THE HIGH COURT AND THE CONSTITUTION IN 2006

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The Constitution was a significant issue in eight High Court decisions in 2006. In each of them the legislative or executive action was upheld as valid. Judicial power and Chapter III was involved in *Vasiljkovic v Commonwealth,*[1] upholding the validity of extradition proceedings without a need to find a prima facie case and *Forge v Australian Securities and Investment Commission,*[2] upholding as consistent with *Kable v Director for Public Prosecutions for NSW*[3] the appointment of a considerable number of acting judges to the Supreme Court of New South Wales.

In *Theophanous v Commonwealth*[4] the relationship of the acquisition power to the *Crimes (Superannuation Benefits) Act 1989* (Cth) was determined, upholding the validity of the Act. The Court decided in *Dalton v NSW Crime Commission*[5] that the phrase 'civil and criminal process' in s 51(xxiv) of the Constitution extended to the process of a State investigative body.

Yet another aliens case was decided in favour of the Commonwealth; this time involving a stateless child born in Australia in *Koroitamana v Commonwealth.*[6]

The external affairs power was held once again to support an extra-territorial law in *XYZ v Commonwealth*[7] and to authorise laws on extradition where there was no relevant treaty in *Vasiljkovic v Commonwealth*.

In *Sweedman v Transport Accident Commission*[8] s 117 was held to be inapplicable where a New South Wales driver was, under Victorian legislation, held liable to indemnify the Transport Accident Commission in respect of an accident in New South Wales, in circumstances where she would not have been liable if she had had her vehicle registered in Victoria. The Court said that residence was not the criterion of the discrimination.

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1 (2006) 228 ALR 447.
2 (2006) 229 ALR 223 ('*Forge*').
3 (1996) 189 CLR 1 ('*Kable*').
4 (2006) 226 ALR 602.
5 (2006) 226 ALR 570 ('*Dalton'*).
6 (2006) 227 ALR 406.
7 (2006) 227 ALR 495 ('*XYZ*').
8 (2006) 224 ALR 625.

The corporations power was held to authorise the radical changes recently made to the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*Work Choices* Act') in *New South Wales v Commonwealth*.[9]

The actual decisions in these cases would not, I think, have surprised many constitutional lawyers, but a number of them were interesting, not because of the results, but by reason of varying attitudes to constitutional interpretation taken by the several judges.

The factors relating to interpretation that I propose to consider (insofar as they are relevant to some of the cases decided last year) are: first, the concept of federalism; secondly, original intent; and thirdly, policies, values and consequences.

I FEDERALISM

The concept of a federal state, and the distribution of powers between the Commonwealth and the States based on that concept, has not been relied on for many decades by a majority of the Court in the interpretation of federal powers. It has been used only to develop principles of intergovernmental immunity.[10]

Some minority judges, however, took the view that the notion of federalism was relevant to the external affairs power. In *Commonwealth v Tasmania*[11] the dissenting judges reasoned that s 51(xxix) could not be construed to authorise the legislative implementation of any bona fide treaty because that would, they thought, give the Commonwealth legislative power with respect to all subject matters leaving the States with no exclusive power. The description of Australia as a 'Federal Commonwealth' in the preamble to the Constitution and the limitation of Commonwealth legislative power to the express and enumerated powers of the Parliament required that States must have some substantial legislative power free from possible inconsistency with any Commonwealth law. That view was rejected by the majority, which regarded it as a return to the doctrine of reserved powers. The principle in the *Tasmanian Dam Case* in respect of the external affairs power was followed and indeed strengthened in *Victoria v Commonwealth*.[12]

In *XYZ* the question of State power and federalism was raised by Kirby J in a surprising context. The issue was the validity of a provision of the *Crimes Act 1914* (Cth) making it an offence for an Australian citizen or resident to engage in sexual activity involving children while outside Australia. A majority of five judges held it valid under the external affairs power, with Callinan and Heydon JJ dissenting. The actual decision surprised no one as it had been established by a unanimous court (including Dawson J) in *Polyukhovich v Commonwealth*[13] that

9 (2006) 231 ALR 1 ('*Work Choices Case*').

10 Those principles find modern expression in *Austin v Commonwealth* (2003) 215 CLR 185; *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

11 (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

12 (1996) 187 CLR 416 ('*Industrial Relations Act Case*').

