

CONSTITUTIONAL ALTERATION AND THE HIGH COURT: THE JURISPRUDENCE OF JUSTICE CALLINAN

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Justice Callinan has rightly commented that ‘it is not only risky but also of doubtful utility to pin a label on a particular judge’.¹ This is because, in his view, ‘there is no single methodology by which the work of the Court, including its Constitutional work can be performed’.² Justice Callinan has been described by Selway J³ as falling within the ‘flexible five’ on the High Court – a description in which Callinan J has revelled.⁴ He has also been described by Andrew Lynch as the ‘most statistically unpredictable member’ of the High Court.⁵

Yet despite the flexibility he has shown in constitutional interpretation, there is one distinct trait that marks Callinan J’s approach to constitutional interpretation. It is his view that the purpose of the Constitution is to provide stability and certainty and that it may only be altered by the Australian people through a referendum, not by the courts. This is evident in his judgments that address the relationship between constitutional interpretation and referenda, the theory of evolutionary constitutional interpretation and the drawing of implications from the Constitution.

I CONSTITUTIONAL AMENDMENTS AND REFERENDA

A *The Reason for Placing Limitations on the Power to Amend Constitutions*

In *Attorney-General (WA) v Marquet*, Callinan J considered the question of the extent to which one Parliament should be able to bind a future Parliament. In doing so he considered the role of a Constitution and the significance of constitutional rigidity. He commented:

The ... whole intention of a constitution is to provide for the community that it is to govern a degree of genuine and effective, but not entirely inflexible, stability and certainty. The preference by and

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¹ I D F Callinan, ‘The Queensland Contribution to the High Court’ in M White QC and A Rahemtula (eds), *Queensland Judges on the High Court* (2003) 199, 215.

² Ibid 216.

³ Bradley M Selway, ‘Methodologies of constitutional interpretation in the High Court of Australia’ (2003) 14 *Public Law Review* 234, 246.

⁴ Callinan, above n 1, 214.

⁵ Andrew Lynch, ‘The High Court on Constitutional Law: The 2007 Statistics’ (2008) 31(1) *University of New South Wales Law Journal* 238, 253.

large of common law countries (apart from the United Kingdom) has been for Constitutions which are alterable in compliance only with a more strict, and, it may be accepted, less accessible process than the mere enactment of other, non-constitutional legislation. Section 128 of the *Constitution* of this country is itself an example of a provision requiring compliance with a strict process for its operation.⁶

Justice Callinan saw the purpose of State manner and form provisions as immunising a constitutional provision from change, ‘consistently with the notion that constitutional change should be a matter of careful and detailed deliberation.’⁷ One of the difficulties of constitutional change through constitutional interpretation is that a court is ill-equipped to take into account all the policy considerations that should form part of that careful and detailed deliberation.⁸ A court’s reinterpretation of the Constitution may also give rise to significant uncertainty both because it may affect the validity of past actions⁹ and because it may not provide sufficient guidance for the future.¹⁰ These concerns feature strongly in Callinan J’s jurisprudence.

B *The Relationship Between s 128 of the Constitution and Constitutional Interpretation*

Section 128 of the Constitution provides that ‘[t]his Constitution shall not be altered except in the following manner’. It then sets out the procedure for parliamentary passage of a constitutional amendment and for its submission to, and approval by, electors in a referendum. While it is the case that the text of the Constitution cannot be altered except by the means set out in s 128,¹¹ the operation of the Constitution may be altered by other mechanisms, such as s 51(xxxvii), s 51(xxxviii) and s 105A of the Constitution, each of which may permit the Commonwealth Parliament to exercise powers otherwise not available to it under the Constitution.¹²

The operation of the Constitution may also be affected by the High Court’s interpretation of its terms. The difficulty here is to draw a line between constitutional interpretation and constitutional alteration. At what

⁶ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 629 [268].

⁷ *Ibid* 632 [274].

⁸ *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 337 [346] (Callinan J).

⁹ *Sue v Hill* (1999) 199 CLR 462, 571-2 (Callinan J).

¹⁰ I D F Callinan, ‘An Over-Mighty Court’ (Summer 1995-6) *Refresher* 34, 41.

¹¹ This is subject to the theoretical argument that s 15 of the *Australia Acts 1986* could be used to effect a constitutional amendment.

¹² Note also Sampford’s argument that certain executive acts expand the legislative powers of the Commonwealth, such as ratifying a treaty or declaring war: C Sampford, ‘Some Limitations on Constitutional Change’ (1979) 12 *Melbourne University Law Review* 210, 212.

point, if any, does the High Court usurp the role of the people by altering the Constitution?¹³ Is there a fixed meaning of the Constitution from which it is illegitimate to depart without seeking the approval of the people through a referendum? Did the framers of the Constitution intend that the Constitution's meaning remain static until altered by the people in a referendum,¹⁴ or did they intend for it to be interpreted in an 'evolutionary' or 'dynamic' fashion?¹⁵ Must constitutional interpretation be incremental in nature, leaving major changes to the people through referenda?¹⁶ Should what Kirby J has described as 'the discouraging history of referendum proposals under s 128 of the Constitution'¹⁷ affect a judge's attitude towards the latitude allowed to him or her in constitutional interpretation?

Michael Coper has noted that s 128 of the Constitution is viewed in different ways by judges. Some see it as the authoritative or preferable means of changing the Constitution. Others see it as a 'safety-valve' to be used when incremental interpretation by the High Court has gone too far or not far enough.¹⁸ Attitudes towards change may also affect the status given to s 128 by the judges and their view of the limits of constitutional interpretation. Coper observed:

Those broadly in favour of change and impatient with our failure to achieve it tend to characterise the process as difficult and the negative results as explicable by anything other than a genuine understanding by the electorate of the issues. Those broadly against change ... tend to see the electorate as appropriately wise. And no doubt the same can be said of the judges themselves: ... the judge who perceives the Australian voter to be ignorant, apathetic, cynical, perverse or some terrifying combination of all of these qualities may view his or her role rather differently from the judge who sees the Australian voter as brimming with robust good sense.¹⁹

¹³ Note the criticism by Saunders of the suggestion that the High Court usurps the role of the people: Cheryl Saunders, 'Oration – Sir Daryl Dawson' (1998) 20 *Adelaide Law Review* 1, 9.

¹⁴ Greg Craven, 'The High Court of Australia: A Study in the Abuse of Power' (1999) 22 *University of New South Wales Law Journal* 216.

¹⁵ Sir Anthony Mason, 'Constitutional Interpretation: Some Thoughts' (1998) 20 *Adelaide Law Review* 49; Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323. Cf Greg Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists?' (2003) 31 *Federal Law Review* 87.

¹⁶ Note the statement by Kirby J that 'a major shift would normally require the concurrence of Australian electors in accordance with s 128 of the Constitution': *New South Wales v Commonwealth* (2006) 229 CLR 1, 225 [541].

