or was not part of the Australian community.

[8] *R* v *Yates; Ex parte Walsh and Johnson* (1925) 37 CLR 36.
[9] (1923) 32 CLR 518.
[10] G Souter, *Acts of Parliament* (1988) 204.
[11] (1925) 37 CLR 36.

The Act had a number of draconian procedural and evidentiary provisions. They declared that statements (known as averments) by the prosecutor in the information were prima facie evidence of their truth.

One respect in which these provisions differed from those in the *Irish Envoys* case was that a person could be deported although he or she was a natural born British subject who had come to Australia as a child, or even as a baby. This caused the Leader of the Opposition, Mr Charlton, to ask 'when does a person become an acknowledged citizen of Australia?'[12] In fact, as a matter of law, the concept of Australian citizen was unknown. There was one nationality for all people of the Empire. A British-born person could not be naturalised as an Australian citizen, because no such status existed. That is why the Commonwealth did not find its power with respect to aliens very useful in dealing with deportation. A British national from any part of the Empire was not an alien. It would seem, therefore, that if in those days an English-born Australian resident could be constitutionally deported, so could an Australian-born person.

None of this legislative activity put an end to the industrial disputes with which Bruce's period of office was hag-ridden. An attempt to have the Constitution changed to give the Commonwealth power over all industrial disputes, and to enable the Commonwealth to create authorities which could directly regulate the terms and conditions in all industries, failed convincingly. The national vote against was 56.5 per cent.

The referendum provided a very good illustration of complex motives that occur in respect of proposals to alter the Constitution, as well as the problem of separating long term from short term political advantages and disadvantages.

The Federal ALP supported the referendum in line with its official policy in favour of increasing Commonwealth power. But many Labor supporters preferred to ensure that as much industrial power as possible should remain with the states because there were five state Labor governments, and many feared that Bruce would use any new powers to disadvantage workers. On the other hand, many Conservative supporters, including Robert Menzies, were opposed to the weakening of the federal balance that the proposed constitutional alteration would create. They united with many socialists to urge a vote against Bruce's proposals.[13]

Denied increased power by the people, Bruce tried dealing with continuing industrial bitterness and warfare by strengthening the penalty provisions of the *Conciliation and Arbitration Act* 1921. Then, a few days before Parliament was due to dissolve in 1928, prior to a general election, the Prime Minister informed the House that a crisis had arisen which required emergency legislation. The waterside workers, objecting to an award provision, had struck in many ports, and shipping was at a standstill. Before the union decided whether it would risk the new penalty provisions by supporting the strike, the

[12] *Parliamentary Debates*, House of Representatives (Cth), 18 February 1926, 1003.
[13] A W Martin, *Robert Menzies, Vol 1, 1894–1943* (1993) 48–52; G Sawer, *Australian Federal Politics and Law, 1901–1929* (1956) 281.

government went for a preemptive blow. It introduced a short Bill with the avowed object of breaking the Waterside Workers' Federation (the 'WWF') and encouraging non-unionists to work on the wharves under police protection. As unemployment was running at 11 per cent, and unemployment benefits were either non-existent or very meagre, it was obvious that there would be little difficulty in recruiting people to replace the members of the union. The Bill passed through Parliament in a couple of days. Parliament then adjourned indefinitely before a general election a few weeks later.

The *Transport Workers Act* 1928 was unusual. It was extremely short. Parliament had in effect been asked to trust the government to do the right thing. The main provision conferred on the Governor-General in Council the power to make regulations in respect of the employment of transport workers in relation to interstate and overseas trade and commerce. In particular regulations could be made for a number of specified purposes including the regulation of their engagement, service and discharge, the licensing of workers and the protection of licensed workers.

The Act also contained a provision that is very rare, if not unprecedented, in peace time in federal legislation. It extended the regulation making power to cover the overriding of other Acts of Parliament (known as a Henry VIII clause).

