

AUSTRALIAN LAW AFTER TWO CENTURIES

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1. Introduction

To review the whole of Australian law, whether over 200 years or even the past 50, would be impossible, at least in a single essay. The law's subject matter is vast: so is the body of legal materials developed to deal with it. The law as a subject of social scientific study is almost equally vast, though much less explored, requiring as it does an account of underlying tendencies and impacts, causal relationships, links with other social sciences.

Law has always had an ambiguous role among the social sciences, and the position is no different in Australia. In part this is because of the overtly prescriptive or normative function of law. In part it arises from the tendency of legal scholars to concentrate on the 'professional' study of law, law as subject matter (but paradoxically, law in the books rather than in practice). Even legal scholars who seek to put their work within a wider frame of reference sometimes appear to be suspended awkwardly between the world of professional legal practice and that of the social sciences. Quite apart from problems of sheer size, this dichotomy presents real difficulties in the focus of any review. The only choice is to be selective and impressionistic. In this article, then, three questions will be dealt with: first, the main historical factors that influenced Australian law, secondly, the things that enable us, geography or nationality apart, to talk about Australian law as a distinct phenomenon, and thirdly and very tentatively, some possibilities for the future.

2. The Historical Legacy

The phenomenon, 'law', has always been intimately related to history. So too 'law' as a subject of study. The historicity of law is enhanced within the common law tradition, since its basic doctrines, its methods of procedure and the organization of its legal profession were all deeply affected by a continuous English development, beginning in the twelfth century and undergoing only a partial and internal revolution in the century after 1645. Legally and constitutionally Australia may not be a 'frozen

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continent'¹—but it is certainly a country without even an inherited revolution.

Historical factors thus profoundly influenced Australian law—in particular, English law, the experience of colonization, and federalism. Another factor—Aboriginal Australia—signally failed to have any influence, itself a profound phenomenon. Something should be said about each of these.

(a) *English Law*

Australian lawyers, in their training and (perhaps less explicitly) in their day-to-day work, experience a 'presentment of Englishry'.² Particular doctrines and rules are, in almost all cases, English in origin. Deliberate Australian variations are notable, and noted, for being so:³ they are not always persisted in.⁴ Equally important is the underlying structure of thought—the notions of 'law' and 'equity', of causes of action, the individualistic assumptions of the law of contract; in public law, the notion of judicial power and its independence, the relationship between executive discretion and the requirements of 'due process' imposed by the courts, the idea of a 'superior court', still the organizing conception, despite federal overlays, of the court system.⁵

I do not suggest this is a bad thing. Legal traditions have their virtues, and take a long time to mature. The common law tradition was tolerant in the mode of liberal individualism, resisted codification, gave considerable power to the individual judge both in the appreciation of facts and the application of previous decisions, avoided—except for half a century at the height of the influence of positivism—any rigid or absolute doctrine of precedent,⁶ and allowed for a considerable degree of 'open texture' in legal reasoning. Except for a period which, curiously, coincided with the emergence of full Australian independence,⁷ the Australian common law was similarly tolerant, and the tolerance extended to variations from the English norm, even though these variations might be justified as furthering a perceived 'purity of doctrine'.⁸

¹ Geoffrey Sawer's concluding words in *Australian Federalism in the Courts* (1967) 208.

² Before 1340 a murdered man was presumed a foreigner, unless it was proved (by presentment of Englishry) that he was a local: W. Holdsworth, *A History of English Law* (1956) vol. 1, 15. Similarly it can be presumed that Australian common law rules are English in origin.

³ E.g. the possibility of recovery in negligence for pure economic loss: *Caltex Oil (Australia) Pty. Ltd. v. The Dredge 'Willemstad'* (1976) 136 C.L.R. 529 (H.C.), not followed by the Privy Council in *Candlewood Navigation Corporation Ltd. v. Mitsui OSK Lines Ltd.* (1985) 60 A.L.R. 163.

⁴ E.g. the High Court's recent return to an objective element in self-defence: *Zecevic v. D.P.P.* (1987) 71 A.L.R. 641, not following its previous decision in *Viro v. R.* (1978) 141 C.L.R. 88 and preferring *Palmer v. R.* [1971] A.C. 814.

⁵ On the concept of a superior court, defined by reference to the English common law courts before the Judicature Act 1873, see e.g. *Re Ross-Jones, ex p. Green* (1984) 56 A.L.R. 609 (held, despite the express provisions of the Family Law Act 1975 (Cth) s. 21(2), the Family Court was not a superior court in this sense).

⁶ The infallibility of the House of Lords was proclaimed in 1898 and rescinded by a Practice Statement in 1966: [1966] 1 W.L.R. 1234.

⁷ *Piro v. W. Foster & Co. Ltd.* (1943) 68 C.L.R. 313, which held sway until *Parker v. R.* (1963) 111 C.L.R. 610.

⁸ As in *Parker v. R.* (1963) 111 C.L.R. 610.

English influences are no longer as dominant as they were, but they remain by far the most important non-Australian influences. For example, of the foreign cases listed as 'judicially considered' in the Australian Law Reports from 1983-87, 397 were English, 16 Canadian, 7 U.S., 6 New Zealand.⁹ All these legal systems are within the same broad tradition. By contrast there was little reference to the case law of continental Europe, and none at all to that of third world countries.

(b) *Colonialism*

Rather than constituting a political entity, Australia began as a collection of British colonies common to a continent. The colonists brought with them a body of British law, common law and 'received' statute law.¹⁰ Subsequent impositions of legislative authority were relatively limited in scope, and tended to be confined to certain fields—for example, shipping.¹¹ Once the initial impetus of British colonial government had passed the occasions for paramount legislative intervention from Westminster were few, and some of the most important of these were in the cause of freedom. The Colonial Laws Validity Act 1865, for example, was enacted to make it clear that the colonies were not fettered by general principles of English law, or by any statutory rules other than those imposed in terms by the Imperial Parliament. The occasion was a series of aberrant decisions by an aberrant judge in South Australia.¹² The fact that the Colonial Laws Validity Act remained binding on the Commonwealth until 1931, and on the States until 1986, testifies to the limited practical effect it had, as well as to the lack of concern of most Australian politicians for symbols of dependence.¹³

As a result the legacy of colonialism as such, in the sense of compulsive elements in Australian law, was limited: the English legacy was the product of influence rather than control, emulation rather than paramountcy.

(c) *Federalism*

The key political event in the emergence of the Australian nation, federation, required a certain stepping outside the English model, a model in theory strictly unitary.¹⁴ Probably the references made by the

⁹ As listed in the Table of Cases Judicially Considered, vols 51-70. 2 'other' cases (1 Scots, 1 Irish) were considered. It is possible that the proportion of non-English cases cited (as distinct from considered) would be slightly higher. About 65% of cases judicially considered were Australian.

¹⁰ See A. C. Castles, *An Australian Legal History* (1982) chs. 15, 17.

¹¹ Especially Merchant Shipping Act 1894 (UK), some provisions of which are still in force in Australia. See *Kirmani v. Captain Cook Cruises Pty. Ltd.* (1985) 58 A.L.R. 29. See also Colonial Courts of Admiralty Act 1890 (UK) (also still in force, and overdue for repeal).

¹² Castles, 406-8.

¹³ See now Australia Act 1986 (UK); Australia Act 1986 (Cth). The passage of these Acts was made possible by an agreement between the States and the Commonwealth not to agree on which provisions of the Acts (which came into force simultaneously) were legally necessary or effective.

¹⁴ Scots lawyers do not accept this: cf. *MacCormick v. Lord Advocate* 1953 S.C. 396, but English formulations of parliamentary sovereignty remain absolute in their terms.

'founding fathers' of the Constitution to Swiss and German experience were rhetorical flourishes rather than serious attempts to assimilate foreign models. But many aspects of the United States Constitution were adopted, if for somewhat different reasons. Hugh Collins has argued that the Australian version of federalism . . .

