The Decline of Federalism?

Sir Harry Gibbs Formerly Chief Justice of the High Court of Australia.*

There can be no doubt that the framers of the Australian Constitution intended that it should establish a federal government in the true sense. That conclusion is inescapable, whether one has regard to the Constitution itself, which appears to limit and restrict Commonwealth powers and to leave the residue of power to the States, or to the debates at the constitutional conventions, which generally proceeded on the assumption that State functions would include, as Griffith said, 'almost all matters which have a direct bearing on the social and material welfare of the people'.[1] The purpose of this paper is to discuss the extent to which that intention has been defeated with the result that the Constitution has progressed, or perhaps one should say degenerated, in the direction of centralisation.

It is desirable, at the outset, to consider what federalism means. Not every association of states has a federal government; for example, the U.S.S.R., before it disintegrated, was not a federation and neither is the Union of South Africa. The essential character of a federation is that the component states should be independent of the central government, and of course the central government should also be independent of the component states. Professor Wheare defined the federal principle strictly; he regarded it as the method of dividing powers so that the general and regional governments should be independent each of the others within their own spheres; they should be coordinate with each other and not subordinate to one another.[2] It followed, in his opinion, that both general and regional governments must each have under its own independent control financial resources sufficient to perform its exclusive functions; each must be financially coordinate with the other.[3] Other writers have emphasised the need for the independence of the respective governments in a federation. Sir Robert Garran defined federalism as 'a form of government in which sovereign or political power is divided between the central and the local governments, so that each of them within its own sphere is independent of the other'.[4] The distinguished economist, Lady Hicks, spoke of 'the classic image of a federation with each level of government supreme and independent within its own sphere'.[5] Professor Sawer did not go quite as far; instead of regarding independence as the criterion he said that in a federation there should be 'a relation between the governing units such that each has a reasonable degree of autonomy within its prescribed competence [and] an inability of any one unit to destroy at will the autonomy of the others'.[6] He added that the possibility of *de facto* coercion or inducement of one government by another should not be such as to impair in a substantial way the legal autonomy of the weaker unit.

There is of course no academic model to which a federation must conform, but a polity cannot be called federal unless the regional governments — that is, in Australia the

* A paper delivered at the Annual Symposium of the T C Beirne School of Law, the University of Queensland, 29 October 1993.

1 See L Zines, 'The Federal Balance and the Position of the States', in G Graven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Sydney: Legal Books Pty Ltd, 1986), 77.

2 K C Wheare, *Federal Government* (4th ed, New York: Oxford University Press, 1964), 10, 12, 14, 35, 93.

3 *Id* 93.

4 Wheare, *supra* note 2, 14.

5 U K Hicks, *Federalism: Failure and Success A Comparative Study* (London: MacMillan, 1978), 145.

6 G Sawer, *Australian Federalisn in the Courts* (Carlton: Melbourne University Press, 1967), 1.

States — have powers which the central government is not able to render inoperative and unless the regional governments have the ability to provide themselves with the finances necessary to enable their powers to be exercised. Under the Constitution as it has been interpreted by the High Court, it seems that neither of these conditions exists. If that is so, the reason why Australia remains a federation is not because in legal theory its Constitution is now federal in character, but because in practice the political influence of the States, and perhaps the strength of public opinion, is such that the nation remains a federation for practical purposes.

The question whether the States have powers and functions which are independent of the Commonwealth, or which cannot be destroyed or substantially impaired by the exercise of Commonwealth powers, depends on the manner in which the powers conferred on the Commonwealth by the Constitution are interpreted. If the powers of the Commonwealth are capable of indefinite expansion it must follow that the powers of the States are at risk of annihilation. Ever since 1920 the powers of the Commonwealth have been interpreted in a way that attaches no real significance to the constitutional position of the States. Two strands of theory, in particular, have led to this position. First, there is the principle, enunciated by O'Connor J in the *Jumbunna* case, and often since applied that:

> [W]here it becomes a question of construing words used in conferring a power ... on the Commonwealth Parliament, it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.
>
> For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should ... always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.[7]