The Opposition argued that the proposed legislation gave a blank cheque to the executive unsupervised by Parliament. The Government replied that under the *Acts Interpretation Act* 1901 the regulations had to be laid before both Houses within 15 sitting days when they could be disallowed by either House. Upon disallowance, the regulations ceased to be law. But Parliament was about to adjourn for some weeks before a general election. It was probable therefore that the regulations — whatever they contained — would have done their work before it met again.

When the regulations were made they controlled nearly all aspects of employer-employee relations. Non-unionists were licensed, and unionists were not, at the proclaimed ports. Police protection was afforded to the non-unionists, many of whom were recruited opposite the Bourke Street police station, and the strike collapsed.[14] The WWF was fined 1000 pounds under the new penalty provisions for encouraging a strike. The *Transport Workers Act* and regulations however were the subject of several constitutional court cases over the next seven or eight years.

The Coalition parties under Bruce and Page were returned to office at the 1928 election with a greatly reduced majority. The government introduced a Bill to incorporate the transport workers' regulations directly into the legislation, but leaving the broad regulation making power with its Henry VIII clause. A new Labor member, John Curtin, expressed puzzlement as to how the Commonwealth could control all industrial conditions in an industry when its chief power was confined to the arbitration of interstate disputes, and any broader power had been denied by the referendum.

The other issue raised was whether Parliament could confer legislative

[14] Souter, op cit (fn 10) 241–2.

power on the Executive to make laws to override Acts of Parliament and with no determination in the Act of any legislative object or policy to be pursued. Section 1 of the Constitution conferred the legislative power of the Commonwealth on the Parliament. Section 61 vested executive power in the Queen, exercisable by the Governor-General. Did the Act breach the principle of separation of powers implied in these provisions by giving broad legislative power to the executive? A third issue arose from the fact that, under the regulations, there could be, and there was, different treatment of workers at different ports. Yet s 99 of the Constitution provided that:

> The Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another State or any part thereof.

Attorney-General Latham assured the House of the validity of the legislation.[15]

Industrial trouble continued in the early part of 1929 while the world economic situation deteriorated, leading to the collapse of the Wall Street stockmarket in October of that year and ushering in the Great Depression. Having been denied by the people full power over industrial relations and conditions of employment, Bruce determined to put an end to the federal arbitration system, except in respect of the maritime industries. In a bill deceptively called the *Maritime Industries Bill* 1929, the sea transport workers and employers were to be placed under a new tribunal which, relying on the commerce power rather than the arbitration power, was given authority that was not confined to the settlement of disputes. The rest of the bill proposed the repeal of all Commonwealth conciliation and arbitration legislation, so abdicating the field in favour of the states.

This caused an uproar. As a result of revolts by some members on the government's side, the legislation was defeated and the government driven to the polls.[16] Industrial relations had again, as so many times before in Australian history, destroyed the government. The election held on 12 October 1929 was a landslide for Labor under James Scullin. Bruce was among five outgoing ministers who lost their seats. Labor remained in office for about two years, overwhelmed by the problems of the Great Depression, frustrated by a Senate controlled by the Opposition, and torn apart by factionalism. From the end of 1931 non-Labor governments ruled for the next ten years in the federal sphere. For most of that period the Prime Minister was Joseph Lyons, formerly Treasurer in the Scullin Labor Government. He had resigned from the Labor Party to join and lead non-Labor forces in a new political party called the United Australia Party ('UAP').

It was during Scullin's term of office, however, that the High Court determined some of the constitutional issues that arose out of Bruce's legislation. Scullin used the *Transport Workers Act* to implement a policy that was the direct opposite of that intended by Bruce. Instead of favouring persons who were not members of the WWF, Scullin's regulations required that they were

[15] *Parliamentary Debates*, House of Representatives (Cth), 5 March 1929, 723 ff.
[16] Sawer, op cit (fn 10) 308–12.

to be licensed in preference to non-WWF members. The stevedoring companies, who were originally the beneficiaries of the Act, were now appalled that they could not employ whoever they wished, and so they challenged its constitutional validity.