. . . is a product of convenience rather than of conviction. Unlike Switzerland, or French and British Canada, Australian federalism is not a means of preserving the integrity of linguistically distinct communities within a single polity. Nor, as in the American case, is it traceable to the normative assumption that, even within a relatively homogeneous community, power should be divided between levels as well as branches of government. Rather, the constitutional framework chosen in Australia in the 1890s was a practical adjustment to circumstance. Faced with small communities separated by great distances but already endowed with political institutions, those seeking a limited range of cooperative action in matters like defense, trade, and immigration found a federal scheme expedient. There continues to be a lively interest in federalism in Australia, but it remains focused upon the practical working-out of fiscal, constitutional, and administrative arrangements between the states and the Commonwealth. Political appeals to "states' rights," like declarations of "new federalism", are typically and realistically understood as claims to particular shares of the federal pie rather than as articulations of normative principle.¹⁵

There is much truth in this. The Australian 'founding fathers' were concerned with political and economic unity in the face of potential external threats, and with the need for increased freedom of trade internally. As experienced State politicians they had little reason to distrust State governments—let alone government, within accepted modes, as such. Thus most individual rights originally contained or subsequently included in the United States Constitution were rejected.¹⁶ The British model of the 'rule of law', a method of protecting rights by seeming to ignore them,¹⁷ was influential in the rejection or watering down of 'rights' in the Australian Constitution. Nonetheless, in key respects the United States model was adopted, with its principles of judicial review of the constitutionality of legislation, a similar structure for the distribution of powers, and similar

¹⁵ H. Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' in S. R. Graubard (ed), *Australia: The Daedalus Symposium* (1985) 147, 152-3.

¹⁶ Apart from federal guarantees (e.g. s. 117), the only real human rights guarantee in the Constitution is s. 116 (Commonwealth not to establish a religion or prohibit the free exercise of religion). It was inserted to counteract the reference to 'Almighty God' in the preamble: see R. Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth, 1891-1906* (1976). At least as to the establishment of religion it has been narrowly construed: *A-G ex rel Black v. Commonwealth* (1981) 33 A.L.R. 321.

¹⁷ Classically expressed by A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885) esp. chs 4, 13.

federal guarantees.¹⁸ Australian courts were thus committed to an involvement in public and political disputes which was different in kind from that of British courts, and which emphasis on 'strict and complete legalism'¹⁹ failed to conceal.

(d) *Aboriginality*

By contrast, Australian law was specifically *not* influenced or affected by the Aboriginal societies which the colonists encountered, or by the laws and institutional traditions of those societies. One reason was the decision not to treat with those societies as collective entities at all. Aborigines were, after initial brief uncertainty, classified as British subjects, that is, as individuals subject to British law.²⁰ The Australian colonies were classified as 'settled', with no relevant pre-existing legal system.²¹ Aboriginal laws were not legally recognized, even in relation to the affairs of Aborigines among themselves.²² And, although this did not follow from the classification of Australia as a 'settled' colony or of Aborigines as British subjects by virtue of settlement, no individual or collective Aboriginal rights to land were recognized at common law.²³ When issues of Aboriginal rights were raised in later years, these were usually dealt with by executive action. Legislation on Aboriginal matters was limited in amount and effect until the latter half of the nineteenth and the early twentieth century, when legislation implementing the policy of 'protection' came to be passed. This legislation restricted still further the formal legal rights of Aborigines, rights which in most cases they were not aware they had.²⁴

In the result Australian law remained wholly uninfluenced and unaffected by Aboriginal laws and traditions — a situation which continued unmodified until very recent times, and which has now been modified only to a slight extent. There is now a considerable amount of legislation on certain Aboriginal issues, especially land rights, local government and Aboriginal heritage issues, race and sex discrimination, and protection of heritage areas. But on most matters the established techniques of

¹⁸ It is controversial whether the Constitution intended, as far as possible consistent with the principle of responsible government, to adopt a separation of powers. If it did do so, according to the High Court in the *Boilermakers' case*, it was out of concern for the preservation of federalism rather than individual liberty. See (1956) 94 C.L.R. 254, 267-8, 275-6.

¹⁹ Dixon, C.J.'s famous words on being sworn in as Chief Justice of the High Court: (1952) 85 C.L.R. viii.

²⁰ See the account in Australian Law Reform Commission, Report 31, *The Recognition of Aboriginal Customary Laws* (1986) chs 3, 5 and references there cited.

²¹ *Cooper v. Stuart* (1889) 14 App. Cas. 286, 291; *Coe v. Commonwealth* (1979) 24 A.L.R. 118.

²² *R. v. Jack Congo Murrell* (1836) 1 Legge 72; B. Bridges, 'The Extension of English Law to the Aborigines for Offences committed Inter Se, 1829-1842' (1973) 59 *JRAHS* 264.

²³ It has only once been decided that this non-recognition in fact was justified at common law: *Milirrpum v. Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141. The matter remains open in the High Court: *Coe v. Commonwealth* (1979) 24 A.L.R. 118.

²⁴ The 1967 referendum, which gave the Commonwealth power to legislate for Aboriginal people and allowed them to be counted in the federal census is usually, but incorrectly, described as the extension of citizenship to Aborigines. They had in law been citizens all along.

executive discretion and accommodation of cultural difference through exercises of flexibility under the general law (e.g. sentencing discretions) continue to hold sway.²⁵

3. 'Australian' Law?

The configuration of Australian law which resulted from English influence, British control, federation, and from the perception of a mono-cultural society remained basically unchanged until the 1970s. Such variation as there has been from this pattern has resulted from legislative innovation, in the nineteenth century often influenced by European or North American ideas which were not yet embodied in law there (for example, universal suffrage, juvenile courts, industrial arbitration); more recently, influenced by legislative models, increasingly North American (for example, trade practices, consumer protection and consumer claims, freedom of information, administrative review). Other influences have been international, in provenance if not origin (for example, race and sex discrimination, protection of natural and cultural heritage). But in what sense is the law so influenced 'Australian', other than in the obvious sense of being the law of the nation state, Australia?

(a) *The Search for 'Autochthony'*

'Autochthon' is a word of respectable ancestry: its rather more recent derivatives 'autochthonous' and 'autochthony' are used by lawyers to indicate that a legal system or (more rarely) a particular rule is of local derivation, and was not imposed from outside (in particular, by a former colonizer).²⁶ In modern times the demand for autochthony has led to deliberate, if momentary, legal discontinuity in the process of a state's becoming independent and establishing its independence constitution.²⁷

Nothing of the kind happened in Australia. Indeed it is still unclear when, and by exactly what process, Australia became independent in international law.²⁸ Australia and New Zealand remained 'dependent' in their own law for more than a decade after they were generally regarded as internationally independent, a curious reversal of the normal course of events.²⁹ The best known use of the term 'autochthonous' in relation to Australian law was the label 'autochthonous expedient', applied by the High Court to the provision in the Constitution (s. 77(iii)) which enables

²⁵ See Australian Law Reform Commission, Report 31, *The Recognition of Aboriginal Customary Laws* (1986) chs 4, 6. The public and official silence that greeted that Report testifies to the unlikelihood of change.

²⁶ The SOED dates 'autochthon' at 1646; 'autochthonous' and 'autochthony' respectively at 1805 and 1846.

²⁷ E.g. in the case of Papua New Guinea: Constitution 1975, Preamble, in A. P. Blaustein & G. H. Flanz, *Constitutions of the Countries of the World* (1987) vol. 12, 25.

²⁸ See J. Crawford, *The Creation of States in International Law* (1979) 238-46.

²⁹ The Statute of Westminster 1931 (UK), enacted to secure the internal legal independence of the Dominions, was adopted by Australia and New Zealand only in 1942 and 1947 respectively.

the Commonwealth Parliament to vest federal jurisdiction in State courts.³⁰ The context was inglorious, but the passage has, unfortunately, been much cited since, to the confusion of law students. Its use in that context revealed a characteristic unconcern on the part of the High Court—characteristic, that is, of most Australian lawyers—for any deeper form of autochthony.

Lack of concern to distance oneself from one's ancestors may be a mark of maturity. But it is also important to understand in what respects we are different, particularly when the difference takes the form of nationhood at the other end of the world. In Australia's case the foundation for autochthony has—at last—been firmly laid. There is (in the case of State courts exercising state jurisdiction, only since 1986) no longer any appeal to the Privy Council.³¹ It is now established that no Australian court is bound as a matter of precedent by non-Australian decisions, however influential they may be.³² Other Australian courts are of course bound by decisions of the Full High Court, but they retain considerable freedom to depart from their own previous decisions. So too does the High Court itself.³³

These rules establish only the preconditions for an 'Australian' jurisprudence. The substance will take longer, especially since there is little indication of anything approaching judicial nationalism.³⁴ The dominant feature is an adherence to independent reasoning within the received, technical mode, but it is combined with a considerable degree of openness to decisions and developments in other jurisdictions. An Australian jurisprudence may well be the outcome of such an approach, but it is not its object.

