The Constitution v the states: federalism a century after federation

By MG Sexton SC, NSW solicitor general. This article is based on an address originally given to the Australian Chapter of the Anglo-Australasian Lawyers Society in May 2012

In 1957 Gough Whitlam published a lengthy essay – originally given as a lecture at Melbourne University – entitled *The Constitution Versus Labor*. This title was a reference to the problems of constitutional validity that might be faced by a future Labor government – still 15 years away as it happened – particularly in light of the High Court's striking down of the bank nationalisation and airline nationalisation legislation by the Chifley government in the late 1940s.[1] A little over half a century later the subject might be reformulated as the Constitution – perhaps more accurately the Constitution as interpreted by the High Court – versus the states.

The centralisation of financial power

To some extent, of course, the expansion of Commonwealth power at the expense of the states is not a recent phenomenon. The effect of the court's decision in the *Uniform Tax Case*[2] of 1942 was to leave the Commonwealth as the major recipient of revenue in the form of income tax and to make the states largely dependent on grants – under s 96 of the Constitution – from those federal funds. This scheme was endorsed by the court's decision on the grants power – *Victoria v Commonwealth* – in 1957. These decisions do not preclude a state from imposing income tax but political realities have meant that no state government has been prepared to take this course.

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Up until the late 1990s the states had, however, raised considerable sums by what were in effect sales taxes on liquor and tobacco at the wholesale and retail levels. These sources of revenue were held by the court to be in contravention of s 90 of the Constitution in *Ha v State of New South Wales*[4] in 1997. In the wake of this decision the Commonwealth agreed to collect these taxes and largely refund them to the states, but this became another potential source of funds over which the states had lost control and this situation continued when the GST was introduced in 2000.

The corporations and external affairs powers

This centralising of financial power in the Commonwealth has been accompanied by a generally broad approach by the court to the construction of specific federal legislative powers in s 51 of the Constitution. The two most significant powers in s 51 in relation to this expansion of the scope of federal legislation have been the external affairs power and the corporations power. The court's construction of the external affairs power has allowed the Commonwealth to legislate in relation to a range of matters that are not referred to in s 51 by way of implementing the provisions of international treaties ratified by Australia[5] (of which there have been a great number over recent decades).

The full extent of the corporations power had long been hinted at by the court in the aftermath of *Strickland v Rocla Concrete Pipes Ltd*[6] but never really spelt out until the decision in the *Work Choices Case*[7] where it became clear that this power allowed the Commonwealth to regulate a wide range of economic and social activities, given that those activities were largely carried out by corporations. As a result, large areas of these activities that would have long been considered as amenable only to state regulation are now the subject of detailed federal legislation, including food labelling, tobacco advertising and environmental requirements for infrastructure projects. The corporations power would also be the basis for any federal regulation of gambling on poker machines in hotels and licensed clubs.

All that said, the states continue to exist as large-scale political and administrative entities and, at least for the present and the immediate future, the Commonwealth finds it practical to use the administrative resources of the states in the day to day implementation of much of its legislative programme. This process has given rise to its own problems, chiefly in the form of increasingly complex agreements in relation to these co-operative exercises. There are also areas, such as transport and health, that are still largely the subject of state legislation and administration, although, as in most fields, the states are heavily dependent on federal funding in carrying out these functions.

Inconsistency between federal and state laws

Section 109 of the Constitution provides that a state

law is invalid to the extent that it is inconsistent with a federal law. The inconsistency can be direct where, for example, both laws cannot be obeyed, or indirect where the Commonwealth legislation is intended to be exclusive in relation to the subject of the two laws, though there may be no categorical distinction between those two classes.[8] In many areas, however, federal legislation expressly states that it is *not* intended to exclude the operation of state laws on the same subject (in the absence, of course, of any direct inconsistency). These savings provisions had long been considered to be effective but some doubt has been cast on this view by the court's decision in *Momcilovic v The Queen*[9] in 2011. Ms Momcilovic was convicted of trafficking in methylamphetamine under the relevant section of the Victorian *Drugs Poisons and Controlled Substances Act 1981*. It was argued that the Victorian provision was inconsistent with the offence of trafficking under the federal Criminal Code despite the presence of a savings clause in the code in relation to the operation of state legislation concerning drug offences.

All members of the court considered, however, that the Victorian provision did not criminalise conduct that was not prohibited by the equivalent provision of the code. This leaves open, however, the question of whether a savings provision would be effective in circumstances where the standard of liability in the state legislation was more stringent than that provided for in the equivalent federal provision. If the savings provision were held to be ineffective in this situation, there would be serious consequences for a number of areas of state regulation, including, of course, drug offences but also such subjects as consumer protection and tobacco advertising. It should be noted that the Commonwealth argued in *Momcilovic* for the general effectiveness of the savings provision but this is no guarantee that the court would come to that conclusion if the issue is raised in a case where liability attaches under a state provision but not under its federal equivalent.