There was nothing new or surprising in that statement. The view that the words of a Constitution should be given a generous interpretation had been suggested by Marshall CJ in *Gibbons* v *Ogden*[8] and has subsequently been accepted by the Privy Council in interpreting the constitutional provisions of former British Colonies.[9] The second principle, laid down in the *Engineers Case*,[10] is on its face equally unsurprising. That is, that the words of the Constitution are to be read in their natural sense and 'if the text is explicit, the text is conclusive'. In that case the Court did appear to acknowledge that when the text is ambiguous, recourse must be had to the context and scheme of the Constitution but in reaching its decision it gave no weight to the fact that the Constitution was that of a federation and not of a unitary state. As Dixon CJ subsequently pointed out in *Melbourne Corporation* v *The Commonwealth*[11] the effect of the *Engineers Case* was that a power to legislate with reference to a given subject enables the Parliament of the Commonwealth to make laws which, upon that subject, affect the operation of the States and their agencies. A constitutional power conferred on the Commonwealth will not be read down by reference to an assumption that some specific heads of power were granted or reserved to the States.[12]

However, the High Court has held that the legislative powers of the Commonwealth are subject to an implied limitation that they cannot be exercised in a manner which would be inconsistent with the continued existence of the States and their capacity to

7 *The Jumbunna Coal Mine, No Liability* v *The Victorian Coal Miners Association*, (1908) 6 CLR 309, 367–368.
8 9 Wheat 1.
9 *Ong Ah Chuan* v *Public Prosecutor* [1981] AC 648, 670.
10 *The Amalgamated Society of Engineers* v *The Adelaide Steamship Company Limited* (1920) 28 CLR 129, 148–152.
11 (1947) 74 CLR 31, 78–9.
12 *In re Foreman & Sons Pty Ltd; Uther* v *Federal Commissioner of Taxation* (1947) 74 CLR 508, 530.

function or which would involve a discriminatory attack upon a State in the exercise of its executive authority.[13] The principle that a Commonwealth law cannot validly impose on the authorities of the State special burdens and disabilities which are not imposed on other persons generally is firmly established.[14] It was recently said in *Australian Capital Television Pty Ltd* v *The Commonwealth*[15] that the inference to be drawn from the continuance of the States as independent bodies politic with their own constitutions and representative legislatures is that, subject to a plain intention to the contrary, the powers of the Commonwealth do not extend to interfering in the constitutional and electoral processes of the States. Those implied restrictions on Commonwealth power have not, however, been held to require that any limit should be placed on the powers of the Commonwealth in response to the need to preserve the scope of the legislative powers of the States.[16] Only a grudging and minimal recognition is allowed to the fact that the Constitution is federal in character when the question arises how the words of the Constitution which grant powers to the Commonwealth should be construed. The fact that the Constitution is a federal one has been allowed to play no significant part in determining the meaning and scope of the various powers conferred by s 51 of the Constitution.

It may well be that the federal context of the Constitution in itself provides little assistance in deciding upon the scope of some of the provisions of the Constitution. Section 109, for example, which has the effect that a Commonwealth law prevails over a State law to the extent of any inconsistency between them, has been of great importance in strengthening Commonwealth power at the expense of that of the States. It is obviously necessary in any federal constitution that some provision should be made, either expressly or by implication, for the situation in which the laws of the central and regional legislatures conflict. Even if the powers of the Commonwealth Parliament are strictly confined, direct inconsistency with State law can arise. However, the principle formulated by Isaacs J in *Clyde Engineering Co* v *Cowburn*[17] and adopted in subsequent cases, that there is inconsistency when the Commonwealth legislature expressly or impliedly evinces an intention to cover the whole field, and a State legislature assumes to enter to any extent on the same field, has been most influential in ensuring the predominance of Commonwealth power at the expense of that of the States. The adoption of that test no doubt indicates that the Courts have favoured a centralist point of view rather than a federal one. Nevertheless, logically it can hardly be said that the fact that the Constitution is federal in character indicates either that the wider test of inconsistency should be adopted or that it should not.

