The Australian Constitution: Growth, Adaptation and Conflict — Reflections About Some Major Cases and Events

GEOFF LINDELL*

INTRODUCTION

It is a great honour and privilege to be asked to deliver a lecture in the Lucinda Lecture Series. The series has provided us with a worthy and timely reminder of the early beginnings of the Australian Constitution.

It has been said that the federation of the Australian colonies was:

> ... a remarkable achievement. In time of profound peace, without the pressure of any great national emergency, six free communities had sunk their differences and agreed to come together, from a deep conviction of the advantages of union.[1]

The role played by the passengers on the *SS Lucinda* in drafting the 1891 Constitution Bill is well known. Less well known is the quip by a New Zealander that the "d" might well have been dropped from the name of the steamer. This was apparently an allusion to the Greek goddess, Lucina. According to legend she presided over the birth of children because of the painless nature of her birth.[2] Whether or not the drafting that took place on the steamer was a painless exercise, one of the delegates to the 1891 Convention said that the Drafting Committee went on 'a little picnic up the Hawkesbury River and returned two days later with a spic and span Constitution for the new nation.'[3] It has been generally acknowledged that the Constitution approved by the Convention was the most significant drafting occasion in the preparation of this instrument,[4] and one noted historian has suggested that the 'draft of 1891 is the Constitution of 1900, not its father or grandfather'.[5]

It is now almost 100 years since the Australian Constitution was established. I wish to offer some reflections on certain important cases and events which, although necessarily selective, provide some significant insights into the way the Constitution has fared in that time.

* Professor of Law, University of Melbourne. Based on the Seventh Lucinda Lecture delivered at the Monash University on Wednesday 28 April 1999.

1 R Garran, *Prosper the Commonwealth* (1958) p 136.

2 J La Nauze, *The Making of the Australian Constitution* (Reprint 1974) 65. Professor La Nauze commented that it might have been more appropriate to suggest the dropping of the "n" since "Lucina had already presided at the birth of the Constitution, but it still lacked lucidity.": ibid. See also J Lempriere, *A Classical Dictionary* (1908) 329.

3 H Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (1997) 51.

4 A Castles, 'The voyage of the "Lucinda" and the drafting of the Australian Constitution in 1891' (1991) 65 *ALJ* 277, 278.

5 La Nauze supra fn 2 at 78 quoted by Castles supra fn 4 p 278.

THE *ENGINEERS'* CASE

A. Introduction

Not surprisingly, I have selected the *Engineers'* case[6] as one of the most important cases in the judicial interpretation of the Australian Constitution. It has always been a source of great fascination to me as a teacher that the case has rightly occupied the centre stage despite the unsatisfactory and puzzling nature of some of the reasoning employed in the joint judgment authored by Sir Isaac Isaacs.[7] It is perhaps fitting that it dealt with a federal legislative power which has a distinctive Australasian character and has also provided the background to much political conflict in this country.

B. Reserved powers doctrine

At its narrowest, the case affirmed that laws passed under the conciliation and arbitration power (s 51(xxxv)) are generally capable of applying to the States and their instrumentalities. In doing so the case was to have a greater and more lasting significance on the general scope of federal legislative powers than it did in relation to the specific problem of intergovernmental immunity.

Its wider significance today stems from the overthrow of the doctrine of the reserved powers of the States. The full impact of that development was not felt until the last quarter of this century with the decisions of the Court on the scope of the corporations and external affairs powers. Those decisions culminated in the celebrated *Tasmanian Dam* case.[8] They also marked a rejection of what many will regard as the modern day variant of the reserved powers doctrine, namely, the 'federal balance' doctrine. This development, when combined with the Court's literal approach to the interpretation of national legislative power, the perceived need to interpret constitutional provisions broadly, and also the general irrelevance of legislative purpose in relation to the non — purposive powers, has done much to give the national parliament ample legal power to make laws for the control of the national economy, the nation's resources, the protection of the environment and human rights. It also played a major role in the literal interpretation of the power of the national parliament to make grants of financial assistance to the States under s 96 of the Constitution and thus contributed to the financial dominance of the Commonwealth over the States.[9]

6 *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129. For a modern assessment of the significance of this case see generally M Coper and G Williams (eds), *How Many Cheers for Engineers?* (1997).

7 The joint judgment of Knox CJ, Isaacs, Rich and Starke JJ was delivered by Isaacs J. According to Sir Zelman Cowen the judgment bore the clear imprint of Isaacs' style: *Isaac Isaacs* (1967) 160.

8 *Commonwealth* v *Tasmania* (1983) 158 CLR 1.

9 This should not be taken as suggesting that the presence of s 96 is necessarily crucial to achieving that result.

These developments appear unlikely to be reversed in the near future, even if the decisions of the High Court in the area of family law and also the *Incorporation* case,[10] serve to remind us that the Court continues to perform its traditional role of supervising federal limitations on national legislative powers — a role which has significantly declined but without having disappeared.[11]

The effect of these developments on federalism in Australia has not escaped criticism. One writer asserted that the 'High Court in the *Engineers'* case dealt a decisive and to date permanently debilitating blow to federalism'.[12] In addition, a former Chief Justice endorsed the following remarks made by Mr David Jackson QC:

> ... in the future the issue between State and Commonwealth Governments is more likely to be whether a Commonwealth power should be exercised, rather than whether it exists. In other words, the resolution of the issue is likely to be political, rather than by legal, means.[13]

These observations can be regarded as fairly typical of the assessments drawn after the famous *Tasmanian Dam* case,[14] although, as already indicated, there are dangers in assuming that the Court's role in the supervision of federal limitations on national legislative power is now non-existent. But a more specific question raised by Professor Zines has perhaps not received the attention it deserves. The *non-federally* constrained power of the Executive Government to enter into international agreements under s 61 of the Constitution and the legislative power it generates under s 51(xxix), prompts the question whether the definition of federalism requires the States to have some guarantee of *some* exclusive legislative power.[15]

[10] *New South Wales* v *The Commonwealth* (1990) 169 CLR 482 where the Court held by a majority that the corporations power did not enable the Commonwealth to make laws for the formation of the corporations described in the same power.

[11] See G Lindell 'Federal Institutions and Processes: A Legal Perspective' in B Galligan (ed), *Australian Federalism* (1989) 175-7 and G Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in G Lindell (ed) *Future Directions in Australian Constitutional Law* (1994), 1-9. The discussion in the latter work shows that literalism does not always work in favour of the Commonwealth. Neither *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 in relation to s 51(xx) nor *Victoria* v *Commonwealth (Industrial Relations Act case)* (1996) 187 CLR 416 in relation to both that power and the power in s 51(xxix) provide any subsequent signs of a reversal of the developments mentioned in the text.

[12] D Meale, 'The History of the Federal Idea in Australian Constitutional Jurisprudence: A Reappraisal' (1992) 8 *Australian Journal of Law and Society* 25, 55 quoted in T Blackshield and G Williams (eds) *Australian Constitutional Law and Theory* (2nd ed, 1998), 243.

[13] D Jackson, 'Federalism in the Future: The Impact of Recent Developments' (1984) 58 *Australian Law Journal* 438, 447 quoted by Sir H Gibbs, 'The Decline of Federalism' (1994) 18 *University of Queensland Law Journal* 1, 5 extracted in G Winterton, H Lee, A Glass and J Thomson (eds) *Australian Federal Constitutional Law* (1998), 23.

[14] *Commonwealth* v *Tasmania* (1983) 158 CLR 1.

[15] L Zines, 'The State of Constitutional Interpretation' (1984) 14 *Federal Law Review* 277, 292 Although the same problem was posed by the defence power (s 51(vi)) during the Second World War, its impact was limited by the duration of that conflict whereas of course the entry into international agreements shows no sign of abating.

The general complaints about the effect of the Court's views on federalism have had their counterparts in the United States where similar developments have occurred but as a result of largely different and non-literal techniques of constitutional interpretation. Thus it was stated in a government report that 'it is not an overstatement to say that, given the Supreme Court's Commerce Clause jurisprudence, the states exercise their reserved powers only at the sufferance of the national government.'[16]

I continue to believe, as do others, that the complaints fail to answer the structural explanations given for the failure of the High Court to use federalism as a ground for restricting the full and literal reach of Commonwealth legislative powers. These are:

(a) the failure of the framers to *expressly* enumerate which powers were to be exclusively reserved to the States; and
(b) the difficulty of judges *implying* such powers in favour of the States given that there is no general agreement even amongst political scientists regarding which powers should be assigned to the Commonwealth and the States.

At the same time, it is doubtful whether the political processes protect federalism to the same extent as they do in America. This is because of the more rigid party system which exists in Australia and also the reduced ability of responsible government to provide for the kind of representation of local and regional interests that exists in the United States.[17]

C. Intergovernmental immunities

It is ironic to recall that the *Engineers'* case was not specifically concerned with the reserved powers doctrine since what was in issue did not relate to the scope of the conciliation and arbitration power in relation to *private bodies and persons* but, instead, State governments and their instrumentalities. There is, it is true, a reference at the end of the joint judgment to the overruling of unnamed cases to the extent to which those decisions called in aid of the doctrine of 'implied prohibitions'.[18] This may well have been intended as a reference to the sister doctrine of intergovernmental immunity. Even if it was, however, it probably remains correct to assert that, in the words of Sir Garfield Barwick, the reserved powers doctrine was 'exploded and unambiguously rejected' in the *Engineers'* case,[19] if only because the former doctrine was directly overruled for reasons which rendered the latter doctrine equally objectionable.

[16] Working Group on Federalism of the Domestic Policy Council, Report on "The Status of Federalism in America" *Executive Summary* (Nov 1986), 3. More recently the decision of the Supreme Court in *United States* v *Lopez* 514 US 549; 131 L Ed 2d 626 (1995) seems to signal a halt to the more extreme versions of the American commingling doctrine.

[17] Lindell supra fn 11 in *Future Directions in Australian Constitutional Law*, 4. The reduced ability relates to the significance of a vote of no confidence to the survival of a ministry under that system of government.

[18] (1920) 28 CLR 129, 159-60 per Knox CJ, Isaacs, Rich and Starke JJ.

[19] *Strickland* v *Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 485.

Despite the disapproving tone of the judgment in relation to *implications*, later developments underlined the resilient nature of constitutional implications and resulted in the development of a resuscitated and narrower doctrine of intergovernmental immunity. It is not always easy to discern the difference between the modern doctrine and the earlier version overruled in the *Engineers'* case. But perhaps two main elements help to mark out that difference. The first is the acceptance of the general rule which allows national legislative authority to be exercised in relation to State governments and their instrumentalities. This reversed the previous rule to the contrary which was based on the notion of coordinate federalism which had been shown to be an ideal form of federal government that was unattainable in practice even before the decision of the Court in the *Engineers'* case.[20] The second is the willingness of the High Court to examine the *actual as distinct from the mere potential impact* of federal legislation on the operation of state governments and their agencies — something which the earlier High Court was unwilling to do.

The result today is that there are many instances of federal legislation which have been held binding on the states and their agencies. These include laws which:

- require States to pay non-discriminatory taxation which does not come within the express protection of s 114 eg customs duty, payroll and fringe benefits tax[21]
- prevent States from constructing dams and logging timber on land protected under the World Heritage Convention (ie environmental protection)[22]
- nationalise the business of private banking in Australia[23]
- protect native title from acquisition by a State without payment of compensation[24]
- require the States and their instrumentalities to offer to their employees wages and conditions of employment fixed by the process of federal arbitration and conciliation, although this is subject to some limitations regarding high level employees (State governors, ministers, judges and senior public servants) and even as regards ordinary employees in relation to their number and eligibility for appointment and dismissal on grounds of redundancy.[25]

[20] See, for example, *Attorney — General for NSW* v *Collector of Customs for NSW (Steel Rails case)* (1908) 5 CLR 818 and generally L Zines, *The High Court and the Constitution* (4th ed, 1997), 3-4.