Judicial power under Chapter III

Another limitation on state legislative power over recent years arises out of the court's decisions on Chapter III of the Constitution. The court has pursued a number of themes in its public law judgments and perhaps the most consistent – although not followed with equal vigour by all members of the court – has been the preservation and, on occasions, expansion of judicial power at the expense of the functions of the legislative and executive branches of government. These decisions are applicable at both the federal and state level, although they have had a much greater impact on state legislation than on federal statutes. As George Winterton observed, speaking of the 'tradition of judicial self-preservation', 'courts have always shown exceptional sensitivity to infringement on their domain'.[10]

The primary means of achieving this goal has been by finding implications in Chapter III of the Constitution, including the implication – first unveiled in *Kable v Director of Prosecutions (NSW)*[11] in 1996 and refined in later decisions – that no function could be conferred on a federal court or a state court capable of exercising federal jurisdiction which undermines the institutional integrity of that court.

In the thirteen years following *Kable*, however, it was relied on only once – by the Queensland Court of Appeal[12] – and challenges to legislation based on the decisions were rejected on numerous occasions in the High Court and in intermediate appellate courts. Then, over the period 2009–2011, the *Kable* doctrine had an apparent resurrection in the form of three decisions of the High Court. In *International Finance Trust Company Limited v NSW Crime Commission*[13] in 2009, a majority of the court held a provision of the *Criminal Assets Recovery Act 1990* (NSW) invalid on the ground that it directed the NSW Supreme Court to hear and determine an application by the NSW Crime Commission for a restraining order preventing dealings with alleged proceeds of crime without the holder of the property in question having an opportunity to be heard. In *Wainohu v New South Wales*[14] in 2011, a majority of the court struck down the *Crimes (Criminal Organisations Control) Act 2009* (NSW) on the basis that it imposed no obligation upon a judge of the Supreme Court – albeit acting not as a judge but as *persona designata* – to provide reasons when deciding an application to make a declaration under the legislation in relation to a particular organisation.

It will be observed, however, that both the provision invalidated in the *International Finance Trust Company* case and the provision on which the court's decision to invalidate the Act turned in *Wainohu* were quite minor aspects of comprehensive schemes, in the one case relating to confiscation of the proceeds of crime and

in the other to making declarations concerning certain organisations and the subsequent imposition of control orders in respect of the members of those organisations. Both defects could obviously be remedied by small amendments to the relevant legislation.

The impact of the court's other decision in 2010 in this trilogy on the legislation there in question – *South Australia v Totani*[15] – was more substantial in that, according to a majority of the court, control orders under the *Serious and Organised Crime (Control) Act 2008* (SA) could not be validly made by a Magistrate's Court on the basis of a declaration of the attorney-general because this process enlisted the court in the implementation of a decision of the executive government. Even this problem with the South Australian legislation could, however, be readily remedied by the adoption of the NSW model concerning criminal organisations, with, of course, the addition of an obligation to give reasons for the making of a declaration by a judicial officer in accordance with the decision in *Wainohu*.

It must be conceded, of course, that the full effect of the *Kable* doctrine is not reflected only in these decisions. It is always present in the minds of those responsible for legislation that confers functions on courts and judicial officers, usually at the state level but at the federal level as well. The doctrine has no doubt influenced the kinds of functions that have been conferred – or not – in legislation and the way in which they have been conferred.

The interlocking decision in 2010 that underlines the influence of the federal Constitution on the role of the Supreme Court at the state level was *Kirk v Industrial Court of New South Wales.*[16] On its face, that decision held that the decisions of courts or tribunals at the state level could not be protected by way of legislation from judicial review in the Supreme Court of the state in cases of jurisdictional error. What that means, however, is that functions that could not be conferred on a court because of the *Kable* doctrine cannot be conferred instead on an administrative body whose decisions were immunised against judicial review. It might be noted, however that privative clauses ousting judicial review have been relatively uncommon in state legal history and largely confined to the decisions of industrial tribunals. The relevant privative clause in *Kirk* – s 179 of the *Industrial Relations Act 1996* (NSW) – had already been amended prior to the High Court's decision to allow judicial review in the case of jurisdictional error.