(b) *Distinctive Institutions*

There are, on the other hand, many distinctive legal institutions, providing the material structure of Australian law and significantly affecting the emphases and context of the substantive law. Again it is only possible to discuss some examples: four of particular interest are the Constitution, the industrial tribunals, the Family Court, and the system of federal administrative tribunals.

³⁰ *Boilermakers' Case* (1956) 94 C.L.R. 254, 268.

³¹ Privy Council (Appeals from the High Court) Act 1975 (Cth); Australia Act 1986 (Cth) s. 11. See J. Crawford, *Australian Courts of Law* (1982) ch. 10.

³² As to the High Court, *Viro v. R.* (1978) 141 C.L.R. 88; as to other courts, *Cook v. Cook* (1986) 68 A.L.R. 353, 362-3.

³³ E.g. *Zecevic v. DPP* (1987) 71 A.L.R. 641 (above, n. 5).

³⁴ The main exceptions have been the two High Court judges in recent years who were former politicians and federal ministers, Barwick, C.J. and Murphy, J. See e.g. their views in *Cullen v. Trappell* (1980) 29 A.L.R. 1; *McInnis v. R.* (1979) 27 A.L.R. 449 respectively. The two cases demonstrate that 'nationalism' may not provide much guidance as to outcomes.

(i) The Constitution

Drafted at a series of intercolonial conventions during the 1890s and enacted by the British Parliament with a single (and as it has proved, insignificant) change, the Constitution remains central to an understanding of the Australian polity. One reason for its influence has been the great difficulty in changing it: 30 of 38 constitutional referenda since 1900 have failed.³⁵ It is unlikely that this indicates general public support for the document, as distinct from electoral conservatism, suspicion or indifference. Recent research suggests that nearly 50% of Australian electors are unaware even of the existence of the Constitution (although most know at least that much of the United States Constitution).³⁶ Faced with such ignorance one cannot praise the constitutional draftsmen for a memorable text. On the other hand the text is, as to fundamentals, workmanlike and economical, unlike some recent amendments to it.³⁷

There is a continuing debate about the constitutional achievement on matters of substance. The key problem the draftsmen faced was the combination of responsible government (members of the executive being also members of one or other House of Parliament, and responsible to it) with federalism, requiring both certain guarantees of the rights of the States, and provision to secure their interests, in particular though equal representation in the Senate. The problem was only partially resolved, leaving a crucial uncertainty about a Government's right to supply (and thus to continue in power) when faced by a hostile Senate. That uncertainty led directly to the crisis of 1975, when the Prime Minister was dismissed by the Governor General on the basis that he had failed to obtain supply from the Senate. Much has been written about this incident, and much controversy generated as to the legality and propriety of the actions of the participants. Sawyer's conclusion, in a masterly study, is that the Governor-General's failure to advise the Prime Minister of his intentions, and to give him the opportunity to advise and, if supply could not be obtained, to go to an election as Prime Minister, was unconstitutional, but not strictly illegal.³⁸ That conclusion is, I think, clearly right: it cannot be right for a Governor-General to ambush a Prime Minister. But the setting for that ambush was provided by the Constitution itself.

³⁵ Constitutional Commission, Background Paper 12, *Amending the Constitution* (1987) 7-8.

³⁶ According to research conducted for the Constitutional Commission by Newspoll (April 1987), 53.9% of voters knew Australia had a written constitution. But of respondents in the 18-24 age group, 70% did *not* know this. (This was presumably the cohort which had not yet had the chance to vote 'no' in a referendum!)

³⁷ For example, two of the 1977 amendments, s. 15 (Senate casual vacancies) and s. 72 (retirement of federal judges), added no fewer than 87 lines of text to the Constitution—in the case of the amendment to s. 15, without fully achieving the desired result.

³⁸ G. Sawyer, *Federation under Strain* (1977) chs 8 & 9. On the events of 1975 see the three apologies, G. Whitlam, *The Truth of the Matter* (1979); J. Kerr, *Matters for Judgment* (1978); G. Barwick, *Sir John did his Duty* (1983). See also G. Winterton, *Parliament, the Executive and the Governor-General* (1983) 149-60; B. J. Galligan, 'The Kerr-Whitlam Debate and the Principles of the Australian Constitution' (1980) 18 *J. Cth & Comp. Pol.* 247.

Since 1975 a number of steps have been taken to prevent a recurrence of the problem,³⁹ but short of constitutional amendment the basic weakness remains: a Prime Minister, to be sure of a full term, needs at least the acquiescence of both Houses of Parliament.

The debate over the events of 1975 has tended to overshadow other, perhaps more fundamental, issues about the Constitution. One relates to what might be described as the 'standard' political science critique, expressed by Jaensch in these terms:

The planners designed the constitution to be long-lasting and inflexible. The product must be seen in the environment of those who produced it. The planners sought to create a structure and process of government which reflected their dominant interests: of agricultural and commercial elites in the colonies which viewed the inauguration of a national government and parliament in some senses as a threat. As a political statement, then, the constitution established a national government with strictly limited powers and functions, and with very restricted authority to affect, let alone intervene in, the states. As a social document, the constitution was, and is today, 'permeated by the conservatism, parochialism and pettiness that characterised the Australian colonies at the end of the nineteenth century'.⁴⁰

I do not think this is fair either to 'the planners' or to the Constitution as it has evolved. There have been rigidities, certainly: one of the most significant is the federal system of industrial arbitration, which, for want of adequate alternative sources of legislative power, is very nearly a constitutional inevitability, and which imposes a high degree of rigidity, equality, and (perhaps to a lesser extent) legalism in the processes of fixing wages and conditions of work.⁴¹ But the 'planners' can hardly be blamed for the difficulty of amending the Constitution, a difficulty they seem not to have foreseen. To vest the constituent power in the federal electorate, without involvement of any kind by State Parliaments or Governments,⁴² was a remarkable act of faith, and of nationalism. The most doubtful aspect of s. 128 was its requirement of a popular majority in a majority of States, but so far this requirement has defeated only 4 referendum proposals: in only one case have the smaller states overridden a proposal with really widespread popular support.⁴³

³⁹ In particular the resolution of the Australian Constitutional Convention in 1985: *Proceedings . . . 1985*, vol. 1, 7-46; and see also the recommendations of the Constitutional Commission, Executive Government Committee, *Report* (1987) ch. 5.

⁴⁰ D. Jaensch, 'Remaking the Australian Constitution' (1981) 58 *Current Affairs Bull.* 14, 15, citing S. Encel, 'The Constitution as a Social Document' in S. Encel, D. Horne & E. Thompson, *Change the Rules!* (1977) 43.

⁴¹ See below, text to nn. 51-67.

⁴² Moreover under s. 128 the Senate, intended as a States House, can be by-passed by the House of Representatives. In the U.S. and Canada, by contrast, State or provincial legislatures have a key role in the amending process.

⁴³ *Viz.*, simultaneous elections (1977), which obtained 62.2% of the vote but only 3 States.

To describe the national government as one with 'strictly limited powers' is also hardly accurate. The federal list of powers in Australia originally contained 39 matters,⁴⁴ many of great potential significance and many not contained in the United States Constitution. It was equally significant that the Constitution contained no list of reserved State powers, similar to the list of exclusive provincial powers in the Canadian Constitution Act of 1867. That left little basis for a secure doctrine of State powers under the Constitution. Not only was it possible to predict the coming financial dominance of the Commonwealth, as Deakin did in 1906,⁴⁵ but it was also possible for Isaacs and Higgins, by 1908, to establish the doctrines of interpretation of powers which prevailed in the *Engineers case* in 1920,⁴⁶ and which underlie all the major developments in the interpretation of powers since then.⁴⁷ There is no basis in the Constitution for the notion of an illicit 'intervention' in State affairs, and little more for any implied protection of State agencies or instrumentalities.⁴⁸

Thus the High Court has been able since 1920 to establish a consensus on basic principles of interpretation of powers which has inevitably seemed to favour the Commonwealth, but only because of the (deliberate or accidental) absence of countervailing guarantees of State power.⁴⁹ Even in the area of nationalization, where the case for a 'conservative constitution' is strongest, there is considerable potential for governments to act. The failure of bank nationalization in 1949 was the result more of a failure of nerve or support than of an unbreachable constitutional barrier. Today the more flexible approach taken to s. 92 would increase the opportunities for success in a carefully planned program of nationalization⁵⁰—although the trend to deregulation and sale of government enterprises seems to have rendered the issue irrelevant, at least for the time being.