¹⁷ *R v Hughes* (2000) 202 CLR 535, 562-3 [59] (Kirby J).

¹⁸ Michael Coper, 'The People and the Judges: Constitutional Referendums and Judicial Interpretation' in Geoff Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 87.

¹⁹ *Ibid.*

The relationship between the amendment mechanism and judicial latitude in constitutional interpretation was the subject of debate in State constitutional conventions in the United States in the early part of the twentieth century. Delegates to constitutional conventions argued that if the amendment procedure were made more flexible, judges would no longer feel the need to update the Constitution by constitutional interpretation. Such a task could safely be left to formal constitutional amendment.²⁰ In Australia, Harrison Moore initially thought that the ‘great facility, with which the Australian Constitution may be altered, makes it probable, that its development will be guided, less by judicial interpretation and more by formal amendment, than the development of the Constitution of the United States’.²¹ This prediction was excluded from the second edition of his work in 1910,²² and since then judicial interpretation has taken on a far more significant role in constitutional change than formal amendment.

The pitiful Australian record of constitutional amendment at the national level has affected the view of some judges regarding their role in interpreting the Constitution. In attacking the arguments of the critics of liberal constitutional interpretation, Sir Anthony Mason contended that they ‘overlook the fact that the process of amendment is so exceptional, so cumbersome and so inconvenient that governments cannot set it in motion regularly to ensure that the Constitution is continuously updated’.²³ Others, however, have regarded such an argument as striking ‘at the heart of popular democracy’.²⁴

Originalists, while being accused of worshipping the dead hands of the framers of the Constitution, often place a greater emphasis upon the current role of the people in formal constitutional amendment. As Craven has observed, it is ‘not dead Founders, but live voters’ who have the last word on constitutional change.²⁵ Jeffrey Goldsworthy has summarised the originalist position as follows:

²⁰ John J Dinan, *The American State Constitutional Tradition* (2006) 50-1.

²¹ W Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902) 332. See also: J A La Nauze, *The Making of the Australian Constitution* (1972) 287.

²² See: W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 621-2, where he simply noted the difficulty of amending the United States Constitution and the risk that judges may ‘interpret opinion rather than law’.

²³ Sir Anthony Mason, ‘The role of a constitutional court in a federation: A comparison of the Australian and the United States experience’ in Geoff Lindell (ed), *The Mason Papers* (2007) 110, 134. See also: Coper, above n 18, 87.

²⁴ Craven, above n 14, 232.

²⁵ *Ibid.*

Originalism is motivated not by misplaced respect for people in the past, but by a proper respect for people in the present – namely, the electors of Australia and their elected representatives, who, pursuant to s 128 of the *Constitution*, have exclusive authority to change their own *Constitution*. Originalism is concerned to ensure that their authority is not usurped by a small group of unelected judges, who are authorised only to interpret the *Constitution*, and not to change it ... Section 128 should not be evaded by lawyers and judges disguising substantive constitutional change as interpretation. In addition, originalism is concerned to ensure that the consent of a majority of electors in a majority of states be expressly obtained, as s 128 also requires. This federal constraint on constitutional change would be all too easily bypassed by judges presuming to divine the ‘contemporary needs and values’ of the nation as a whole.²⁶

This respect for the role of the people, the reference to the intention of the framers and the desire to maintain federal constraints on constitutional change, are all reflected in the jurisprudence of Callinan J. He has neither been prepared to ‘write s 128 out of the *Constitution*’,²⁷ nor to interpret the Constitution in such a manner as ‘to enable the court to supplant the people’s voice under s 128 of it.’²⁸ The inter-relationship between the will of the people, the need for stability and the role of federalism was made clear by Callinan J in *New South Wales v Commonwealth* (the ‘*Work Choices Case*’) where he stated:

The language of s 128 of the *Constitution* has bearing upon the meaning of other sections of the *Constitution*. It places the States [in] a special position with respect to constitutional stability. Read with s 107 it necessarily imposes a limitation upon any expansion of central power and is not to be circumvented by judicial intervention. It is also of central importance to other matters: the federal balance and the continued existence of discrete State powers. The requirement that for constitutional change there must be a majority of votes *in a majority of the States* makes this clear.²⁹

C *The Relevance of Constitutional Referenda to Constitutional Interpretation*

There is a symbiotic relationship between High Court jurisprudence and constitutional referenda. Judgments of the High Court that have identified limits on Commonwealth legislative power have given rise to constitutional

²⁶ Jeffrey Goldsworthy, ‘Interpreting the *Constitution* in its Second Century’ (2000) 24 *Melbourne University Law Review* 677, 683-4.

²⁷ *New South Wales v Commonwealth* (2006) 229 CLR 1, 304 [738] (Callinan J).

²⁸ *Ibid* [772] (Callinan J).

²⁹ (2006) 229 CLR 1, 343 [820] (emphasis in original).

referenda to override the effect of the High Court's decision, most of which have failed. On the other hand, where the people in a referendum have refused to grant the Commonwealth a particular legislative power, the High Court has on occasion later reinterpreted the Constitution so the Commonwealth can exercise the power denied to it by the people. In some cases judgments and referenda create a complete circle. Examples include the following.³⁰

Trade Practices: In 1908 the High Court held that the Commonwealth did not have power to legislate with respect to restrictive trade practices.³¹ Referenda were held to give the Commonwealth this power in 1911, 1913, 1919, 1926 and 1944. They all failed. Eventually, in 1971 the High Court in *Strickland v Rocla Concrete Pipes Ltd*³² overruled its earlier decision and the Commonwealth was able to exercise a power that it had been denied on five occasions.

Aviation: In 1936 the High Court held that neither the external affairs power nor the trade and commerce power were sufficient to support regulations with respect to aviation.³³ A referendum was held in 1937 to give the Commonwealth legislative power with respect to aviation, but it failed. The Commonwealth now has legislative power with respect to aviation through the reinterpretation of the trade and commerce power,³⁴ the external affairs power,³⁵ and the corporations power.³⁶

Marketing Schemes: In 1936 the Privy Council held that Commonwealth marketing schemes were in breach of s 92 of the Constitution.³⁷ In 1937 and 1946 referenda were held to give the Commonwealth legislative power to control the marketing of primary products. They failed. The High Court's change in the

³⁰ See further: Coper, above n 18, 78-80.

³¹ *Huddart Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330.

³² (1971) 124 CLR 468.

³³ *R v Burgess; Ex parte Henry* (1936) 55 CLR 608.

³⁴ *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54.

³⁵ *Commonwealth v Tasmania* (1983) 158 CLR 1.

³⁶ *New South Wales v Commonwealth* (2006) 229 CLR 1.