Free speech and public order under the Lange principle

One potential area of limitation on state legislative power – but one that has not so far operated significantly in this way – arises out of the court's decision in *Lange v Australian Broadcasting Corporation*[17] in 1997. Again this was a decision applicable to the Commonwealth as well as the states but its potential impact is likely to be much greater at the state level. A majority of the court found there to be an implied freedom of communication concerning political or government matters in the Constitution and posed a two-stage test for the validity of legislation in the light of the implied freedom. At the first stage it was asked whether the law in question effectively burdened the freedom of communication about government or political matters in its terms, operation or effect. If the answer to that question be yes, it was then asked – as a question slightly refined in *Coleman v Power*[18] in 2004 – whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of government prescribed by the Constitution.

Lange was itself a case about defamation law but the most likely area of collision between the implied freedom and state law is in the area of public order. Thus in *Coleman v Power* the relevant provision of the Queensland *Vagrants, Gaming and Other Offences Act 1931* provided that it was an offence to use threatening, abusive or insulting words in or about a public place. Mr Coleman was convicted of using insulting words to a police officer and it was conceded by the state that the words used concerned matters within the freedom of communication protected by the Constitution. That left only the second question posed in *Lange* to be answered by the court. Three members of the court – Gummow, Kirby and Hayne JJ – construed the statutory provision as limited to language that might provoke in effect a breach of the peace and on this basis concluded that the provision did not contravene the implied freedom – because the second question posed in *Lange* could be answered 'yes'. The other four members of the court did not place this limitation on the provision but then disagreed as to its validity, with Gleeson CJ, Callinan and Heydon JJ holding it to be valid and McHugh J finding that it did contravene the

implied freedom.

Similarly, provisions of the Queensland Corrective Services Act allowing the imposition of conditions on parole restricting public comments and limiting media interviews with persons on parole were upheld in *Wotton v State of Queensland*[19] in 2012.

Freedom of trade between the states

Section 92 of the Constitution provides that trade between the states shall be 'absolutely free' and Commonwealth legislation extends this freedom to trade between the states and the territories. It must be said that the High Court has always had difficulties with the intersection of law and economics that seems to be embodied in s 92. From the 1930s through to the 1950s, however, s 92 was held to invalidate various state statutes, particularly marketing schemes for primary products and the regulation of road transport to the benefit of rail networks.[20] It might be noted, of course, that Commonwealth legislation was also struck down over this period, most particularly the bank nationalisation and airline nationalisation statutes. To some extent these decisions were based on a notion of the rights of individual traders but in *Cole v Whitfield*[21] in 1988 the court concluded that what was prohibited by s 92 was legislation that discriminated against interstate trade with the purpose or effect of protecting the intrastate trade in question.

In *Betfair Pty Limited v State of Western Australia*[22] in 2008 the court used this test to hold invalid two provisions of Western Australian legislation that restricted the operations of Betfair – which operated a betting exchange from premises in Tasmania – in Western Australia. In *Betfair Pty Ltd v Racing New South Wales*[23] and the associated case of *Sportsbet Pty Ltd v New South Wales*[24] in 2012, however, the court upheld the validity of NSW legislation that provided for fees to be paid by gaming operators – whether based inside or outside the state – for the use of race fields information in carrying on their businesses.

Federal funding to bodies other than the states

As already noted, the Commonwealth can provide grants to the states under s 96 of the Constitution, and can attach conditions to those grants. The question was raised, however, in *Williams v Commonwealth*[25] – which was argued in the High Court in early August 2011 – as to the scope of Commonwealth power to make grants to other bodies or individuals. It had generally been accepted that this could be done when the funds related to an area of federal legislative power under s 51 of the Constitution; or arose out of an exercise of the prerogative power; or concerned an exercise of so-called nationhood power. But what if none of those three situations were relevant? The Commonwealth argued that such payments could still be made under s 61 of the Constitution – the executive power. Consider, however, an example that we put to the court – in those circumstances it would be possible for the Commonwealth to provide the funds for an individual or a corporation to establish a university in one or more of the states, although this had always been seen to be a sphere of activity for state governments and, in more recent times, for some private organisations. This was a big question because the Commonwealth's contention, if accepted, obviously had the potential to significantly undermine the role of the states in the federation.

When the decision of the court was delivered in June 2012, it was explicit or implicit in all of the judgments, except for Heydon J who dissented, that expenditure was not authorised under the executive power in s 61 if it could not be authorised by legislation under a head of power in s 51 or under one of the following heads of power:[26]

- the administration of departments of state under s 64 of the Constitution;
- the execution and maintenance of laws of the Commonwealth;
- the exercise of the prerogative powers of the Crown;
- the exercise of inherent authority derived from the character and status of the Commonwealth as the national government.