[21] *Steel Rails* case (1908) 5 CLR 818 (customs duty); *Victoria* v *Commonwealth (Pay-roll Tax case)* (1970) 122 CLR 353; *State Chamber of Commerce and Industry* v *Commonwealth (Second Fringe Benefits Tax case)* (1987) 163 CLR 329.

[22] *Tasmanian Dam* case (1983) 158 CLR 1; *Richardson* v *Forestry Commission (Lemonthyme case)* (1988) 164 CLR 261.

[23] *Bank of NSW* v *Commonwealth (Bank Nationalisation case)* (1948) 76 CLR 1.

[24] *Western Australia* v *The Commonwealth (Native Title Act case)* (1995) 183 CLR 373.

[25] See for example *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 and the application of those limitations in *Victoria* v *The Commonwealth (Industrial Relations Act case)* (1996) 187 CLR 416.

What remains of the immunities which states enjoy can be summarised as protection from laws which either:

1. discriminate against the States (either generally or amongst themselves); or
2. operate to destroy or curtail the continued existence of the States or their capacity to function as governments.[26]

The second of these limitations remains elusive and difficult to apply, especially, in light of the need to focus on the actual impact of the operation of a law. But in essence, what the modern doctrine protects is the way in which State governments function, that is, the *processes* of State governments rather than the *content* of their powers.[27] It is clear, in that respect, that the implied immunity protects all the arms of government: the state legislatures, executives and courts.[28] A distinction also needs to be drawn between the *application* of a federal law to the States and their instrumentalities, and the *enforcement* of those laws when they create an obligation to pay money which may, as a general rule, require State parliamentary appropriation to be fully effective.[29]

D. Principles of constitutional interpretation

It remains to discuss the contribution made by the *Engineers'* case to the general principles of constitutional interpretation. One of the reasons given for rejecting the implied immunity of instrumentalities in that case was that the implication was said to be contrary to the 'settled rules of construction.'[30] This was of course a reference to the rules of English statutory construction.

Many years ago I recall hearing Professor Zines remark that that there is one case which contains worse reasoning than that found in the joint judgment in the *Engineers'* case, and that is the case of *D'Emden* v *Pedder*.[31] The reasoning in both cases has always given me much trouble. Like others before me, I have never understood the precise relevance and the heavy emphasis placed in the former case on responsible government and the indivisibility of

[26] *Queensland Electricity Commission* v *The Commonwealth (Queensland Electricity Commission case)* (1985) 159 CLR 192, 217 per Mason J. This summary was quoted with approval in the *Native Title Act* case (1995) 183 CLR 373, 476 — 7 and *Re Australian Education Union, Ex parte Victoria* (1995) 184 CLR 188, 231. In the *Native Title Act* case the High Court left open whether the limitation could also be expressed as the Commonwealth Parliament's inability to impair the capacity of the States to exercise for themselves their constitutional functions: that is to say, their capacity ... to function effectually as independent units' as suggested by Dawson J in the *Queensland Electricity Commission* case (1985) 159 CLR 192, 260: (1995) 183 CLR 476.

[27] See for example Brennan J in the *Tasmanian Dam* case (1983) 158 CLR 1, 214 and *Street* v *Queensland Bar Association* (1989) 168 CLR 461, 512-3.

[28] See for example *Koowarta* v *Bjelke — Petersen* (1982) 153 CLR 168, 216 per Stephen J; *Native Title Act* case) (1995) 183 CLR 373, 464; and *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518. S 77(iii) of the Constitution does however authorise the Australian Parliament to vest and thus require State Courts to exercise federal jurisdiction.

[29] See for example *Australian Railways Union* v *Victorian Railways Commissioners (ARU case)* (1930) 44 CLR 319, 387-90 per Starke J, 391 per Dixon J (general rule); cf *New South Wales* v *Commonwealth (Garnishee case)* (1932) 46 CLR 155 (because of the special nature of s105A(5) and the Financial Agreement). The possible general rule has the potential to render any monetary liability to be a 'duty of imperfect obligation' to quote the words of Dixon J in the ARU case (1930) 44 CLR 319, 391.

[30] (1920) 28 CLR 129, 148.

[31] (1904) 1 CLR 91.

the Crown. Those doctrines were used to distinguish the early American authorities on intergovernmental immunities. Responsible government can, if anything, be used as a factor for strengthening the case in favour of implying federal limitations on national legislative authority.

Although it is not my purpose to rehearse all the familiar criticisms leveled against the standard of the reasoning employed in the joint judgment, I do wish to advert to some of those criticisms. For Professor Galligan the judgment has always contained an unreasoned bias towards centralism and if the quality of judicial review — both in making decisions and justifying them — is to be improved the Court needs to transcend the dogmas and legalism of the *Engineers'* case.[32] He has continued to maintain that position although he now appears to concede that the case has served the purposes of nation building. Unfortunately little guidance is provided on what should replace the foundations of the 'nation building'[33] or, in particular, how the content of federalism is to be defined to overcome the structural failure of the framers to explicitly reserve *exclusive* powers in favour of the states.

Professor Galligan's concern focuses on the need for a modern court to dispense with the literalism which has enabled the Court to interpret national powers liberally, irrespective of the federal character of the Australian Constitution. At the other extreme, Sir Anthony Mason once expressed the view that the adoption of the English principles of statutory interpretation led to a tendency to interpret federal powers narrowly even though some allowance was made for the special character of this statutory instrument as a constitution.[34] It is not often that I find myself in disagreement with the former Chief Justice but on this matter I think it is clear that those same principles, and especially the emphasis on giving literal effect to the powers granted to the national parliament, have actually operated in favour of widening Commonwealth power once they are appropriately modified to take account of the need to give constitutional provisions a wide interpretation.

Like Professor Zines, I think there is much to be said for the narrower ground used by Higgins J to reach his conclusion in the *Engineers'* case. This approach draws attention to 'questions of utility, of proper ordering of political arrangements and a desirable division of powers',[35] although he too supported the application of the same principles of interpretation. Higgins J demonstrated the practical inconvenience of attempting to fix wages and conditions of private employees if the Commonwealth Court of Conciliation and Arbitration could not fix the same conditions for State government employees.[36] This took account of the conditions which prevailed in Australia where state activities were more numerous than in most other countries at that time.

[32] B Galligan, 'The Dams Case: Political Analysis' in M Sornarajah (ed), *The South West Dam Dispute: The Legal and Political Issues* (1983) (Special Issue of the *Tasmanian University Law Review*) 118-121.

[33] B Galligan, *Federal Republic: Australia's Constitutional System of Government* (1995), 188.

[34] Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 24.

[35] Zines supra fn 20, 14.

[36] (1920) 28 CLR 129, 163.

That brings me to my main concern. That concern is the criticism embodied in the oft quoted remark that the *Engineers'* case opted in favour of the 'crabbed English rules of statutory interpretation, which is one of the sorriest features of English law'.[37] In my view, there need to be some rules which govern the interpretation of a written constitution no less than any other written legal instrument. If the rules of interpretation chosen in the *Engineers'* case are to be jettisoned what are we to put in their place?

I still believe that the attainment of Australia's independence and the changing explanations given for the binding character of the Australian Constitution need not have altered the application of the rules which originally governed its interpretation provided of course proper account is taken of the different nature of that particular legal instrument. That proviso emphasises, as Sir Anthony Mason and many other judges have done, the importance of interpreting constitutional provisions broadly. As I have argued before the proviso may have avoided the necessity for devising entirely separate principles of interpretation. This may well have gone far towards explaining the true reason for the emphasis placed on the literal and expansive approach to the grants of Commonwealth legislative power, including the rejection of the reserved powers doctrine. According to this approach the use of such maxims of statutory interpretation as *expressio unius est exclusio alterius* as a means of limiting Commonwealth legislative power can only have a limited use.[38] My argument is that the recognised principles of statutory interpretation serve, at the very least, as a necessary starting point and they should be applied unless the special character of the Constitution as a 'mechanism of government' suggests a reason for not applying those principles when they are not appropriate to the task.

To descend from the general to the particular, let me illustrate why I would still argue for the continued modified application of those principles. It is sometimes forgotten that one of the consequences of the Constitution being embodied in a British Act of Parliament is the application of the *Interpretation Act* 1889 (UK) to the provisions of the Constitution as originally enacted in 1900. This could prove useful in the interpretation of the number of provisions which refer to gender, time and distance.[39] The current *Acts Interpretation Act*

[37] R Latham, 'The Law and the Commonwealth' in *Survey of British Commonwealth Affairs* (Royal Institute of International Affairs, 1937) 510, 563 (reprinted in book form, 1949).

[38] G Lindell, 'Why is Australia's Constitution Binding ? — The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29, 43-6.

[39] See the application of *Interpretation Act* (UK) s 1(a) (in relation eg to ss 16, 42, 17 — 20, 34, 37 — 38 of the Australian Constitution as regards gender); s 3 for the definition of month as a calendar month instead of four weeks (in relation to ss 57 and 128); s 20 for the definition of writing (in relation eg to ss 19 and 37) and s 34 (in relation to s 125 as regards measurement of distance). I concede that the High Court did not find it necessary to rely on s 1(b) in relation to whether more than one proposed law could be passed at a joint sitting of the Parliament under s 57: *Cormack* v *Cope* (1974) 131 CLR 432. The *Territory Senators* cases can be seen as an illustration of the application of the rule that in the event of conflict (eg ss 7 and 122), later provisions prevail over earlier provisions but to have decided those case *solely* by reference to such an arbitrary rule would I believe have constituted a misapplication of the normal rules of statutory interpretation to the Constitution: *Western Australia* v *Commonwealth* (1975) 134 CLR 201; *Queensland* v *Commonwealth* (1977) 139 CLR 585. See also J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1900), 792 — 3.

1901 (Cth) probably applies to alterations made to the Constitution by the Commonwealth Parliament with the approval of the voters at a referendum under s 128 of the Constitution. This would serve as a useful shorthand and standing expression of the Parliament's intention in regard to the detail of any constitutional alteration put to the voters at a referendum.[40] Finally there is a well known rule that technical words should receive their technical meaning. This could be important in relation to such detailed matters as when a federal judge reaches his or her retiring age.[41]

E. Evaluation

How then are we to evaluate the modern significance of the *Engineers'* case? Its effect in expanding the scope of national legislative power is undoubted. The expansion of central power under the influence of Sir Isaac Isaacs came, as Professor Sawer reminded us, by the time a government was in office which showed no real desire to use those powers.[42] It proved to be more permanent than the attempt by the same judge to immunise the Commonwealth from the operation of s 92.[43] According to the well known remarks of Sir Victor Windeyer the true explanation for this expansion of power was not the overthrow of heresy. After all the earlier High Court had purported to follow the same principles of statutory interpretation. Rather it was due to events outside the court room. By 1920 there was a new sense of nationhood in the air and Australia had survived a major world war which had done much to strengthen federal authority and identity.[44] The period which followed saw the growth of the welfare state and an accompanying increase in the centralisation of power in Australia, as elsewhere.

If these were the underlying reasons for the growth of that power what are we to make of the more recent contraction of the role of governments in our

[40] A contrary view was expressed by a former and much respected Deputy Secretary of the Federal Attorney-General's Department: E Smith, *The Australia Card: The Story of its Defeat* (1989), 182-3. This view was based on the need for a constitutional alteration to receive the approval of the voters. In my view the same approval does not alter the character of a constitutional alteration as an Act of the Parliament since that is the way the Parliament normally expresses its will: *Reg* v *Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 226 and see also *Rex* v *Nat Bell Liquors Ld* (1922) 2 AC 128, 134 — 5. This is so at least for proposed constitutional alterations which are initiated by both Houses of the Australian Parliament. According to that view the provisions of the *Acts Interpretation Act* should apply according to their tenor to such constitutional alterations. Nevertheless, difficult questions may still arise with alterations of constitutional provisions contained in the Constitution as originally enacted by the British Parliament where the alterations merely seek to extend their operation without otherwise changing their *meaning*. This occurred with the referendum held in 1988 which sought to extend the existing guarantees contained in ss 51(xxxi), 80 and 116 to the *States: Constitution Alteration (Rights and Freedoms)* 1988.