³⁷ *James v Commonwealth* (1936) 55 CLR 1. This decision overturned the High Court's finding in *W A McArthur Ltd v Queensland* (1920) 28 CLR 530 that the Commonwealth was not bound by s 92 of the Constitution.

interpretation of s 92³⁸ now means that Commonwealth marketing schemes are unlikely to be invalid.³⁹

Social Services: In 1945 the High Court struck down the validity of the *Pharmaceutical Benefits Act 1944* (Cth) and lent doubt to the reliance on s 81 of the Constitution to support the provision of other forms of social security benefits.⁴⁰ In 1946 a referendum was held to insert s 51(xxiiiA) in the Constitution to allow the Commonwealth to provide a range of pensions and social security benefits. The referendum passed. In 1975 the High Court rejected a challenge to appropriations for social security services outside the scope of s 51(xxiiiA).⁴¹ Although the mixed views of the majority make this authority equivocal, there appears to be a general assumption that the Commonwealth may now appropriate money for any purpose it fixes upon,⁴² rendering s 51(xxiiiA) unnecessary.

Communist Party Dissolution: In 1951 the High Court in the '*Communist Party Case*' struck down as invalid Commonwealth legislation to dissolve the Australian Communist Party.⁴³ In 1951 a referendum was held to give the Commonwealth Parliament legislative power with respect to communists and communism where this was necessary for the security of the Commonwealth. It failed to pass. In *Thomas v Mowbray* the High Court broadened the scope of the defence power and undermined (although it did not formally overrule) aspects of the *Communist Party Case*.⁴⁴

Corporations Power: The High Court's interpretation of the limitations on the corporations power and the industrial relations power led to referenda to expand the scope of one or both of these powers in 1911, 1913, 1919, 1926, 1944 and 1946. All were rejected. In 2005 the High Court reinterpreted the corporations power in a manner that effectively removed previous limitations on it and rendered the industrial relations power largely redundant.⁴⁵

³⁸ *Cole v Whitfield* (1988) 165 CLR 360.

³⁹ P D Connolly, 'Cole v Whitfield – The Repeal of Section 92 of the Constitution?' (1991) 16 *University of Queensland Law Journal* 290.

⁴⁰ *Attorney-General (Vic); (ex rel Dale) v Commonwealth* (1945) 71 CLR 237.

⁴¹ *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338.

⁴² See, eg, *Davis v Commonwealth* (1988) 166 CLR 79, per Mason CJ Deane and Gaudron JJ at 95; and *Combet v Commonwealth* (2005) 224 CLR 494 per Gleeson CJ at [5].

⁴³ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁴⁴ *Thomas v Mowbray* (2007) 237 ALR 194. Note in particular Callinan J's attack on the majority in the *Communist Party Case* at [583]-[585].

⁴⁵ *New South Wales v Commonwealth* (2006) 229 CLR 1.

Universal Franchise: The Constitution does not provide for a universal franchise. Instead, it originally imposed the franchise of the States (which excluded many groups from voting) and then left the franchise to the Commonwealth Parliament to determine. In 1974 and 1988 referenda were held to impose a universal franchise (subject to exclusions for persons of unsound mind and prisoners). Both failed. The High Court has now implied the existence of a universal franchise and struck down as invalid laws denying all prisoners the right to vote.⁴⁶

Despite this long history, until recently, rarely has the High Court taken into account failed referenda or sought to identify the original intent concerning successful referenda, when interpreting the Commonwealth Constitution. Indeed, to do so was sometimes considered completely inappropriate.⁴⁷ The first substantial discussion of a referendum took place in 1949 when both Latham CJ and Williams J considered the meaning of s 51(xxiiiA) of the Constitution, which had been inserted by a successful referendum in 1946. In interpreting the provision, they contrasted its reference to ‘civil conscription’ against the phrase ‘industrial conscription’ used in a failed referendum question in 1946 and the genesis of that phrase in earlier defence legislation.⁴⁸ Williams J also referred to the High Court decision that struck down the *Pharmaceutical Benefits Act 1944*⁴⁹ as the reason for the insertion of s 51(xxiiiA) in the Constitution and interpreted its main ‘purpose’ in that light.⁵⁰ There was also a brief reference in 1977 to the success of the referendum which allowed territory voters to vote in referenda under s 128 of the Constitution. Two judges, when considering whether territory voters could elect Senate representatives, noted the anomaly that would arise if territory voters could vote in referenda but not for representatives in the Commonwealth Parliament.⁵¹ Justice Jacobs, however, did not see this potential anomaly as reason not to overturn a previous decision if it were wrong.⁵²

It was not until the 1990s, however, that the relevance of both successful and failed referenda became the subject of substantive argument

⁴⁶ *Roach v Electoral Commissioner* (2007) 239 ALR 1.

⁴⁷ See, eg, T C Brennan, *Interpreting the Constitution* (1935) 99.

⁴⁸ *British Medical Association v Commonwealth* (1949) 79 CLR 201, 249 (Latham CJ), 285-7 (Williams J).

⁴⁹ *Attorney-General (Vic); (ex rel Dale) v Commonwealth* (1945) 71 CLR 237.

⁵⁰ *British Medical Association v Commonwealth* (1949) 79 CLR 201, 285-6 (Williams J).

⁵¹ *Queensland v Commonwealth* (1977) 139 CLR 585, 607 (Mason J), 608 (Jacobs J).

⁵² *Ibid* 608 (Jacobs J).

before the High Court⁵³ and later started to appear in judgments. For example, in 1995 McHugh J noted the failure of referenda in 1974 and 1988 to entrench the principle of one vote one value. He concluded that this showed ‘that the Australian people do not regard one vote one value as an essential requirement of representative democracy’.⁵⁴

The following year Dawson J pointed to the Commonwealth’s frustration with the limitations on its industrial relations power and the failed referenda of 1911, 1913, 1919, 1926 and 1946 by which it tried to overturn these limitations. His Honour concluded that it is ‘ironical, to say the least, that the Commonwealth should seek and, upon the view adopted by the majority in these cases, find in the external affairs power a way to disregard the restrictions imposed upon it by s 51(xxxv) and to legislate in a manner denied to it by the continued refusal of the electors to amend the Constitution.’⁵⁵

In contrast, in 1997 in *Newcrest Mining (WA) v Commonwealth*, Kirby J was fairly scathing about the relevance of the failure of the 1988 referendum concerning the compulsory acquisition of property. He found the ‘notion that the court should stay its hand because of the rejection of the constitutional referendum in 1988’ to be ‘the least convincing reason of all’.⁵⁶ He noted that the referendum question contained several proposals, any one of which could have caused its failure, and that political factors may have played a part. He also suggested that the Australian people would have been ‘blissfully ignorant’ about the relevance of the referendum to the ‘*Teori Tau Case*’.⁵⁷

The interpretation of a successful constitutional amendment was raised in *Kartinyeri v Commonwealth*.⁵⁸ Although Callinan J heard argument in this case, he later disqualified himself from handing down a judgment because he had previously advised on the statute in question.⁵⁹ One of the arguments in *Kartinyeri* was that the ‘intention’ of the 1967 referendum in amending s 51(xxvi) of the Constitution was that the power only be used for the benefit or advantage of Aboriginal people. Chief Justice Brennan and McHugh J did not need to address this issue as they resolved the case on another basis. The other members of the High Court considered the

⁵³ *New South Wales v Commonwealth* (1990) 169 CLR 482, 489 (summary of argument). For a more detailed account of the transcript of argument see: Coper, above n 18, 81.

