THE PARAMETERS OF CONSTITUTIONAL CHANGE*

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I INTRODUCTION

Seven years ago, we celebrated the centenary of our *Constitution*, observing how well it has served us in times of war and in times of peace; in times of prosperity and in times of poverty. Six Colonies have grown into an independent nation, free of Imperial legislative power, conducting our own affairs and responsible for our own safekeeping. Our *Constitution* has been the framework of a stable democracy, governed by the rule of law and modelled somewhat loosely on the Westminster system.

The *Constitution* could be improved in a number of respects which were identified by the Constitutional Commission's Report in 1988. They relate chiefly to the composition, tenure and powers of the Parliament. It could be improved by acknowledging the dignity of our indigenous peoples. Changes of these kinds can be effected only by referendum, but structural changes can occur and have occurred without significant change in the constitutional text. The last 100 years have seen a transformation of our form of government. A facilitator of change has been the High Court, as Alfred Deakin foretold when he introduced the Bill for the *Judiciary Act* in 1903:

> the nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life, which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary. ... It is as one of the organs of Government which enables the *Constitution* to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates.[1]

The High Court has not been the only organ of government that has responded to changing circumstances. The politico-economic exigencies of the day have worked changes in the relationship of Commonwealth and States and the relationship of Parliament and the Executive.

In retrospect, the High Court's judgment in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[2] – probably the most dramatic change in the constitutional landscape – can be seen as the opening of Commonwealth dominance in both legislative and fiscal power. The change was not isolated from the political sentiment of the time. As Windeyer J observed:

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1 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967–8 (Alfred Deakin, Attorney-General).

2 (1920) 28 CLR 129 ('*Engineers' Case*').

> in 1920 the *Constitution* was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs. … As I see it the *Engineers*' *Case*, looked at as an event in legal and constitutional history, was a consequence of developments that had occurred outside the law courts as well as a cause of further developments there.[3]

So when we look at our *Constitution* today, we must be conscious of the changes that have occurred in the nature and location of political power in consequence of factors external to the law courts, notably vertical fiscal imbalance and the dominance of party leadership. Then, in the judicial branch of government, the growth of the federal court system has been criticised and a single court structure has been suggested. And finally, the issue of a Republic remains alive but dormant.

These are major structural issues and we may think that their solution should find, and perhaps need, expression in the *Constitution.* Yet I venture to suggest that constitutional amendment to change or reverse any of these movements is unlikely or, in the case of the Republic, dependent on solving a yet unsolved problem.

II VERTICAL FISCAL IMBALANCE

In 1901, the collection of revenue from the duties of customs and excise passed to the Commonwealth although it was forbidden to apply more than a quarter of the net revenue towards its expenditure for a period of at least 10 years.[4] Subject to the loss of revenue from customs and excise, the States retained power to levy taxation of all kinds. They retain that power today, but in practice it can be exercised only in limited fields, including the exaction of mining royalties and stamp duty.

The reason, of course, is that the Commonwealth, by exercising its concurrent taxing power, made it politically impossible for States to impose income tax in addition to that imposed by the Commonwealth and, by exercise of its power under s 96, made financial grants to the States conditional on the States abstaining from imposing income tax. Thus the States were legislatively excluded from the most important sources of taxation,[5] not because they were stripped of taxing power but because they were induced not to exercise it.[6]

Sections 90 and 92 of the *Constitution* ensured that the geographical Commonwealth, consisting at least of the entire mainland and the island of Tasmania, should be a free trade area[7] and that the sole authority to determine

3 *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J) ('*Payroll Taxation Case*').

4 *Australian Constitution* ss 86, 87.

5 *South Australia v Commonwealth* (1942) 65 CLR 373 ('*First Uniform Tax Case*').

6 *Victoria v Commonwealth* (1957) 99 CLR 575, 610 (Dixon CJ) ('*Second Uniform Tax Case*').

7 See *Cole v Whitfield* (1988) 165 CLR 360.

duties of customs and excise and the payment of bounties on the production or export of goods should be the Commonwealth Parliament.[8] Customs, bounties and taxation must be uniform throughout the Commonwealth.[9] In *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)*,[10] the joint judgment commented that:

> ss 90 and 92, taken together with the safeguards against discrimination in s 51(ii) and (iii) and s 88, created a Commonwealth economic union, not an association of States each with its own separate economy.[11]

The concurrent powers of the Commonwealth over currency, banking and insurance (other than State banking and insurance) have been exercised so as to cover those respective fields.[12] The consequence of these provisions is to give the Commonwealth 'control of the national economy as a unity which knows no State boundaries, by a legislature without direct legislative power over the economy as such'.[13] That was the view of s 90 taken by Sir Garfield Barwick CJ in *Western Australia v Chamberlain Industries Pty Ltd*,[14] and expanded in his dissenting judgment in *Victoria v Commonwealth*:[15]

> There is but one economy of the country, not six … But no specific power over the economy is given to the Commonwealth. Such control as it exercises on that behalf must be effected by indirection through taxation, including customs and excise, banking, including the activities of the Reserve Bank and the budget, whether it be in surplus or in deficit.[16]

Thus the Commonwealth has in hand the chief regulatory levers of the national economy, both fiscal and monetary. Its influence on State borrowings has waxed and waned since the establishment of a Loan Council in 1923. The Commonwealth acquired a measure of control over State borrowing powers through the Loan Council after s 105A was inserted into the *Constitution* in 1928.[17] Today, if Commonwealth control over State borrowings were required, it would not be effected by action under the current Financial Agreement which dates from 1994,[18] but by some other policy mechanism, perhaps by attaching conditions to State grants.