⁴⁴ There have been a few additions: s. 51(xxiiiA) (social security allowances), s. 51(xxvi) (Aborigines) and s. 105A (State debts).

⁴⁵ In a *Morning Post* letter of 1906, cited by G. Greenwood, *The Future of Australian Federalism* (2nd edn, 1976) 64.

⁴⁶ *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129. The basic positions were established by Isaacs and Higgins, JJ. in dissenting and separate opinions in cases such as *R. v. Barger* (1908) 6 C.L.R. 41.

⁴⁷ The doctrine of broad interpretation of granted powers and the rejection of any implied prohibition on the Commonwealth 'entering State fields of power' underlie the perceived 'expansion' of federal power in areas such as trade and commerce (*Murphyores Pty. Ltd. v. Commonwealth* (1976) 136 C.L.R. 1), corporations (*Strickland v. Rocla Concrete Pipes Ltd.* (1971) 124 C.L.R. 468) and external affairs (*Commonwealth v. Tasmania* (1983) 158 C.L.R. 1). The only exception, and that a partial one, is the marriage power, which after an expansive beginning (*A-G (Vic) v. Commonwealth* (1962) 107 C.L.R. 529; *Russell v. Russell* (1976) 134 C.L.R. 64) has been the subject of an erratic and unconvincing jurisprudence: e.g. *R. v. Lambert ex p. Plummer* (1980) 146 C.L.R. 447; *Gazzo v. Comptroller of Stamps (Victoria)* (1981) 149 C.L.R. 227.

⁴⁸ As was made clear in the *Tasmanian Dams case*, *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1. The principal implied protection is against overtly discriminatory legislation: for a rare example, *Queensland Electricity Commission v. Commonwealth* (1985) 61 A.L.R. 1.

⁴⁹ See further J. Crawford, 'The Legislative Power of the Commonwealth' in G. Craven (ed), *Commentaries on the Convention Debates* (1987) 113; and generally on the High Court see L. Zines, *The High Court and the Constitution* (2nd edn, 1987); B. Galligan, *Politics of the High Court* (1987).

⁵⁰ *Clark King & Co Pty. Ltd. v. Australian Wheat Board* (1978) 140 C.L.R. 120; *Uebergang v. Australian Wheat Board* (1980) 145 C.L.R. 266.

(ii) The Industrial Tribunals

One of the most distinctive aspects of the Australian legal system is its industrial tribunals. Operating both at federal and State levels, they play a central—and centralized—role in determining wages and conditions of work and in settling industrial disputes. Only a few comments can be made here.

Unlike the idea of a Labour Court in some other countries, the Australian industrial tribunals are not primarily concerned with the enforcement of industrial laws but with establishing wage and labour standards binding on employers and employees. Indeed at the federal level most of the strictly enforcement functions are required to be vested in a federal court, whereas the 'non-judicial' function of making industrial awards and settling industrial disputes cannot be vested in a court.⁵¹

Attempts have been made from time to time to impose 'penal' sanctions on trade unions in respect of breaches of awards (especially unauthorized strikes or other industrial action) but, except in extreme cases of non-compliance, with very limited success.⁵² One recent 'extreme case' involved the Australian Builders' Labourers Federation: the penalty amounted to exclusion from the industrial system altogether by way of deregistration. But the legal and practical obstacles encountered in the process of deregistration⁵³ suggest that it is unlikely to be attempted very often.

The setting of industrial conditions by a quasi-adversary, quasi-judicial process involves a pronounced degree of legalism. This occurs both at the level of the Australian Conciliation and Arbitration Commission, where hearings on major issues have a pronounced forensic character, and also in the High Court and the Industrial Division of the Federal Court, which hear challenges to the jurisdiction or procedure of the Commission, based in particular on the somewhat restrictive requirements of an 'industrial dispute extending beyond the limits of a State'.⁵⁴

The establishment of industrial tribunals in Australia and New Zealand in the fifteen years after 1896 was heralded as a 'new province for law and order'.⁵⁵ A century later enthusiasm has dwindled, and proposals continue to be made that the industrial arbitration systems should be abandoned, converting to some form of collective bargaining

⁵¹ *A-G (Commonwealth) v. Queen* (1957) 95 C.L.R. 529 (PC), affirming (1956) 94 C.L.R. 254 (HC) (the *Boilermakers' case*).

⁵² See the discussion in Commonwealth, Committee of Review (Chairman: K. J. Hancock), *Australian Industrial Relations Law and Systems, Report* (1985) (Hancock Report) 622-57.

⁵³ See e.g. *Re Ludeke, ex p. A . . . BLF* (1985) 62 A.L.R. 407; *A . . . BLF v. Commonwealth* (1986) 66 A.L.R. 363.

⁵⁴ Constitution s. 51(xxxv). Here again the High Court has taken a broad view on most issues: the remaining area of constraint, imposed by restrictive interpretations of the term 'industrial', is now dissolving. See *R. v. Coldham ex p. Australian Social Welfare Union* (1983) 153 C.L.R. 297 and subsequent cases. But the basic constraints imposed by s. 51(xxxv) (in particular the adversary method of industrial standard setting) remain.

⁵⁵ H. B. Higgins, *A New Province for Law and Order* (1922).

(such as in the United Kingdom or the United States).⁵⁵ In particular, the period from 1966 to 1975 was a troublesome one for the industrial tribunals. Penal sanctions against unions were discredited;⁵⁷ the capacity of the tribunals to maintain 'industrial peace' was challenged by a large increase in strikes, and there was a distinct move towards collective bargaining. The consensus among industrial relations writers was of the undesirability, and lack of realism, of industrial arbitration.⁵⁸ In England, judicial settlement of labour disputes was tried and failed.⁵⁹ Higgins' 'new province for law and order' was repeatedly debunked, seldom defended.

But the inflation, industrial troubles, and recession of the 1970s led to a gallop back to arbitration. In 1974-5, only 21.2 per cent of the average weekly wage increase was attributable to the national wage case: in 1975-6, with indexation, the figure was 88.5 per cent. Except for the period 1981-2, when wage indexation was temporarily abandoned, similar high figures have been maintained since.⁶⁰ In a sense, collective bargaining was never really tried, because the arbitration system retained its role as guarantor of minimum standards for the employed, passing on what the strong had earned to the industrially humble and meek. Real collective bargaining would cause pronounced changes in wage relativities, which have always been extremely difficult to achieve in Australia.⁶¹ Some critics of industrial arbitration have accepted the point, proposing mixed forms of bargaining and arbitration with the tribunals acting only in a secondary role.⁶² Indeed, that is not far from Higgins' own conception (the problem of penal sanctions against trade unions apart).⁶³ At the same time many of the supposed defects of the system have been reassessed in more

⁵⁶ See e.g. R. Blandy & J. Niland (eds), *Alternatives to Arbitration* (1986); J. T. Ludeke, 'Is now the Time for Radical Change?' (1984) 26 *JIR* 254.

⁵⁷ D. W. Rawson, 'The Retreat from the "New Province for Law and Order"' in A. Tay & E. Kamenka (eds) *Law-making in Australia* (1980) 290, 291-5.

⁵⁸ E.g. J. E. Isaac, 'The Prospects for Collective Bargaining in Australia' in J. E. Isaac & G. W. Ford, *Australian Labour Relations Readings* (2nd edn, 1971) 496, 536-43; K. M. Laffer, 'Compulsory Arbitration and Collective Bargaining' *id.*, 527; A. E. Woodward, 'Industrial Relations in the '70s' (1970) 12 *J.Ind.R.* 115; J. H. Wooten, 'The Role of the Tribunals' *id.*, 130. But some economists were less sure: K. J. Hancock, 'Compulsory Arbitration versus Collective Bargaining: Three Recent Assessments' in Isaac & Ford, 514.