In *Huddart Parker & Co Pty Ltd* v *Commonwealth*,[17] the main argument was that the Commonwealth could not rely on its power with respect to interstate and overseas trade and commerce, because the question whether a worker was or was not a member of a particular union, did not affect the interstate or overseas transport. The object of the regulations related to industrial or employment policy not to commercial policy or the furtherance of the export trade. Under the commerce power, the licensing of waterside workers, it was argued, could be based only on the fitness of the individual to perform the task.

This argument appealed only to a minority of the High Court. Starke J considered that both Bruce's regulations and Scullin's were utterly irrelevant to any object related to interstate or overseas trade. They involved the use of the commerce power as a mere front for a law about industrial relations. A majority, however, consisting of Rich, Dixon and Evatt JJ, took a different view. The judgment of Dixon J became a classical exposition, which in decades to come was the basis for a method of interpretation favourable to an expansion of Commonwealth authority. He said that any law which prescribed who should or should not perform any activity essential to interstate or overseas commerce was a valid law within the commerce power. The fact that the statutory criteria had no apparent relationship to that commerce was irrelevant as was the clear industrial motive or policy of the Act. They were questions of politics or policy, ie of legislative discretion. He and Rich J were, however, cautious about going further. They left open whether the power authorised the control of all conditions of employment of those engaged in that commerce.

The stevedoring companies did not give up. In *Victorian Stevedoring Company and General Contracting Ltd* v *Dignan*[18] they raised the issue of the broad delegation of legislative power and the separation of powers said to be implied in the Constitution. The fact that governments were authorised to use the same Act to enforce opposing policies, and in disregard of other Acts of Parliament, emphasised the degree of delegation. American cases in this area had required Congress to indicate in the Act a general policy to be pursued by the regulations.

The Court unanimously upheld the regulation making provisions. The judges relied in part upon a gradual course of earlier decisions (although the separation doctrine had not been argued in those cases). Some judges suggested limits that were unlikely to be a serious inconvenience to the Commonwealth. Sir Owen Dixon in his judgment and later in an elaborate article showed that he was torn by his fascination with the separation of powers on the one hand and his concern for the practical affairs of government on the

[17] (1931) 44 CLR 492.
[18] (1931) 46 CLR 73.

other.[19] The latter, he thought, were also supported by British constitutional concepts and practices and the close relationship between the legislature and the executive. This overcame the clear textual exposition of the separation of powers principle that he saw in the Constitution.

The judicial consideration of the validity of Bruce's legislation did not end there. The *Transport Workers Act* remained on the statute book after the fall of Scullin's government. Unrest in the maritime industries continued. The UAP Government, under Mr Lyons, was faced with militant action of the Seamen's Union reminiscent of the actions of the Waterside Workers some years before. In response to a seamen's strike, the Attorney-General, Mr Menzies, had made licensing regulations under the *Transport Workers Act.* The regulations were made applicable to five ports. No ports were specified in Western Australia or Tasmania. Mr Eliot Valens Elliott, a member of the Seamen's Union, sought a declaration that the regulations were invalid on the constitutional ground raised in Parliament in 1929 based on s 99 of the Constitution prohibiting a preference being given to states or parts of states over other states or parts of states in laws or regulations of commerce. Elliott said that his home port was Sydney. He could not be employed unless licensed, while those in Fremantle or Hobart could.

The regulations were upheld by a majority of four to two.[20] There was some dispute over which ports were preferred over others and whether any were. Did you look at it from the point of view of the stevedoring company, a union member, or a non-member, or the people of the state? But the majority, including Chief Justice John Latham — who had been the Attorney-General responsible for the original Act and the original regulations — held that, in any case, the localities were not chosen as parts of states but as Australian localities, that is as parts of the Commonwealth. Nor could it be said that the preference was to the state itself because the state as a whole could not be identified by its principal port or ports. Dixon and Evatt JJ delivered strong and separate dissents. For Dixon J the legislation was clearly designed to assist commerce at the ports to which it applied and as a practical matter an advantage to a principal port through which most overseas trade flowed was given to the state as a whole. Both Evatt J, and Dixon J in later years, expressed the view that s 99 was breached if a preference was given to a locality that was in fact part of the state. There was no reason to have the further requirement (which for some was incomprehensible)[21] that the place be chosen *as* part of a state. The majority view meant that everything depended on drafting and could reduce s 99 to insignificance.