⁵⁴ *McGinty v Western Australia* (1995) 186 CLR 140, 246, 248 (McHugh J). See also McHugh J’s similar approach in *Cheng v The Queen* (2000) 203 CLR 248, at 299, taking into account the rejection in 1988 of proposed amendments to s 80 of the Constitution.

⁵⁵ *Victoria v Commonwealth* (1996) 187 CLR 416, 565 (Dawson J).

⁵⁶ (1997) 190 CLR 513, 647 (Kirby J) (*Newcrest Mining*).

⁵⁷ *Ibid* 647 (Kirby J), referring to *Teori Tau v Commonwealth* (1969) 119 CLR 564.

⁵⁸ (1998) 195 CLR 337.

⁵⁹ Nicholas Hasluck, ‘Ian David Francis Callinan’ in T Blackshield, M Coper and G Williams, *The Oxford Companion to the High Court of Australia* (2001) 79.

parliamentary debates on the proposed amendment and the official ‘Yes’ case, but formed different conclusions. Justice Gaudron, while previously being sympathetic to the benefit argument,⁶⁰ ultimately rejected it because it was inconsistent with the effect of the referendum, which was to delete an exception or limitation on power. The effect was therefore to augment the Commonwealth’s legislative power, not limit its application to laws with a beneficial application.⁶¹ Justices Gummow and Hayne thought that the circumstances surrounding the passage of the 1967 amendment, ‘assuming regard may properly be had to them’, indicated an aspiration to benefit Aboriginal people, but no limitation on Parliament’s powers.⁶²

Justice Kirby, however, pointed out that none of the parties had objected to the Court considering the parliamentary debates of the 1960s and the materials prepared for the 1967 referendum ‘in order to secure a general understanding of the ... object of the constitutional alteration approved at referendum in 1967.’⁶³ His Honour observed that:

[T]he Parliamentary debates, and the referendum materials, may be used in the same way as the Court now uses the Convention Debates. This is to understand the cause which occasioned the amendment of the Constitution and to help resolve ambiguities in the resulting text. The search is not for the private intentions of the Members of Parliament who spoke in the debates. Nor is it for the undiscoverable subjective intentions of the electors involved in the exceptional law-making process required by s 128 of the Constitution. It is to help to derive the meaning of the Constitution, where amended, on the basis of a thorough understanding of the reasons for the amendment and of the means by which it came about.⁶⁴

Justice Kirby concluded that it was the ‘clear and unanimous object of the Parliament in proposing the amendment to par (xxvi)’ to alter the Constitution in a manner that did not permit the making of laws detrimental to or discriminatory against Aboriginal people.⁶⁵ His Honour observed that ‘[t]his Court should take notice of the history of the amendment and the circumstances surrounding it in giving meaning to the amended paragraph.’⁶⁶

⁶⁰ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 56 (Gaudron J).

⁶¹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 363 [32] (Gaudron J).

⁶² *Ibid* 382-3, [91], [94] (Gummow and Hayne JJ).

⁶³ *Ibid* 393 [117] (Kirby J). Note, however, that Callinan J had raised concerns that the use of this material might breach parliamentary privilege: Transcript of Proceedings, *Kartinyeri v Commonwealth* (High Court of Australia, Callinan J, 5 February 1998, 35-6).

⁶⁴ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 401 [132] (Kirby J).

⁶⁵ *Ibid* 413 [157] (Kirby J).

⁶⁶ *Ibid* 413 [157] (Kirby J).

In *Re Governor, Goulburn Correctional Centre; ex parte Eastman*, reference was made to the referenda of 1977 in two different contexts. On the one hand, counsel argued that it was ‘significant that the 1977 referendum in dealing with s 72 proposed no change’ regarding the status of territory courts outside of Chapter III of the Constitution.⁶⁷ Thus an attempt was made to draw significance from what was not included in a referendum. In contrast, Kirby J considered that ‘[i]f any inferences spring from the 1977 referendums, they point away from the early notions that territories were in a state of “tutelage” to the Commonwealth’.⁶⁸ This was because territory voters obtained the right to vote in constitutional referenda under s 128.

In *Durham Holdings Pty Ltd v New South Wales*, it was argued that the courts should recognise as a ‘fundamental common law right’, the right to receive just terms compensation if one’s property is compulsorily acquired by a State.⁶⁹ In the New South Wales Court of Appeal, Spigelman CJ (with whom Handley and Giles JJA agreed) rejected this submission. His Honour noted that such a proposal had been defeated by the Australian people in a referendum in 1988, albeit as one of four amendments put as a single question.⁷⁰ He concluded that the ‘courts should not change the constitutional law of the States in a manner which the people of the States have so recently rejected.’⁷¹

On appeal to the High Court, Kirby J also addressed the relevance of past referenda for constitutional interpretation. This time, in contrast to his approach in *Newcrest Mining*, Kirby J saw greater significance in the rejection of the 1988 referendum. His Honour said:

Where the Constitution is amended pursuant to referendum, it is permissible, in my view, to take into account the history and purpose of the change that is thereby effected. If this aid to construction is available where an amendment is adopted, I see no reason to reject it where an amendment is proposed but fails. It is true that defeat of a proposal may be explained by many reasons. These may include the fact that the proposal was combined with other amendments, arguably more controversial ...

Nevertheless, the rejection by the electors of the Commonwealth (including those in New South Wales) of a proposed amendment to the federal Constitution, which would have prevented or invalidated legislation such as the amending legislation adopted by the New

⁶⁷ (1999) 200 CLR 322, 326 (Gummow SC, during argument).

⁶⁸ *Ibid* 383 [153] (Kirby J).

⁶⁹ Section 51(xxxi) of the Commonwealth Constitution requires just terms compensation to be paid where property is compulsorily acquired under a Commonwealth law, but the attempt by referendum to extend its application to compulsory acquisitions under State laws failed in 1988.

⁷⁰ *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340, 365 [106] (Spigelman CJ).

⁷¹ *Ibid* [107] (Spigelman CJ).