8 See *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; *Ha v New South Wales* (1997) 189 CLR 465; *Betfair Pty Limited v Western Australia* (2008) 234 CLR 418.

9 *Australian Constitution* ss 51(ii)–(iii), 88.

10 (1993) 178 CLR 561, 585 (Mason CJ, Brennan, Deane and McHugh JJ).

11 See, eg, *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399, 426 (Mason CJ and Deane J).

12 As to the scope of the exception of 'State banking', see *Bourke v State Bank of New South Wales* (1990) 170 CLR 276.

13 *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1, 17 (Barwick CJ).

14 (1970) 121 CLR 1. Cf the rejection of this view in *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 616–17 (Gibbs CJ) ('*Pipelines Case*').

15 (1975) 134 CLR 338 ('*AAP Case*').

16 Ibid 362 (Barwick CJ).

17 See Cheryl Saunders, 'Government Borrowing in Australia' (1989) 17 *Melbourne University Law Review* 187.

18 See *Financial Agreement Act 1994* (Cth).

In the National Economy Chapter of the Final Report of the Constitutional Commission in 1988, it was said that:

> In economic matters, Australia is not the master of its own destiny. This was made clear during the depression of the 1930s. It is just as clear today, perhaps even more so.[19]

Recent events confirm that view. National responses – indeed, supranational responses – are needed to protect and foster the national economy and central control of fiscal and monetary policy is essential for that purpose. A de facto return of taxing powers to the States, or to the States and Territories, would today be unacceptable, not only to the Government of the Commonwealth, but to the Governments and peoples of the States and Territories. Indeed, in 2006 agreement was reached between the Commonwealth and the States on the progressive elimination of State stamp duties on various documents and transactions. I do not sense any current agitation for relinquishing the exercise of any of the Commonwealth's taxation powers in order to admit the exercise of corresponding powers by the States and Territories. Rather, accepting Commonwealth hegemony, the movement has been towards reaching agreement on the disposal of Commonwealth revenue to fund the functions of the States and Territories. The most obvious example is the allocation of GST revenue to the States and Territories.

The constitutional issue of the present time is not the exercise of taxing powers but the distribution of the revenue derived from their exercise. In principle, revenue should be so distributed as to allow each organ of government to fund the maintenance, support and regulation of the activities for which it is responsible. But there is no constitutional provision which determines which activities should fall within the responsibility of one organ of government and which within another.

The only constitutional provisions now governing Commonwealth expenditure appear to be ss 81 and 83. In accordance with established constitutional principle,[20] those sections require Parliamentary appropriation of any moneys to be withdrawn from the Consolidated Revenue of the Commonwealth.[21] An appropriation must be 'for the purposes of the Commonwealth'.[22] The meaning of that phrase has not been settled, but there is substantial support for the view that authorised purposes extend to 'such purposes as Parliament may determine'.[23]

19 Constitutional Commission, *Final Report of the Constitutional Commission 1988* (1988) vol 2, 773.

20 *Auckland Harbour Board v The King* [1924] AC 318, 326–7 (Viscount Haldane).

21 *Constitution* ss 81, 83.

22 *Constitution* s 81.

23 See, eg, *A-G (Vic) v Commonwealth* (1945) 71 CLR 237, 256 (Latham CJ); 274 (McTiernan J) ('*Pharmaceutical Benefits Case*'); *AAP Case* (1975) 134 CLR 338, 396 (Mason J); 417 (Murphy J); *Combet v Commonwealth* (2005) 224 CLR 494, 522 (Gleeson CJ) ('*Work Choices Advertising Case*'). The narrower view was put by Owen Dixon KC after reviewing the American authorities in his evidence before the 1929 Royal Commission on the *Constitution*: '[the *Constitution*] restricts the power of Parliament to appropriate money to the subjects assigned to Federal legislative power. The function of appropriating money seems to be treated as an exercise of the power of law-making, and not as a separate power': see Constitutional Commission, above n 19, 780.

The consequence, as the dissenting judgments in the *AAP Case* pointed out, is that an appropriation of funds to be expended on a subject outside Commonwealth legislative power (which includes the legislative power inherent in a national legislature)[24] erodes the amount which would otherwise be available for grants to the States under s 96 or perhaps for payments to the States under s 94.[25] The framers of the *Constitution* envisaged that there would be a surplus of Commonwealth revenue available for distribution to the States. But fluctuating economic and political factors, sometimes producing budget surpluses, sometimes deficits, destroyed any notion that the States might rely on a steady distribution of Commonwealth surpluses.

