THE HIGH COURT AND THE WORLD OF POLICY

BY MICHAEL COPER*

Being the last speaker of the day I suppose has advantages and disadvantages. One disadvantage is that, as I had anticipated, much of what I would have wished to say about the *Franklin Dam* case[1] has been said — and well said — by earlier speakers. One advantage, however, is that I may now speak substantially without fear of contradiction — perhaps the "infallibility of finality", as it has sometimes been called,[2] is not the exclusive province of the High Court! In any event, I will confine myself to some very general remarks — not so general, I hope, as to be trite, but general enough, at least, to put some of the points we have heard earlier today into perspective.

Professor Zines' paper is entitled "The State of Constitutional Interpretation".[3] My first thought was that this might be a new slogan for Tasmanian number plates — but in the light of the result of the *Franklin Dam* case I suppose that this would scarcely be appropriate!

Professor Zines discusses one of the most fundamental and difficult of all of the problems of constitutional interpretation: what general principles are appropriate, and from whence are they derived. In a way, it is remarkable that after eighty years' experience of judicial exegesis and, as Jacobs J was fond of adding, of judicial epexegesis,[4] such fundamental issues should be so much in dispute. No doubt the dispute has been narrowed by the decision in the *Engineers'* case,[5] but the permissibility of implications and their nature and content remain at the heart of the controversy.

There is, of course, nothing wrong with the process of implication as such. It has often been said that the *Engineers'* case[6] did not forbid the making of implications in the interpretation of the Constitution, and it is hard to see how any legal instrument can be satisfactorily interpreted without doing so.[7] I have in mind here not only structural or contextual implications in aid of the interpretation of express provisions, but also fundamental principles which lie wholly or largely outside particular provisions in the text. Some of the most significant and the most familiar tenets of our constitutional framework could easily be implied, and probably would have been, had they not been embodied in express terms — for example, the supremacy of Commonwealth law,[8] freedom of interstate

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[1] *Commonwealth* v *Tasmania* (1983) 46 ALR 625.

[2] *Eg* see *Brown* v *Allen* (1953) 344 US 443, 540 *per* Jackson J.

[3] Above 277.

[4] *Eg H C Sleigh Ltd* v *South Australia* (1977) 136 CLR 475, 514.

[5] *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[6] *Ibid.*

[7] See generally, Cheryl Saunders, "The National Implied Power and Implied Restrictions on Commonwealth Power" above 267.

[8] *Cf* Sir Maurice Byers, "Commentary" above 276.

trade,[9] and perhaps even the ability of the Commonwealth to grant financial assistance to the States on such terms and conditions as it thinks fit.

The great danger inherent in this process, obviously, is the danger of vagueness, uncertainty and subjectivity. No doubt we reduce our constitutional and other arrangements to writing precisely in order to clarify and put beyond argument as much of those arrangements as possible. But where there are ambiguities or gaps in the text, as is more likely in constitutions than in most other documents, the process of implication seems unavoidable. Many lawyers seem uncomfortable with what is seen as Murphy J's free-wheeling discovery of a bill of rights in the Constitution,[10] but the argument must, it seems to me, be with the content rather than with the process. I think that Professor Zines is absolutely right when he says that the major dispute in the *Franklin Dam* case is in truth a clash between two competing principles which are both based on implications: the "federal balance" as a principle of limitation of central power on the one hand, and the idea of the "national interest" as a principle of expansion, on the other.[11] The real difficulty is, how does one choose between these competing implications?

The first point to keep in mind is that the choice has to be made, unless we turned the clock back to before *Marbury* v *Madison*,[12] by a court — not by an assembly charged with the task of redrafting the Constitution, nor by some political grouping with a particular constituency to satisfy. This makes it both inevitable and proper that objective standards be applied, or at least sought after, and Professor Zines has noted that there are many examples of constitutional interpretation where quite legalistic principles seem clearly to be the operative factor.[13] Having regard to the ordinary and natural meaning of the words of the Constitution is arguably such a principle, assuming for the moment that it is genuinely used as a principle of guidance rather than merely as the *post-hoc* justification for a congenial result. The meaning of "industrial dispute" in s 51(xxxv) of the Constitution was clearly arrived at recently by *R* v *Coldham; ex parte Australian Social Welfare Union*[14] by genuine and plausible resort to the plain meaning principle, though in combination with other factors.