In finding that the regulations gave a preference to the ports in which they applied, Evatt J described them in terms which struck a chord with those who were subject to them. It explains why the Act was known as a 'dog-collar Act'. Forty years later an interview with Elliott was published in *The Australian* under the heading 'I'll cease to be a militant when rigor mortis sets in'. He had

[19] O Dixon, 'The Law and the Constitution' (1935) 51 LQR 590.
[20] *Elliott* v *Commonwealth* (1936) 54 CLR 657.
[21] For example, *Commissioner of Taxation* v *Clyne* (1958) 100 CLR 246, 265–6.

then been federal secretary of the union for 35 years. He referred to the time 'when Menzies threw the dog collar on us'.[22] A licence could be cancelled if a seaman refused to comply with an order, if he used abusive language to anyone or if he was convicted of an offence under any law, if committed on any wharf, pier, or ship. The licensing officer could fix a period of up to twelve months during which a person who committed a breach of the regulations would be ineligible for a licence. Evatt J described the regulations as class legislation leading to loss of livelihood or penalties resulting from industrial action. It clearly benefited shipowners and this meant a definite economic advantage where the regulations applied. These were however dissenting views. Constitutionally, therefore, the *Transport Workers Act*, in all its aspects, had held up very well.

During Lyons' period of office, another part of Bruce's legislation was activated, namely, the provisions of the *Crimes Act* dealing with associations that had subversive or treasonable objects. Francis Devanny, the editor of the communist paper, the 'Workers' Weekly', was charged with a breach of the *Crimes Act* in respect of an article soliciting contributions of money for a demonstration against an imperialist war. The charge was soliciting contributions for an unlawful association. The Australian Communist Party was alleged in the information to be an unlawful association which advocated the overthrow of the Constitution by force and violence. As I mentioned earlier, the Act provided that the averments (ie allegations) of the prosecutor were prima facie evidence of the matter averred. Devanny was sentenced to six months gaol. He applied to the High Court to have the conviction quashed on various grounds, including the ground that the appropriate provisions were constitutionally invalid.

Despite an information consisting of 68 pages of typewritten material containing 61 averments (and which apparently took three hours to be read out) the Court held that the averments and evidence did not establish the offence charged. Nothing alleged or proved showed that the body organising the anti-war demonstration was the Australian Communist Party. The majority did not therefore have to deal with the constitutional arguments. Only Evatt J questioned the existence of an inherent power of the Commonwealth to control these matters. As for the information, Gavan Duffy CJ and Starke J called it 'an amazing document well calculated to embarrass the proper trial of the accused'.[23] Evatt J said it was 'one of the most amazing documents in the whole history of the law.'[24]

[22] *The Australian*, 16 December 1976, 9.
[23] *R* v *Hush; Ex parte Devanny* (1932) 48 CLR 487, 500.
[24] Id 513.

THE AFTERMATH

Where did all these constitutional determinations and arguments lead? How relevant are they to the social and political conflicts of our own time?

It seems that for decades lawyers found the decision in *Huddart Parker*, upholding the plenary power of the Commonwealth to choose who may engage in interstate and overseas commerce, difficult to believe. Twenty years later, the Solicitor-General of the Commonwealth, Professor KH Bailey, contrasting the Canadian and Australian Constitutions, said that there were only four cases where any question arose under the Australian Constitution necessitating subtle deliberate and controversial assessment of whether a law belonged to one category or another. This, he said, allowed play for what he called a 'personal approach' and a 'sociological assessment'. Among the four cases out of over 400 was *Huddart Parker*.[25] Certainly when I was a young legal officer in the Attorney-General's Department in the 1950s it was usually said in departmental opinions that the decision should not be interpreted expansively or read too literally.