⁵⁹ B. Weekes *et al.*, *Industrial Relations and the Limits of Law. The Industrial Effects of the Industrial Relations Act 1971* (1975). See also Wedderburn, 'Industrial Relations and the Courts' (1980) 9 *Ind.L.J.* 65; O. Kahn-Freund, *Labour Relations, Heritage and Adjustment* (1979) 77-80.

⁶⁰ Hancock Report, 44-9.

⁶¹ The 'received wisdom', that there is little difference between the economic effects of the Australian arbitration system and other systems in comparable countries, in terms of the distribution of wages, at least (B. Hughes, 'The Wages of the Strong and the Weak' (1973) 15 *J.Ind.R.* 1; K. Norris, 'Compulsory Arbitration and the Wage Structure in Australia' (1980) 22 *J.Ind.R.* 249), is being reviewed in the light of studies showing that relativities in Australia are more compressed: e.g. Plowman, in J. Niland (ed), *Wage Fixation in Australia* (1986) 15, 38-41; Norris, *id.*, 183.

⁶² E.g. J. Niland, *Collective Bargaining and Compulsory Arbitration in Australia* (1978).

⁶³ Throughout *A New Province for Law and Order*, Higgins emphasized the role of consent and conciliation. The role of arbitration, in his view, was to achieve what would, if the right conditions (equality of bargaining power, legal neutrality) had existed, have been agreed through collective bargaining. See *id.*, 25, 40, 44, 47, 55, 98, 109, 138; but *cf. id.*, 150-1. For a reassessment, see J. E. Isaac, 'Lawyers and Industrial Relations' in A. D. Hambly & J. L. Goldring, *Australian Lawyers and Social Change* (1976) 321.

favourable terms—the 'legalism' of the Australian Commission, for example.⁶⁴

These 'revisionist' interpretations culminated in the endorsement of the principles of conciliation and arbitration by the Hancock Report, which concluded that

In the submissions we received, no strong case for radical change by way of abolition of conciliation and arbitration was apparent . . . After an examination of all the material before us, we reached the conclusion that no substantial case had been made that industrial relations would improve if conciliation and arbitration were abandoned in favour of some other system, such as collective bargaining. Thus, we have concluded that conciliation and arbitration should remain the mechanism for regulating industrial relations on Australia.⁶⁵

On the basis of this somewhat unenthusiastic conclusion, the Report went on to propose substantial re-enforcement and centralization of the arbitration machinery under a new Act. As embodied in the Industrial Relations Bill 1987 (Cth), the new system would involve an Australian Industrial Relations Commission with comprehensive authority over federal industrial disputes, an Australian Labour Court, with judges holding joint commissions as presidential members of the Commission, and with provision for joint proceedings with state industrial authorities, and for other forms of co-operation.⁶⁶ Whatever the details of the new system when it is eventually introduced, the underlying structure is likely to remain very much the same as that developed since 1904, with a continuing need for the industrial tribunals to balance their role as settlers of industrial disputes with their role as central economic agencies, independent arms of government. Short of fundamental constitutional change (always unlikely),⁶⁷ that dual role seems destined to continue—an 'established' province for law and order, perhaps for want of a better.

(iii) Family Law

The movement to establish specialist family courts was by no means limited to Australia, but the 'family court ideal' has been carried to considerable lengths under the Family Law Act 1975 (Cth). The family court ideal envisages a unified court with as wide a jurisdiction over family

⁶⁴ E.g. L. Cupper, 'Legalism in the Australian Conciliation and Arbitration Commission: the Gradual Transition' in G. W. Ford, J. M. Hearn & R. D. Lansbury, *Australian Labour Relations Readings* (3rd edn, 1980) 409.

⁶⁵ Hancock Report, Summary, 1-2. See also Hancock Report, 241-5, for a fuller account of the Committee's reasons.

⁶⁶ The Industrial Relations Bill 1987 was withdrawn when the 1987 federal election was announced, but will be reintroduced in some form.

⁶⁷ The Constitutional Commission's Distribution of Powers Committee recommended that s. 51(xxxv) be replaced with power over 'industrial relations and employment matters': *Report* (1987) 35, and see id., 31-4, for a review of earlier proposals.

matters as possible, a 'helping court', which provides counselling facilities to persons with family troubles, whether or not they are litigants, a specialist court, with judges who are aware of and responsive to its special needs, and which functions with a minimum of formality and delay. It is intended to be 'as much a therapeutic agency as a judicial institution'.⁶⁸ A Senate Committee Report in 1974 strongly supported the family court ideal, predicting that 'the establishment of a Family Court and the simplified substantive provisions in the Bill will reduce the scope for legal disputation.'⁶⁹ This view was accepted, and the principal judicial agency under the Family Law Act 1975 (Cth) was a new specialist court, the Family Court of Australia. The Act also established a comprehensive divorce law with divorce based on a single ground—irretrievable breakdown of the marriage, evidenced by a year's separation, without regard to the fault of either party.

The Act sought to achieve the ideal of the family court in a number of ways. A prospective judge must be 'by reason of training, experience and personality . . . a suitable person to deal with matters of family law' (s. 32(2)(b)). There was extensive provision for counselling and reconciliation, with court counsellors appointed as officers to the Court's staff and welfare officers also available.⁷⁰

Since its establishment the Family Court has attracted a vast caseload. For example in the years 1980-4 it averaged, in round figures, 42,000 dissolution applications, 9400 custody applications, 4600 applications for access, 9400 maintenance applications, 12,300 property applications and 4800 applications for injunctions. The numbers of dissolution applications have been fairly steady, after the initial rush in the first year or so after the Act came into force.⁷¹ But there have been significant increases in maintenance and especially property cases since 1980. To cope with the workload the Family Court has 46 judges, making it by far the largest superior court in Australia. Apart from this enormous pressure of work, there have been real problems with the operation of the Court. Indeed attacks on the Family Court in the 1980s have created the impression, and to some degree the reality, of a court under siege. In the period 1980-4 three bomb attacks (one on a court building, two on judges' homes) and a shooting resulted in the death of a judge, and a judge's wife.⁷² The physical security of Court personnel and buildings has become a major problem.

⁶⁸ *Report on the Committee on One-Parent Families* (2 vols, 1974, Cmnd 5629) I, 173 (Finer Committee). See also New Zealand, Royal Commission on the Courts, *Report* (1978) 146-85 (a particularly enthusiastic account); Canadian Law Reform Commission, *Report on Family Law* (1976) 7-12.

⁶⁹ Senate Standing Committee on Constitutional and Legal Affairs, *Report on . . . the Family Law Bill, 1974* (Parl. Paper 1974/133) 29.

⁷⁰ Commonwealth, Joint Select Committee on the Family Law Act, *Family Law in Australia* (1980) I, 130-3, 164-84.

⁷¹ Family Law Council, *Annual Report 1984-85* (1986) contains the statistics, and also details 'serious problems' in collecting statistics under the Act: *id.*, 69-70.

⁷² P. Abrahams, 'Violence' (1986) 1 *A.J. Fam. L.* 67.

The prestige and professionalism of the Court has also been questioned, for example in these extrajudicial comments of Gibbs, C.J. in 1985:

It may have been a mistake to establish a separate court to administer the Family Law Act . . . [T]he creation of that Court has made it difficult to maintain the highest standards in the making of judicial appointments . . . Although many judges of considerable ability have been appointed . . . it would be hypocritical to pretend that the jurisdiction of that Court, which is limited in scope and likely to be emotionally exhausting, is such as to attract many of the lawyers who might be expected to be appointed to the Supreme Courts or to the Federal Court. The consideration which I have had to give to judgments of the Family Court has led me to conclude that . . . there is a present need to provide a new and more effective avenue of appeals from its decisions.⁷³

Within the legal profession there is a tendency to segregate family law from other areas of legal practice, and to regard family law as a 'less prestigious' area of practice.⁷⁴ The poor quality of many family court buildings and facilities, and the lower salaries of judges, have contributed to this tendency.

The Court has also experienced major jurisdictional problems, to a considerable degree caused by the limitations on federal legislative power over family law under the Constitution, but also by a rather narrow approach adopted by some members of the High Court to the interpretation of the relevant powers.⁷⁵ Problems have arisen with the extent of jurisdiction over custody of ex-nuptial children, the effect of Family Court orders (especially property orders) on third parties, and the relationship of federal to State law and jurisdiction.