We all know, however, that the plain meaning principle will frequently fail to deliver the goods, for reasons which are too obvious to bear repeating. It may in any event be countered by the equally respectable principle, so strongly emphasised by Dawson J in the *Franklin Dam* case,

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[9] As in the case of the so-called "negative implications of the commerce clause" in the United States.

[10] *Eg R* v *Director-General of Social Welfare for Victoria; ex parte Henry* (1975) 133 CLR 369, 388; *Buck* v *Bavone* (1976) 135 CLR 110, 137; *Ansett Transport Industries (Operations) Pty Ltd* v *Commonwealth* (1977) 139 CLR 54, 87-88; *Seamen's Union of Australia* v *Utah Development Company* (1978) 144 CLR 120, 157; *McGraw-Hinds (Australia) Pty Ltd* v *Smith* (1979) 144 CLR 633, 668-670; *Ansett Transport Industries (Operations) Pty Ltd* v *Wardley* (1980) 142 CLR 237, 267; *Sillery* v *R* (1981) 35 ALR 227, 234; see also *Western Australia* v *Commonwealth* (1975) 134 CLR 201, 283-284; *A-G (Cth); ex rel McKinlay* v *Commonwealth* (1975) 135 CLR 1, 71; *McInnis* v *R* (1979) 143 CLR 575, 588.

[11] L Zines, above 284; see also C Saunders, above 268.

[12] (1803) 5 US (1 Cranch) 137.

[13] L Zines, above 290-291.

[14] (1983) 47 ALR 225.

that regard must be had to context.[15] So the court searches for other objective touchstones — history for example, and also, of course, precedent — in an endeavour to base decisions on something other than personal predilections. Yet these other touchstones are also endemically inconclusive, and in particular the resort to history is confounded by the not-at-all sophistical argument that the framers of the Constitution contemplated a dynamic rather than a static interpretation.

So by this route we are led to the world of policy. If the so-called strictly legal considerations are inconclusive, then, it seems, the court must, and, many would say, in any event should, have regard to policy considerations. Putting aside for the moment the very real problem of saying precisely what is meant by "policy considerations", I should say here that the outstanding merit of Professor Zines' paper, in my opinion, is the way in which he lays out the relevant policy considerations, especially those underlying the concept of national interest and national concern, a concept which he does much to clarify by setting out a number of different meanings it may carry. Professor Zines has earlier made the point, in his book[16] and elsewhere,[17] that commentators have underestimated the extent to which the High Court's consideration of policy has been overt. The major criticism, he says, is not that there has been no attention to policy, but that policy justifications have been stated dogmatically, with no attention to or even acknowledgement of competing policies, and therefore with no defence of the particular policy choice.[18] His paper does much, by laying out the competing policies and clarifying the nature of the choice, to facilitate the process which he says is desirable, although the problem remains of how the choice should be made.

I agree that the judgments are replete with policy considerations, but judicial acknowledgement of the relevance of policy sometimes emerges rather more sharply from extra-curial writings. Let me quote to you a fairly lengthy but instructive passage from a recent book review by Sir Anthony Mason.[19] Sir Anthony said:

> the Court has moved away from a legalistic approach based on analysis involving precedent and juridical concepts distilled from the vague and general language of the . . . [Constitution] to a more realistic approach which treats the . . . [Constitution] as having a dynamic operation, adjusting itself to changing times and circumstances — an approach which enables the Court to take into account and balance factors and policies relevant to the public interest. . . .
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> The point might well be made that the new approach adopted by the Court, that of examining the underlying reality of policy issues, is one which calls for qualities different from those expected of lawyers according to past Australian training and experience. For us, this presents a problem which immediately distinguishes us from the Supreme Court of the United States. The Supreme Court has been pursuing an open approach for a long time in accordance with American legal tradition. But the change in our approach