This disbelief that the Commonwealth could control a subject matter of power in pursuance of any policy or political purpose no matter how remote from the subject, such as the control of exports for trade union purposes, lasted a long while. By the 1970s the issue had to be faced in a new area of social conflict, namely development versus the environment. The issue became, like that of the 1930s, a cause celebre. The Queensland Government favoured the mining of Fraser Island and issued leases for that purpose. In order to save the environment of that island the Commonwealth denied export licences for any minerals mined there. The High Court upheld the federal action as authorised by Commonwealth power to make laws with respect to overseas trade.[26] No shred of any commercial or trading policy was relied on. The Court, however, followed the reasoning in *Huddart Parker*. If the commerce power authorised Bruce and Scullin to determine who could engage in that commerce according to industrial relations criteria, so it could authorise Whitlam and Fraser to determine what could go into that trade according to environmental criteria.

Although the decision put an end to the doubts and uncertainties of the previous 40 years (as well as an end to the mining of Fraser Island) it caused outrage among some sections of the community who argued that it allowed the Commonwealth to use its powers as mere pegs on which to hang policies that related to matters that were none of its concern. Yet, controlling matters related to general welfare, when activities or services within Commonwealth powers were involved, had always been seen as a legitimate federal function. These included such laws as those preventing the importation of pornography, the broadcasting of advertisements for quack medicines, the sending through the mail of scurrilous material or the export of proscribed fauna, flora or rare works of art. A distinction, for constitutional purposes, between the

[25] KH Bailey, 'Discussion' in Sawer (ed), *Federalism*, 1952, 253.
[26] *Murphyores Incorporated Pty Ltd* v *Commonwealth* (1976) 136 CLR 1.

objects of these laws and those in *Huddart Parker* and the Fraser Island cases could have been made only on the basis of political bias or other personal predilection - a situation that the United States Supreme Court got itself into in the early twentieth century.

The principle that prevented the deportation of Walsh and Johnson proved to be the rock on which the Menzies government's anticommunist legislation foundered a quarter of a century later. The Act relied on the powers of the Commonwealth with respect to defence and its incidental or implied power to prevent acts of a treasonable or subversive kind. The flaw in the legislation, as in the case of *Walsh and Johnson*, was that it left to the Parliament, in the case of Communist Party, and the Governor-General, in the case of other communist bodies and communist persons, rather than the court, to determine conclusively whether those persons or bodies were a threat to the defence and security of Australia or to its constitutional form of government.[27] The High Court held that the Parliament and government were claiming to be the final interpreters of the Commonwealth's own powers under the Constitution. Dr Evatt had put forward the successful argument, as he had done previously in *Walsh and Johnson*.

The other principles that came out of the challenges to the industrial and industrially motivated legislation of the 1920s and 1930s are today on more shaky ground as new values, policies and perceptions emerge in both the community and among the judges in the late twentieth century.

The large delegation of power upheld in *Dignan* does not fit well with the long-term and increasing concern of the court to ensure the separation of federal judicial power and to preserve its integrity. The only reason given for the different treatment of the legislative and executive powers in relation to the doctrine of the separation of powers was the demands of modern government, supported by British constitutional practice. Certainly, these considerations would prevent a conclusion that the legislature could not delegate to the executive any substantial power to make rules. It certainly does not justify an Act which allowed governments of different complexions to pursue diametrically opposed policies without the constitutional necessity of parliamentary consideration. A Henry VIII clause also seems to fly directly in the face of s 1 of the Constitution, unjustified by anything short of very exceptional circumstances.

The concern shown by the High Court in recent times for our federal democratic institutions, and frequent statements by judges suggesting that the relationship of Parliament and the executive does not conform to the classic descriptions of responsible government, may today lead to a conclusion different from that in *Dignan's* case. Only recently the court suggested that the separation of powers prevented any exercise of the executive power which took the form of the discretionary conferring of pecuniary benefits on individual members of Parliament, not being mere facilities for the functioning of

[27] *Australian Communist Party* v *Commonwealth* (1951) 83 CLR 1.