South Wales Parliament in 1990, suggests a reason for special caution when this Court is invited, but twelve years later, effectively to impose on the Constitution of the State a requirement which the electors, given the chance, declined to adopt.⁷²

D *Justice Callinan on the Relevance of Referenda to Constitutional Interpretation*

The above history provides the context for Callinan J's approach to the relationship between referenda and constitutional interpretation. In the *Work Choices Case*,⁷³ Callinan J quoted, with approval, the second paragraph above from Kirby J's judgment in *Durham Holdings*. Justice Callinan referred to the constitutional referenda of 1911, 1913, 1926 and 1946 by which the Commonwealth had sought, but failed, to expand its legislative power with respect to industrial affairs and corporations.⁷⁴

Justice Callinan then observed:

What happened in the referenda to which I have referred is particularly compelling because of the repetitiveness and ingenuity of the attempts made by the Commonwealth to gain the power which in this case it now says it has always had. The Court should not disregard that history. The people have too often rejected an extension of power to do what the Act seeks to do for that. To ignore the history would be, not only to treat s 128 of the *Constitution* as irrelevant, but *also* for the Court to subvert democratic federalism for which the structure and text of the *Constitution* provide.⁷⁵

In contrast, the majority in the *Work Choices Case* rejected the relevance of prior failed referenda. Their Honours stated that there were 'insuperable difficulties in arguing from the failure of a proposal for constitutional amendment to any conclusion about the *Constitution's* meaning.'⁷⁶ They first noted that there was a problem of equivalence between the scope of a failed constitutional amendment and the question that fell for determination in the case.⁷⁷ Their Honours then added:

⁷² *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 428 [64]-[65] (Kirby J). See also: *Re Pacific Coal; Ex parte CFMEU* (2000) 203 CLR 346, 441 [277] (Kirby J); *New South Wales v Commonwealth* (2006) 229 CLR 1, [466]-[468], [614] (Kirby J).

⁷³ *New South Wales v Commonwealth* (2006) 229 CLR 1, 299 [731] (Callinan J).

⁷⁴ *Ibid* 285-99 [708]-[730]. See also two referenda in 1919 and 1944 that sought to give the Commonwealth temporary legislative powers with respect to corporations.

⁷⁵ *Ibid* 299 [732].

⁷⁶ *Ibid* 100 [131] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁷⁷ *Ibid* 100 [131]. See also: Coper, above n 18, 80.

Secondly, ... few referendums have succeeded. It is altogether too simple to treat each of those rejections as the informed choice of electors between clearly identified constitutional alternatives. The truth of the matter is much more complex than that. For example, party politics is of no little consequence to the outcome of any referendum proposal. And much may turn upon the way in which the proposal is put and considered in the course of public debate about it. Yet it is suggested that failure of the referendum casts light on the meaning of the *Constitution*.

Finally, is the rejection of the proposal to be taken as confirming what is and always has been the meaning of the *Constitution*, or is it said that it works some change of meaning? If it is the former, what exactly is the use that is being made of the failed proposal? If it is the latter, how is that done? The plaintiffs offered no answers to these questions.⁷⁸

Justice Callinan responded by arguing that the 'joint reasons attach too little weight to the intelligence and common sense of voters in a referendum'. He stated that he was 'not prepared to regard the people as uninformed'.⁷⁹ He added:

To the extent that the joint reasons suggest the contrary, or that the failure of most referenda in some way justifies the taking by this Court of an activist expansive or different view of the meaning of the *Constitution* from that which prompted Parliament's attempt to change it, I am unable to agree with them.⁸⁰

Justice Callinan rejected the suggestion that because s 128 raises a high hurdle for constitutional change, the Court should take on the role of keeping the Constitution up-to-date. He concluded that if 'Parliament cannot persuade the people to change, it is not for this Court to treat the people's will as irrelevant by making the change for them'.⁸¹

As for the argument about whether a failed referendum can affect the interpretation of constitutional terms, Callinan J responded that:

The meaning of the words of the *Constitution* may not change following, and as a result of the failure of a referendum, but it is a distortion of reality to treat the failure as other than reinforcing the

⁷⁸ Ibid 101 [132]-[133] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁷⁹ Ibid 300 [733].

⁸⁰ Ibid.

⁸¹ Ibid 300 [735].

received meaning of the words which prompted the attempt to change or enlarge them.⁸²

E *Does the High Court Have Equal Standing with the People to Alter the Constitution?*

Perhaps the most provocative statement made by the majority of the High Court in the *Work Choices Case* was its attempt to equate the High Court's power to interpret the Constitution with the power of the people to alter the Constitution. Their Honours said:

Chapter III, particularly s 76(i), indicates that the determination of matters arising under or involving the interpretation of the *Constitution* is committed to the judicial power of the Commonwealth. The phrase 'or involving its [the *Constitution's*] interpretation' encompasses later curial disputation concerning earlier decisions respecting the *Constitution*. Such decisions may also be followed by the passage of a proposed law for the alteration of the text of the *Constitution* pursuant to s 128. But the opening words of s 128, '[t]his Constitution shall not be altered except in the following manner ...', must be read with those of Ch III to which reference is made above.⁸³

By this statement the High Court appears to seek to arrogate to itself a power of constitutional alteration through interpretation⁸⁴ which is equal to that of the people in a referendum under s 128.

Justice Callinan responded by rejecting the argument that the High Court has an equal or higher status than the people in amending the Constitution. He contended:

Section 128 is not expressed to be subject to any other provision of the *Constitution*. And of course it is not. It is an overarching provision. It is certainly not to be trumped by Ch III of the *Constitution*. If it were, the Court would be elevated above the people. The power to make laws constitutionally granted by s 76(i), which provides that the Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under the *Constitution* or involving its interpretation, does not vest political power in the Court. Its purpose is to give the High Court, as a final court, additional, that is to say an original jurisdiction in various federal matters. It is a power to *confer* judicial and not political power upon the Court. Section 76(i) certainly cannot and

⁸² Ibid.

⁸³ Ibid 101 [134] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁸⁴ Ibid 311 [755] (Callinan J), referring to an earlier statement by Barwick CJ.

does not ‘commit’ political power to the Court, or, to put it another way, empower the Court to substitute itself for the people voting in a referendum. The words ‘involving [the Constitution’s] interpretation’, beyond all doubt, cannot be read as ‘involving its alteration’.⁸⁵

This passage sums up Callinan J’s view of the role of the High Court and the importance of maintaining the rights and role of the people under s 128 of the Constitution.