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[15] (1983) 46 ALR 625, 841.
[16] L Zines, *The High Court and the Constitution* (1981) 299.
[17] L Zines, "The Australian Constitution 1951-1976" (1976) 7 FLRev 89, 134.
[18] *Ibid;* supra n 16, 299-300.
[19] (1983) 6 UofNSWLJ 234, reviewing M Coper, *Freedom of Interstate Trade Under the Australian Constitution* (1983).

> may not produce much difference in results. It would be a grave mistake to think that Sir Owen Dixon paid no attention to issues of policy. However, he did not emphasise them, preferring to base himself in the main on strict legal reasoning. Overt attention to policy considerations calls for reasoning of a different order and at times it leads to an uneasy amalgam or compromise between that mode of reasoning to a conclusion and the more traditional analytical method which proceeds to a conclusion from precedent and accepted concept. A striking illustration is provided by *Commonwealth* v *Tasmania* (the *Tasmanian Dams* case). There the majority did not hesitate to base themselves on policy considerations in giving a wide interpretation to the external affairs power. At the same time, they accepted the construction placed on s 100 of the Constitution in *Morgan* v *Commonwealth*, a decision described by Professor Sawer as one which proceeded from the strictest legalism, without offering other additional reasons to sustain it. The difference in reasoning on section 51(xxxi) — the acquisition power — between Deane J and the other members of the majority perhaps provides another example.
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> I am not to be taken as saying that we should now desert the language of the Constitution. The quest is always to ascertain its meaning and we are more likely to achieve success if we pay close attention to the scope and object of the provision in the framework in which it is to be found in the Constitution, instead of concentrating our attention on primary meanings to the relative exclusion of other considerations. In the ultimate analysis we can only give to the words a meaning which they are inherently capable of sustaining. We have not yet arrived at the American position which is best illustrated by the comment of the American professor to the student who interpreted a statutory provision according to the natural and ordinary meaning of the words: "That is an interesting and novel approach".[20]

It is instructive that Sir Anthony Mason should have called attention to the ambivalence shown by the High Court and by individual justices to the relevance of policy considerations. The United States Supreme Court has shown the same ambivalence, from the earliest days of Marshall CJ, whose very legalistic reasoning in *Marbury* v *Madison*[21] is in stark contrast to the style of *McCulloch* v *Maryland*[22] and the famous sentiment expressed there that "we must never forget that it is a *constitution* we are expounding"[23] — or, as some present members of the High Court might have said, "we must never forget that it is a constitution we are expanding"!

The reason for this ambivalence is clear enough. It harks back to what I said earlier about the fact that it is a *court* which is called upon to make the choice between the competing interpretations. The court has no warrant to disregard the text and to decide simply whether, as a matter of policy, it is desirable that the Commonwealth have very wide legislative powers, or whether, on the other hand, it is desirable that the States retain a significant amount of exclusive legislative power. Neither has it any warrant to decide the associated but narrower question of whether, as a matter of policy, a particular matter is better handled centrally or locally. These are questions which have no objective answers — as is perhaps

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[20] *Ibid* 235-237. Sir Anthony was specifically concerned with s 92, but his comments are appropriate to the Constitution as a whole.

[21] (1803) 5 US (1 Cranch) 137.

[22] (1819) 17 US (4 Wheat) 316.

[23] *Ibid* 407.

inherent in the very notion of "policy". But if the text of the Constitution is inconclusive, is there any choice but to weigh the consequences of the competing interpretations? There is a dilemma here, which I have written about elsewhere[24] — failure to take into account the broad political consequences will be criticised as legalistic and unrealistic (and perhaps even as disingenuous), and deliberately to base a decision upon a consideration of those consequences will satisfy only those who would make the same policy choice.