[41] See *Prowse* v *McIntyre* (1961) 111 CLR 264. The 1977 amendment to s 72 was not passed after the reversal of the rule established in the latter case which took effect with the insertion in 1984 of s 25E of the *Acts Interpretation Act* 1901(Cth).

[42] G Sawer *Australian Federal Politics and Law* 1901-1929 (1956), 329.

[43] *W & A McArthur Ltd* v *Queensland* (1920) 28 CLR 530, 556 — 558. According to Sir Zelman Cowen the style reveals clearly that Isaacs wrote the majority judgment: supra fn 7, 180.

[44] *Queensland Electricity Commission* case (1985) 159 CLR 192, 244-5 per Deane J.

social and economic affairs and the increasing trend mentioned by Professor Galligan and others in favour of diffusing power.[45] Such trends are at work today even in the United Kingdom. Should they provide the signal for undoing the judicial recognition of central power in Australia or should they, as I think, be left to the electorate to resolve? Such a course at least allows the electorate to choose, whereas an attempt to seek additional judicial protection of the federal division of powers will continue to encounter the difficulties which explain the overthrow of the reserved powers of the States.

The extra-judicial explanations also invite speculation as to whether the expansion of central power represents an inevitable response to deeper political and social developments. How truly *instrumental* was the High Court in bringing about this process of change? Or, in the words of Sir Anthony Mason, 'is the law' (in this case the Australian Constitution as interpreted by the courts) 'an agent or merely [the] ultimate reflection of social change?'[46]

Be that as it may, and as I will attempt to explain later, the introduction of change as a result of *judicial interpretation* does not come without certain disadvantages.

From the strictly analytical perspective, Sir Anthony Mason is right, in my view, to rely on the need to construe constitutional provisions broadly, as the modern reason for supporting the conclusions reached in the *Engineers'* case. I have, however, argued in support of the continued and modified application of the rules of interpretation adopted in the same case.

As will be seen later in this article, the British assumptions of parliamentary supremacy which can be found to underlie the joint judgment in the case proved vulnerable in two important respects. The first was the need for consistency in giving all constitutional provisions a broad and dynamic interpretation — even those provisions which operate as *restrictions* on legislative power; and secondly, the possibility of *implying* such restrictions for reasons which were not based on federalism or the separation of powers.

THE *BANK NATIONALISATION* CASE AND ITS SEQUEL (s 92)

A. The *Bank Nationalisation* Case

It is now nearly fifty years since the Privy Council decided the *Bank Nationalisation* case[47] and over ten years since the case was (in relation to s 92 of the Constitution) overruled by necessary implication in a unanimous judgment of the High Court in *Cole* v *Whitfield*.[48] The *Bank Nationalisation* case is one of the two cases often cited as illustrations of the neutral quality of

[45] Galligan supra fn 33, 242-4.

[46] 'The courts and their role in a changing the law today' in A Tay and E Kamenka (eds) *Law — making in Australia* (1980), 11. For a sceptical view on the instrumental nature of law generally see the lecture delivered by J Griffith, *Is Law Important?* (1978, Kluwer — Deventer).

[47] *Commonwealth* v *Bank of NSW* (1949) 79 CLR 497.

[48] (1988) 165 CLR 360.

judicial review. The major casualty on this occasion was the Australian Labor Party. As the then Associate Professor Geoffrey Sawer correctly predicted, the legislation to nationalise the private banks proved to be 'one of the greatest political and legal battles in Australia's history'.[49] I am only concerned with the significance of the case for the guarantee of freedom accorded to interstate trade and commerce in s 92. If that guarantee has rightly been regarded as the cornerstone of our Constitution, it has also provided Australian courts with a staple diet of constitutional litigation. By the time the High Court came to decide *Cole* v *Whitfield* that Court had already decided 140 reported cases which dealt with the same guarantee.

The legal test adopted in the obiter dicta contained in the Privy Council's judgment was to last for nearly forty years.[50] It also illustrated the willingness of courts to enforce restrictions on legislative authority which attempt to interfere with economic activity and property interests. The record of the courts in relation to the interpretation of ss 92 and 51(xxxi) stands in marked contrast with that of the judicial interpretation accorded to the few guarantees of social and political liberty contained in the Australian Constitution.

The decision by the Chifley Labor Government to nationalise the banks is said to have its origins in the *State Banking* case.[51] In that case the High Court held invalid the provisions in the *Banking Act* 1945 (Cth) which required State governments to conduct their banking with the Commonwealth Bank. The decision to nationalise may also have been due to fears, possibly misplaced, about the constitutional vulnerability of the other controls on banking contained in the same legislation which were designed to protect the interests of the public.[52] The strict necessity for the prohibition on private banking was later doubted given the possibility of achieving the same objective by merely acquiring their shares and assets.[53]

In any event, and however sound these assessments were, the case marked the triumph of the 'individual right' view of s 92. Hitherto, that view had largely prevailed in the field of agricultural marketing but the 'free trade' view had prevailed in the road transport cases. Under the individual right view, s 92 conferred a right on each individual to engage in interstate trade free from any restraint that is not necessary for the reasonable regulation of that trade or the preservation of an ordered society. Under the free trade view, s 92 was confined to preventing policies that are pursued with the object or effect of protecting the trade and industries of a State from interstate competition.[54]

The earlier decision which invalidated the nationalisation of air transport was not an accurate indication of the law on s 92 in that regard because the powers of the national parliament were thought in those days to be largely

[49] A May, *The Battle for the Banks* (1968), p 16.
[50] The dicta became the ratio in the succeeding case of *Hughes and Vale Pty Ltd* v *New South Wales* (No 1) (1954) 93 CLR 1 (PC).
[51] *Melbourne Corporation* v *Commonwealth* (1947) 74 CLR 31 and see G Sawer *Australian Federal Politics and Law 1929-1949* (1963), 197, 212.
[52] L Crisp, *Ben Chifley* (1963), 324 — 6 and Sawer supra fn 51, 220.
[53] Ibid.
[54] Constitutional Commission: *Final Report* 1988 Vol 2 para 11.161, 804.

confined to trade and commerce with other countries and among the States (as well as the less important branch of trade and commerce with and within the Territories). This gave that legislation the appearance of discriminating against and being aimed at *interstate* air transport.[55]

Under the formula approved in the *Bank Nationalisation* case, and followed in subsequent years, s 92 was only breached if:

(a) a legislative or executive act imposed a direct or immediate burden on interstate trade (as distinct from one which was merely indirect or consequential) and

(b) the same burden could not be characterised as a mere regulation of the same trade.[56]

As was explained by the Constitutional Commission, over the years important legislation on a wide variety of important matters was held to be inconsistent with s 92 insofar as it purported to operate on interstate trade: price control, agricultural marketing schemes, the nationalisation of interstate airlines and banks, the licensing and taxation of interstate road transportation and the sale of fauna. In addition, legislation which might otherwise have been merely regulatory, was held not to apply to interstate transactions because of a wide discretion given to an official.[57]

The political significance of a decision which invalidated legislation to nationalise banks in Australia can hardly be over-emphasised. It can fairly be claimed to have helped put an end to Labor's socialization objective. If the case illustrates an institutionalised tension between the judicial and political branches of the government, it cannot be said that the invalidated legislation was popular. In fact the exact opposite was the case. Not only was the legislation an important factor in the defeat of the Labor Government at the 1949 federal elections but it had also played a significant role in the defeat of Labor Governments in a number of State elections even though the legislation was, of course, passed by the Federal Parliament. According to some, the political ramifications of the legislation contributed to the great split in the Labor movement which was to occur a few years later. Clearly, the decisions of the High Court and the Privy Council in the case cannot be seen as unpopular with the general public. The judgment of Professor Sawer was that:

> by turning s 92 into a guarantee of continued private enterprise, and of competition between private enterprise and government enterprise instead of monopoly government enterprise, the Courts frustrated some contemporary enthusiasms, but they anticipated the movement of party policy and of popular preference in the decade or longer after 1950."[58]

But if the decisions were consistent with the course of public opinion they were not free from difficulty in their legal application and operation. For a time

[55] *Australian National Airways Pty Ltd* v *Commonwealth* (1945) 71 CLR 29 and see L Zines and G Lindell (eds) *Sawer's Australian Constitutional Cases* (4th ed, 1982), 277.

[56] *Bank Nationalisation* case (1949) 79 CLR 497, 639. See also Constitutional Commission: *Final Report* para 11.164, 804.

[57] Ibid paras 11.167-8, 805 — 6.

[58] Sawer supra fn 51, 223.

it seemed that with the ascendancy of Sir Owen Dixon the potential reach of the formula devised by the Privy Council could be contained in its application to both federal and state legislation under the 'criterion of liability' test. This type of approach characterised the work of the High Court during the period when Sir Owen was Chief Justice with its heavy emphasis on literal and textual considerations. In time it came to be characterised as legalistic and formal. The period also spawned some mysterious and rather artificial interstate road transport journeys as a means of attracting the operation of the exemptions from road transport taxes and controls which flowed from the judicial interpretation accorded to s 92. This phenomenon was called 'border hopping' and students undergoing Australian federal constitutional law were required to be familiar with not a few cases which dealt with that issue. The criterion of liability test did not long survive the departure of Sir Owen Dixon. Sir Garfield Barwick, his successor, who was also the very successful counsel in the *Bank Nationalisation* case, was attracted to an approach which stressed practical effects and which threatened to widen and not narrow the operation of s 92. Other judges may have been attracted by the new emphasis on practical effects but not the prospect of 'putting more and more matters outside the authority of all parliaments of Australia, Commonwealth and State.'[59] By the time Sir Garfield's successor, Sir Harry Gibbs, ceased to be Chief Justice, great uncertainty had once again descended upon the meaning and interpretation of s 92 with the validity of the wheat stabilization schemes left unresolved.[60] No doubt part of that doubt was itself the result of judges who like the next Chief Justice, Sir Anthony Mason, and Deane J, had done much to undermine any consensus which might have existed in the operation of the formula devised in the *Bank Nationalisation* case. It is not unfair to suggest that the same Chief Justice sought to achieve the free trade view within the framework provided by the existing formula based on the individual right view of s 92.

B. *Cole* v *Whitfield*

It is now over 10 years since the formula approved in the *Bank Nationalisation* case was overruled by necessary implication in the famous case of *Cole* v *Whitfield*.[61] This development came unheralded by any great political controversies. Governments seemed slow to seek its overthrow, possibly because of on already emerging trend in favour of deregulation. The increasing emphasis on written argument and also the length of the hearings contrasts sharply with the way in which the *Bank Nationalisation* case was argued, even if allowances are made for the many other issues apart from s 92 which were involved in the latter case. The *Bank Nationalisation* case took 38 days to be

[59] To quote the words of Windeyer J in *S.O.S. (Mowbray) Pty Ltd* v *Mead* (1972) 124 CLR 529, 574.

[60] This was sparked by the surprising decision of the Australian Wheat Board to seek to apply the scheme to wheat sold interstate contrary to previous assumptions held about the operation of s 92. The same decision led to the protracted and ultimately inconclusive proceedings in *Clark King and Co Pty Ltd* v *Australian Wheat Board* (1978) 140 CLR 120 and *Uebergang* v *Australian Wheat Board* (1980) 145 CLR 266.

[61] (1988) 165 CLR 360.

argued before the High Court and 37 days before the Privy Council. *Cole* v *Whitfield* took only 3 to 4 days. The case marks an important trend in favour of the use of written argument.

The new test adopts the free trade approach so that a law will not violate s 92 unless it discriminates against interstate trade and has a protectionist purpose or effect. The protection referred to is that of the domestic industry of a State against competition from the trade of other States ie the means by which domestic industry or trade of that State is advantaged or protected.[62]

Subsequently it was made clear that even if a law otherwise breached this test it could still be valid if it could be shown to be appropriate and adapted to the protection of the people of the State from a real danger or threat to its well being, for example if the law was a reasonable and appropriate means of furthering a public interest.[63]

Sir Anthony Mason is credited with having written the most important parts of the unanimous judgment of the Court in *Cole* v *Whitfield*.[64] The judgment constitutes a striking achievement even if the Court's new found unanimity was broken six weeks later with the majority decision in *Bath* v *Alston Holdings Pty Ltd*[65] in relation to the taxation of interstate trade.