The Family Court has had its successes: these include the provision of counselling, simplified procedures for dissolution, the reduced formality of proceedings, and, perhaps, the growth of a specialist judiciary and legal profession. The defects are equally clear: excessive delay in some registries, jurisdictional gaps and uncertainties greater than any other Australian court, and marked unevenness of operations between States. Despite these difficulties there is still strong support, within the Court and outside it, for the family court ideal.⁷⁶ The Commonwealth Government also

⁷³ H. Gibbs, 'The State of the Australian Judicature' (1985) 59 *A.L.J.* 522. For criticism of Gibbs' criticisms see R. Chisholm & O. Jessup, 'Sir Harry Gibbs and the Family Court' (1985) 1 *Aust. Fam. L.* 1. See also F. C. Hutley, 'What's Wrong with the Family Law Act: A Case for Dismantling the Family Court' (1987) 31 *Quadrant* 73.

⁷⁴ J. Wade, 'The Professional Status of Family Law Practice in Australia' (1985) 8 *U.N.S.W.L.R.* 183. But *cf.* E. Evatt, 'Foreword', *id.*, vii.

⁷⁵ See above n. 48.

⁷⁶ For defences of the ideal see e.g. P. E. Nygh, 'Sexual Discrimination and the Family Court' (1985) 8 *U.N.S.W.L.R.* 62; J. F. Fogarty, 'Family Court - Possible Future Directions', *id.*, 204; H. A. Finlay, 'Fault and Violence in the Family Court of Australia' (1985) 59 *A.L.J.* 559.

appears to remain committed to the ideal, and has undertaken a program of 'renovation' of the Court,⁷⁷ with improved facilities and buildings, greater delegation of cases to registrars and magistrates, and measures to resolve many of the jurisdictional problems which have dogged the Court.⁷⁸ It remains to be seen whether these reforms will resolve the problems, or whether they are of a more basic, structural kind.⁷⁹

(iv) Administrative Review

Like other common law courts, Australian courts can review the legality of administrative decisions, and grant appropriate relief: the massive expansion of statutory executive powers in this century has been accompanied by a similar expansion of administrative law decision making by the courts, applying and extending common law principles. Although there are important differences in jurisdiction and in the remedies provided by statute, both within Australia and as compared with other common law countries such as the United Kingdom, Canada and New Zealand,⁸⁰ substantive doctrines of review are very similar, and have tended to be expanded along parallel lines in the various countries, with a good deal of mutual reinforcement and citation. Important though it is, the area of judicial review of administrative action is not, with minor exceptions, distinctive to Australia.⁸¹

On the other hand there have been important experiments with non-judicial review of administrative decisions, especially through the federal Administrative Appeals Tribunal (AAT), established in 1975.⁸² The AAT's function is not, or not primarily, to determine the legal validity of a federal administrative decision, but to 'review' it on the merits, as an independent authority. Although it will take note of administrative policy in particular areas it is not bound by such policies (unless they are given statutory force).⁸³ What it has to determine is whether the decision

⁷⁷ The term used by the Constitutional Commission, Australian Judicial System Committee, *Report* (1987) para. 3.137, 3.140. For the Attorney-General's announcement see *id.*, para. 3.138.

⁷⁸ Especially Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth); Commonwealth Powers (Family Law) Act 1987 (NSW) and SA, Tasmanian and Victorian equivalents.

⁷⁹ It has been suggested for example that the Court should be transformed into a division of the Federal Court, or into a federal trial court at District Court level. There is strong opposition to both proposals, including from the judges of the Federal Court and the Family Court itself. See the discussion of various suggested options by the Constitutional Commission, Australian Judicial System Committee, *Report* (1987) para. 3.117-141.

⁸⁰ The most important Australian innovation is the Administrative Decisions (Judicial Review) Act 1977 (Cth).

⁸¹ One feature is the limited extent to which the federal Parliament can immunize administrative decisions from judicial review, arising from the High Court's interpretation of s. 75(v) of the Constitution: see e.g. *R. v. Hickman, ex p. Fox & Clinton* (1945) 70 C.L.R. 598.

⁸² Only Victoria has an equivalent to the AAT: Administrative Appeals Tribunal Act 1984 (Vic.). The Act was in part inspired by a critical review of the working of Victorian tribunals by the Victorian Law Foundation, *Administrative Tribunals in Victoria* (1983), noted (1983) 8 *L.S.B.* 92. On the Victorian Act see E. Kyrou, *Victorian Administrative Law* (1985).

⁸³ *Re Georges & Minister for Immigration and Ethnic Affairs* (1978) 22 A.L.R. 667; *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577, 589-91; *Minister for Immigration and Ethnic Affairs v. Pochi* (1980) 31 A.L.R. 666. See J. Sharpe, *The Administrative Appeals Tribunal and Policy Review* (1986).

made is the preferable one, all things considered. It can review the facts of the case, and in many instances much more information becomes available through the arguments and investigations of the parties. It can also review the correctness of the application of the law to the facts, although as a non-judicial body it cannot decide questions of law or jurisdiction conclusively.

As at 30 June 1986 the AAT had jurisdiction to review decisions under a total of 236 Acts, regulations and ordinances,⁸⁴ a steep increase from 93 in 1980. The matters over which it has jurisdiction vary in importance, but they include decisions to deport persons under the Migration Act 1958 (Cth), appeals in federal tax matters, decisions of the Director General of Social Services which vary decisions of a Social Security Appeals Tribunal, and so on.⁸⁵ In its first three full years of operation the AAT averaged 288 applications for review annually.⁸⁶ For the three financial years from 1983-4 to 1985-6, that average had grown to 2160, an enormous increase, due in large part to new areas of jurisdiction.⁸⁷

Despite the conferral of jurisdiction over social welfare cases and taxation cases in 1980 and 1986 respectively, the AAT's jurisdiction still falls short of the original proposals made in the Kerr Report in 1971.⁸⁸ It is possible that the rather formal approach taken by the AAT in many cases, with a strict adversarial method and frequent use of legal representation, may deter further substantial increases in jurisdiction.⁸⁹ Within federal government departments different views are held as to the value of the AAT, at a time of financial restrictions in the public sector.⁹⁰ Perhaps the main argument against an AAT is that it leads to excessive legalism and formalism in administration, and tends to assimilate administrative to judicial decision-making.⁹¹ According to this view it is better to concentrate resources on improving primary administration, rather than on providing a more elaborate apparatus of appeals. Such criticisms have to meet the point that tribunals continue to be established in a diffuse and disorganized way, in which case what is at issue would

⁸⁴ Listed in Administrative Review Council (hereafter ARC), *Tenth Annual Report 1985-86* (1986) Appendix 4.

⁸⁵ On this jurisdiction see ARC 8, *Social Security Appeals* (1981); ARC 21, *The Structure and Form of Social Security Appeals* (1984).

⁸⁶ ARC, *Fourth Annual Report 1979-80* (1980) 64-8.

⁸⁷ In 1985-6, 29.5% of cases were social security appeals, 26.0% veterans' appeals, 11.2% freedom of information matters. See *Tenth Annual Report 1985-86* (1986). A significant feature of the jurisdiction has been the way in which new heads of jurisdiction initially attract a very large number of applications, which then reduces in size as the AAT establishes guidelines and principles appropriate to the area. Thus in 1982-3 social security appeals constituted 64.1% of all applications, in 1985-6, only 29.5% (in numerical terms, 1104 compared with 735).

⁸⁸ Commonwealth Administrative Law Committee, *Report* (1971) 86-92.

⁸⁹ See generally J. Goldring (ed), *The Workings of the Administrative Appeals Tribunal* (1980); G. Brennan, 'The Anatomy of an Administrative Decision' (1980) 9 *Sydney L.R.* 1.

⁹⁰ See e.g. the different assessments by Skehill, Broome & Davey, in Goldring (1980).

⁹¹ See e.g. B. Jinks, 'The "New Administrative Law": Some Assumptions and Questions' (1982) 41 *A.J. Pub. Adm.* 209.

seem to be not the 'tribunal' form of decision making so much as the independence or lack of it of tribunals.⁹² But on any view the AAT is an important experiment in public administration.