Similarly, it may be said that the federal nature of the Constitution provides no sure guide in deciding whether many of the provisions of s 51 of the Constitution which confer powers on the Commonwealth Parliament should be given a wider or narrower meaning. For example, the fact that Australia is a federation gives no indication of the extent to which the powers conferred on the Commonwealth with reference to 'trade and commerce with other countries, and among the States' (s 51(i)), or 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' (s 51(xx)) should be given a wider or narrower meaning. On the other hand, it may be that too little attention has been paid to the context of the Constitution, and that generosity of interpretation was carried a little far, in the line of decisions that held that a union can cre-

13 *Commonwealth* v *Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1, 281; see also 128, 169, 215, 220–1.

14 See *Queensland Electricity Commission* v *The Commonwealth* (1985) 159 CLR 192.

15 (1992) 177 CLR 106, 242.

16 Cf *Secretary, Department of Health and Community Services* v *JWB (Marion's Case)* (1992) 175 CLR 218, 261.

17 (1926) 37 CLR 466, 489.

ate an industrial dispute extending beyond the limits of any one State, within s 51(xxxv) of the Constitution, by making a demand on employers in different States, even if an employer on whom the demand is made has no argument with his or her own employees and does not employ any member of the union which made the demand.[18] That question may, however, be no more than academic if, as the Commonwealth claims, and as appears possible, the Commonwealth has power to regulate the conditions of employment of any employees by recourse to the power given by s 51(xxix) of the Constitution. That power, to legislate with regard to 'external affairs', has been given an interpretation 'which ... proceeds without regard to the context of par (xxix) in s 51 and to the federal character of the Constitution' to repeat the words of Wilson J in *Richardson* v *Forestry Commission.*[19]

It is unnecessary for present purposes to attempt to give a full account of the scope of the external affairs powers as interpreted particularly in *Koowarta* v *Bjelke-Petersen,*[20] the *Tasmanian Dam Case*[21] and *Richardson* v *Forestry Commission.*[22] The later decision in *Polyukhovich* v *The Commonwealth*[23] deals with a different aspect of the power and one with which I am not now concerned. The cases established that the Commonwealth has power to execute within Australia the provisions of treaties and conventions entered into with foreign powers regardless of the fact that their subject matter does not affect relations with other countries and is not otherwise of international concern. Indeed, it appears that the power is not limited to the carrying out of obligations actually imposed by a treaty which Australia is bound to implement. Indeed, on one view it is not necessary that there should be a treaty at all if the law is passed to obtain an international benefit. However, it hardly matters whether the power goes beyond giving effect to treaties, since already there is in existence a multitude of treaties — the number 1600 has been suggested — which cover a wide field of social, cultural, religious, industrial, economic, environmental, educational, medical, legal and other matters.[24] There are, of course, some limits to s 51(xxix); it has been said that if the law gives effect to a treaty it must conform to the treaty and carry its provisions into effect, and speaking more generally it has been said that the law must be capable of being considered to be reasonably appropriate and adapted to achieve whatever it is that gives it its character with respect to international affairs. Further, it has been said that an international agreement entered into merely as a device to confer legislative power on the Commonwealth Parliament would not be enough. These qualifications do little to narrow the extraordinary width of the power.

Under Australian law the Executive can enter into and ratify treaties without the authority or approval of the Parliament. There is no limit to the matters that may be dealt with by a treaty and the Executive is free to enter into an international agreement binding Australia to conduct its internal affairs in a particular manner, even though the Parliament has no power, apart from that given by s 51(xxix) to legislate with regard to such affairs. The result is that the legislative power of the Commonwealth can be expanded by Executive action and the expansion can be wide enough to extend over almost all, if not all, of the matters within State legislative power. The grant of power to the Commonwealth by s 51 becomes quite irrelevant. The extent to which the Commonwealth can go in legislat-

18 *Burwood Cinema Ltd* v *Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528; *Metal Trades Employees' Association* v *Amalgamated Engineering Union* (1935) 54 CLR 387; *The King* v *Blakeley; ex parte Association of Architects etc of Australia* (1950) 82 CLR 54; *The Queen* v *Cohen; ex parte Attorney-General (Qld)* (1981) 157 CLR 331.

19 (1988) 164 CLR 261, 298.

20 (1982) 153 CLR 168.

21 (1983) 158 CLR 1.

22 (1988) 164 CLR 261, 298.

23 (1991) 172 CLR 501.