The Court relied on three main factors for departing from the formula in the *Bank Nationalisation* case and the criterion of operation test: history, the failure of the criterion of operation test to have achieved certainty, and the context of s 92, including, in that regard, its potential to nullify the operation of s 51(i). The test is similar to that advocated by Sir Owen Dixon for the amendment of s 92 by referendum under s 128.[66]

The new approach adopted to s 92 restricts its destructive potential to invalidate legislation which was previously held invalid and removes the privileged position enjoyed by interstate road hauliers and traders, assuming, of course, such legislation does not discriminate against interstate trade in the relevant protectionist sense. It will also open the way to an expansion of the power to make laws with respect to interstate trade and commerce under s 51(i) of the Constitution, without also attracting the previous immunity which existed as a result of s 92.

The elucidation of the current test awaits future challenges and it would surely be too much to expect that we have seen the last of uncertainty in this area. It is ironic that the old test, while covering more than s 92 was probably intended to cover, also prevented most of the policies which s 92 was

62 Ibid, 392-3, 394-5, 408-410.

63 *Castlemaine Tooheys Ltd* v *South Australia* (1990) 169 CLR 436.

64 Sir G Brennan, 'A Tribute to Sir Anthony Mason' in C Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 1, 13.

65 (1988) 165 CLR 411.

66 Evidence given to the Royal Commission on the Constitution: *Minutes of Evidence* (1929), 778. The amendment suggested by Sir Owen did not explicitly refer to the need for the offending laws to be protectionist in character and would also have exempted the Commonwealth from the operation of s 92. As is mentioned below, however, the current test involves the continued operation of that section to the Commonwealth even though its likely impact would seem to be more directed at the States. See also C Saunders, 'Owen Dixon: Evidence to the Royal Commission on the Constitution, 1927-29' (1986) 15 *Melbourne University Law Review* 553, 560-1.

intended to prevent[67]. The advantage of the old test was that it obviated the need to inquire into the way administrative discretions might be exercised for disguised protectionist purposes. The reforms made to administrative law in the last quarter of this century may assist in ensuring that administrative discretions are not abused for such purposes so as to conform with the modern requirements of s 92. A useful glimpse of what the modern test may require to ensure such conformity may have been provided by the approach which Brennan J adopted to deal with the special position of radio and television shortly before the new test was adopted.[68]

The likely impact of s 92 would seem be more directed at the States than the Commonwealth although the latter still remains bound by the guarantee contained in the same section. Sir Isaac Isaacs may have drawn some comfort from the narrowed and much weaker operation of s 92 in relation to the Commonwealth if, contrary to his view, the Commonwealth was to be bound at all by the guarantee contained in s 92.[69] But there are still some ambiguous passages in the judgment to interpret regarding this matter.[70] In addition there is the question of the extent to which s 92 adds to the prohibitions contained in s 99 against the grant of preferences to particular States in laws or regulations of trade, commerce or revenue.

The inability of the High court to rely on an expert body such as the Interstate Commission deprives the Court of valuable assistance in ascertaining the facts and practices which are essential to the application of the new test. As Sir John Latham once observed:

> If section 92 is to be fully operative, it needs an administrative organisation to deal with and to correct interferences with the freedom of interstate trade and commerce which are the result of administrative action under legislation which is not itself an infringement of section 92."[71]

Such a facility may have assisted the Court in determining whether there were other more acceptable means of enforcing the fish conservation controls in that case which fell short of preventing the sale or possession of the smaller size crayfish obtained from SA waters.

Finally, the Court has yet to identify the precise effects of the interaction between ss 51(i), 90, 92, 99 and 102, a matter which as the Court observed has not been examined in the decided cases. The case of *Cole* v *Whitfield* may have hastened the day when the Court will need to address that task.[72]

C. Evaluation

The preceding part of this lecture showed how the High Court has accommodated the growth of central power in Australia. The discussion of the *Bank Nationalisation* case shows how the courts interpreted and adapted a high

67 Sawer, supra fn 51, 222.
68 *Miller* v *TCN Channel Nine* (1986) 161 CLR 556, 612-5, and see also 570 per Mason J, 619 per Deane J.
69 Supra fn 43.
70 (1988) 165 CLR 360 at pp 397-8, 407-8.
71 *Riverena Transport Pty Ltd* v *Victoria* (1937) 57 CLR 327, 352. See also the note in 62 ALJ 586
72 (1988) 165 CLR 360, 398.

flowing but essential guarantee of Australian federalism. The interpretation went beyond what was necessary to give effect to the federal aims of the guarantee and led to the frustration of some government controls on economic activity. While the decisions were not politically unpopular, it is difficult not to suspect the role of subjective judicial values which favoured *laissez faire* and Spencerian assumptions of individual liberty. In addition, it has always seemed illogical to give s 92 the force of a guarantee of individual rights when, by its nature, it is confined to interstate trade and does not extend to trade generally.[73]

Although they have been important in other areas of Australian constitutional interpretation, literalism and textual considerations fail to explain the important but in the end temporary victory of the individual right view. The 'silences of the Constitution' have never made clear the meaning of those uncompromising words 'absolutely free' and, as Rich J once so elegantly observed, it was for the Court 'to explain the elliptical and expound the unexpressed'.[74] Nor did the criterion of liability, with its faith in the text of the Constitution, provide any more convincing explanation in that regard.

The corrective force of *Cole* v *Whitfield* provided yet another instance of the judicial interpretation of the Constitution resulting in an expansion of power when governments show little inclination to use it. This can obviously be said about the ability of governments to nationalise banks and other forms of trade and commerce at the present time. Doubtless it would provide little comfort to Mr Chifley, even if he was alive today, to know that nationalisation is now no longer precluded by s 92. It is true that the Court has changed its mind at the very time when the community has returned to free market theories. But at least the judicial change of mind returns to the ballot box the determination of which policies should be followed in the timeless conflict between government control and free market forces. There is, after all, no constitutional obligation to exercise the greater governmental control made possible by the contraction of the freedom guaranteed by s 92. It is not surprising that the Constitutional Commission was unwilling to recommend any major amendment of s 92 and that it regarded the issue of choosing between government control and free market forces as more properly belonging to the sphere of political action rather than constitutional solutions.[75]

The currently accepted free trade test does not avoid altogether the need for the Court to solve 'political, social or economic' problems[76] but at least it restricts their width by confining them to economic theories of protectionism rather than the larger questions of *laissez faire*. It thereby adds to the growing list of areas which require the Court to be concerned in one way or another with the concept of discrimination.

[73] L Zines, *High Court and the Constitution* (1981), 128. See also Constitutional Commission: *Final Report* (1988), para 11.206, 814.

[74] *James* v *Cowen* (1930) 43 CLR 386, 422-3.

[75] *Final Report* para 11.202, 813.

[76] As was acknowledged in *Cole* v *Whitfield* (1988) 165 CLR 360, 408, quoting the remarks of the Privy Council first made in the *Bank Nationalisation* case (1949) 79 CLR 497, 639 and repeated later in *Freightlines & Construction Holding Ltd* v *New South Wales* (1967) 116 CLR 1, 5.

The contraction by the High Court of the freedom guaranteed by s 92 has roughly paralleled developments in the United States in relation to the corresponding restriction on the States and, more generally the swing away from the problems of 'economic due process'.

One final observation to make is that the law relating to s 92 has fallen strangely silent. A reader steeped in the history of that much litigated section can only wonder for how long.

THE *COMMUNIST PARTY* CASE AND ITS MODERN SUCCESSOR

A. Introduction

The election of the Menzies Liberal and Country Party Government in 1949 saw the beginning of a new era of prosperity and affluence even if did not result in immediate economic stability. But it also took place in an increasing atmosphere of hostility towards the Communist party fueled by the increasing intensity of the Cold War. The new Government was elected on a platform which promised to outlaw the Australian Communist Party and this was ultimately implemented with the enactment of the *Communist Party Dissolution Act* 1950 (Cth) — legislation which was passed with the reluctant support of the Australian Labor Party. The successful challenge to the legislation in the High Court and the narrow defeat of a referendum proposal which sought to reverse the result of that challenge, occupies an important place in Australian political history. As with the bank nationalisation legislation, this legislation may have contributed to the major split which subsequently occurred in the Labor Party a few years later.

Professor George Winterton has concluded that the decision in the *Communist Party* case[77] was a celebrated triumph of constitutionalism and the rule of law over national hysteria and that it was probably the most important decision ever rendered, even if its importance has been somewhat overshadowed by the *Engineers'*[78] case. It is the other decision usually cited to illustrate the neutrality of judicial review. On this occasion it was the legislation promoted by the Liberal and Country Party which suffered at the hands of the Court only a few years after the Court decided the *Bank Nationalisation* case.

The case involved two of Australia's most famous constitutional lawyers. Dr Evatt, the then Deputy Leader of the Opposition and former High Court judge, appeared for a communist controlled union which challenged the legislation. Sir Garfield Barwick who later became Chief Justice appeared on behalf of the Government. The case was argued for 26 days and the judgments occupy 156 pages of the *Commonwealth Law Reports*.

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

[78] 'The Significance of the *Communist Party* Case' (1992) 18 *Melbourne University Law Review* 630, 653.

The legislation purported to dissolve and declare the Australian Communist Party as an unlawful association (s 4). It also purported to do the same in relation to any association affiliated with same party if the Governor-General in Council was satisfied that the association posed a threat to the security and defence of the Commonwealth, the execution or maintenance of the Constitution or the laws of the Commonwealth (s 5). In addition, the legislation disqualified persons who were communists from holding public office or in a trade union, again if the Governor-General in Council was satisfied that those persons posed a threat to the security and defence of the Commonwealth (s 9). The preamble to the Act contained some damaging recitals about the activities of the Communist Party here and overseas. In effect the Australian Communist Party was accused of engaging in treasonable and seditious activities. It also accused the same party of using the strike weapon for political ends (eg the Coal Strike in 1949), and of attempting to bring about the overthrow of the Australian system of government and assisting Australia's Cold war enemies eg Soviet Russia.

There were already in existence the provisions in *Crimes Acts* which were directed at treasonable and seditious activities and also the dissolution of unlawful associations which sought to carry on such activities. But those provisions required proof of offences in the ordinary courts of law, that is, they required compliance with the rule of law. Although an appeal did lie to a court it was confined to the questions whether an association was affiliated with the Australian Communist Party and whether a person was a Communist (ss 5(4) and 9(4)).

In the end six judges to one ruled that the legislation was invalid because at least in time of peace such legislation went beyond the scope of the Commonwealth's legislative power to make laws for defence (s 51(vi)) and the execution and maintenance of the Constitution and the laws of the Commonwealth (ss 51(xxxix) and 61).[79]

B. Civil liberties

The threat to civil liberties posed by the legislation needs little elaboration. Perhaps the best way of illustrating that threat is to reproduce the chilling exchange which took place between the then Prime Minister, Robert Menzies, the Leader of the Opposition, Mr Ben Chifley and the colourful Labor backbencher, Mr Eddie Ward, during the enactment of the *Communist Party Dissolution Bill*:

> Mr Ward: The right honourable gentleman could declare a couple of the Labor Senators.
>
> Mr Menzies: I am obliged to the honourable member for the suggestion. I can think of at least one Labor Senator whom it would be easy to declare.
>
> Mr Ward: The Fuhrer has spoken.
>
> Mr Menzies: I can think of one member of this house who might escape only by the skin of his teeth.

[79] Per Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ; Latham CJ dissenting.