13 (1991) 172 CLR 501 ('*Polyukhovich*').

the power extended to such a law. The surprise was that three judges refused to follow that case.

Justice Kirby was concerned for State power. He did not overrule *Polyukovich* and cases that followed it, because he decided the case in favour of the Commonwealth on another ground, namely, that the Act affected Australia's external relations.[14] But he indicated that he was likely to overrule it in the future, if necessary.[15]

In expressing his concern for the federal character of the Constitution his Honour described it as 'protective of individual liberties and personal freedoms' and urged that the Court should 'look afresh at its federalism jurisprudence'.[16] What is puzzling about this is that he accepted the *Tasmanian Dam Case* relating to the implementation of treaties that, as mentioned, was regarded by federally minded judges, such as Gibbs CJ, Dawson and Wilson JJ, as a grave undermining of the federal system. Yet Dawson J readily embraced the 'externality principle' (as Kirby J called it). However, in *XYZ* the plaintiff argued that the sole criterion relating to s 51(xxix) was relations with other countries, which included the implementation of treaties.

Justice Kirby's concern was that there were so many facts, persons and things outside Australia that if the power extended to any law operating *in* Australia with respect to such things there would be no limit to law making concerning laws operating internally. It is difficult to know what to make of this. *Polyukovich* and subsequent cases dealt with laws operating on acts or persons external to Australia. No doubt laws operating locally would be valid if they were incidental to an extra-territorial law, such as the provision in *XYZ* making it an offence to encourage persons to engage in the principal offence or profit from it. Apart from such cases and those dealing directly with matters regarding relations with other countries, it is difficult as a practical matter to envisage laws with respect to matters outside Australia that operate domestically which could be a significant threat to State legislative power.

Chief Justice Gleeson dismissed concerns about 'the federal balance' by saying that it did not arise, referring to Dawson J in *Polyukovich*.[17] The joint judgment of Gummow, Hayne and Crennan JJ did not refer to federalism as such, but commented on a 'distorting or alarming possibility' which 'had an apparent influence upon some minority judgments in cases upholding legislation based upon treaties touching "domestic" matters'.[18] They went on to say that 'that particular concern is of no moment in the present case'.[19] Justice Dawson was quoted at some length.[20]

Justices Callinan and Heydon, in overruling *Polyukovich*, did not rely on the issue of federalism, dissenting on other grounds referred to later. However in the

14 *XYZ* (2006) 227 ALR 495, 532 [139].
15 Ibid 517 [78].
16 Ibid 526 [115].
17 Ibid 502 [18].
18 Ibid 507 [39].
19 Ibid.
20 See, Ibid [40], [47] and [52].

course of examining whether the law might be seen as concerning international relations, they adverted to the issue of a radical alteration of the distribution of powers, adding in a footnote that that was not a problem in relation to legislation which was purely extra-territorial.[21]

If *XYZ* provided an unlikely context in which to raise federal issues, either legally or politically, that was not true of the *Work Choices Case*. The upholding of the new industrial relations regime on the basis of the corporations power brought forth many claims by state governments, trade unions, newspaper editors, some academics, and the dissenting judges (Kirby and Callinan JJ), that the federal nature of the Constitution had been ignored. Many of the warnings and predictions about the destruction of the states as independent units and centres of power were similar to those heard nearly a quarter of a century earlier as a result of the *Tasmanian Dam Case*.

Even before that case some judges debated the relevance of the federal nature of the Constitution in interpreting the corporations power. In *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* [22] Gibbs CJ spoke of the need 'to achieve the proper reconciliation between the apparent width of s 51(xx) and the maintenance of the federal balance which the Constitution requires'.[23] To this, Mason J replied that there was 'a competing hypothesis' that the paragraph was intended to confer comprehensive power 'so as to ensure that all conceivable matters of national concern would be comprehended'.[24]

In the *Tasmanian Dam Case* the issue was not resolved. Justices Mason, Murphy and Deane held that the power extended to control of all the activities of the corporations. Justices Wilson and Dawson would have confined the power to the control of trading activities for trading objectives. Chief Justice Gibbs was prepared to extend it to acts done for the purposes of trade, and Brennan J said he had no need to go further than that. That might be seen therefore to constitute the ratio of the case.

