The 50th Anniversary of *Melbourne Corporation* v *The Commonwealth*

Address by The Honourable J W Shaw QC MLC NSW Attorney General to the Macquarie University Law Society on 7 May 1997 on the occasion of a dinner held to commemorate the 50th anniversary of Melbourne Corporation v The Commonwealth (1947) 74 CLR 31.

THE LAST TIME I ADDRESSED the undergraduate law students of Macquarie University was in 1995 when I spoke at the Macquarie University Law Society Annual Dinner on the *Balmain Ferry* case[1]. I have to admit that it was somewhat easier to prepare a speech for a dinner on false imprisonment, bombastic Balmain barristers and their girlfriends, and circular quay turnstiles than it was to confront the question of state banking and the constitutional principles involved in the *Melbourne Corporation* case.

Nonetheless I think there are some interesting things to say about the *Melbourne Corporation* case. The two issues that I wish to touch on are workable federalism and the question of implications in the Australian Constitution, an issue which leads to the broader issue of judges making law.

I will begin by dealing briefly with the facts of the *Melbourne Corporation* case.

Melbourne Corporation v *The Commonwealth* concerned an attempt by the federal government to establish the Commonwealth Bank as the central bank in Australia which was to handle all government business. The mechanism it used to do this included passing the *Banking Act 1945* and the *Commonwealth Bank Act 1945*. Section 48 of the *Banking Act* provided that without the written consent of the federal Treasurer, a bank was not permitted to conduct any banking business for a state or for any authority of a state, including a local government authority. The effect of this mechanism was that if a state did not have a state bank (a public bank), a state government and its instrumentalities would be required to bank with the Commonwealth Bank.

The section was challenged by the Melbourne City Council which wanted to choose which bank it used. The Council sought a declaration in the High Court that section 48 was invalid because it was beyond the enumerated powers of the Commonwealth government provided in the Constitution.

The High Court found that the section was unconstitutional, that is, the federal government could not force a state authority to organise its banking in a particular way. The six members of the majority reached this conclusion from different approaches. I will focus on the judgment of Sir Owen Dixon because it is the approach which has endured.

Dixon J found that the *Banking Act* fell within the constitutional section 51(xiii), the banking power[2]. Despite coming under a head of power, the section of the Act in question was unconstitutional because it was a law aimed at the restriction or control of a state in the exercise of its executive authority. He found that the law directly operated to deny to the states banking facilities open to others, and so discriminated against the states or imposed a disability upon them[3]. Sir Owen Dixon acknowledged that such a restriction was unwritten in the Constitution, but implied it from the frame or the structure of the Constitution[4]. This question of implications in the Constitution has, of course, been a matter of contemporary controversy.

It is interesting to note that the *Melbourne Corporation* case led the Chifley government to adopt a more extreme policy of bank nationalisation as L.F. Crisp describes in his biography of Ben Chifley[5]. This scheme was itself denied constitutional validity in the *Bank Nationalisation* cases, later in the 1940s[6]. The question of nationalising banks is a far cry from today's policies towards banks which have seen the privatisation of the Commonwealth Bank and continuing deregulation of the banking sector. However the deeper issue of the High Court having a direct impact in federal and state politics continues, as the current native title debate illustrates.

Federalism

Somewhat surprisingly, there is little in the Constitution which deals directly with the question of how the two levels of governments (state and federal) should interact with each other[7]. This gap has been filled by judicial interpretation of the appropriate relationship.

The decision in the *Melbourne Corporation* case profoundly shifted the way the High Court interpreted the federal balance contained in the Constitution. In my view, it created a greater degree of balance between the two levels of government compared to the relationship which existed before the case. Until *Melbourne Corporation*, the question of the constitutional embodiment of federalism had been set in the landmark 1920 case, the *Engineer's* case[8]. In *Engineers*, the High Court swept aside the doctrine of reserved powers which had existed up until that time. Additionally, the Commonwealth power was to be read as complete, without any deference to the immunities of a state.

While *Melbourne Corporation* did not revive the untenable reserve powers doctrine, the case did increase the independence of the states to some extent. The result

was that while *Engineers* provided that either party to the Federation could make general laws that bound the other party, *Melbourne Corporation* forbad either party from interfering substantially with the other or from discriminating against the other.[9] The relationship between Engineers and Melbourne Corporation was well summed up by Professor P H Lane:

> The first case was explaining (I cannot say deliberately) that in the Federation the parties desired union, the second that the parties did not go to the length of desiring unity[10]

The territory which marks out the area into which the Commonwealth may not venture has been further delineated by the *Queensland Electricity* case[11] and the *Australian Education Union* case in 1995[12].