> Mr Chifley: The right honourable member is on dangerous ground.
>
> Mr Menzies: I agree — on dangerous ground . . .
>
> Mr Ward: Heil Menzies.
>
> Mr Menzies: I agree — on dangerous ground. If this is dangerous ground I suggest to the right honourable gentleman that he might restrain his interjectors but, of course, the problem does not arise because...
>
> Mr Chifley: I suggest that the right honourable member should not make threats.
>
> Mr Menzies: I never make a threat that I do not carry out.[80]

The legislation struck at the basic tenets of the rule of law and also freedom of political association.

Given the obvious threat that the legislation posed to the rule of law, the outcome of the case might suggest that the majority of the High Court upheld the basic tenets of that concept despite the absence of a judicially enforceable Bill of Rights. In fact that can be true only in an indirect sense. A closer analysis shows that the Court was concerned with the question of *characterising* the legislation to see whether it came within the scope of the Commonwealth's legislative powers. In other words, the inquiry was ostensibly more concerned with the question of the *federal distribution of powers* between the Commonwealth and the States. The same ground would not have been available in relation State legislation because the legislative powers of the States are residual in character and not enumerated.

It is true that the essential ground of the decision rests on the ultimate need for the *judiciary* to be satisfied that any legislative and executive action comes within the powers granted to those branches of government under the federal distribution of powers ordained by the Australian Constitution. The satisfaction of those branches can never be enough by itself to guarantee the validity of such action. In the words of Professor Galligan 'the Communist Party case was not primarily about civil liberties but about the limits of legislative and executive power and the supremacy of the judiciary in deciding such questions.'[81] I shall return to that aspect of the Court's decision later.

Even the well known remarks of Sir Owen Dixon regarding the rule of law being regarded as one of the many traditional conceptions in accordance with which the Constitution was framed were made in the context of restraining the scope of the incidental powers of legislation conferred upon the Commonwealth Parliament.[82] In addition, and as Professor Winterton has correctly observed, any comparisons with regard to the suppression of Communism between the respective records of the Australian Constitution

[80] *Commonwealth Parliamentary Debates* 4 May 1950, p 2219 quoted in G Williams, 'The Suppression of Communism by Force of Law: Australia in the Early 1950s' (1996) 42 *Australian Journal of Politics and History* 220, 220.

[81] B Galligan, *Politics of the High Court* (1987), 203 quoted in Winterton supra fn 78, 658.

[82] *Communist Party* case (1951) 83 CLR 1, 193.

(despite its failure to incorporate a Bill of Rights) and the United States Constitution (with its inclusion of such an instrument), tend to be misleading.[83]

Fifty years later a much simpler ground for invalidating the legislation may perhaps have been found by the Court's unanimous acceptance of the principle that a Bill of Attainder constitutes a breach of the separation of powers since the legislation may in substance amount to a non-judicial determination of guilt and punishment.[84] This is so despite the express disavowal of such a ground in the case itself.[85] In addition the implied freedom of political communication[86] may in time lead to the acceptance of a concomitant doctrine of the freedom of political association. These are more direct routes to invalidity and I suspect they are much easier to understand.

I suggest that the absence of a judicially enforceable Bill of Rights invites judges to use less direct judicial means to attain the end served by such an instrument. This trend has been magnified in more recent times. The remarkable case of the *Kable* v *Director of Public Prosecutions (NSW)*[87] provides in some ways a modern replica of the *Communist Party* case and this time one which affected the State level of government. I hasten to add, however, that the quality of the reasoning used in that case seems to me, at any rate, to be far less intellectually convincing than that which was employed in the *Communist Party* case.

In that case a majority held invalid legislation which made provision for the detention of a single and named individual (Gregory Wayne Kable). The order for detention was made by the NSW Supreme Court on the application of the NSW Director of Public Prosecutions if the Court was satisfied on reasonable grounds that the individual:

- was more likely than not to commit a serious act of violence; and
- that it was appropriate for the protection of a particular person or persons in the community generally that the individual be held in custody.

The legislation thus provided a form of preventive detention not essentially for the commission of a criminal offence proved in a court of law beyond all reasonable doubt and before a jury, but for something which a court was satisfied, on the balance of probabilities, he might do in the future. The ground of

83 Supra fn 78, p 657.

84 *Polyukhovich* v *Commonwealth* (1991) 172 CLR 501 and see also G Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in G Lindell (ed) *Future Directions in Australian Constitutional Law* (1994), 190-3 and Zines supra fn 20, 207-8. The principle mentioned in the text was further discussed in *Nicholas* v *The Queen* (1998) 72 ALJR 456.

85 (1951) 83 CLR, 268-9 per Fullagar J and see also Winterton supra fn 84, p 191.

86 In *Lange* v *Australian Broadcasting Corporation* (1997) 189 CLR 520 a unanimous High Court thought that the constitutional requirement for periodical and free elections embraced all that was necessary to effectuate that requirement: 557. The Court also referred with approval to remarks which suggested that the same requirement included, in effect, all that was implied 'in the way of freedom of speech and political organisation': 559 — 560 quoting from Birch, *Representative and Responsible Government* (1964), 19. See also generally G Lindell, 'Expansion or Contraction? Some Reflections About Recent Judicial Developments on Representative Democracy' (1998) 20 *Adelaide Law Review* 111, 140 — 2.

87 (1996) 189 CLR 51.

invalidity did not, ostensibly at least, relate to the operation of the separation of powers at the State level of government. Instead a majority found that State courts which exercised federal jurisdiction cannot be given functions to perform which are incompatible with the performance of their judicial duties since this might otherwise harm the respect and respect of the public for those courts when they exercise their federal jurisdiction.[88] Obviously the rule of law can be seen as a fertile field for determining whether a function is incompatible with the performance of their judicial duties. In that case the rule of law was breached because judges were used in a process which deprived an individual of liberty for reasons which did not involve a conviction in a court of law for an existing criminal offence.

This was coupled with a concern for the independence of the judiciary as a result of being identified with the executive arms of government. That was so despite the failure of a judge to approve the renewal of the preventive detention of the plaintiff in that case for a further period of time. The involvement of judges and the independent way in which they performed that function would, if anything, have increased the confidence of the public in the integrity of the process assuming that such a process would be employed at all. This was after all the kind of consideration which proved decisive in upholding the function conferred on federal judges as *persona designata* in the approval of wiretaps, despite the acknowledged intrusive and clandestine nature of that process.[89]

The limited nature of the protection accorded to the rule of law in this way is demonstrated by imagining a State law which confers the same function on a member of the Executive Government of a State, for instance, a Minister (instead of judge). That is not to say, however, that such a law would necessarily be upheld. The true lesson to be learned from the *Kable* case is that perhaps some other kind of imaginative and strained reasoning might be employed to invalidate the legislation. All that could be reasonably assumed is that the ground used in *Kable* could not be relied on for that purpose.

The lengths that judges are now prepared to go in order to limit parliamentary supremacy through the existence of a written constitution is illustrated by the way in which some judges have concluded that the existence of the State Supreme Courts are guaranteed under the Australian Constitution. The reason for that guarantee, and the inability to abolish those courts, is that otherwise the High Court would not be able to hear appeals from such courts under s 73.[90] This contrasts sharply with the refusal of the High Court to treat s 15 in its original state as a guarantee of the existence of State Upper Houses of Parliament.[91]

[88] Per Toohey Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting.
[89] *Grollo* v *Palmer* (1995) 184 CLR 348, 367-8 per Brennan CJ, Deane, Dawson and Toohey JJ. McHugh J dissented.
[90] (1996) 189 CLR 51, 102-3 per Gaudron J, 110 per McHugh J, 139-142 per Gummow J.
[91] *Clayton* v *Heffron* (1960) 105 CLR 214, 248 — 9 per Dixon CJ, McTiernan, Taylor and Windeyer JJ.

Before leaving the *Kable* case, it is worth mentioning that the doctrine established in that case and the possible development of an implied freedom of political association, may now have the result that even a state would not be able to validly enact legislation to ban a political association without due process. The doctrine in *Kable* could prevent any attempt to invest State courts with the power to determine whether a person was a member of such an association or any other association was affiliated with it, as was the case with the legislation which banned the Australian Communist Party.[92] The risk is that the performance of such a function would again identify the courts with the political branches of the government. The circle begun by the *Communist Party* case would thus be completed by the *Kable* case and the possible further development of the implied freedom based on the recognition of representative government in the Australian Constitution.[93]

C. Source and stream principle

As Professor Winterton explained the importance of the *Communist Party* case transcended the question of civil liberties. The case stands for the principle that the courts must decide for themselves whether legislation falls within the scope of a legislative power or restriction on the exercise of such a power contained in the Constitution. This accounts for the view maintained by the High Court that a law will be invalid if it only deals with matters which are in the *opinion* of any person or body matters with respect to which the Parliament has been given power to legislate.[94] Another aspect of the same principle requires the courts to be satisfied of every fact the existence of which is necessary to in law to provide a constitutional basis for legislation or any other governmental action.[95]

The principle in question is often referred to as the 'source and stream' principle. This description highlights the inability of the legislature to recite itself into power and thus enable the legislative and executive branches of government to exceed their constitutional powers. As Professor Winterton observed the 'ultimate foundation' for the principle is 'the rule of law, enforced by the judicial review of legislation'.[96]

The principle predated the *Communist Party* case and there is nothing to suggest that this principle has been or is likely to be abandoned, even if it too has received remarkably little judicial attention in recent times.

92 *Communist Party Dissolution Act* 1950 (Cth) ss5(4), 9(4) and 23.

93 The freedom of political association would probably operate even if it was seen as an adjunct to the free discussion of political matters which bore some relationship with the *federal* level of government unless of course the association was entirely confined to the pursuit of objectives which only related to the *State* levels of government.

94 See for example the classic formulation of the principle by Fullagar J in the *Communist Party* case (1951) 83 CLR 1, 258.

95 See the well known remarks of Williams J in the *Communist Party* case (1951) 83 CLR 1, 222 which were quoted with approval in *Hughes and Vale Pty Ltd* v *New South Wales* (No 2) (1955) 93 CLR 127 at 165 per Dixon CJ, McTiernan and Webb JJ.

96 See also Winterton supra fn 78, 655.

That said I have argued elsewhere that practical and pragmatic considerations necessary to enable the machinery of government to function, may require the modification of the principle especially when it comes to decide questions of facts the existence of which are essential to the existence of the valid exercise of constitutional power.[97]

D. Evaluation

The importance of the source and stream principle goes beyond its relevance to the protection of civil liberties and helps to underline the essential role of judicial review in ensuring compliance with any aspect of the Australian Constitution.

The other aspect of the case illustrates the potential of a written constitution to protect important values such as the rule of law. But this is done in an indirect way which has its modern counterpart in the *Kable* case where, as I have suggested, the reasoning employed was more strained and less intellectually convincing. The result in the *Communist Party* case can be explained as an application of a general principle which was and remains essential to the operation of judicial review. The result in the *Kable* case is symptomatic of a new trend of extending existing doctrines, which seems to signal a desire to extend by a process of *implication* at least some aspects of the separation of powers doctrine to the *state level of government.*

It is difficult to predict the extent of the future development of this trend. Thus when judges like Gummow and Hayne JJ refer to the well known remarks of Dixon J in the *Communist Party* case regarding the rule of law they may be signaling the use of the same concept as a platform on which to construct wide ranging limitations on the abuse of legislative powers.[98] This may, or may not, herald the *partial* recognition of the rule of law being treated as merely an example of a more general and overarching recognition of the same doctrine in its entirety, despite disavowals of such a process of reasoning by the whole Court in the *Lange* v *Australian Broadcasting Corporation*.[99]

So far in this lecture I have dealt with decisions which were, if not popular, at least not inconsistent with public opinion. The *Communist Party* case provides an instance where the Court invalidated legislation which would have enjoyed the support of very large sections of public opinion even if there was little overt criticism of the Court's decision. It will be recalled that the referendum to reverse the Court's decision was only narrowly defeated.

For many this will be seen as an illustration of the valuable and instrumental role which courts can play in checking the excesses of majority rule. The conflict engendered by a court which fails to give effect to the will of the

[97] See 'Proportionate Representation of States in the House of Representatives and Associated Issues — Some Recent Developments in Australia and the United States' (1988) 11 *University of New South Wales Law Journal* 102, 148 — 150; 'The Justiciability of Political Questions: Recent Developments' in H Lee and G Winterton (eds), *Australian Constitutional Perspectives* (1992) 180, 209-215.