(c) *Conclusion*

Any proper study would require a far more comprehensive account of the similarities and differences between the Australian legal system and cognate systems abroad — and even then the assessment would be markedly subjective. What is clear is that the original heritage has been added to, principally by legislation, with the addition of a considerable number of institutions and structures distinctive either in conception or in the relatively thorough-going way in which they have been applied. Moreover the range of influences is now considerably wider. New developments are as likely to come from Canada, the United States or continental Europe as from the United Kingdom. Examples, adopted in the past 15 years, include the ombudsman, small claims courts, a judicial commission charged with 'judicial training' and exercising certain disciplinary powers,⁹³ and community justice or mediation centres.⁹⁴ There have also been advances in the monitoring of new or existing laws, through standing governmental bodies such as the Administrative Review Council or the Family Law Council, or through semi-governmental organizations such as the Australian Institute for Judicial Administration.⁹⁵ Whether all this amounts to an autochthonous, distinctively Australian legal system is perhaps not very important (there is certainly an 'Australian blend'). The degree of communication and borrowing between legal systems has increased markedly, as has the quantity of international legislation in the form of treaties regulating a wide variety of questions and requiring to be implemented as part of Australian law.⁹⁶ A more important question is whether the system meets the needs of the community, and in particular whether it allows effective democratic control to be exercised whenever necessary over powerful groups — foreign corporations, local conglomerates controlling particular sectors (mining, the media), the professions and so on. Those issues, still inadequately investigated, are among the most important areas for socio-legal study.

⁹² Cf. C. A. Hughes, 'Governmental Action and the Judicial Model' in A. Tay & E. Kamenka (eds), *Law-making in Australia* (1980) 263.

⁹³ Judicial Officers Act 1986 (NSW). The introduction of this legislation aroused great controversy: see Note (1987) 61 *A.L.J.* 157.

⁹⁴ The first Australian experiment was Community Justice Centres (Pilot Project) Act 1980 (NSW), made permanent after review. See Schwartzkoff & Mogan, *Community Justice Centres: A Report on the NSW Pilot Project 1979-1981* (1982); Community Justice Centres Act 1983 (NSW); R. Graycar, (1983) 1 *A.J. Law. & Soc.* 134; Evidence (Neighbourhood Mediation Centres) Act 1987 (Vic); J. Mugford (ed), *Alternative Dispute Resolution* (1987).

⁹⁵ See e.g. R. Cranston & Others, *Delays and Efficiency in Civil Litigation* (1985).

⁹⁶ See J. Crawford, 'The International Law Standard in the Statutes of Australia and the United Kingdom' (1979) 73 *A.J.I.L.* 628 for a quantitative review.

4. Trends and Prospects

One thing more difficult than reviewing the development of Australian law (whether as subject matter or social science) is predicting the future. But something can at least be said about some trends and prospects.

(a) *Centralism and the Accommodation of Regional Differences*

I have argued that the High Court is on firm constitutional ground in refusing to imply 'protected' State rights or powers into the Constitution, and that it is this consistent refusal, rather than any change in the composition of the Court, which has led to the present position of extensive federal legislative power. But the balance of political power in a federation is not wholly or even mainly a matter of the interpretation of a written document: to have legal power does not resolve the question whether or how it should be used. Claims after the *Tasmanian Dam* case, that 'federalism is dead' are thus not merely exaggerated but unfounded.⁹⁷ While State institutions remain, so will federalism, however muted, and the shape of federalism will be more the result of the interplay of those institutions and of public opinion than the product of legal doctrine.

On the other hand the 'dynamics' of federalism do point towards a greater use by the Commonwealth of its legislative powers, particularly in the area of corporate law and regulation. The uniform co-operative companies scheme is widely seen as inefficient and cumbersome and is ripe for replacement by a unified federal Act.⁹⁸ Similar moves for greater federal regulation are likely to occur in the area of the control of organized crime. On the other hand in many areas the case for federal involvement may be principally one of standard setting, as distinct from day-to-day administration, which may be more sensibly devolved to or left with the States. It should be noted that the external affairs power, which has been at the heart of much of the recent debate about the 'demise of federalism', is substantially a power to set minimum standards in accordance with international treaties, rather than a plenary power to regulate and administer the subject in question.

(b) *Legalism and its Alternatives*

One important theme in political science literature in Australia is that of 'legalism'. It is argued that the Australian polity turns to legalistic methods in order to solve essentially political or social problems. The debate is as much concerned with quasi-legal or para-legal bodies as with the ordinary courts. It relates to the use of quasi-legal tribunals to resolve

⁹⁷ G. Samuels comments that the argument that the High Court is undermining federalism disregards 'an authoritative interpretation of the relationship between the Commonwealth and the states which has stood unchallenged for over sixty years': 'The End of Federalism?' (1984) 56 *Aust. Q.* 11.

⁹⁸ See Senate Standing Committee on Constitutional and Legal Affairs, *The Role of Parliament in relation to the National Companies Scheme* (1987).

industrial issues, or of administrative tribunals to resolve policy or administrative issues for which governments should take responsibility themselves. It concerns also the role of *ad hoc* commissions of inquiry, which may be used not so much in a genuine search for 'the facts' as in an attempt to postpone political responsibility for decision making. (Incidentally there is also a continuing and lively controversy among judges as to when it is proper to accept extra-judicial roles of this kind, although that debate has been conducted largely in terms of judicial prestige and the separation of powers.)⁹⁹

It is not easy to reach any overall assessment of these arguments.¹⁰⁰ Federalism has often been equated with legalism, and it certainly means duplication. Judging by numbers of lawyers per unit of population, Australia ranks reasonably high on any international scale (though, of course, far behind the United States).¹⁰¹ But such comparative figures are relatively crude indicators, given the large number of variables, including the differing roles lawyers are called on to play in different societies.

An apparently inevitable trend, which Australia shares with other developed countries, is the trend towards increasing complexity of laws and legal disputes, especially in the areas of corporation law but also in certain areas of crime. This is giving rise to law cases of a size, complexity and cost which remind one of the famous and endless case of *Jarndyce v. Jarndyce* in Dickens' *Bleak House*, and which cast almost equal doubt on the capacity of the system to cope. This aspect of 'legalism', much less commented on, requires more attention to methods of judicial administration (until recently neglected in Australia), and willingness to experiment with new procedures. It is, for example, hard to see how the jury system can continue to work in criminal trials lasting nine months. More is needed than merely tinkering with the rules for the composition of juries: some form of interlocutory procedure in criminal cases, provision for formal admissions of fact, and reform and simplification of the law of evidence, are among the changes needing to be explored.¹⁰²

To some extent the increased length and complexity of legal disputes seems to be an inevitable result of technological changes and of the growth of corporatism in the private sector. If so it is unlikely to be affected by developments such as plain English legislative drafting,¹⁰³ or alternative

⁹⁹ See e.g. the statement of alternative views in Australian Institute of Judicial Administration, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (1986), and see further J. Crawford, *Australian Courts of Law* (1982) 56-8.

¹⁰⁰ On 'legalism' see e.g. G. S. Reid, 'The Parliamentary Contribution to Law-making' in A. Tay & E. Kamenka (eds), *Law-making in Australia* (1980) 116; J. P. Paul, 'Are Judicial Responsibilities Exceeding Judicial Capacities?' (1983) 27 *Quadrant* 55; S. N. Verdun-Jones, 'The Dawn of a "New Legalism" in Australia? The NSW Mental Health Act, 1983 and Related Legislation' (1986) 8 *Int. J.L. & Psych.* 95.

¹⁰¹ See the discussion, in the context of 'manpower planning', in D. Pearce, E. Campbell & D. Harding, *Australian Law Schools. A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) ch. 14.

¹⁰² See e.g. P. Sallmann, *Report on Criminal Trials* (AIJA/Victorian Bar, 1985); R. Cranston *et al*, *Delays and Efficiency in Civil Litigation* (1985) esp. Part IV. On reform of the law of evidence see A.L.R.C. 38, *Evidence* (1987).