There is no constitutional provision which guarantees the payment of any Commonwealth Consolidated Revenue to the States or Territories or which specifies the subjects on which Commonwealth Consolidated Revenue may be expended. The States (and Territories) are left to carry out their functions with only their domestic revenues and such funding as the Commonwealth determines. That funding is a matter for political negotiation. The Parliament may grant financial assistance to a State pursuant to s 96, and may attach conditions to the grant. The conditions may direct the use by the States of the moneys granted,[26] thus prescribing the manner in which the State exercises its power. Attached conditions may require a State to distribute the moneys granted to particular recipients,[27] and may induce a State to take action which the Commonwealth is constitutionally prohibited itself from taking.[28] The conditions attached to a grant can become the provision which, albeit indirectly, regulates the activity which would otherwise be a State responsibility. Although the State retains and exercises its power to regulate the activity, the attached condition may make it impossible for the State to exercise its own legislative discretion.

The appropriations power seems to go further, allowing the Commonwealth to bypass the State and to regulate an activity lying outside its legislative power by funding that activity directly and attaching conditions to the funding whereby the conditions become the effective regulation. Fields of activity are brought under Commonwealth regulation not by legislation but by contract made by the Executive requiring the beneficiary to conform to specified standards and practices. Thus, for example, State universities, pursuant to individual funding agreements, have been required to conform to Commonwealth governance protocols. That has been the price of receiving Commonwealth funding, even though State laws had prescribed a different governance regime. States have had to modify those regimes in order to allow universities to receive Commonwealth funding.

24 See *Davis v Commonwealth* (1988) 166 CLR 79.

25 Cf *New South Wales v Commonwealth* (1908) 7 CLR 179 (‘*Surplus Revenue Case*’); *AAP Case* (1975) 134 CLR 338, 357 (Barwick CJ); 374 (Gibbs J).

26 See *Victoria v Commonwealth* (1926) 38 CLR 399 (‘*Federal Roads Case*’); *Second Uniform Tax Case* (1957) 99 CLR 575.

27 See *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559.

28 *Pye v Renshaw* (1951) 84 CLR 58, 76–9 (Dixon, Williams, Webb, Fullagar and Kitto JJ). Cf *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 592–3 (Gibbs J).

Until recent times the areas of activity within Commonwealth responsibility were ascertained by reference to its allocated legislative power. The High Court was the arbiter of any dispute. Increasingly, the areas of responsibility are ascertained by reference to the source of supporting funding, a question determined by the political branches of government. The High Court has no role to play in that determination.

Although an appropriation in blank would be beyond the power of the Parliament,[29] an appropriation can, and often is, expressed in very general terms.[30] In the *Work Choices Advertising Case*, the High Court construed an *Appropriation Act* which appropriated funds as a 'departmental item', to 'be applied for the departmental expenditure'[31] of the Department of Employment and Workplace Relations. The majority held that was an appropriation for a purpose of the Commonwealth.[32] An amount listed under the heading 'Departmental Outputs' authorised the minister to direct departmental expenditure of that amount on such departmental subjects as he chose. In so holding, the majority observed:

> at least since the mid-1980s the chief means of limiting expenditures made by departments of State that has been adopted in annual appropriation Acts has been to specify the amount that may be spent rather than further define the purposes or activities for which it may be spent.[33]

It appears that, unless the expenditure of moneys appropriated under the *Combet* formula is restricted by other legislation,[34] it may be expended on such departmental activities as a Minister may choose and on terms of the Minister's choosing.[35] It is difficult to postulate any constitutional limitation on the subjects to which Commonwealth funds can be channelled through departments. Thus Commonwealth Consolidated Revenue can be expended on subjects, which have not been subjected to Parliamentary scrutiny in the budget process.

The *Combet* formula allows the Parliament to return to the Executive the spending discretion it was traditionally denied.[36] The absence of constitutional restriction on the exercise of Commonwealth taxing power, on appropriations and on some departmental spending leaves the areas to fall within Commonwealth responsibility to political negotiation. The necessity for central regulation of the economy and the desirability of national standards in many fields of activity has

29 *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 253 (Latham CJ); *Brown v West* (1990) 169 CLR 195, 208 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

30 *Work Choices Advertising Case* (2005) 224 CLR 494, 522 (Gleeson CJ).

31 Ibid 527.

32 Ibid 568 (Gummow, Hayne, Callinan and Heydon JJ).

33 Ibid 577 (Gummow, Hayne, Callinan and Heydon JJ).

34 See, eg, *Brown v West* (1990) 169 CLR 195.

35 Although as Gleeson CJ pointed in the *Work Choices Advertising Case* (2005) 224 CLR 494, 523: 'While the generality of statements of outcome may increase the difficulty of contesting the relationship between an appropriation and a drawing, appropriations are made in a context that includes public scrutiny and political debate concerning budget estimates and expenditure review. The higher the level of abstraction, or the greater the scope for political interpretation, involved in a proposed outcome appropriation, the greater may be the detail required by Parliament before appropriating a sum to such a purpose.'