II EVOLUTIONARY CONSTITUTIONAL INTERPRETATION

His respect for the role of the people in amending the Constitution and his concern to maintain the stability and certainty that constitutional rigidity is intended to achieve, are both evident in Callinan J’s general approach to constitutional interpretation. Justice Callinan has taken the view that if the Constitution is interpreted to mean something different from what was intended when it was enacted, then the judges are using their power to interpret, as a power to alter the Constitution, contrary to the requirements of s 128 of the Constitution.⁸⁶

This approach requires the Court to consider the original intent of the framers where the meaning of the Constitution is not manifest on its face. Justice Heydon has described Callinan J as falling within the category of originalists who seek to find the actual intentions of the founders rather than the meaning of the words in 1900.⁸⁷ However, Callinan J’s approach often appeared to be broader, as is indicated by his views in *Singh v Commonwealth*:

There is no doubt that the common law and the founders’ understanding of it heavily informed the language of the *Constitution*. So too of course did history and contemporary perceptions of mischiefs to be dealt with and objectives to be attained. The Court is not only, in my opinion, entitled, but also obliged, to have regard to the Convention Debates when, as is often the case, recourse to them is relevant and informative.⁸⁸

His Honour frequently resorted to the Convention debates when considering the meaning of constitutional provisions.⁸⁹ He also considered

⁸⁵ Ibid 343-4 [820] (emphasis in original).

⁸⁶ For a similar argument see: Craven, above n 15, 88.

⁸⁷ Justice J D Heydon, ‘Theories of constitutional interpretation: a taxonomy’ (Winter 2007) *Bar News – The Journal of the NSW Bar Association*, 12, 19.

⁸⁸ *Singh v Commonwealth* (2004) 222 CLR 322, 423-4 [293].

⁸⁹ See, eg, *Re Wakim; Ex parte McNally* (1998) 198 CLR 511, 620-1 [242]-[244]; *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 438-9 [133]-[136]; *Smith v ANL Ltd* (2000) 204 CLR 493, 542 [156]; *Ruhani v Director of Police* (2005)

that material in the Convention debates that showed what the framers deliberately excluded could be as illuminating as evidence of what parties to a contract deliberately excluded, in negating any implication of a term.⁹⁰

In *XYZ v Commonwealth*, Callinan and Heydon JJ, in a joint judgment, rejected the interpretation of ‘external affairs’ by reference to what it means ‘to us as later twentieth century Australians’, in favour of the view that constitutional words bear the meaning ‘they bore in the circumstances of their enactment by the Imperial Parliament in 1900’.⁹¹ Their Honours referred not only to what was said of the subject ‘external affairs’ prior to federation, but also to the understanding of contemporaries of federation as expressed in their later writings.⁹²

Justice Callinan noted in *Singh v Commonwealth* that the change in meaning of language is very slow and tends to affect popular culture more than the fundamental principles and legal concepts expressed in the Constitution.⁹³ Hence he considered that linguistic change was not usually a sufficient excuse to depart from the original intent of the Constitution. He accepted, however, that the interpretation by the High Court in *Cheatle v The Queen*⁹⁴ of the term ‘jury’ and in *Grain Pool (WA) v The Commonwealth*⁹⁵ of the term ‘patent’ was correct even though it was different from what was contemplated by the framers of the Constitution.⁹⁶ Indeed, his Honour was a contributor to a joint judgment in *Grain Pool* that acknowledged the ‘dynamism which, even in 1900, was inherent in any understanding of the terms used in s 51(xviii)’ of the Constitution.⁹⁷ However, in *XYZ v Commonwealth* he explained that where a constitutional expression was subject to ‘dynamism’, the meaning that should be attributed to it is that

222 CLR 489, 573 [286] (Callinan and Heydon JJ); *New South Wales v Commonwealth* (2006) 229 CLR 1, [696], [838]-[843]; *Attorney-General (Vic) v Andrews* (2007) 233 ALR 389, [174]-[175]; *Thomas v Mowbray* (2007) 237 ALR 194, [605]-[606]; *White v Director of Military Prosecutions* (2007) 235 ALR 455, [237], [241].

⁹⁰ *Singh v Commonwealth* (2004) 222 CLR 322, 425 [295].

⁹¹ *XYZ v Commonwealth* (2006) 227 CLR 532, 583 [153] (Callinan and Heydon JJ) quoting from *King v Jones* (1972) 128 CLR 221, 229 (Barwick CJ).

⁹² *XYZ v Commonwealth* (2006) 227 CLR 532, 588-90 [165]-[170] (Callinan and Heydon JJ)

⁹³ *Singh v Commonwealth* (2004) 222 CLR 322, 424 [295]. Cf Christopher Birch, ‘Mill, Frege and the High Court: The connotation/denotation distinction in constitutional interpretation’ (2003) 23 *Australian Bar Review* 296, 311.

⁹⁴ (1993) 177 CLR 541.

⁹⁵ (2000) 202 CLR 479.

⁹⁶ *Singh v Commonwealth* (2004) 222 CLR 322, [296]. Note, however, the analysis of Selway J of the distinction between the approach of the majority in these two cases and the absence of any explanation for that difference: Selway, above n 3, 244.

⁹⁷ *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479, 496 [23] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

which skilled lawyers and other informed observers of the federation period 'would reasonably have considered it might bear in future'.⁹⁸

His Honour considered that the 'substance and the essence of the concept of trial by jury remain unchanged' and that the nature of intellectual property is such that it embraces change 'not so much in meaning as in scope'.⁹⁹ As for the meaning of 'alien', Callinan J noted that the scope of the term 'can be affected by changes in the identity of the sovereign and the boundaries of the sovereign's territory', but that this does not alter the meaning of the word.¹⁰⁰

His Honour warned:

Judges should in my opinion be especially vigilant to recognise and eschew what is in substance a constitutional change under a false rubric of a perceived change in the meaning of a word, or an expression used in the *Constitution*. That power, to effect a Constitutional change, resides exclusively in the Australian people pursuant to s 128 of the *Constitution* and is not to be usurped by either the courts or the Parliament ... The constitutional conservatism of the Australian people reflected in the failure of so many referenda cannot justify a supposed antidote of judicial 'progressivism'.¹⁰¹

Justice Callinan was also strongly critical of the theory of evolutionary constitutional interpretation in *Sue v Hill*. There he stated:

The evolutionary theory is, with respect, a theory to be regarded with great caution. In propounding it, neither the petitioners nor the Commonwealth identify a date upon which the evolution became complete, in the sense that, as and from it, the United Kingdom was a foreign power ...

The great concern about an evolutionary theory of this kind is the doubt to which it gives rise with respect to peoples' rights, status and obligations as this case shows. The truth is that the defining event in practice will, and can only be a decision of this Court ruling that the evolutionary process is complete, and here, as the petitioners and the Commonwealth accept, has been complete for some unascertained and unascertainable time in the past. In reality, a decision of this Court upon that basis would change the law by holding that notwithstanding that the Constitution did not treat the

⁹⁸ *XYZ v Commonwealth* (2006) 227 CLR 532, 584 [153] (Callinan and Heydon JJ).

⁹⁹ *Singh v Commonwealth* (2004) 222 CLR 322, 425 [296].