¹⁰³ See Victorian Law Reform Commission, DP 1, *Legislation, Legal Rights and Plain English* (1986).

dispute resolution, however valuable these may be in themselves. The alternative dispute resolution movement is a good example of the way in which new initiatives, often presented as ways of stemming the tide of legalism and reducing the cost of legal proceedings, may be extending the 'legal domain' to new areas of dispute not previously covered by it. But another danger with such developments is that they may transfer cases which require adjudication into a forum where 'mediation' leads to a compromise of rights in favour of the more powerful party. The New South Wales community justice centres were specifically designed to avoid this, and have apparently succeeded in doing so. If so, it is because they have excluded from their scope most disputes which presently come before courts or tribunals.¹⁰⁴

The point is that one function of law is to confer rights in situations of relative inequality of bargaining power. Increasingly those rights—especially against governments—are of a procedural character, rights to due process.¹⁰⁵ It seems likely that there will be a growth of similar kinds of rights in the corporate sector, which (especially with 'deregulation' and 'privatisation') is likely to take on still further the role of a 'private government' in certain fields. But a characteristic of procedural rights is that they usually require specific adjudication: whether a particular opportunity to present a case amounted to a 'hearing', whether 'irrelevant considerations' were taken into account, are not questions which lend themselves to decision by rule. Individual decision-making, which is the focus of most administrative law and which the rules of administrative law tend to reinforce and extend, requires individual consideration on appeal or review. Whether it is not more efficient to settle some kinds of cases by rule, even at some cost to individual cases, may be a real issue—it is one reason for the adoption of no-fault compensation schemes for personal injury.¹⁰⁶ Either way lawyers are likely to be called on, in courts or tribunals, to apply the alternative structures. In short, it is difficult to see an end to 'legalism', a by-product of a process of conferring and extending rights (including rights to individual consideration or due process) which shows no sign of stopping.

(c) *Law Reform*

A cynic would define 'law reform' as the process of seeking to change the law described by those with an interest in change. A substantial point underlying the cynicism is that, in considering proposals for law reform, it is essential to look at indirect costs and effects, as well as the more obvious or substantive arguments for change. Standing law reform agencies

¹⁰⁴ See Schwartzkoff & Mogan, *Community Justice Centres: A Report on the NSW Pilot Project 1979-1981* (1982) 179-90 for a good discussion of these issues.

¹⁰⁵ In Australia, lacking a bill of rights, the term 'due process' is rarely used—rather the established phrases of administrative law: natural justice, legitimate expectation, relevant considerations etc.

¹⁰⁶ See T. Ison, *The Forensic Lottery* (1967). The NSW scheme (Transport Accidents Act 1987 (NSW)) by contrast retains the fault principle and thus succeeds in getting the worst of both worlds.

in Australia are, in my experience, well aware of this, but the techniques of legal cost-benefit analysis are still rudimentary, and the law and economics movement, itself underrepresented in Australia, has tended to get bogged down in ideological debates having little to do with 'efficiency'.

What the enthusiast would describe as the law reform agenda still contains many items, despite the effects of the 'first wave' of law reform which began in the early 1970s. Considerable attention has been given, for example, to the possibility of constitutional reform, first through the Australian Constitutional Convention (1973-85), and more recently through the Constitutional Commission. The failure of the Convention, which combined the deliberations of politicians and quite extensive preparatory work by sub-committees with expert assistance, only reinforced stereotypes of Australian constitutional inertia. It remains to be seen whether the Constitutional Commission, a smaller body assisted by five specialist committees, will have any greater success. Certainly any proposals for change are likely, after the combined work of Convention and Commission, to be well considered.¹⁰⁷

Less spectacular but equally important is the work of the increasing number of law reform agencies established in the last 15 years.¹⁰⁸ They will no doubt continue to deal with substantive subjects, but as suggested, perhaps their most important role in the next decade—whether or not it is dignified as a 'second phase' of law reform—should be to examine a range of legal and administrative procedures and structures, in the interests of effectiveness and efficiency. To some extent this is happening already, with work on criminal procedure, judicial administration and plain English drafting. But much more needs to be done, for example in the area of comparative cost-benefit analysis of different methods (judicial, quasi-judicial and administrative) of dispute resolution, and the availability and effect of legal aid programs. The old reproach, that the law, like the Ritz, is open to all, is increasingly justified for litigants without legal aid or other sources of legal assistance. As the costs of litigation are increasingly met, directly and indirectly, from public funds so the public interest in procedural efficiency increases.

An area of 'law reform' which has so far had limited acceptance is the proposal for a Bill of Rights. Three different federal Bills, each based substantially on the International Covenant on Civil and Political Rights of 1966, have been introduced since 1973. In each case the proposal has been repulsed, amid much invective in a debate which has seemed less well informed as successive Bills have been watered down.¹⁰⁹ The only area of change has been that of discrimination, with federal legislation on race (1975) and sex (1983) discrimination, and with equal opportunity legislation

¹⁰⁷ See Constitutional Commission, *Australia's Constitution. Time to Update* (1987) for a summary of the proposals of the Advisory Committees.

¹⁰⁸ Their recommendations are conveniently tabulated in ALRC, *The Law Reform Digest 1910-1980* (1983) (with periodic supplements).

¹⁰⁹ Human Rights Bill 1973 (Cth); Australian Bill of Rights Bill 1984 (Cth); Australian Bill of Rights Bill 1985 (Cth).

in some States. In addition there have been not one but two versions of a federal human rights commission, with the function of educating about human rights and conciliating complaints, but without any enforcement powers.¹¹⁰

Apart from these institutional arrangements, the courts retain important responsibilities for law-making and thus for 'law reform'. Indeed some topics may be more appropriate for 'gradual' reform through the judicial process than for legislative change, especially of a detailed kind. For example in one case where the High Court refused to extend the standing of a conservation group to challenge non-compliance with statutory procedures, Stephen, J. commented that:

If the present state of the law in Australia is to be changed, it is pre-eminently a case for legislation, preceded by careful consideration and report, so that any need for relaxation in the requirements of locus standi may be fully explored and the limits of desirable relaxation precisely defined. Just such an investigation is at present being undertaken by the Australian Law Reform Commission.¹¹¹

But the Australian Law Reform Commission report which resulted from this inquiry, and which did recommend a substantial extension in the law of standing, has not been implemented: the Commission's recommendation is seen as politically too controversial.¹¹² By contrast in England an almost identical outcome was achieved by a series of judicial decisions based on an apparently slight change in wording in the Rules of the Supreme Court.¹¹³ Evidently there are more ways than one of extending rights.

5. Conclusion

An account of two centuries of Australian law should, no doubt, come to a resounding conclusion, with far-reaching prophecies as to the future. Personally I have little faith in prophecies, especially my own. Nor are lawyers much good at prophesying. The great American academic lawyer and judge, Felix Frankfurter, commented that 'to give shape and visage to mysteries still in the womb of time . . . requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop'.¹¹⁴ Judges are lawyers well-promoted, but otherwise fairly characteristic of the breed. When asked to predict the future, a lawyer's characteristic response is to look for a precedent!

¹¹⁰ Human Rights Commission Act 1981 (Cth); Human Rights and Equal Opportunity Commission Act 1986 (Cth).

¹¹¹ *Australian Conservation Foundation v. Commonwealth* (1980) 146 C.L.R. 493, 540.

¹¹² A.L.R.C. 27, *Standing in Public Interest Litigation* (1985).

¹¹³ See e.g. *Gouriet v. Union of Post Office Workers* [1978] A.C. 435; *R. v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617. Australian courts seem now to be moving in the same direction: *Onus v. Alcoa of Australia Ltd.* (1982) 149 C.L.R. 27; *Davis v. Commonwealth* (1986) 68 A.L.R. 18.

¹¹⁴ F. Frankfurter, *Of Law and Men* (1956) 39.

The habit of searching for and relying on precedents itself ensures that the legal issues and problems of the future will tend to be addressed through the received array of concepts and terms. And there are other reasons why legal change in Australia is likely to be gradual, with the future emerging by osmosis, apparent on reflection rather than through revelation. They include the failure of the movement for an enforceable bill of rights, the unlikelihood of other major constitutional, or indeed institutional, changes, and the increasing interpenetration of the Australian economy and polity by international influences and institutions, which, without world war or economic collapse, will continue to work in an evolutionary, diffusely-organized way. If the future holds a 'big bang', it is unlikely to be produced by the lawyers, however much they may claim to control it afterwards.