In the resolution of this dilemma, there are two further aspects of the fact that it is a court which is confronted with the task of interpretation. The first is that the so-called policy considerations tend inevitably to be considered in the context of what the Constitution "intends" rather than what interpretation is "desirable", though any argument can of course be cast in the form of discovering an intention; it may be said, for example, that because something is desirable it must have been intended. Thus, the issue is presented not so much as whether a wide or narrow view of the external affairs power is desirable, but rather as whether the notion of the "federal balance" is a reasonable implication to be drawn from the Constitution, or whether, alternatively, the notion of the "national interest" finds more support. But the line between these two rather different perspectives is not always easy to draw.

The second aspect of the fact that it is a court which, under our arrangements, has the job of interpreting the Constitution is that it is reasonable to expect that the tests of validity will be based on judicially manageable criteria. To my mind, the majority criticism of the minority view in the *Franklin Dam* case of the ambit of the external affairs power — namely, that the test embraced by the minority is both elusive and invidious — is in this respect a telling one.[25] Moreover, there are further institutional considerations, such as those upon which the presumption of validity[26] and associated ideas are based. It seems to me to be highly relevant to say that in choosing between competing interpretations or competing implications, one should lean in favour of that which supports a finding of validity. Some would say that this is of no assistance where the question is not whether legislative power exists but rather how it is divided and allocated between the Commonwealth and the States; but if a State law is rendered invalid or State legislative power ousted because a Commonwealth law is upheld, that is the inexorable consequence of the supremacy of Commonwealth law.

But the dilemma remains — the so-called legal considerations are notoriously inconclusive, yet policy, by itself, seems unsatisfactory as the sole basis for judicial decisions, even if the policy choice is made within certain parameters. I have argued elsewhere that an important ingredient in perceiving whether a judge is obtaining genuine guidance from legal

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[24] *Eg* M Coper, "Interpreting the Constitution: A Handbook for Judges and Commentators" in A R Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone* (1983) 52, 65; M Coper, *The Franklin Dam Case* (1983) 25.

[25] *Eg* (1983) 46 ALR 625, 690-692 *per* Mason J; and 771-772 *per* Brennan J.

[26] *Commonwealth* v *Tasmania* (1983) 46 ALR 625, 721-726 *per* Murphy J; H Burmester, "The Presumption of Constitutionality" (1983) 13 FLRev 277; *cf* Mason J, supra n 19, 237-238.

principles, although they are not compelling, or whether those principles are rather being manipulated to produce an expedient result, is the consistency with which they are employed over a pattern of decisions.[27] I refer here to individual consistency — the coherence of the pattern of decisions as a whole will of course be affected by the diversity of individual opinion, by chance majorities, by the degree of adherence to precedent, and by other factors. But I admit that the consistency idea does not take us very far. In the current court, it is scarcely a problem in relation to questions of the ambit of Commonwealth power: in the *Franklin Dam* case, for example, the four majority justices took a consistently wide view of the three relevant heads of power, and the three minority justices a consistently narrow view. But in any event, it must be permissible for a judge to change his mind, and we have some recent examples of that in other areas[28] — so once again, as in the case of the canons of construction, a counterbalancing principle is available. Like proverbs and aphorisms (and no doubt for the same reasons), the guide-posts point in all directions.

I am conscious of the fact that I have been speaking very generally, and in abstract terms, and that in particular I have not attempted to say precisely what either so-called "legal" considerations, or so-called "policy" considerations, are. It would be a mistake to think, for example, that the following of precedent in the pursuit of certainty — thought by many to be a hallmark of legalism — is not a policy consideration. But let me now try to be a bit more specific, and return in particular to the question of whether, in the interpretation of the external affairs power, the more persuasive implication in aid of that interpretation is the notion of the "federal balance" or, alternatively, of the "national interest".