¹⁰⁰ *Ibid* 429 [305].

¹⁰¹ *Ibid* 424 [295].

United Kingdom as a foreign power at Federation and for some time thereafter, it may and should do so now.¹⁰²

When his Honour came to address the question of whether a British subject could be classified as an ‘alien’ in the later case of *Shaw v Minister for Immigration and Multicultural Affairs*, he accepted the fact that the Court had previously held that there had been an evolutionary change that affected the meaning of the term ‘alien’.¹⁰³ However, he remained critical that the Court had failed to identify a date by which this evolution had taken place. Justice Callinan remedied this failing by identifying 3 March 1986, the commencement date of the *Australia Acts 1986*, as the relevant date.¹⁰⁴

III CONSTITUTIONAL IMPLICATIONS

A *The Implied Freedom of Political Communication*

Before being appointed to the bench, Callinan J was critical of the High Court for drawing an implication from the Constitution of freedom of political communication. He criticised this development on the ground that the framers of the Constitution, being well aware of the first amendment to the United States Constitution, must have deliberately chosen not to include such a provision in the Commonwealth Constitution.¹⁰⁵ He was also, characteristically, concerned that such a development would result in ‘unnecessary uncertainty’ and take ‘decades of litigation’ before its scope and application would be settled.¹⁰⁶

As predicted by Callinan J, the first few years after the implication was identified in 1992 gave rise to uncertainty and divisions within the High Court.¹⁰⁷ These were substantially resolved in 1997 in the landmark High Court decision of *Lange v Australian Broadcasting Corporation*¹⁰⁸ in which the High Court unanimously accepted the existence of an implied freedom of political communication but tied the implication more closely to the text and structure of the Constitution and set out a two-stage test for its application.

¹⁰² *Sue v Hill* (1999) 199 CLR 462, 571-2.

¹⁰³ *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 80 [162]. See also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 517 [372] (Callinan J).

¹⁰⁴ *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 85 [178].

¹⁰⁵ Callinan, above n 10, 40.

¹⁰⁶ Callinan, above n 10, 41. See also: J D Heydon, ‘Judicial activism and the death of the rule of law’ (2003) 23 *Australian Bar Review* 110, 123, 131-2.

¹⁰⁷ See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers* (1994) 182 CLR 211; *McGinty v Western Australia* (1996) 186 CLR 140.

¹⁰⁸ (1997) 189 CLR 520.

When Justice Callinan was appointed to the High Court in February 1998, there was therefore strong authority supporting the implied freedom of political communication. His Honour, however, remained a sceptic as to whether the Constitution supported such an implication. He was torn by the importance of following settled precedent on the one hand and the importance of adhering to the text of the Constitution and the original intent of its framers on the other.

In *ABC v Lenah Game Meats Pty Ltd*,¹⁰⁹ Callinan J expressed his disquiet about the status of the implied freedom and the process of drawing implications from the Constitution. He again drew an analogy with the implication of terms in a contract. If an officious bystander had drawn the matter to the attention of those framing a contract or a Constitution, how would they have responded? Justice Callinan speculated that if the framers of the Constitution had been asked about whether they intended to deal with freedom of speech, they would have responded that they had considered the subject but that it was not a matter with which the Constitution ought to be concerned and that it was adequately dealt with by the common law or State laws concerning defamation.¹¹⁰

Perhaps, however, the officious bystander was asking the wrong question. What if the bystander had asked the framers if they had intended that the Commonwealth Parliament should have the power to enact laws banning political advertising in some forms of media, or requiring media organisations to give free political advertising to political parties in proportion to their existing representation in Parliament? The framers no doubt considered that the Commonwealth Parliament had no power to legislate with respect to such matters as they were unlikely to have anticipated that in decades to come the primary news source would be radio and television which would be interpreted as 'like services' under s 51(v) of the Constitution. Would the framers have dealt with free speech issues in the Commonwealth Constitution if they had been aware that the Commonwealth Parliament was being given legislative power to control, to some extent, speech about political matters and elections? There are significant difficulties involved in speculating about the hypothetical intent of the framers in relation to matters of which they had no knowledge or understanding of the relevant context.¹¹¹

In *Lenah Game Meats* the twin themes of the role of the people in constitutional amendment and the importance of constitutional stability and certainty again arose. Justice Callinan observed:

If an implication may be made long after the composition of the instrument into which it is to be implied, the question arises as to when, and at what intervals, the implication can be made or

¹⁰⁹ (2001) 208 CLR 199.

¹¹⁰ *Ibid* 336 [345].

¹¹¹ Birch, above n 93, 309-10; and Craven, above n, 225.

amended thereafter. How does this Court know when the time has arrived for the making of an implication?¹¹²

He was also concerned about what proof was required to support a change in circumstances which gives rise to a constitutional implication. He pointed out that an opportunity must be given to those who have an interest in contradicting an impression that informs the drawing of a constitutional implication. However, 'the fact that a debate of that kind would have the appearance of a parliamentary debate rather than one of a kind customarily conducted in judicial proceedings, is in itself an indication of the inadvisability of a court's drawing implications from a written constitution.'¹¹³

As for the implication itself, Callinan J expressed concern about the difficulty in giving it content when there are no express terms in the Constitution which can be used as a 'formulation or yardstick for the measuring of the extent of the power.'¹¹⁴ This leaves it to the High Court to establish both the content of the implied freedom as well as all 'the rules and conditions for its invocation'. He concluded that 'to some that might have the appearance of legislative activity.'¹¹⁵ Similarly in *Coleman v Power* his Honour pointed out that the operation of the implication is determined by the reasons in *Lange*, not by the text of the Constitution. He argued that '[r]easons for judgment can only state principles, and not express rules as instruments and enactments do.'¹¹⁶ To do so would be to cross the boundary from the exercise of judicial power to the exercise of legislative power.

Justice Callinan adhered to his views in *Lenah Game Meats* in later cases, but nonetheless proceeded on the assumption that *Lange* was in accord with the Constitution and that he was bound to apply it.¹¹⁷ In each case, however, through the narrow application of the implied freedom, he was able to find that it did not apply.

In *Roberts v Bass*, Callinan J pointed to the 'undesirability of the importation, after more than ninety years, into the Constitution of an hitherto undetected judicial implication'. He saw this as resulting in years of uncertainty before the Court would reach a settled view of the elements of the implication and its application.¹¹⁸

In *APLA Ltd v Legal Services Commissioner*, Callinan J again noted the difficulty involved in giving content to the expression 'government or

¹¹² *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 336 [345].

¹¹³ *Ibid* 337 [346].

¹¹⁴ *Ibid* 337 [347].

¹¹⁵ *Ibid* 337-8 [347].

¹¹⁶ (2004) 220 CLR 1, 111 [294].