36 *Auckland Harbour Board v The King* [1924] AC 318, 326.

led to a new political approach, which is termed 'co-operative federalism'. At its March 2008 meeting, the Council of Australian Governments ('COAG') agreed to 'a new model for federal financial relations, with priority being to modernise payments for specific purposes and the development of National Partnership payments'.[37]

When the Budget was brought down in May 2008, *Budget Paper No 3* declared:

> The proliferation of these payments since the 1970s has been a source of increasingly blurred roles and responsibilities, duplication and overlap, higher administration costs and cost-shifting.
>
> These payments are also subject to conditions which the Commonwealth imposed on the States to dictate the way that funding was to be used. For example, the Commonwealth used conditions known as input controls that limited the States' flexibility in how they allocated funding or pursued policy objectives.
>
> This overly prescriptive approach constrains the States' innovation in service delivery and leads to each level of government blaming the other for instances of poor service delivery and inadequate funding.[38]

COAG declared that it would consider a new 'intergovernmental agreement on financial relations together with drafts of each new Special Purpose Payment and proposals for National Partnership payments'.[39] A monitoring and reporting role for a COAG Reform Council is proposed. At its July meeting, COAG declared that:

> Many of the challenges facing the economy can only be addressed through more effective Commonwealth–State arrangements. By moving towards a seamless national economy through the reform of business and other regulation, COAG's reforms will make it easier for businesses and workers to operate across State and Territory (State) borders.[40]

In October, COAG agreed to introduce national consumer protection and credit regulation laws and to deal with federal financial relations in December.

If the creation of national standards for business and industry is needed to achieve a seamless national economy, that could have been achieved by the Commonwealth alone had the Constitutional Commission's recommendation in its 1988 Report been adopted. The Commission recommended that s 51(i) of the *Constitution* be amended.[41] Presently the Commonwealth's power is to make laws

37 Council of Australian Governments ('COAG'), *Council of Australian Governments' Meeting 3 July 2008* (2008) <http://www.coag.gov.au/coag_meeting_outcomes/2008–07–03/index.cfm> at 14 April 2009.

38 Australian Commonwealth, *Budget Paper No 3: Australia's Federal Relations 2008–09* (2008) 12–13 <http://www.budget.gov.au/2008–09/content/bp3/html/bp3_prelims.htm> at 14 April 2009.

39 COAG, above n 37.

40 Ibid.

41 Constitutional Commission, *Final Report of the Constitutional Commission – Summary: 1988* (1988) 64.

with respect to 'trade and commerce with other countries and among the States'[42] and the Commission proposed that the power be more broadly stated simply as 'trade and commerce'.[43] For some reason, that power has been little used by the Commonwealth, perhaps for fear that its use would be liable to unforeseen frustration by s 92 of the *Constitution*. That fear should have dissipated after *Cole v Whitfield*[44] when the High Court observed that:

> s 51(i) is a plenary power on a topic of fundamental importance. That being so, the express conferral of legislative power with respect to interstate trade and commerce lends some support for the view that s 92 should not be construed as precluding an exercise of legislative power which would impose any burden or restriction on interstate trade and commerce or on an essential attribute of that trade and commerce. Obviously, the provision conferring legislative power (s 51(i)) and the provision restricting the exercise of legislative power (s 92) sit more easily together if the latter is construed as being concerned with precluding particular types of burdens, such as discriminatory burdens of a protectionist kind.[45]

Whether national standards are introduced by unilateral Commonwealth legislation or pursuant to inter-governmental agreements, it seems that major initiatives for Australia in the coming years will be negotiated between the respective Executive Governments of the Commonwealth and the States and Territories. The complexity of modern government, the necessity for central control of fiscal and monetary policy, the interdependence of national and international policies, the growth of national enterprises and national media, the movement for national standards, the enhancement of national rather than local sentiment and identity, the mobility of the Australian population, the elimination of unnecessary duplication of bureaucracies, and general community acceptance of the present form of government are irresistibly fashioning a new distribution of governmental power. The only practical limitation on the subjects of Commonwealth expenditure and regulation is a political one. The constitutional division of legislative powers between Commonwealth and States, though relevant, has become of secondary importance. We have come a long way from the basic constitutional system envisaged by the Founding Fathers of Federation.

That does not mean, however, that federalism is dead or that the movement towards centralising governmental power will continue unabated until we arrive at a unitary system. There are significant factors, other than the *Constitution*, which indicate not only the desirability of maintaining a form of federalism but also the practical impossibility of eliminating the functions of the States and Territories and centralising those functions in Canberra. Much essential administrative expertise remains with the States and Territories, not possessed by the Commonwealth, especially in the delivery of public services.

42 *Constitution* s 51(i).

43 Constitutional Commission, above n 41.

44 (1988) 165 CLR 360 ('*Tasmanian Lobster Case*').

45 Ibid 398.

When some of the functions of the Colonies or States were taken over, entire departments had to become part of the Commonwealth public service to provide the requisite administrative expertise. Thus, when the collection of customs and excise and the payment of bounties became the function of the Commonwealth Executive by operation of s 86, the State departments dealing with those functions were immediately transferred to the Commonwealth. Subsequently, State departments dealing with posts, telegraphs, and telephones; naval and military defence; lighthouses, lightships, beacons, and buoys; and quarantine were transferred pursuant to s 69. When the Commonwealth assumed the sole power to tax income in 1942, it took over from the States the officers, premises and equipment concerned with the assessment and collection of income tax. These examples, and there are no doubt others, illustrate that the transfer of power is not effected merely by a constitutional or statutory text, nor by an intergovernmental agreement.

There are two conditions which must be met to provide efficiency in administration. Principally, there must be an efficient organisation for delivery of a governmental service; then there must be sufficient funding for the creation and maintenance of the organisation. The recent report of the Hon Ian Callinan on the outbreak of equine flu demonstrates the importance of departmental culture, interconnection of the various elements in the delivery of the service, recruitment and training and professional control of quarantine services. These are elements that develop over time and in response to local circumstances. They can be supported by adequate funding but no stroke of a drafting pen can produce them. So if the States and Territories possess administrative expertise and the Commonwealth possesses the funds, co-operative federalism is the means by which governmental services can be delivered to the Australian people.