In the *Industrial Relations Act Case*[25] the provisions of the Act were based on the corporations employees were not challenged as Western Australia conceded that the power extended to regulating all relations between constitutional corporations and their employees. In the *Work Choices Case* 10 years later, counsel for Western Australia expressed regret that the concession had been made.

The arguments after the *Tasmanian Dam Case,* that the decision would lead to the destruction of the federal system, were nearly all based on the interpretation given to the external affairs power. Little attention was paid for this purpose to the considerable development of the corporations power in that case, which seemed to affirm that the Commonwealth had power to control not only trade, but production, mining, agriculture and other activities which were carried out

21 Ibid 555 [209], 317.
22 (1982) 150 CLR 169 ('*Fontana Films*').
23 Ibid 182.
24 Ibid 207.
25 *Victoria v Commonwealth* (1996) 187 CLR 416.

for the purposes of trade. Moreover they could be regulated for non-commercial objects such as the preservation of the Tasmanian wilderness. The Commonwealth used the power as a major basis for all manner of regulation relating to, for example, heritage, environment, sex discrimination, human cloning and stem cell research and (since 1993) industrial relations.[26]

In the *Work Choices Case*, a joint judgment of five judges upheld the legislation on orthodox grounds. Those judges were assisted by the fact that there was no challenge to the *Amalgamated Society of Engineers v Adelaide Steamship Company Limited* [27] or the *Strickland v Rocla Concrete Pipes Ltd*[28] in its application to the intrastate trade of trading corporations.[29] Therefore, the Court asked, if s 51(xx) is not affected by s 51(i) – as the *Concrete Pipes Case* established – why is it affected by the limitations inherent in the conciliation and arbitration power, as the plaintiffs had argued? The various arguments of the challengers were concerned, however, with the fact that, owing to the pervasive presence of corporations in our society, the legislative powers of the States could be reduced to insignificance if the control of all a constitutional corporation's activities came within the reach of the power.

The majority's examination of the Convention Debates led them to conclude that the attempt to find the framers' intention was 'to pursue a mirage'[30] because no clear evidence was available. At the time of the constitutional conventions corporations law was still developing and, according to the joint judgment, the courts did not fully grasp the implications of corporate personality until the decision of *Salomon v Salomon and Co*[31] in 1896. Secondly, the place of corporations in the economic life of Australia today is radically different from when the framers were considering the legislative powers of the Commonwealth.

The joint judgment dismissed the concept of federal balance. The judges said that whereas the early court had started with a view that the Constitution preserved for the States some measure of legislative power, since the *Engineers' Case* the Court began with the text, which points to the States as continuing independent and separately organised entities having legislative, executive and judicial functions. However, the Constitution gives no indication as to what those functions are to be.[32] They concluded that the proposition that a particular construction of s 51(xx) would impermissibly alter the federal balance was without content.[33]

Although the two dissenters argued that that was not so, the majority were also concerned that 'federal balance' carried an implication of a static equilibrium.[34]

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26 See, eg, *Sex Discrimination Act 1984* (Cth)*; Industrial Relations Act 1993* (Cth)*; Prohibition of Human Cloning Act 2002* (Cth)*; World Herritage (Properties Conservation) Act 1983* (Cth).
27 (1920) 28 CLR 129 ('*Engineers' Case'*).
28 (1971) 124 CLR 468 ('*Concrete Pipes Case'*).
29 Ibid 18 [50].
30 Ibid 40 [120].
31 [1897] AC 22.
32 *Work Choices* (2006) 223 ALR 1, 58-59 [194].
33 Ibid 59-60 [196].
34 Ibid 20 [54].

They embraced the famous passage of Windeyer J in *Victoria v Commonwealth*[35] to the effect that the *Engineers' Case* was a consequence of developments outside the law courts. This included the consolidation of Australia's nationhood in war, by economic and commercial integration and the growth of international standing. The result was that by 1920 the Constitution was read in a new light and with a realisation of national identity.

What is interesting about the approval of these views is that the *Engineers' Case*, with its emphasis on text and structure, is not followed simply because it is the correct legal way to read the Constitution, as we have been repeatedly told in recent years. Rather, it is followed because it suited the changing social and political forces and events that had occurred. Coming from most judges of the present Court that is a surprising proposition.