As Professor Zines points out, and quite apart from the handicap created by acceptance of the *Engineers'* case,[29] the difficulty with the "federal balance" idea is that it is quite unhelpful in determining the extent and the content of the exclusive power to be retained by the States.[30] Identification of these matters can come, he says, only from history, tradition and familiarity.[31] The policies underlying the "national interest" idea, however, are based on the need for change, flexibility and adaptability. Put in this way, the contrast is, although, as I think, appropriate, rather loaded. After all, who dares to prefer rigidity, inflexibility and being rooted in the past, to adaptability, dynamism and keeping pace with current need? But the question runs deeper than this, for the adherents of the federal balance idea say, as Professor Zines points out,[32] that the external affairs power is a special case, because of the absence of any limits as to subject-matter on the widest and now prevailing view of the power; the federal balance idea may be used here in a negative way, it is said, as a reason for rejecting that wide view, on the basis that the Constitution contemplates not only the continued existence of the States as entities but also the continuation of *some* residue of exclusive power.

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[27] M Coper, *Freedom of Interstate Trade Under the Australian Constitution* (1983) 294.
[28] *Eg Baker* v *Campbell* (1983) 49 ALR 385, 414-415 *per* Wilson J.
[29] (1920) 28 CLR 129.
[30] L Zines, above 284-285.
[31] *Ibid* 284, 289.
[32] *Ibid* 285, 292.

It is here that Professor Zines says that the majority do not really answer this argument.[33] This, I think, is a little unfair. First of all, it is not self-evident that there are now no, or no significant, limits on the external affairs power, as Professor Zines himself notes.[34] But secondly, and I think more importantly, the answer suggested by Professor Zines — that the external affairs power was comprehended as wide enough to authorise the implementation of any treaty and that what has really changed is the factual situation, especially the expansion of subject-matters thought to be appropriate for international agreement[35] — is in fact given, I think, by the majority. This is what Mason J is getting at, I would suggest, when he observes in *Koowarta*[36] that an important aspect of the "federal balance" is precisely the allocation of "external affairs" to the Commonwealth.[37] And thirdly, of course, other reasons are given in support of the wide view and in rejection of the narrow view, especially those referred to earlier as institutional considerations.

So, in the end, which is the better view of the external affairs power, and to the extent that it is a question of policy, how does one choose between the competing policies so well laid out by Professor Zines? Let me confine myself here to the latter part of the question, for putting aside everything that can be said about plain words, context, historical intentions, implications, deference to the legislature and the filtering of policy through these concepts, it is clear that both majority and minority in the *Franklin Dam* case were influenced by these competing policies. The majority asserted that the wide view of the external affairs power was appropriate to enable Australia to discharge its international responsibilities.[38] As to the minority, Sir Daryl Dawson makes it reasonably clear, I think, from his recent Southey Memorial Lecture, that he favours a narrow view of the external affairs power, and of Commonwealth powers generally, as much as a matter of policy as a matter of law.[39]

In his book, Professor Zines says that these final value judgments cannot be conclusively supported by reason, but they can be arrived at as a result of the application of reason.[40] Quoting MacCormick on *Legal Reasoning and Legal Theory*,[41] he says that "we find ourselves beyond that which can be reasoned out, although we got there *for reasons*".[42] I am not sure that this takes us very far, but then neither am I sure that there is much further to go. The dilemma I referred to earlier remains — to ignore policy is unrealistic, and to embrace it is subjective. Personally, I am persuaded by the policy espoused by the majority in the *Franklin Dam* case in relation to the external affairs power, but I am not entirely comfortable about

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[33] *Ibid* 287, 292.
[34] *Ibid* 286.
[35] *Ibid* 293.
[36] *Koowarta* v *Bjelke-Petersen* (1982) 39 ALR 417.
[37] *Ibid* 462.
[38] *Eg* (1983) 46 ALR 625, 693 *per* Mason J. Professor Zines notes Brennan J's ambivalence about the relevance of this consideration, a nice reflection of the tensions between legalism and pragmatism, above 278.
[39] Sir Daryl Dawson, "*The Constitution — Major Overhaul or Simple Tune-Up?*", Southey Memorial Lecture, University of Melbourne, 19 October 1983, esp 30-38.
[40] L Zines, *The High Court and the Constitution* (1983) 309.
[41] (1978) 254.
[42] Supra, n 40, 309.

accepting that as a complete justification for the decision, even when it is remoulded into the form of what was intended, or what is a reasonable implication, rather than presented unadorned in terms of what is desirable. As I indicated earlier, there is, to my mind, a stronger justification — though perhaps the two are cumulative — in the institutional considerations.