However, the 'seamless national economy' may well require Commonwealth laws to prescribe national standards. The wide extent of the Commonwealth's power to make laws with respect to trading and financial corporations has been shown in *New South Wales v Commonwealth*[46] and the trade and commerce power is awaiting exploration. In addition there is the reference power in s 51(xxxvii) by which the States may refer to the Commonwealth power to enact laws with respect to a matter, either permanently or for a time.[47] Given co-operation, there should be no need for constitutional amendment to permit the prescription of national standards, although it may be preferable to add some heads of legislative power to s 51.[48]

Given the central role which executive governments will play in co-operative federalism, supervision of the exercise of executive power needs consideration. In *R v Kirby; Ex parte Boilermakers' Society of Australia*[49] the joint judgment remarked:

46 (2006) 229 CLR 1 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ) ('*Workchoices Case*').

47 *R v Public Vehicles Licensing Appeals Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207.

48 For example, technology affecting human existence, nuclear energy and the ecosystem.

49 (1956) 94 CLR 254 ('*Boilermakers' Case*').

> Probably the most striking achievement of the framers of the Australian instrument of government was the successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism.[50]

Now, however, the Diceyan theory of responsible government, which made the fate of the Executive dependent on the confidence of Parliament, does not fully reflect the political reality. Responsible government depends more on debates in the party room than in the Parliament. Today the political fortunes of the members of the Parliament are tied to the performance of the party leaders who take major decisions. The problem is not unique to Australia; it is the consequence of, inter alia, the complexity of modern government. Lord Hailsham observed that '[we] live under an elective dictatorship, absolute in theory if hitherto thought tolerable in practice'.[51]

And, as *Work Choices Advertising Case* shows, the Parliament's constitutional authority over Commonwealth expenditure by the Executive has been diminished in practice by a device of drafting. As financial and regulatory power passes increasingly to the executive branch of the Commonwealth government, the adequacy of existing controls on its exercise may be doubted. There is a measure of supervision by the Senate which is not usually controlled by government and by Parliamentary Committees constituted by members from both sides of the House or Senate. And Commonwealth Grants Commission reports may influence expenditure and may be laid before Parliament for scrutiny.[52]

The funding of programs to be delivered by non-governmental entities raises another question of accountability. If a grant is made under s 96 or a similar grant to the Territories, the political and judicial institutions of those polities are responsible for the due administration of the funds received. But in the case of other external funding arrangements, some accountability mechanism may be required, especially if the expenditure has been authorised not by legislation but by ministerial direction. Ministerial responsibility for the actions or omissions of departmental staff in performing some function is an aspect of responsible government but if an external entity is funded to perform the function, the relevant Minister may not be responsible to the Parliament for that entity's acts or omissions. Outsourcing erodes responsible government.

Moreover, if a funded function is outsourced and is intended to provide third parties with a right to some benefit and the benefit is not provided, it is not a satisfactory remedy to impose a penalty on the recipient of the funds. The intended beneficiaries should be provided by statute with remedies similar to those available under the Commonwealth's administrative law package.[53]

50 Ibid 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

51 Lord Hailsham, *Elective Dictatorship: The Richard Dimbleby Lecture 1976* (1976) 2.

52 *Commonwealth Grants Commission Act 1973* (Cth) s 25.

53 *Administrative Appeals Tribunal Act 1975* (Cth); *Ombudsman Act 1976* (Cth); *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Our constitutional landscape, at least in the near future, shows a continuing accession of central power, achieved in part by changing circumstances which attract one of the Commonwealth's constitutional heads of power, in part by the referral of legislative power and in part by contract or other forms of conditional funding determined largely by the federal Executive.

There will be no return of taxing powers to the States, no greater Parliamentary control of the Executive. Commonwealth expenditure will fund new federal programs but, hopefully, the administrative expertise of State and Territory departments will be employed in administration of many of the fields which fall within Commonwealth regulation. New review mechanisms will be required to protect intended beneficiaries of these programs. The High Court remains as the keystone of the federal arch, but the piers of the arch are coming closer together.

III THE DUAL COURT SYSTEM

Moving from the political branches of government, we may consider the judicial branch. From time to time, it is suggested that the dual system of federal and state courts should be eliminated in favour of a single judiciary. The suggestion has a worthy provenance.[54] An interesting model is the German judiciary.[55] Ninety-eight per cent of the judges are members of the public service of the 16 States (or *Länder*) and they staff the trial courts and the intermediate courts of appeal.[56] The judges of the Federal Court of Justice,[57] to which appeals are brought from the lower courts on points of law, are federal judges; so are the judges of the Federal Constitutional Court.[58] The Federal Court of Justice, which has 25 senates or divisions, has the function, inter alia, of ensuring that the law is applied uniformly throughout Germany. Could such a system be applied in Australia?