[98] *Kartinyeri* v *Commonwealth* (*Hindmarsh Island Bridge* case) (1998) 72 ALJR 722, 743 — 4 para [89].

[99] (1997) 189 CLR 579, 566 — 7.

majority is seen as a healthy aspect of the institutional tension which should exist between the judiciary and the other arms of government. But not everyone has accepted that the existence of the Court was truly essential for that purpose. According to the opposing view expressed by Leicester Webb if the High Court had not existed, the Labor Party would have acted differently in the Senate before finally giving its support to the legislation which banned the Communist Party:

> A party which has no immediate prospect of a parliamentary majority will commit itself to policies which it would reject if it was in power. The parliament of a unitary State with an unwritten constitution will act more responsibly than a parliament of a State in which (as in Australia) there is judicial review of all legislation. In the first case, the connexion between decision and action is immediate and certain; in the second case there is delay and uncertainty. The Communist Party Dissolution Bill would have fared very differently if there had not been in the background a High Court which, over a period of nearly half a century, had shown itself a vigilant defender of civil liberties.[100]

This view probably represents an overly optimistic view of the responsiveness of the political processes to the protection of minority interests, at least by today's standards. It nevertheless calls attention to the effect of judicial review in perhaps reducing the responsibility which politicians should enjoy for their actions.

THE *AUSTRALIAN CAPITAL TELEVISION* CASE AND ITS FUTURE IMPLICATIONS

A. The new direction

The joint judgment in the *Engineers'* case affirmed that the grant of legislative power to the Commonwealth, is under the doctrine of *Hodge* v *The Queen* (1893) 9 AC 117, 132, and within the prescribed limits of area and subject matter, of an 'authority as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow . . .' The foundation for these remarks can be found in the opening words of ss 51 and 52 which give the Australian Parliament the power to 'make laws for the peace order and good government of the Commonwealth' with respect to the matters enumerated in those sections. But the same provisions are of course prefaced by the important qualification 'subject to this Constitution'. That qualification underlies the importance of the observation in the *Lange* case that:

> The Constitution displaced, or rendered inapplicable the English common law doctrine of the general competence and unqualified supremacy of the legislature.[101]

[100] L Webb, *Communism and Democracy in Australia: A Survey of the 1951 Referendum* (1954) at p 177. The Labor Party could have blocked the legislation in the Senate but it feared the use of such a Bill as the ground for a double dissolution of the Parliament.

[101] *Lange* v *Australian Broadcasting Corporation* (1997) 189 CLR 520, 564.

The tension which exists between these two sets of remarks conveys one of the most important aspects of the process of adapting the Australian Constitution to its own environment.

In recent years the High Court has finally acknowledged that even express constitutional provisions which *restrict* or *limit* the scope of legislative power should in general be construed broadly and be given a substantial operation, as can be seen with the new and broader interpretation accorded to s 117 of the Constitution in *Street* v *Queensland Bar Association*.[102] It remains to be seen whether the same approach will lead to the reversal of the old cases which dealt with the restrictions contained in ss 51(ii) and 99.[103]

What is significant about the High Court's landmark decisions in the *ACTV* case[104] and also the *Nationwide News* case,[105] is the willingness to *imply* limitations and restrictions on the scope of legislative powers which are not based on *federal* considerations or the *separation of powers*, especially given the deliberate decision of the framers to reject the incorporation of an American style Bill of Rights.

Opposition to a Goods and Services Tax (GST) was an important contributing factor in explaining the result of the federal election held in 1993. If it had not been for the decisions of the High Court in the same cases in the preceding year, the Labor Party would have been prevented by legislation promoted by its own government from capitalising on that opposition through the use of radio and television advertising.

Subsequent developments, and in particular the unanimous reaffirmation of the implied freedom of political communication which took place in the *Lange* case[106] in 1997, have made clear that the freedom operates to limit the legislative powers of *both federal* and *State* legislatures; and also applies to restrict the common law and statutory provisions which deal with the private rights of persons, namely, liability in defamation. The latter development filled a long term need to free the discussion of political affairs and matters, on a uniform and national basis, from the restrictions created by those laws.

My view was that the 1992 decisions opened the way to the development by our judges of an implied Bill of Rights, if the judges wished to go in that direction. The full potential of that development has not been realised. Rather, what has emerged is a consolidation of the doctrine established in the 1992 cases. The reaffirmation and refinement which took place in the *Lange* and *Levy* cases[107] evidenced a note of judicial restraint by which the Court has tried to steer a middle course. As I have written elsewhere, the course may be seen by some to be uniquely Australian in that it is similar in different respects to,

[102] (1989) 168 CLR 461

[103] L Zines and G Lindell, 'Form and Substance: "Discrimination" in Modern Constitutional Law' (1992) 21 *Federal Law Review* 136, 140 and also C Saunders "Concepts of Equality in the Australian Constitution" in G Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 209, 213.

[104] *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106.

[105] *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1.

[106] *Lange* v *Australian Broadcasting Corporation* (1997) 189 CLR 520.

[107] *Levy* v *Victoria* (1997) 189 CLR 579.

but not the same as, the British and American approaches to constitutional interpretation.[108] I have also argued that the decisions of the Court in the *McGinty*[109] and *Langer*[110] cases disclose that the pattern of consolidation has been somewhat in the nature of a patchwork quilt given the weak operation of the notion of representative government recognised in those cases.[111] It now seems strange to have the Court attaching far greater importance to matters which influence how persons will vote (freedom of political communication) than it does to the right to vote itself (equality of electoral divisions and making it an offence to urge voters to vote in a particular and lawful way).

But none of this alters the fact that the *ACTV* and *Nationwide News* cases marked a new direction in the judicial interpretation of the Australian Constitution and one made all the more striking by its failure to emerge until the end of this century.

B. Future implications

What then are the wider implications of the techniques used to launch this new direction? At first it seemed to some as if the High Court was treating the *partial* recognition of representative government in ss 7 and 24 of the Constitution, as mere examples of the recognition of the same concept in its *entirety* or, in other words, as mandating compliance with the *whole* concept. This is arguably similar to what occurred with the separation of powers in the *Boilermakers'* case.[112] It is also similar to the controversial way in which the United States Supreme Court was able to develop in the implied right of privacy in the American Constitution.

The High Court now seems to think that it has rejected this form of reasoning in the *Lange* case. As I have also argued elsewhere the Court has instead chosen to emphasise the need to ground implications in the text and structure of the Constitution. Thus the whole Court said in the case:

> "Under the Constitution, the relevant question is not, "What is required by representative and responsible government?" It is, "What do the terms and structure of the Constitution prohibit, authorise or require?".[113]

But the line between 'construing the text and making implications is not always easy to draw' and ultimately the question is likely to reduce itself into one of degree. While there remains much room for subjective differences of degree the emphasis on the text probably serves to highlight a reduced inclination to derive implications of this nature. Perhaps the implied basis of the restrictions on legislative power (which the Court emphasised did not confer rights on individuals) also weakens their existence and operation.

[108] Supra fn 86, 143.
[109] *McGinty* v *Western Australia* (1996) 186 CLR 140.
[110] *Langer* v *The Commonwealth* (1996) 186 CLR 302.
[111] Lindell supra fn 86, 123.
[112] *Attorney — General for the Commonwealth* v *The Queen; Ex parte The Boilermakers' Society of Australia* (1957) 95 CLR 529 (PC).
[113] (1997) 189 CLR 520, 567.

That said, I have no doubt that the *Lange* case confirms that the new constitutional law is here to stay and that only the pace and scope of its development may have been impeded. In other words there will be room for further development. I would therefore be surprised if the Court did not in time come to accept the existence of concomitant freedoms of political assembly and of political association. It would be mistake to treat *Kruger* v *The Commonwealth*[114] as having rejected the latter. The same rationale which supports the existence of an implied freedom of political expression in order to ensure free elections supports those freedoms as well.[115]

I feel less sanguine about the Court's willingness to draw implications from the provisions in the Constitution which partially recognise the system of representative government known as responsible government both in the 1992 cases and in the *Lange* case as well. The emphasis placed on the provisions which are taken as formally establishing responsible government continues to strengthen the possibility of the conventional rules of that system of government being given the force of law to the extent they are not already given that status by reason of existing and express constitutional provisions.[116]

Some of those rules have a reasonably clear meaning but the conversion of rules of *convention* into rules of *law* will lead to some searching questions about the scope of the so called reserve powers about which there may be little consensus. It also raises questions about whether all the rules are worth enforcing such as those which require Ministers to maintain Cabinet secrecy and solidarity even if agreement existed about their precise meaning. A further cost involves the loss of the advantage of the potential to adjust to new circumstances. I have argued before that the kind of rhetorical remarks which support the recognition of responsible government in the Australian Constitution and which found their expression in the joint judgment in the *Engineers'* case are quite consistent with asserting the operation of those rules according to their tenor that is as rules of convention in their permissive and non-obligatory legal sense.[117]

Perhaps the following remarks of Kirby J in *Egan* v *Willis*[118] show that he holds a similar view:

> Care must be observed in the use of the notion of "responsible government" in legal reasoning. It is a political epithet rather than a definition which specifies the precise content of constitutional requirements. As with the notion of "responsible government" it is possible to accept the words as a general description of a feature of constitutional arrangements in Australia without necessarily being able to derive from that feature precise implications which are binding in law.[119]

[114] (1997) 190 CLR 1.

[115] Lindell supra fn 86, 140-2 and also the remarks of the High Court in the *Lange* case referred to in the same note.

[116] Ibid, 134.

[117] G Lindell, 'Responsible Government' in P Finn (ed) *Essays on Law and Government Vol 1 Principles and Values* (1995), 85 — 6.

[118] (1998) 73 ALJR 75.

[119] Ibid, 114 para [152]. The second reference to 'responsible government' may have been intended to be a reference to 'representative government'.

It has been suggested that the High Court should keep in mind that parliamentary supremacy remains the major principle and that the judicial implication of representative government is in aid of that principle and thus avoid wide interpretations which are more suited to the ideology of a state with a bill of rights rather than one which, has since the *Engineers'* case, relied on representative and responsible government as its central principle.[120] Looked at in this way *judicial implication of responsible government* is seen as reinforcing the major principle. Such a course would seem attractive at a time when the institution of responsible government can be seen to be in serious decline. The welcome support given to the importance of holding governments accountable is not difficult to discern in such cases as *Lange* and *Egan* v *Willis*. In other words, the implication which entrenches responsible government would work as a perceived judicial corrective to the political shortcomings of its operation.

I would prefer to treat the concept as something which the Court should take into account in interpreting existing constitutional provisions. A good example would be to widen the powers of the Houses of the Parliament to investigate the activities of the executive government under s 49 of the Constitution.[121] This would maintain the distinction between the *recognition* and *enforcement* of rules of convention.

The late Sir Maurice Byers seemed to think that freedom of (political) speech, when combined with representative democracy and responsible government would obviate the need for any (other) written guarantees of individual rights. It will be interesting to see if the future vindicates his view.[122]

One explanation that was advanced for the new direction set by the High Court in the *ACTV* case was that the decision in that case was given in response to a changing public opinion on the inadequate protection of individual rights.[123] This assertion is certainly not supported by the decisive rejection of the some of the proposals for constitutional alteration defeated in 1988. At most, I think the public reaction to the new direction may parallel the general community's acceptance of the *expansion* of central power when it was introduced through the agency of judicial interpretation ie by the judges instead of politicians.

What we come back to is the increasing restlessness of the judges in relation to questions of individual liberty, even if the lengths they are prepared to go to in that direction have been somewhat muted by the recent decisions of the Court. The entrenchment of responsible government by judicial implication may signal a similar restlessness in relation to questions concerning the organisation of government.

[120] Zines supra fn 20, 393.