¹¹⁷ *Roberts v Bass* (2002) 212 CLR 1, 101-2 [285]; *Coleman v Power* (2004) 220 CLR 1, 109 [289]; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 293 [322]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) CLR 322, 477 [446].

¹¹⁸ (2002) 212 CLR 1, 102 [285].

political matter' as it is 'not part of the text of the Constitution and lacks therefore any contextual anchor in it'.¹¹⁹ He attempted to tie the scope of 'government or political matter' back to the constitutional basis for the implication, so that its content must be of 'real significance to the election of parliamentarians or the maintenance of responsible and representative government, or the conduct of a referendum pursuant to s 128 of the Constitution'.¹²⁰

His Honour again looked back to contract law and the implication of contractual terms. He quoted from Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* where he said with regard to contracts that it is 'not enough that it is reasonable to imply a term; it must be *necessary* to do so to give business efficacy to the contract'.¹²¹ Callinan J was also concerned that the implied freedom of political communication only be invoked 'when it is necessary to do so, and when the burden can be seen to be a burden upon what is *necessary* for the *effective* operation of the system of responsible and representative government'.¹²² He saw the rule of 'necessity' as even more relevant to constitutional matters than contractual matters, for the following reasons:

The particular, indeed rigorous, application of the 'necessity rule' to the *Australian Constitution* is required by reason of a number of features unique to our *Constitution* and its composition: the prolonged and fully recorded debates and deliberations preceding it to which modern lawyers have ready access and which show clearly, in most instances, why proposals were adopted or discarded; the substantial public acceptance in Australia of the *Constitution* before its passage through the Parliament of the United Kingdom; its generally comprehensive and explicit language; the availability of one, and one only mechanism for its amendment, a referendum under s 128; the reluctance, in many referenda of the people of Australia to change it; and, despite the last its enduring efficacy.¹²³

In *Mulholland v Australian Electoral Commissioner*, Callinan J rejected the appellant's argument that the free choice required by ss 7 and 24 of the Constitution meant that electoral laws could not be discriminatory in operation as this would distort the choice. He observed that accepting such an argument 'would require the making of further constitutional implications, in effect implications to be made from implications'.¹²⁴ He

¹¹⁹ (2005) 224 CLR 322, 478 [450]. See also: *Coleman v Power* (2004) 220 CLR 1, 111 [294].

¹²⁰ (2005) 224 CLR 322, 478 [451].

¹²¹ (1982) 149 CLR 337, 346 (Mason J), quoted in *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 485 [469].

¹²² *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 481 [460] (emphasis in original).

¹²³ *Ibid* 485 [470].

¹²⁴ (2004) 220 CLR 181, 295 [325]. See also [334].

stressed that only implications of ‘the most necessary kind can be available in the context of a written constitution’ and concluded that there was no necessity in this case.¹²⁵

B *Implications From Chapter III and ‘Nationhood’*

In *APLA Ltd v Legal Services Commissioner*, the Court was invited to draw implications from Chapter III of the Constitution. Justice Callinan, unsurprisingly, refused to do so. He observed:

The provisions of Ch III are, on their face, ample, explicit, concrete and clear, complete, and not such as to *necessitate* amplification by implication or otherwise. In *Kable v Director of Public Prosecutions (NSW)* this Court took the view that legislation detracting from the integrity, independence and impartiality of the Supreme Court of New South Wales as a court invested with federal jurisdiction, was incompatible with Ch III. That was tantamount to a holding that there should be inferred from Ch III an implication that non-judicial powers of a particular kind could not be exercised by any court which might exercise federal jurisdiction. That seems to me, with respect, to require the drawing of a very long bow. I would be unwilling to stretch the bow any further, as the plaintiffs here seek to have the Court do.¹²⁶

In *Shaw v Minister for Immigration and Multicultural Affairs*, Justice Callinan also rejected an appeal to the ‘implied nationhood’ power to support legislation that controls the entry, exit and removal of people to and from Australia. His Honour once again stressed that ‘[c]onstitutional implications may only be made in clear and unarguable cases of real necessity.’¹²⁷ He saw ‘nothing in the fact of a national government to justify an implied power to legislate for the removal of persons from Australia’ otherwise than pursuant to existing enumerated legislative powers.¹²⁸

C *Implications From Federalism*

Justice Callinan was, however, prepared to draw implications from Australia’s federal system. This is because he regarded such implications as both ‘necessary’ and supported by the original intent of the framers of the Constitution.

In *Sweedman v Transport Accident Commission*, his Honour pointed out that the Constitution ‘expressly, and in many places by clearest of necessary implications, recognises the continuing existence of the States’

¹²⁵ Ibid 295 [325].

¹²⁶ (2005) 224 CLR 322, 484 [469].

¹²⁷ (2003) 218 CLR 28, 85 [181].

¹²⁸ Ibid.

and their co-existence with the Commonwealth and each other.¹²⁹ He concluded that the Constitution ‘intended each State to have primary legislative responsibility, subject to the Commonwealth’s enumerated powers, for occurrences within its borders.’¹³⁰ His Honour was also prepared to apply the *Melbourne Corporation* implication derived from federalism, as a limitation on Commonwealth legislative power.¹³¹

In the *Work Choices Case*, Callinan J recognised that the Constitution may be subject to constitutional implications. He added that ‘the maintenance of the federal balance is a powerful one of these, more powerful than, for example, the implication of freedom of political speech, not a word concerning which, unlike the repeated references to the States, appears in the *Constitution*.’¹³²

IV CONCLUSION

Justice Callinan’s approach to constitutional interpretation has been remarkably consistent during his period on the High Court. It shows a deep respect not only for those who framed the Constitution, but also for the Australian people of today, in whose hands is entrusted the ultimate power of approving or rejecting proposed constitutional amendments put to them by the Parliament. It also shows a degree of humility not usually characteristic of the High Court. There must be a great temptation for judges, when appointed to the highest court in the land, to make their mark, achieve ‘good’, reach preferred policy outcomes, refashion the Constitution in their own image and leave a legacy for history. Justice Callinan not only criticised such an approach before being appointed to the High Court, but also had the strength to resist these temptations throughout his period as a judge. While he has described the High Court as an ‘over-mighty court’,¹³³ no one could describe Callinan J as an ‘over-mighty’ judge.

¹²⁹ (2006) 226 CLR 362, 421 [101].

¹³⁰ *Ibid* 429 [123].

¹³¹ See, eg, *Bayside City Council v Telstra* (2004) 216 CLR 595, 660 [136], 663 [146]; *Purvis v New South Wales* (2003) 217 CLR 92, 173 [266].

¹³² *New South Wales v Commonwealth* (2006) 229 CLR 1, 320 [772]. See also *Bennett v Commonwealth* (2007) 235 ALR 1, 45-6 [183] (Callinan J).

¹³³ Callinan, above n 10, 34.