24 See P Durack QC, 'The External Affairs Power — What is to be done?' in *Upholding The Australian Constitution*, vol 2 (Melbourne: The Samuel Griffith Society, 1993), 211, 222.

ing under s 51(xxix) has been illustrated by the cases I have already mentioned and in particular by the striking decision in the first *Mabo* case[25] which had the effect that a law passed under the external affairs power has imposed a fetter on the power of State Parliaments to legislate with respect to the title to lands within their boundaries.

The doctrine that the Commonwealth cannot legislate in a way that is inconsistent with the continued existence of a State becomes rather a mockery if the Commonwealth nevertheless has power to legislate in a way that will enable it if it wishes to render most or all State powers ineffective. It appears no exaggeration to say that the combined effect of s 51(xxix) and s 109 is that the Commonwealth can annihilate State legislative power in virtually every respect. Mr D F Jackson, QC has rightly observed 'that in the future the issue between State and Commonwealth Governments is more likely to be whether the Commonwealth power should be exercised, rather than whether it exists. In other words, the resolution of the issue is likely to be by political, rather than by legal, means'.[26]

There is another constitutional provision which has enabled the Commonwealth to invade many areas which under the Constitution one would expect to be within the province of the States. That is s 96 which provides that: 'During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'. The opening words of the section, and the reference to ten years which also appears in s 87 (the Braddon clause) suggests, as Sir Owen Dixon has said, that it may well be that s 96 was conceived by the framers as a transitional power.[27] However, the section now occupies a prominent place in our constitutional system and an important one. It is established that a grant of financial assistance and the conditions to which it is subject will be valid although a State is bound to apply the money to a defined purpose which is outside the power of the Commonwealth to effect directly.[28] Thus, although the Commonwealth is not given any express power by the Constitution to deal with such matters as the provision of roads, health, education, housing or legal aid, grants are made to the States to be applied for those purposes subject to very detailed conditions as to the way in which the States should perform their functions.

By reason of the effect of s 96, and to a lesser but increasing extent of s 51(xxix), there has grown a Commonwealth bureaucracy which duplicates that of the States. Australians complain that they are over-governed; the fault largely lies with the Commonwealth for its intrusion into areas already served by the States.

I have suggested that if the Constitution is to be truly federal in character it will satisfy two criteria: the State will have power which the Commonwealth cannot defeat at will and the States will have the capacity to raise for themselves the finances necessary to perform their functions. Section 96 has detracted from the second of these *desiderata* as well as from the first. It was partly in reliance on s 96 that the Commonwealth in 1942 devised a scheme which prevented the States from raising income taxes. As part of that scheme the Commonwealth imposed income tax at rates high enough to raise annual revenue approximately equal to the total of the amounts previously raised by the Commonwealth and the States and granted to each State financial assistance substantially equivalent to the tax which it had previously raised on condition that it levied no income tax. The high rate at which the Commonwealth tax was imposed made it practically impossible for the States to impose further income taxes, and although the States were not compelled to accept the additional grants they had no practicable alternative but to accept them. After the

25 *Mabo* v *Queensland* (No 1) (1988) 166 CLR 186.
26 D F Jackson, 'Federalism in the Future: The Impact of Recent Developments' (1984) 58 *Australian Law Journal* 438, 447.
27 *Victoria* v *The Commonwealth* (1957) 99 CLR 575, 609.
28 *Id* 606–7.

Second World War the Commonwealth decided to continue uniform taxation indefinitely. Although the original scheme has been abandoned and the condition that the States should not levy income tax no longer applies, the States are still for practical purposes excluded from the field of income tax.

One feature of the 1942 scheme was that it included legislation giving priority to the liability to pay Commonwealth taxation over the liability to pay State taxation. This legislation was held to be valid.[29] Professor Wheare considered that this decision meant that the federal principle does not appear to find a place in the Constitution so far as the taxing power is concerned.[30] In theory the Commonwealth could similarly give priority to the collection of all Commonwealth taxation and if this were raised at high enough levels it could have the practical result of making it impossible for the States to collect any taxes.