[121] Stressed in *Lange* 189 (1997) CLR 520, 558 — 9 and see generally the writer's discussion of the coercive powers of the federal Houses of Parliament to require the giving of evidence notwithstanding claims of executive privilege in 'Parliamentary Inquiries and Government Witnesses' (1995) 20 *Melbourne University Law Review* 383, 399-404.

[122] 'Constitutional change and implied freedoms' in M Coper and G Williams (eds), *Power, Parliament and the People* (1997) 1, 5.

[123] Galligan supra fn 33, 133-4. The same explanation was advanced for *Mabo* v *State of Queensland* [No 2] (1992) 175 CLR 1.

THE SENATE AND SUPPLY: THE LEGACY OF 1974 — 1975

A. THE PROBLEM

The deep and emotional turmoil engendered by the dismissal of the Whitlam Labor Government in 1975 could not have occurred without the exercise of the power of the Senate to block Supply — a power which it also threatened to exercise in 1974. It is difficult to recapture the intensity of the events of those years, especially when we are now witnessing almost a game of musical chairs regarding the attitudes of the major political parties on the role of the Senate. Unlike the other matters so far dealt with in this lecture, the Senate's power to reject Supply did not directly involve the courts. It offers some significant insights into the way in which the Australian Constitution deals with, and adapts in the face of, major political conflict.

My essential concern is with the Senate's power to refuse Supply which was exercised for the first time in our history in 1974 and 1975. In both cases the exercise of the power led to the elections for both Houses of the Australian Parliament. For some, like myself, the events which led to those elections called into question what had been described as 'probably the most striking achievement' of the framers of the Australian Constitution, namely, 'the successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism'.[124] It also recalled a reference to the fear voiced during the constitutional conventions of the 1890's and embodied in the famous aphorism that either 'responsible government would kill federalism or federalism would kill responsible government'. Dire predictions were raised following the events of 1975 that a precedent had been set which might in the future lead to more frequent elections and ensuing political and economic instability. The existence of the power to reject Supply would make it difficult for governments to pursue necessary but politically unpopular policies, especially given the difficulty of a government obtaining a majority in both Houses because of the system of proportional representation. I should say that I subscribed to those fears.

Contrary to some predictions, the exercise of the power to block Supply has not been confined to its use for federal reasons. Professor Harrison Moore had thought that it would not be used except in case of an 'obvious outbreak of localism', otherwise its exercise would be 'an illegitimate exercise of financial control — ie unconstitutional'.[125] The exercise of the power in 1974 and 1975 highlights the literal way in which the Australian Constitution can operate. It is almost as if the mere existence of a power guaranteed the propriety of its

[124] *Reg* v *Kirby Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

[125] 'Lectures on the Commonwealth of Australia Constitutional Bill' quoted in R Campbell, *A History of the Melbourne Law School 1857 to 1973* (1977), 114. The term 'unconstitutional' is almost certainly used in the British sense ie contrary to constitutional propriety.

exercise with the only true guide to its exercise resting on the force of public opinion.

The essence of the problem lies in the attempt made by the framers to adopt the system of British responsible government with its basic assumption that a government and its Ministers are responsible to the *lower* House of the Parliament. At the same time the framers conferred on the Senate the power to reject money bills. Professor Sampford has rightly pointed out that the cause of the problem is that the Australian Senate was given the same "legal legislative power" which the British House of Commons used to gain "conventional executive power" over governments.[126] This creates the potential for requiring "the Ministry to serve two Houses".[127]

This position is radically different from that in the United States where the exercise of the power to reject Supply does not serve as a trigger for or bring about early elections because the American system of government adopts the fixed term system of parliament without any qualifications at all, even a double dissolution in case of a deadlock between the two Houses of Congress. Accordingly the attempt by one of the main actors in the crisis of 1975 to rely on the intentions of the founders to follow the model of the American Senate seems unconvincing. Mr Fraser was right to stress the elective character of the Senate, but the comparison should end there, especially when regard is had to the different consequences of a rejection of a money bill in that country, as was illustrated by the weeks of stalemate which followed the protracted deadlocks that occurred between the current President and the United States Congress.[128]

All the reviews of the Australian Constitution which have taken place since the dismissal of the Labor Government in 1975 have sought to resolve the problem. A wide variety of solutions have been advanced, none of which have so far been adopted: the abolition of the power of the Senate to reject Supply,[129] the retention and streamlining of the power by ensuring that its exercise would automatically bring about an election for *both* Houses of the Australian Parliament,[130] and the removal of the power for a part of the term of a parliament combined with a qualified fixed term to curtail the power of a

[126] 'Reconciling responsible government and federalism' in M Ellinghaus, A Bradbrook and A Duggan (eds), *The Emergence of Australian Law* (1989), 371, quoted and discussed in B Galligan, supra fn 33, 72.

[127] H Moore, *The Commonwealth of Australia* (2nd ed 1910), 151.

[128] M Fraser, 'Lessons from 1975' in M Coper and G Williams supra fn 122, 164, 166 and see also G Lindell 'The constitutional issues: an overview' ibid, 204, 210 where I had occasion to make the same point.

[129] The proposal moved by Mr Whitlam at the meeting of the Australian Constitutional Convention held in Hobart in 1976: *Proceedings of the Australian Constitutional Convention: Hobart 27 — 29 October 1976*, 98.

[130] Ibid, 106-7. The proposal moved by the then Premier for the State of Western Australia, Sir Charles Court, at the same meeting of the Australian Convention referred to in the preceding note. Under the present position it is possible to contemplate the dissolution of only the House of Representatives if the deadlock over Supply fails to satisfy the conditions of a double dissolution and those conditions have not been satisfied in relation to any other bills.

prime minister to obtain an early election.[131] The latter solution has not received the attention it deserves. The proposal to establish an Australian Republic which is likely to be put to a referendum at the end of this year does not disturb the existence of the power to reject Supply but may make it less likely that the Constitutional Head of State would dismiss a Prime Minister who was unable to obtain Supply from the Senate.[132] If so, the effect of refusing Supply might come to resemble the deadlocks that occurred in Victoria in the 19th century.

B. Effect of failure to solve the problem

All this assumes that the present position should be altered. But it by no means follows that everyone agrees with that assumption. Professor Galligan has argued that the combination of responsible government and federalism has worked reasonably well and that this is what Australians wanted and federalism required. In essence, the synthesis achieved is peculiarly adapted to the way federalism was meant to and should work in Australia. Traces of a similar view can be found in the writings of eminent constitutional authorities earlier in this century. Thus Sir Samuel Griffith warned in 1914 that the basis of the rule regarding the need for a government to retain only the confidence of the House of Representatives might require some modification in the future.[133] A few years earlier Professor Harrison Moore suggested that the answer to the classic fears raised about the contradiction between responsible government and federalism created by the Senate's power to reject Supply was that:

> . . . neither the Cabinet System nor Federal Government is a rigid institution. The liability of the first to *change* and to *mould* itself to conditions is its one permanent feature and perhaps its principal advantage. Both "federal" and "unitary" [ie Cabinet system] governments are commonly mere approximations to a type, and neither necessarily excludes . . . the other.[134]

As Professor Galligan has also argued the powers of the Senate can be used to both frustrate and enhance responsible government.[135] The notion that upper houses can enhance the attainment of responsible government has also found

[131] The proposal recommended by the Constitutional Commission in its *Final Report* (1988) paras 4.345, 195 and 4.476, 219. (The part of the term specified was the first three years of a four year term.)

[132] See generally the *Constitution Alteration (Establishment of Republic) Bill* 1999, introduced into the House of Representatives on 10 June 1999 and proposed, by the present Australian Government, to be put to a referendum at the end of 1999. This was the republican model recommended by the Constitutional Convention which met in February 1998: "Final Resolutions of the Constitutional Convention, Canberra, 2 — 13 February 1998" (1998) 9 *Public Law Review* 55.

[133] 'Memorandum by Sir Samuel Griffith, Chief Justice of Australia, on the double dissolution section of the Constitution' at p 1. The memorandum was given to the then Governor — General, Sir R G Ferguson in relation to the double dissolution of the Australian Parliament in 1914 (Novar papers MS 696, National Library.)

[134] Moore supra fn 127, 151 (emphasis added).

[135] Supra fn 33, 87.

its echoes in judicial remarks made in *Egan* v *Willis*.[136] While it may be unrealistic to assert that this development is strictly consistent with the British notions of responsible government, the elective nature of Australian upper houses gives them some claim to legitimacy to perform the roles which lower houses have almost ceased to discharge in holding governments to account — at least when those governments govern in their own right and not with the support of other parties or independents. This suggests that the British system of responsible government has been adapted to Australian conditions in response to the failure of lower houses of parliament to hold governments accountable.

Looking back over the last quarter of a century after the heady days of 1975, is it possible that some constitutional observers like myself exaggerated the potential consequences of the Senate's power to reject supply and its accompanying instability? It is of course true that the potential continues to exist today and that, as the then Senator Kernot pointed out, blocking Supply would have even greater ramifications today than it did in 1975 because of the globalisation of the economy.[137] It is also not possible for me to ascertain the extent to which, if any, the actions of succeeding governments have been unduly influenced by the existence of the power of the Senate to reject Supply as a reason for not taking decisive but unpopular action. So, whether by careful planning on the part of governments or otherwise, the fact remains that the Senate has not exercised that power since 1975.

Despite this, my views on the desirability of removing the power of the Senate to reject Supply have not changed. As Professor Moore predicted many years ago, the Senate could and still does perform a useful and powerful role in the enactment of other legislation and through its committee system.[138]

I suspect, however, that it is unlikely that any of the solutions proposed for dealing with the problems created by the power to reject Supply will ever be adopted. This effectively means that the enormity of what happened in 1975 will have to provide its own solution to the problem discussed above.

Perhaps this was the solution to the problem which at least some of the framers may have had in their minds. Professor Galligan has reminded us that the Chairman of the 1897 — 98 Convention, Sir Richard Baker, observed that the Senate was:

> like a fort which has only one big gun, and that big gun so powerful and so uncertain in its effect that they hardly dare to let it off, because it may burst and injure those who occupy the fort, and possibly blow it to pieces. This big gun is the power of refusing to grant supplies and to thus cause the stoppage of all the functions of government.[139]

[136] (1998) 73 ALJR 75, 85-6 para 45 per Gaudron, Gummow and Hayne JJ.
[137] 'The Senate and Supply' in Coper and Williams supra fn 122, 169, 170.
[138] Supra fn 127, 153.
[139] *Official Report of the National Australasian Convention Debates (Sydney 1897)* 785 quoted in Galligan supra fn 33, 80.

There are difficulties with viewing the Senate as a 'fort' which could be 'blown to pieces' especially when in some circumstances the occupants may be in a position to force an election for the House of Representatives without having to face the electors themselves. But even so, the colourful metaphor may still serve as a useful way of suggesting that the continuing absence of any solution to the problem may have to continue to provide a sufficient incentive or safeguard against a repetition of the events which occurred in 1975.

THE EXCEPTIONAL CHARACTER OF THE SUCCESSFUL 1967 REFERENDUM

In 1967 the people of Australia[140] overwhelmingly voted in favour of an alteration to s 51(xxvi) of the Australian Constitution which had the effect of enabling the national parliament to make laws for people of the Aboriginal race. Whatever might be said about the wisdom of using the special races power as a vehicle for such a purpose, the fact remains that the adoption of this proposal enables Australia to come to terms with its past. Doubtless few voters would have realised that they were undoing the work of the drafters on the *SS Lucinda* by bringing the power within the reach of the special races power.[141] However the voters would have realised that the national government had an important role to play in the advancement of Australia's indigenous population which went beyond its responsibilities for those same people in the Territories of the Commonwealth.[142]

The successful amendment can hardly be regarded as typical of the experience with referendums to alter Australia's Constitution both in terms of their success generally and, in particular, the success of referendums designed to expand federal power.[143] It is generally accepted that Australia has a poor statistical record of successful proposals for constitutional amendment even if has been suggested that the record is not really unique and that it is comparable with that in other relevant countries.[144] The record presently stands at eight out of 42 proposals which have been put to a referendum, not counting other proposals which did not even reach that stage. The defeats have occurred with both proposals to expand federal power as well as those which, increasingly since 1974, have been more concerned with questions of the machinery of government. In more recent times they have also encompassed proposals

[140] Except those who lived in the internal Territories since they could not vote in referendums to alter the Constitution until 1977. The alteration was contained in the *Constitution Alteration (Aborigines)* 1967.