In some superficial respects, the Australian system is comparable. The High Court and the Federal Court are federal and each of those courts has appellate jurisdiction. The difference lies in the vesting of original jurisdiction and its incidents.[59] The autochthonous expedient, which allows the Commonwealth to vest jurisdiction in the courts of the States, has worked well in many fields of federal jurisdiction, but not in all. A good example is the field of taxation. For many years, appeals against assessments to tax were determined by the High Court in its original

54 Commonwealth of Australia, Royal Commission on the Constitution of the Commonwealth, *Report of the Proceedings and Minutes of Evidence* (1929) 789–90 (Sir Owen Dixon); Ian Callinan, 'Imaging a Judiciary for a New Republic', *The Australian* (Sydney), 22 August 2008, 15. See also Owen Dixon, 'Sources of Legal Authority' in *Jesting Pilate* (1943) 201.

55 What follows is taken from a paper by Dr Klaus Tolksdorf, President of the Federal Court of Justice (Paper presented at the Conference of Supreme Court Presidents, Abu Dhabi, 23 March 2008).

56 Local Courts (*Amtsgerichte*), Regional Courts (*Landgerichte*) and Higher Regional Courts (*Oberlandesgerichte*).

57 *Bundesgerichtshof*.

58 *Bundesverfassungsgericht*.

59 And requires consideration of Australian jurisprudence about the nature of the judicial power of the Commonwealth.

jurisdiction even though the Supreme Courts were available fora.[60] In time the volume of such appeals demanded the vesting of original jurisdiction in another court and the creation of an intermediate appellate court which would ensure uniformity of application of the taxing statutes throughout the Commonwealth. The Federal Court was created accordingly. That court could also determine appeals from, or judicially review, administrative decisions which are a feature of tax administration. The Commonwealth Parliament has never been willing to vest in State courts jurisdiction to review judicially decisions taken by Commonwealth administrators in the exercise of their statutory powers,[61] that jurisdiction being vested today in the Federal Court or in the Federal Magistrates Court.[62]

Governments, whether Commonwealth or State, may be willing to vest jurisdiction in the courts of another polity in some areas, but not in others. There are sound reasons for such discrimination: some areas of jurisdiction relate particularly to local conditions – planning and mining, for example – or concern the functions of a particular government – matters of 'special federal concern'.[63] In such areas, each government needs to retain its own legislative discretion to shape the laws which the court administers. It would be neither wise nor realistic to expect that either the Commonwealth or a State would vest original jurisdiction under all its laws in a single court of another polity.

In a federation, jurisdiction should be distributed between federal and state courts to achieve, so far as possible, two objectives: ease of access to a tribunal having jurisdiction to hear and determine a matter and uniformity of application of law throughout the relevant territory.

Jurisdictional disputes can be avoided by cross-vesting of suitable original jurisdiction with power to remit cases to the appropriate or most convenient court. State courts can be[64] and have been[65] invested with federal jurisdiction except in specified areas, but federal courts cannot be vested by State Parliaments with jurisdiction in exclusively State or non-federal matters.[66] However, federal courts can hear and determine controversies which encompass both claims arising under vested federal jurisdiction and under non-federal jurisdiction.[67]

Uniformity of application of State or Territory laws is primarily the responsibility of the Supreme Court of the State or Territory, but uniformity in the application of Commonwealth laws should be the responsibility of a single court. If it were left to the High Court alone to ensure such uniformity, the workload involved

60 See Robert Ellicott, 'The Autochthonous Expedient and the Federal Court' (2008) 82 *Australian Law Journal* 700, 702.

61 See *Judiciary Act 1903* (Cth) s 38(e); *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 9; Ellicott, above n 60, 701: Ellicott comments: 'It has always been the Commonwealth Parliament's view that judges appointed by it [sic] should review those decisions'.

62 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5–8.

63 See Michael Black, 'The Federal Court of Australia: The First 30 Years: A Survey on the Occasion of Two Anniversaries' (2007) 31 *Melbourne University Law Review* 1, 6–10.

64 *Constitution* s 77(iii).

65 *Judiciary Act 1903* (Cth) s 39.

66 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

67 See *Fencott v Muller* (1983) 152 CLR 570.

would be excessive, especially as more laws prescribing national standards are enacted, whether pursuant to referred powers or not.[68] The Federal Court now has the primary responsibility of ensuring uniformity in some areas of federal law, notably taxation, intellectual property and workplace relations. Differences in the interpretation and application of Commonwealth laws are more likely to occur if appeals in cases involving Commonwealth laws are decided by the eight appellate courts of the States and Territories than if they were decided by the Federal Court. Uniformity provides a strong argument in favour of channelling all appeals in federal jurisdiction to the Federal Court. If that were done, the Court would probably need to be restructured into an appellate and a trial division.[69]

The notion of a single Australian court system runs into several difficulties, the principal difficulty being the unwillingness of any polity to forego its ability to confer on its court the functions which it chooses – functions which, in the case of the States, may include non-judicial functions. Another difficulty is court administration – appointment of judges, staffing, court houses and facilities, services and execution of court process. Each government has made its own arrangements for court administration and the likelihood of agreeing on funding and of creating a single administration is remote. In time, if Australia becomes virtually a unitary state, the court system will follow. But not in the near future.

At present the only constitutional amendment that might be contemplated is one to allow the vesting of suitable State judicial powers in Commonwealth courts.[70] Otherwise the present system will remain, although a statutory vesting of all federal appellate jurisdictions in the Federal Court would assist in securing uniformity in the application of federal laws.