Furthermore, it was not sufficient for four members of the court that legislation supported by s 51 could have authorised the expenditure in question. It had been argued in the alternative in *Williams* by the Commonwealth that, although the expenditure (the funding of a chaplaincy programme in schools) had not been made under a statute on a s 51 subject, this could have been done (under the corporations power in s 51(xx) or the power in s 51(xxiiiA) concerning benefits to students) and this was sufficient to bring the

payments under s 61. Despite the general assumption already referred to that this would have authorised the expenditure, a majority considered that, in the absence of specific legislation under a head of power in s 51, the payments in question could not be validly made under s 61, given that they did not relate to any of the additional bases of power set out above.[27]

Two members of the court – Hayne and Kiefel JJ – considered that the s 51 heads of legislative power relied on by the Commonwealth could not have authorised the payments in question in any event but the other members of the court did not need to decide this question.[28]

This was a significant victory for the states in the sense that many direct Commonwealth payments to local governments and community bodies over recent years would appear to be beyond power and could only be made in the future indirectly via s 96 grants to one of the states. In rejecting the Commonwealth's submissions, French CJ and Kiefel J emphasised the effect on the states of the expansion of Commonwealth executive power.[29]

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A new model of federalism?

The net result of all these decisions is that the High Court has dramatically changed the distribution of powers between the Commonwealth and the states that appeared to be adopted by the Constitution in 1901, although the court's decisions over the last two years have resulted in a number of successes, at least in appearance, for the states. There are no doubt differing views as to whether the overall trend since federation is a good thing or not. It is also a different model from the existing versions of federalism that exist in Canada and the United States which have always been considered Australia's closest counterparts in this respect.

Oddly enough, the United Kingdom, once a unitary state that gave birth to these and other federations, has had significant changes to its original political structure over recent decades. These have been the result of both internal and external pressures. At the external level, membership of the European Union has meant that British laws are subject to the overriding provisions of the European Convention and British courts are required to construe those laws accordingly. At the internal level, Wales and Northern Ireland have a greater degree of autonomy and in Scotland, where devolution has proceeded much more quickly, there is a strong movement for independence, at least in a political if not a financial sense. In the absence of similar pressures to those at play in the United Kingdom, however, the centralising trend in decisions by the High Court over the century since federation does not appear likely to be reversed in the immediate future.

Endnotes

1. *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.
2. *South Australia v The Commonwealth* (1942) 65 CLR 373.
3. *Victoria v Commonwealth* (1957) 99 CLR 575.
4. *Ha v State of New South Wales* (1997) 189 CLR 465.
5. See e.g. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1.
6. *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.
7. *NSW v Commonwealth* (2006) 229 CLR 1.
8. *Momcilovic v The Queen* (2011) 85 ALJR 957; 280 ALR 221 at [245].
9. *Momcilovic v The Queen* (2011) 280 ALR 221.
10. G Winterton, 'The Communist Party Case' in HP Lee and G Winterton (eds.) *Australian Constitutional Landmarks* (Cambridge University Press, 2003) at 153.
11. *Kable v Director of Prosecutions (NSW)* (1996) 189 CLR 51.
12. *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 QDR 40.
13. *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319.
14. *Wainohu v New South Wales* (2011) 278 ALR 1.
15. *South Australia v Totani* (2010) 242 CLR 1.
16. *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
17. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
18. *Coleman v Power* (2004) 220 CLR 1 at [93] and [196].
19. *Wotton v State of Queensland* [2012] HCA 2.
20. See e.g. *James v Cowan* (1932) 47 CLR 386; *Hughes & Vale Pty Ltd v New South Wales (No. 1)* (1953) 87 CLR 49.
21. *Cole v Whitfield* (1988) 165 CLR 360.
22. *Betfair Pty Limited v State of Western Australia* (2008) 234 CLR 418.
23. *Betfair Pty Ltd v Racing New South Wales* [2012] HCA 12.
24. *Sportsbet Pty Ltd v New South Wales* [2012] HCA 13.
25. *Williams v Commonwealth* [2012] HCA 23.
26. *Williams v Commonwealth* [2012] HCA 23 at [4] per French CJ; [150] and [159] per Gummow and Bell JJ; [199] and [252] per Hayne J; [534] per Crennan J; [594]-[595] per Kiefel J.
27. *Williams v Commonwealth* [2012] HCA 23 at [83] per French CJ; [134]-[137] per Gummow and Bell JJ; [544] per Crennan J; cf [288] per Hayne J; [569] per Kiefel J.
28. *Williams v Commonwealth* [2012] HCA 23 at [286] per Hayne J; [574]-[575] per Kiefel J.
29. *Williams v Commonwealth* [2012] HCA 23 at [61], [83] per French CJ; [581] per Kiefel J.