[141] La Nauze supra fn 2, 67.

[142] For a useful collection of materials concerning that referendum see generally B Attwood and A Markus, *The 1967 Referendum, Or When Aborigines Didn't Get The Vote* (1997).

[143] For a comprehensive and scholarly analysis of the outcomes of referendums to alter Australia's Constitution and the lessons to be drawn from those referendums see E Campbell, 'Southey Memorial Lecture 1988: Changing the Constitution — Past and Future' (1989) 17 *Melbourne University Law Review* 1.

[144] B Galligan supra fn 33, 118 — 122.

to restrict State legislative power by extending the operation of the few guarantees of individual liberty contained in the Australian Constitution to the States.[145] An earlier attempt to adopt a limited list of guarantees of individual during the period of post war reconstruction also failed in 1944.[146]

At first glance this would seem to suggest that the Australian Constitution has not adapted to change. But the initial impression is soon dispelled by the way the High Court has filled the vacuum by judicial interpretation. This is well illustrated by the way that the limitations on the power contained in s 51(xxxv) can be avoided by the ability of the Parliament to legislate with respect to industrial relations under the external affairs and corporations powers.[147] This no doubt coincides with a decline in the popularity of the peculiarly Australasian method of resolving industrial disputes. There are also the familiar rules of progressive interpretation which have rendered unnecessary proposals to deal with such matters as radio and television. Possibly the defeat of the 1988 referendums may suggest the beginning of the same trend as regards *limitations* on the exercise of legislative power.

The author of an essay on constitutional alteration theory is surely right then to suggest, in their application to Australia, the following propositions:

> *Proposition 5*: A low amendment rate, associated with a long average constitutional duration, strongly implies the use of some alternative means of revision to supplement the formal amendment process.
>
> *Proposition* 6: In the absence of a high rate of constitutional replacement, the lower the rate of formal amendment, the more likely the process of revision is dominated by a judicial body.[148]

This gives rise to the well known paradox as to why a community rejects changes at referendums under the more direct democratic process but accepts them when they are introduced by decisions of the High Court as a result of judicial interpretation. It is, I think, only a partial answer to this paradox to point to the fact that changes which result from judicial interpretation are introduced in a more gradual way and take many years to occur. To this we should now add a further paradox and that is why State referendums seem to have a better success rate. That is so despite the fact some of the questions put to such referendums are just as complex to the electors as was seen, for example, with the referendums held in NSW to introduce a fixed term parliament and also to protect the independence of the judiciary.[149]

Familiar questions have also been raised as to the true reason for the high rate of rejection at the federal level, such as whether the process is too difficult to satisfy or whether the rejection reflects the inherent conservatism of the Australian voters. The tendency of almost all successful proposals to be carried in all States as well as nationally tends to cast doubt on the first

[145] *Constitution Alteration (Rights and Freedoms)* 1988.
[146] *Constitution Alteration (Post — war Reconstruction and Democratic Rights)* 1944.
[147] See eg *Victoria* v *Commonwealth* (*Industrial Relations Act* case) (1996) 187 CLR 416.
[148] D Lutz, 'Toward a Theory of Constitutional Amendment' in S Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995) 237, 266.
[149] Lindell in Coper and Williams supra fn 122, 205.

possibility, and a proposal to require a proposal to be carried in only three States instead of a majority of States, in addition to the approval of electors voting nationally, would only have made a difference in the case of three proposals put to the electors in the past.[150]

A number of mechanisms for reviewing the Constitution have now been tried.[151] These have included the appointment of the Royal Commission on the Constitution in 1927 — 1929 and more recently the Constitutional Commission in 1986 — 1988. This involves review by experts and the calling of submissions and evidence from the public and governments. That is somewhat like the operation of modern law reform commissions. By themselves, such bodies are unlikely to be successful in gauging the existence of the necessary degree of consensus needed to guarantee the acceptance of proposals for constitutional alteration. There have also been the reviews by a joint federal parliamentary committee (Joint Committee on Constitutional Review 1956 — 1959) and the holding of Premiers Conferences. This kind of review emphasises the role of governments and parliamentarians in the process.

An improvement on these approaches occurred with the holding of the Australian Constitutional Conventions (1972 — 1985) which had as its essential rationale the representation of all political parties and levels of government (including local government). It was composed of serving and current politicians who were nominated by their respective parliaments as was the case with the delegates of the 1891 Convention. This form of review can fairly claim success for three proposals which were carried in 1977.

The most recent mechanism tried was the Constitutional Convention which met in February 1998 and consisted of elected members who were not serving parliamentarians and members appointed by the Commonwealth Government from current members of the federal and State Parliaments and members of the public.[152] This mechanism is partly based on the method of appointment used for the Convention which was held in 1897 — 98. The Convention was of course confined to the question of the Republic. The impression I have is that this Convention more than other mechanism used in my lifetime captured the interest of the general public.

My own preference is for the use of a combination of the 'expert body' approach with the kind of 'people's convention' approach just described. I also believe that there is room for much greater discussion in our parliaments, and on a regular basis, of matters concerning the operation and alteration of the Australian Constitution. This could be done, for example, by setting aside regular periods of parliamentary debate and discussion for that purpose.

[150] *Constitution Alteration (Organised Marketing of Primary Products)* 1946, *Constitution Alteration (Industrial Employment) 1946 and Constitution Alteration (Simultaneous Elections)* 1977

[151] For a comprehensive account see C Saunders, 'The Australian experience with constitutional review' (1994) Vol 66 No 3 *Australian Quarterly* 49.

[152] For an appraisal of its work by one of its participants see G Winterton, 'Australia's Constitutional Convention 1998' (1998) 5 *Agenda* 97.

What then are the lessons to be drawn for constitutional reform in the future? Obviously there will always be room for much greater public education on constitutional matters and the presentation of arguments for and against particular proposals.[153] Whether all proposals for increasing central power are necessarily doomed to fail as some have suggested is probably questionable since there have been exceptions to that trend. But it is, in any event, largely rendered unnecessary by the course of judicial interpretation. (What may be more interesting is to speculate on the likely outcome of proposals to decrease central power.)

One central and abiding lesson to be drawn from our experience with the process relates to its intensely political nature. From that characteristic emerges an important condition for success, namely, the need to obtain bipartisan support and consensus between all the major political parties. Even then the defeat of the other proposal put to the 1967 referendum[154] shows that the condition can only be seen as a necessary but not always sufficient condition for success. The referendum to be held later this year for the establishment of a republic will test the universal character of the condition described here. It remains to be seen whether the failure of one of the major parties to either support or reject a proposal will make any difference to its chances of success, especially when it is known that the Prime Minister is opposed to the measure.

CONCLUDING OBSERVATIONS

I have not chosen to highlight in this lecture the reluctant, fragmented and above all evolutionary way, in which Australia achieved its independence. The silent nature of that process was illustrated by three cases decided by the High Court which in their different ways affirmed the existence of Australia as a country separate from the United Kingdom. Those cases were decided in 1988 — 200 hundred years after the European settlement of this country.[155] Not surprisingly, and like the enactment of the *Statute of Westminster* 1931 (UK)

[153] Much has been done in that regard by the Constitutional Centenary Foundation which was established to give effect to a resolution passed by the Constitutional Centenary Conference which met in April 1991 to mark the centenary of the First National Australasian Convention. The Conference was convened by Professors Cheryl Saunders and James Crawford and the participants invited to attend the function were distinguished members of the community. The role of the Foundation is described in J Warhurst, 'The Constitutional Centenary Foundation and the politics of constitutional reform' (1995) Vol 67 No 3 *Australian Quarterly* 40.

[154] *Constitution Alteration (Parliament)* 1967 which proposed the breaking of the nexus between the House of Representatives and the Senate.

[155] *In re Wood* (1988) 167 CLR 145 — a British subject was not qualified to stand for election to the Senate because he was not an Australian citizen as required by laws made pursuant to ss 16, 34 and 51(xxxvi); *Attorney-General (UK)* v *Heinemann Publishers Pty Ltd* (No 2) (*Spycatcher* case) (1988) 165 CLR 30 — the public laws of the United Kingdom were not enforced in an Australian court because that country was treated as "foreign" under the relevant rules of private international law; and *Nolan* v *Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 — a British subject who resided in Australia was nevertheless an "alien" and thus capable of being deported under laws made pursuant to s 51(xix) because the same person had not been naturalised as an Australian citizen.

and the *Australia Act*(s) 1986 (Cth and UK) which helped to achieve our independence, these cases passed unnoticed by the Australian public despite the symbolic significance of 1988.

I have suggested elsewhere that the alteration of the Australian Constitution has always represented a mix of *popular sovereignty* as represented by the role of the electors at referendums under s 128 and *parliamentary supremacy* as represented by the role previously played by the British Parliament.[156] The enactment of the British version of the *Australia Act* by the parliament of that country represented the last exercise of the residual ability of the same parliament to deal with Australia's constitutional affairs. The effect of s 15(1) of the *Australia Act* seems to have transferred at least some of that residual ability to all the Australian Parliaments.

The effect of those Acts has been to leave us with *three* fundamental laws. The understanding of our constitutional arrangements would surely be simpler, and the lot of students and teachers of Australian constitutional law would surely be easier, if they could be reduced to *two* basic laws, namely, the federal and State constitutions.

Preferably, and if we could engage in what would appear to be an element of wishful thinking, they would replace the existing constitutions, but what should the new constitutions look like?

Reference was made before to world trends in favour of diffusing power in ways that are broadly compatible with federalism.[157] As already indicated, I do not favour the contraction of national power in Australia. There is no legal obligation to exercise it and electors are quite free to reject its use if Australia follows the same trends.

I would favour, instead, the end of the judicial supervision of the federal limits on national legislative power but without abolishing state parliaments and governments. Changes that have resulted from judicial interpretation have had some disadvantages. Judicial change occurs gradually and over long periods of time. The effect of the literal emphasis placed on the wording used to define national power forces the High Court to draw distinctions which would have little appeal to rational policymakers charged with the task of drafting an ideal or new constitution — as witnessed by the power of the national parliament to control intra-State trade when conducted by s 51(xx) corporations, but not individuals or non — s 51(xx) corporations, and also its inability to deal with family relationships not based on marriage.[158]

What may need attention is the nature of the Australian customs union and the additional question regarding the financial viability of the States.

Kable and the 1992 cases which have set the High Court on its new direction in respect of implications which could be drawn from representative and responsible government, suggest to me that the time has arrived to support a judicially enforceable Bill of Rights, even if my support remains at best

[156] G Lindell and D Rose, 'A Response to Gageler and Leeming: "An Australian Republic: Is a Referendum Enough?"'(1996) 7 *Public Law Review* 155, 160.
[157] Supra fn 45 and accompanying text.
[158] Lindell, in Galligan supra fn 11, 176.

lukewarm. The existence of a rigid and written constitution has provided an inevitable temptation to those judges who now support a greater judicial role in regard to the abuse of power and protection of the individual. But these developments create considerable uncertainty and ample room for judicial ingenuity in devising ways of achieving that objective. I think the time spent on giving free play to such ingenuity, with the accompanying debates about the legitimacy of judicial implications, would be better spent if the courts could concentrate their energies on how constitutionally guaranteed rights can be *regulated* and *balanced* with the conflicting interests of the community. A good case in point was *Kable* itself.

The new constitutions should also implement the many and detailed recommendations that emerged from the depressing succession of royal commission reports which inquired into the failures of state governments over the last decade. It is true that the events of 1975 were dramatic and important. In the end, however, the problems of regulating the daily *exercise* of governmental power have become far more pressing than the attention paid to the *getting* of that power.