IV THE REPUBLIC

The constitutional powers and functions presently vested in Queen Elizabeth II are, upon her death, immediately vested in her 'heir and successor in the sovereignty of the United Kingdom'.[71] If Australia were to become a Republic, the powers and functions of the Monarch would have to be vested in another repository, probably called a President.

Assuming that we would wish to retain our system of responsible government in the absence of a Monarch, how can the executive government be made responsible to the Parliament for the manner in which a President exercises his or her powers and functions? This is the central and critical question that must be resolved before, or at least contemporaneously with, deciding on the manner

68 See, eg, *Corporations Act 2001* (Cth).

69 Cf the views of Black, above n 63, 10–17.

70 See *R v Hughes* (2000) 202 CLR 535, 553 which suggests that it may be desirable also to seek an amendment allowing State administrative powers to be vested in Commonwealth agencies.

71 Covering clause 2 of the *Commonwealth of Australia Constitution Act 1900* (Imp). Succession is governed by the laws of the United Kingdom, unaffected by Australian law.

of the President's appointment. The present system relies chiefly on convention – long established convention, but only convention, not law. Sir Anthony Mason has explained the role of convention in the system of responsible government:

> The principle that in general the Governor defers to, or acts upon, the advice of his Ministers … is a convention, compliance with which enables the doctrine of ministerial responsibility to come into play so that a Minister or Ministers become responsible to Parliament for the decision made by the Governor in Council, thereby contributing to the concept of responsible government.[72]

At present the convention is supported by a Prime Minister's ability to secure the removal of a Governor-General by the Queen if the Governor-General should breach the convention. Absent the Queen, the present convention might not be sufficient to sustain responsible government if the President chose to follow his or her own judgment. Constitutional law would have to make alternative provision.

It would be easy enough to provide that the President must act only in accordance with ministerial advice but an exception has to be made for the reserve powers which are essential to safeguard stable government and, in the last analysis, to maintain the rule of law. The reserve powers, though exercised in only the most unusual and extreme circumstances, are necessary to ensure that a government does not pursue an unlawful course of conduct or refuse to enforce court orders or to ensure that the elements of our parliamentary democracy perform their intended function, especially if they should be unwilling or unable to do so. The *Constitution* would be imperilled if, for example, a Prime Minister who had lost the confidence of the House of Representatives were to refuse to resign or to advise an election. If such a situation were to arise, the President might have to act promptly without or even contrary to ministerial advice. At present, the Governor-General is solely responsible for an exercise of the reserve powers, as the dismissal of the Whitlam Government illustrates.

If the *Constitution* were to provide that the President is bound generally to act in accordance with ministerial advice, the framing of an exception to provide for the reserve powers immediately raises two questions: how to identify the reserve powers and how to prescribe the circumstances in which they might be exercised. Even if a textual amendment could answer those questions, a challenge to any exercise of the powers would be justiciable in the High Court and delay would be inevitable – probably to the detriment of the nation.

There are some reserve powers which can be exercised without ministerial advice and without the likelihood of challenge: for example, the power to dismiss a Prime Minister who refuses to resign after the government is defeated in a general election. These can be easily defined. But the exercise of other powers or in other circumstances cannot be exhaustively defined and cannot be fully foreseen. The *Constitution* must allow some flexibility while defining both the

72 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 364.

purpose of the exercise of a reserve power and the nature of the circumstances in which such a power might properly be exercised without ministerial advice. The purpose of the reserve powers is to ensure compliance with the law or the effective operation of responsible government. The only occasion for an exercise of a reserve power is when it is absolutely necessary[73] to effect that purpose. A provision drafted in these general terms would cover the constitutionally defined powers to prorogue the Parliament, to dissolve the House of Representatives, to dissolve both Houses after the Senate has twice failed to pass a proposed law and to appoint and dismiss ministers (*Constitution* ss 5, 57, 64). However, the propriety of exercising a power defined in such general terms should not be left to the judgment of the President alone. Nor should the High Court be the primary arbiter of the open-textured question whether, in the circumstances of the time, it was absolutely necessary to exercise a reserve power. But if the people (and the President) cannot have the effective protection of a High Court order, some other mechanism must be found. A Council of State can provide it.

It would be for a President to form the opinion that an exercise of any reserve power is absolutely necessary, but a Council of State, immediately available to the President, could be empowered to certify – if it sees fit – that the President's intended exercise of a reserve power is valid. The certificate and all proceedings relating to the Council of State should be immune from question in any court. Such a certificate would preclude curial challenge and the consequent delay. The jurisdiction of the High Court could be invoked only if the President had acted without first obtaining such a certificate.

But how should a Council of State be constituted? The Council should be small enough to allow speedy consultation in the event of an emergency. The issues with which the Council would have to deal would be highly political though within a legal context. I would favour a Council of three, one of whom has served as a Governor-General or President or as a Governor of a State; the second of whom has served as a Chief Justice or Justice of the High Court or as a Chief Justice of a superior federal court or the Supreme Court of a State; and the third of whom should have served in one or more of the offices just mentioned. To ensure that there is confidence reposed by the government in the Council of State I would suggest that they should be appointed by the President after consultation with the Prime Minister in the early days of any government – say, within three months after the date on which the Parliament is summoned to meet after a general election.