Parliament. Significantly, the court added that 'the control by the executive of the lower house of parliament strengthens, not weakens, that view.'[28]

The decision in *Elliott* v *Commonwealth* regarding preference to States or parts of States has not been successfully challenged during the past 60 years, but there have been occasions when the formalistic approach of Latham CJ has been adversely referred to. In recent times the Court has made a virtue of emphasising that it is concerned with substance rather than mere form. It has also adopted a practice of endeavouring to determine the object or purpose of a constitutional provision as a factor in its interpretation.[29] Both of these approaches might lead the modern court to avoid a situation where the provision against preferences in s 99 could be easily avoided by drafting technique, which is what the majority reasoning in *Elliott* amounted to.

The issue of discrimination in various forms under various constitutional provisions, both expressed and implied, and under Commonwealth and state legislation, has occupied quite a lot of the High Court's time. There is even a view expressed by some judges in recent times that the Constitution implies that the Commonwealth shall treat people equally. This of course does not mean that there cannot be different rules for different people provided that there are relevant or justifiable reasons for the difference. In *Elliott* there may have been valid reasons for prescribing the port of Sydney and not Hobart or Fremantle, but this was left to the Minister to determine. No criterion appeared in the Act, and the reasons of the court in *Walsh and Johnson*, followed in the *Communist Party* case, would lead to a finding of invalidity.[30] Mr Elliott might have had more luck before the court in 1996 than in 1936.

While Evatt J's view against implied powers of the Commonwealth to deal with subversion has not prevailed, the emphasis has shifted to issues of rights. The separation of judicial power has acquired a new focus, namely, the demands of due process.[31] There is a strong argument today that the averment provisions of Bruce's *Crimes Act* amendments might be invalid on the ground that these presumptions interfere with the proper administration of justice and so are inconsistent with Chapter III of the Constitution. Indeed, if as Gavan Duffy CJ and Starke J said in *Devanny*, the averments in that case jeopardised the fair trial of the accused, I have little doubt that they would be regarded by the present court as an unconstitutional interference with the exercise of judicial power.

What of deportation, which loomed so large in Bruce's day? Today it is in some respect easier, and in other respects more difficult. The creation of an Australian citizenship and the evolution of the Crown from an Imperial to a national office has extended the category of aliens for purposes of the constitutional power with respect to aliens. In the 1920s and 1930s, and for some

[28] *Brown* v *West* (1990) 169 CLR 195.
[29] Zines, *The High Court and the Constitution* (3rd ed, 1992) 359–62.
[30] Rose, 'Discrimination, Uniformity and Preference — Some aspects of the express constitutional provisions' in Zines (ed), *Commentaries on the Australian Constitution* 196.
[31] G Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in G Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 185 ff.

decades after that, no British subject born, for example, in England, Ireland or New Zealand came within the aliens power. Today they do, unless naturalised as Australians.[32] Their deportation therefore is, constitutionally, a matter over which the Parliament has plenary power, even though that was not so earlier. But there is now more doubt as to whether, under other powers, an Australian citizen, while he or she remains a citizen, can be subject to deportation as a sanction for an offence. It has recently been declared by some judges that the sovereignty of the Australian people has replaced the earlier sovereignty of the Imperial Parliament.[33] If 'the people' for this purpose means all the people, it is arguable that a member of the sovereign body cannot be expelled from the Commonwealth or prevented from returning to it.

Today, as ever, employment policy remains at the centre of political debate. Our new national government put it in the forefront of its election platform. As a result of court decisions of the 1970s and 1980s relating to the corporations power, federal authority in this area is almost as great as Bruce tried unsuccessfully to obtain.[34] But even now the government faces constitutional uncertainty in implementing its policy in respect of small non-corporate businesses.

So it goes on. Each generation looks at the Constitution in the light of its own political and social conflicts and values. Yet each generation is affected by past judicial decisions which have shaped Australia's history and, to some degree, our present perceptions.

[32] *Nolan* v *Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.

[33] *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106, 138; *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1, 72.

[34] *Strickland* v *Rocla Concrete Pipes Ltd* (1971) 124 CLR 468; *Actors and Announcers Equity Association of Australia* v *Fontana Films Pty Ltd* (1982) 150 CLR 169; *Commonwealth* v *Tasmania* (1983) 158 CLR 1.