Despite the shift in the federal balance slightly in the direction of the States contained in this case, it has not stopped the seemingly inexorable movement towards centralisation of power which has occurred throughout the century. In the 1970s the federal government relied heavily on the corporations power to expand its legislative control. In the 1980s, the focus moved to the external affairs power which lead to the celebrated *Koowarta*[13] and *Tasmanian Dams*[14] cases and the use of treaties to enact legislation for remarkably diverse areas of law including unfair dismissals[15] and decriminalisation of homosexuality in Tasmania[16].

Implications in the Constitution

The other major issue raised by the case is the broader issue of constitutional interpretation. In the *Engineers* case, the court established a general approach to interpreting the Constitution which could be described as 'strict legalism'. The text of the Constitution was to determine how the court decides a case. The context of the particular words, the constitutional conventions, the political debate or the society they applied to, were considered to be irrelevant.

Melbourne Corporation moved away from this approach and acknowledged the need when interpreting the Constitution to imply meaning from the structure and the context of the constitution. As I noted earlier, Sir Owen Dixon implied the restriction on the federal government found in the *Melbourne Corporation* case from the frame of the Constitution. His Honour recognised that it is meaningless to try to distinguish between legal and political considerations in constitutional cases. The more useful question is whether a consideration is compelling[17].

The *Melbourne Corporation* case puts some of the hyperbole for the current debate about the High Court into perspective. The implied rights cases and *Wik* have been the most recent foci of that debate.

The conservatives of the Samuel Griffiths Society complain about the High Court's propensity to imply terms of Constitution. They don't like the *Theophanous*[18] decision which implies a freedom of political discourse (see also *Nationwide News*[19] and *Australian Capital Television*[20]).

Melbourne Corporation shows that the implication of terms into the Constitution has a long pedigree, and also has respectability by reason of its authorship in the judge of Sir Owen Dixon, a judge who stood for 'strict and complete legalism'. Moreover, the doyen of black letter lawyers, Sir Garfield Barwick, put, as counsel, a robust argument to the court in favour of the implications which should be drawn from the mere fact of federalism. He stated:

> It flows naturally from the federal structure that neither Commonwealth nor State is competent to aim its legislation at the other so as to tend to weaken or destroy the functions of the other. You do not look in any of the placita of s. 51 to this incompetence; you get it from the federal structure... You must start with the implication.[21]

The recognition of the political pressures and effects of constitutional law, and the willingness to imply meaning into the structure and context of the constitution are welcome. They amount to judicial recognition that the Constitution is a living document that is more than a set of rules or relationships. This document defines us as a political community and establishes our ideas about how our community functions.

The *Melbourne Corporation* case, and particularly its decision on interpretation, is also relevant to the wider debate about whether judges should or should not 'make law'. In my view, the case shows that it is a myth to think that judges can do anything but make law. Judges always have made law. The only difference of late is that they have become more willing to publicly acknowledge the fact than their predecessors.

This is eloquently illustrated by Lord Reid:

> There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment descends on him knowledge of the magic words 'open sesame'. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.[22]

The High Court's foray into implied constitutional rights and the widespread acknowledgment (after *Wik*) that judges do make law are part of the process of the High Court defining its role in the Australian polity. The *Engineers* case was the most visible symbol of the tradition of the supposedly non-political approach of the Court. *Melbourne Corporation* was an early acknowledgment of the view that law and politics overlap and are often difficult to distinguish.

1 J.W. Shaw QC MLC 'Some Observations on *Robertson* v *Balmain New Ferry Company*' (1995) *Bar News* 13
2 (1947) 74 CLR 31 at 78-80.
3 Ibid at 84
4 Ibid at 83
5 Crisp, L. F. (1963) *Ben Chifley: A Biography* Longmans, London. pp 323 - 329.
6 (1948) 76 CLR 1; (1949) 79 CLR 497.
7 Lane, P. H. (1995) *A Manual of Australian Constitutional Law* 6th Edition, The Law Book Company, Sydney. p 387.
8 *Amalgamated Society of Engineers* v *Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129
9 op.cit. p 387 - 388
10 Ibid. p 387
11 *Queensland Electricity Commission* v *The Commonwealth* (1985) 159 CLR 192
12 *Australian Education Union* (1995) 128 ALR 609
13 *Koowarta* v *Bjelke-Petersen* (1982) 153 CLR 168
14 *Commonwealth* v *Tasmania* (1983) 158 CLR 1
15 *Industrial Relations Reform Act 1993*
16 *Human Rights (Sexual Conduct) Act 1994*
17 (1947) 74 CLR 31 at 82
18 *Theophanous* v *Herald and Weekly Times* (1994) 182 CLR 104
19 *Nationwide News* v *Wills* (1992) 177 CLR 1
20 *Australian Capital Television Pty. Ltd.* v *The Commonwealth* (1992) 177 CLR 106
21 (1947) 74 CLR 31 at 41
22 Lord Reid (1972) 'The Judge as Law-Maker' 12 *JSPTL* 22