There is little point in debate about the way in which a President should be elected or appointed until there is agreement about the way in which Presidential powers are to be controlled. Once that is agreed, the other issues – the people's franchise, Presidential election campaigns, availability of candidates and the like

73 Absolute necessity was the test proposed by Professor George Winterton: George Winterton, 'Reserve Powers in an Australian Republic' (1993) 12 *University of Tasmania Law Review* 249, 256; George Winterton, 'The Resurrection of the Republic' (Law and Policy Paper No 15, Centre for International and Public Law, Australian National University, 2001) 17. Both the majority and the minority of the Executive Government Advisory Committee to the Constitutional Commission endorsed a test similar to that of 'absolute necessity' – their formula was 'that there is no other method available to prevent': Executive Government Advisory Committee to the Constitutional Commission, *Final Report* (1988) vol 1, 326.

– can be debated with a better understanding of the kind of Republic we should have. Unless we first determine how a President's power is to be controlled, the possibility of an Australian Republic is remote. I append some clauses which might (once they have been drafted by a more skilful hand) govern the role of President in an Australian Republic.

The events of the last 100 years have shown some shortcomings and some obsolete provisions in our *Constitution*. Perhaps the wonder is that an instrument which was a work of inspired compromise should have served us as well as it has. We now live in a different age and there are different dynamics affecting the functions of governments. Old controversies about the maintenance of State powers have been diminished by political and economic factors in the 21st century. But our basic constitutional structure can be maintained even if we choose a republican form of government. Those who occupied the cabin of the *SS Lucinda* could not have provided for the constitutional exigencies of our century but we can be grateful for their work in fashioning a *Constitution* which allows us to do so.

V ADDENDUM

Possible Clauses to Govern a President's Powers

Section 2 of the *Constitution* might be amended to read as follows:

(1) The executive power of the Commonwealth and all other prerogatives, powers and functions which were vested in or exercisable by the Queen or by the Governor-General before the *Constitution Alteration (Republic of Australia) Act* came into force are vested in and may be exercised by the President.

(2) Subject to subsection (3), the powers conferred upon the President by this *Constitution* shall be exercised, and exercised only, in accordance with advice tendered to the President by the Federal Executive Council, the Prime Minister or, in the case of a power conferred by or under an *Act of the Parliament*, a Minister of State responsible for the administration of the *Act*.

(3) The President may, without the advice prescribed by subsection (2) –

  (a) following a general election or the death or resignation of a Prime Minister, appoint as Prime Minister the person who, in the opinion of the President, is most likely to form a government which will have the confidence of the House of Representatives;

  (b) following a vote of no confidence by the House of Representatives or following a general election in which the Government has been defeated, dismiss the Prime Minister;

  (c) decline to accept advice to prorogue the Parliament, to dissolve the House of Representatives or to dissolve the Senate and the House of Representatives simultaneously if –

(i) the President is not satisfied that the Parliament has granted or will grant sufficient funds to enable the administration of the Commonwealth during the period ending when the Parliament might next meet if the President were to act on the advice; or

(ii) the President is not satisfied that there are reasonable grounds to warrant the prorogation or dissolution;

(d) exercise a power conferred by section 5, 57 or 64 if the President is of the opinion on reasonable grounds that the proposed exercise of power is absolutely necessary to ensure compliance with the general law or the effective operation of representative and responsible government under this *Constitution*.

(4) In the exercise of power and the formation of opinions under this *Constitution*, the President and the Constitutional Council shall have regard to the conventions affecting those functions when performed by the Governor-General before the Commonwealth of Australia became a Republic and to any conventions subsequently established.

(5) A certificate issued by the Constitutional Council that there are reasonable grounds for the President's opinion under paragraph (3)(d) is conclusive evidence of the existence of such grounds and that certificate shall not be called in question in any court.

(6) The Constitutional Council shall consist of three citizens –

(a) one of whom has served as Governor-General or President of the Commonwealth of Australia or as a Governor of a State;

(b) one of whom has served as Chief Justice or as a Justice of the High Court of Australia or as Chief Justice of a superior federal court or of the Supreme Court of a State; and

(c) one of whom has served in one or more of the offices referred to in paragraphs (a) and (b) of this subsection.

(7) Subject to subsection (8) members of the Constitutional Council shall remain in office until their successors are appointed in accordance with paragraph (9)(a).

(8) A member of the Constitutional Council –

(a) may resign office by writing under her or his hand delivered to the President;

(b) shall not be removed except by the President in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

(9) (a) The President, after consultation with the Prime Minister, shall appoint members of the Constitutional Council within 3 months after the day on which the Parliament is summoned to meet after a general election;

(b) If, at any time prior to the issuing of writs for a general election, there be a casual vacancy in the Constitutional Council, the President, after consultation with the Prime Minister, shall appoint an eligible person to fill that vacancy.

Amend s 64 to read:

The President may appoint a Prime Minister and other Ministers of State for the Commonwealth to administer such departments of State of the Commonwealth as the President in Council may establish.

Subject to this *Constitution*, the Prime Minister and other Ministers of State holding office when the Republic commenced shall continue in their respective offices.

The Prime Minister holds office until he or she resigns office or is dismissed by the President under this *Constitution*.

Ministers of State other than the Prime Minister hold their respective offices during the pleasure of the President but no Minister of State shall hold office for a longer period than three months unless the Minister is or becomes a Senator or a member of the House of Representatives.