In actual practice the States raise for themselves less than half of the revenue they need for their own purposes. They rely on Commonwealth grants for about fifty-five per cent of their revenue. On the other hand, the Commonwealth raises more than seventy-five per cent of all taxes levied in Australia although its expenditure only represents about fifty per cent of all governmental expenditure. The fact that the Commonwealth raises many millions of dollars more than it needs for its own purposes and that the States raise much less than they need for their purposes imposes a strain on the working of the federal system; it puts the financial relationship between the States and the Commonwealth out of balance. The result is a reduction of accountability, because the Commonwealth raises money although it is not responsible for the way in which it is spent while the States spend money although they are not responsible for the manner in which it is raised.

Another provision which has been interpreted in a way that imposes difficulties for the States in their financial arrangements is s 90 which makes the power of the Commonwealth Parliament to impose duties of customs and excise exclusive. The expression 'duties of excise' is one which has no fixed connotation and it has been necessary to attribute some rather artificial meaning to the expression where it appears in s 90. It seems apparent that it was originally intended that there should be a close connection between duties of excise and duties of customs but in a number of High Court cases effect has been given to the view that the section was intended to have some wider economic purpose with the result that the scope of the section, and accordingly the extent of the limitation of the taxing power of the States, has been broadened. There has been no agreement as to the constitutional purpose of the section[31] and in those circumstances it might have been thought that there was no constitutional reason to give it a wider interpretation. State taxes on the sale and production of goods have been held to be duties of excise but licence fees calculated by reference to sales and purchases made in a period other than the licence period, and imposed in relation to the sale of tobacco and alcohol, have been held not to be excises.[32] However, licence fees calculated in that way have been held to be excises when imposed in relation to the processing of fish or the slaughtering of meat.[33] The distinction seems irrational, and the whole question whether licence fees imposed in that way are duties of excise is under consideration in the High Court at the moment.[34] The decision in that case may remove some of the uncertainty that attends the section at present, but whether it will reduce the deleterious effect of the section on Commonwealth-State financial relations is another question. The restriction of the taxing base of the States brought

29 *South Australia* v *The Commonwealth* (1942) 65 CLR 373.
30 Wheare, *supra* note 2, 107.
31 *Philip Morris Ltd* v *Commissioner for Business Franchises (Victoria)* (1989) 167 CLR 399, 425.
32 *Dennis Hotels Pty Ltd* v *Victoria* (1960) 104 CLR 529; *Dickenson's Arcade Pty Ltd* v *Tasmania* (1974) 130 CLR 177; *Philip Morris Ltd* v *Commissioner for Business Franchises (Victoria)* (1989) 167 CLR 399.
33 *MG Kailis (1962) Pty Ltd* v *Western Australia* (1974) 130 CLR 245; *Gosford Meats Pty Ltd* v *New South Wales* (1985) 155 CLR 368.
34 *Rainsong Holdings Pty Ltd* v *ACT; Capital Duplicators (NSW)* v *ACT.*

about by s 90 does not, in my opinion, significantly assist the Commonwealth to control the economy but it forces the States to resort to taxes (such as payroll tax) which from an economic point of view are far from satisfactory.

It will be seen that there are grave dangers, in theory, to the survival of a true federal system in Australia and considerable deficiencies in practice, in the working of the system. Unfortunately, the values of federalism are not widely understood. As Lady Hicks has pointed out a federation is inherently democratic. The division of power which it involves is a more effective check on the abuse of governmental power than any bill of rights can ever be.[35] In the case of a nation, such as Australia, which covers a far flung geographical area, a federal system enables that level of government which ought to be most directly concerned with the ordinary affairs of the people — that is the States — to be close enough to the people to have a true understanding of local feeling and local needs. Although there are those who urge that the Commonwealth would benefit if it had increased powers to control the economy, economists such as Professor Kasper have persuasively argued the superior advantages of competitive federalism.[36] Experience of the management of the economy by the Commonwealth does not necessarily inspire complete confidence in the superior virtues of centralised economic power. Nor, for that matter, does the increased influence of the Commonwealth on such matters formerly managed by the States as education make one believe that it will always be beneficial to give increased powers to Canberra. Whatever views may be held on these matters one argument which seems to me to be quite unanswerable is that there is little or no likelihood that the States will be abolished in the foreseeable future, and that accordingly the federal system for which our Constitution was designed to provide should be made to work effectively and without a costly and inefficient duplication of effort.