If there were time, I would go on to speculate about how the judges come to form their policy preferences, and to observe — however superficial it may seem — that the four majority justices in the *Franklin Dam* case were primarily associated with the Commonwealth in their earlier careers (Mason J as Solicitor-General, Murphy J as Attorney-General, and Brennan and Deane JJ as Federal Court judges), and the three minority justices primarily with the States (Gibbs CJ as a Supreme Court judge, and Wilson and Dawson JJ as Solicitors-General of Western Australia and Victoria respectively).[43] For some, the relevance of policy preferences has serious implications for the process of selection of High Court judges, and I have in mind in particular the shock waves produced by some of Gareth Evans' suggestions in his paper on the High Court[44] given at the Law and Social Change conference here in Canberra some years ago.[45] But it may be, to some extent at least, that the competing policy considerations are amenable to argument; in the passage quoted earlier, Sir Anthony Mason certainly seemed to contemplate this when he observed that overt attention to policy calls for a different style of argument.[46]

Finally, as with Professor Zines, a brief glance to the future. Whether the majority views are likely to endure depends on many factors, including, of course, changes in the composition of the High Court, and the use which the Commonwealth makes of the external affairs power in the near future. As Professor Sawer has observed, the High Court has in the past left the Commonwealth poised to expand its powers greatly — in 1920 for example — but by the time the opportunities were taken, the High Court, for one reason or another, was not so amenable.[47] We can expect the opportunities to be taken up more quickly this time, especially in the field of human rights. But even apart from this, it seems to me that the wide view of the external affairs power is now firmly established, even though it was rejected by a majority in *Koowarta*[48] only a year previously. Certainly, the tone of Sir Daryl Dawson's Southey Memorial Lecture is one of resignation. Sir Daryl does not think that accretion of power by the centre is inevitable in all federal systems, but attributes this consequence in Australia partly to the method by which powers are divided; it may be, he says, that residuary powers, because of lack of definition, can be

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[43] It is not suggested either that the correlation is complete (before their respective elevations to the High Court, Gibbs CJ was a federal judge in Bankruptcy and Mason J a judge of the New South Wales Court of Appeal), or that, in any event, anything necessarily follows from it.

[44] G Evans, "The Most Dangerous Branch? The High Court and the Constitution in a Changing Society" in D Hambly and J Goldring (eds), *Australian Lawyers and Social Change: Proceedings of a Seminar held at the Faculty of Law, Australian National University, 23-24 August 1974* (1976) 13.

[45] *Eg* Commentary by W Deane and R L Mathews, and reply by G Evans in D Hambly and J Goldring (eds), supra n 44, 80-81; 97-98, 102; 115-116.

[46] Above, 296.

[47] G Sawer, *Australian Federalism in the Courts* (1967) 89-90.

[48] (1982) 39 ALR 417.

contracted more easily.[49] This has certainly been our experience, in which the *Engineers'* case[50] has been pivotal, whether the justification for the approach taken there is to be found in legalism, nationalism, judicial self-restraint or a combination of all three. The centralisation of power will, I think, continue, if it is not, as Sir Daryl Dawson suggests in his lecture, already virtually complete. As one of my less literate students put it recently in an essay, "I find Mr Justice Dawson's view in the *Dam* case very persuasive, but he was, after all, in descent [sic]"! The wide view is certainly in the ascent, and that position is unlikely to change in the immediate future.

[49] Supra n 39, 34.
[50] (1920) 28 CLR 129.