The nature of the malady is apparent, but it is not so easy to prescribe the remedy. Indeed, thinking of the way the Constitution has step by step descended downwards from the original idea of federalism, I have inevitably been reminded of the well known lines of Virgil (Aeneid, VI, 126):

> Facilis descensus Averno ...
> Sed revocare gradum, superasque evadere ad auras,
> Hoc opus, hic labor est.
> (Easy is the descent to Avernus, but to retrace one's footsteps, and ascend again to the upper air — that is the labour, that is the toil).

All constitutional reform, by way of the referendum process, is difficult to achieve, and the reform of Commonwealth-State relations is particularly difficult to effect because opposed views are strongly held as to the direction reform should take. I have so little confidence that constitutional reform can be effected in this area that it almost seems idle to canvas the various measures that might be taken to restore true federalism in Australia. The gravest danger to the federal system lies in the increasing use of the external affairs power. Since there seems little prospect that the High Court will depart from its present views as to the scope of s 51(xxix), the most desirable course would be the adoption of a constitutional amendment to restrict the application of the paragraph, perhaps along the lines of the bill introduced by Senator Durack in the Senate in 1984 which sought to ensure that the power does not authorise the Federal Parliament to make laws regulating persons, matters or things in the Commonwealth except to the extent that:

35 Hicks, *supra* note 5, 4.

36 W Kasper, 'Making Federalism Flourish' in *Upholding the Constitution*, vol 2 (Melbourne: The Samuel Griffith Society, 1993), 167; W Kasper, 'Competitive Federalism, May the Best State Win' in *Restoring the True Republic* (St Leonards: Centre for Independent Studies, 1993), 53.

(a) Those persons, matters or things have a substantial relationship to other countries or to persons, matters or things outside the Commonwealth; or

(b) The laws relate to the movement of persons, matters or things into or out of the Commonwealth.

Clearly, also, s 90 should be amended so that the power of the Commonwealth to impose duties of excise is no longer exclusive. The section in its present form places arbitrary and unnecessary restrictions on the extent of State taxing powers without conferring any real fiscal or economic advantage on the Commonwealth. Section 96 presents greater difficulties. It would not be possible to change the present system merely by amending s 96 in such a way that the Commonwealth no longer had the power to impose terms and conditions on grants of financial assistance. As Sir John Latham indicated in the *First Uniform Tax Case*[37] the Commonwealth Parliament, in a Grants Act, might simply provide for the payment of moneys to States, without attaching any conditions whatever, but might nevertheless determine the amount of the grants by its satisfaction with the policies of the respective States. Indeed, on one view, which I do not share, it is possible that even in the absence of s 96, the Commonwealth might be able to rely on the appropriation power given by s 81 of the Constitution to make grants for purposes outside the Commonwealth powers.[38] It is no doubt possible by constitutional amendment to restrict the sort of grants that the Commonwealth could make, but it would be very difficult to devise a formula which would be effective yet would not prevent the Commonwealth from making grants for purposes which, although not within its powers, should be made in the national interest.

In the end, the best hope for the survival of federalism in Australia lies in the recognition, by politicians of all parties and at all levels of government, and by the public, of the value, and indeed the necessity, of the maintenance of a real, workable federal system in Australia. The prospects of such general recognition do not look very bright at the moment but one can only hope that the weaknesses of the present system will be appreciated and that an effort will be made to make the Constitution work more as it was intended by the framers to do.

I should however add this. Australia, like some other countries that have inherited British constitutions, but like few others, has enjoyed a long period of internal peace and stability. Our Constitution is therefore not without merits. It is also not without faults. The defect which most deserves attention is the lack of balance in our federal institutions. If any reforms are to be made, that is the area to which attention should be directed. Other suggested changes which receive more public attention, such as the suggested movement towards a republic, if adopted, will not in any way improve the working of the Constitution.

37 *South Australia* v *The Commonwealth* (1942) 65 CLR 373, 429.
38 *Victoria* v *The Commonwealth and Hayden* (1975) 134 CLR 338.