Justice Kirby in dissent in *New South Wales v Commonwealth*[36] continued the federalism theme he first raised in *XYZ*, but in a less unusual setting. For the most part he treated the existence of s 51(xxxv) as limiting any interpretation of s 51(xx), treating the restrictive wording of the former as equivalent to a 'safeguard guarantee or qualification'[37] found to exist in the banking and acquisition powers, so limiting the scope of other powers that might otherwise extend into the protected area. But, from a wider point of view, he also regarded the Constitution's federal character as relevant.

Justice Kirby claimed that on a broad view of the corporations power the Commonwealth could enter almost any field, because corporations were so prevalent. He named education, health care and many other areas where there has been outsourcing through corporatised bodies.[38] This, he said, would reduce the States to service agencies of the Commonwealth 'by a sleight of hand', and convert the corporations power into 'a near universal power' to regulate.[39] This, he thought, was so alien to the position envisaged by the Constitution that any rational mind will reject it.[40]

Justice Kirby did not reject the passage of Windeyer J approved by the joint judgment. He could hardly do so in the light of his Honour's many judgments emphasising social concerns and evolutionary development in interpretation of the Constitution. Instead he argued that just as the matters raised by Windeyer J resulted in the *Engineers' Case* and a need for stronger national institutions, so too today, the tendency of modern government, corporate development, global forces and modern technology, to concentrate power to a greater degree, makes it necessary to 'rediscover the essential federal character' of the Constitution.[41] He stated that the federal limitations on government were deliberately chosen in the Commonwealth because of the common experience that concentration of power

35 (1971) 122 CLR 353 at 395-96 ('*Payroll Tax Case*').
36 (2006) 231 ALR 1 ('*NSW v Commonwealth'*).
37 Ibid [540].
38 Such as town planning, security and protective services, transport, energy, water, sports and recreation services, gaming and racing and so on.
39 *NSW v Commonwealth* (2006) 231 ALR 1 [549].
40 Ibid.
41 Ibid 150-51 [556].

was often inimical to the attainment of human freedom and happiness.[42] It seems to me very unlikely that this was the motive of the framers in choosing a federation and I know of no historical evidence to that effect.

Many of the matters that Kirby J raises as showing a need to tilt the balance in favour of decentralised power might lead others to adopt the opposite view. International corporations, globalisation and recent technology might lead to a conclusion in favour of greater national and international regulation and control of these mighty forces.

Justice Callinan's judgment is a more full-blooded attack on the development of constitutional interpretation over the past 86 years. His Honour expressed disapproval of almost all the principles of interpretation expounded since 1920. The one exception is the principle in *Melbourne Corporation v Commonwealth*[43] that he interpreted more widely than anyone has yet done.

Generally, his Honour opposed the *Engineers' Case*, finding the dissent of Gavan Duffy J persuasive.[44] His Honour disapproved of the principle in *Murphyores Inc Pty Ltd v Commonwealth*[45] and the interpretation of the external affairs power in the *Tasmanian Dam Case*.[46] Further, his Honour objected to the principle that the Commonwealth powers should be given a large and liberal construction when legislation affected traditional State activities, and he did not agree that each head of power should, as a general rule, be interpreted independently of other powers. Justice Callinan declared that the Constitution contained a powerful implication of a federal balance and that the *Melbourne Corporation* principle required that careful regard be had to the federal balance.[47] His Honour saw control of local industrial disputes and the local economy as essential functions of a State. The *Work Choices Act* by intruding into this area distorted the federal balance and was therefore invalid.

If necessary Callinan J would have overruled the principle in *Concrete Pipes*, but found it unnecessary.[48] This was a clear return to a reserved powers doctrine emphasised by his Honour declaring that s 107 was an important provision which needed to be reconciled with other provisions.[49] But Justice Callinan's judgment contains many unanswered queries such as why the control of local labour disputes, the local environment and mining are essential State functions. That is, of course, different from arguing, as Callinan and Kirby JJ do, that the framers intended to limit Commonwealth power over labour matters or that s 51(xx) is restricted by s 51(xxxv).

With a solid judgment of five judges pursuing what for many decades had been an orthodox approach it is of course highly unlikely that Justice Callinan's call for a return to a golden age of reserved State economic powers will be

42 Ibid 150 [555].
43 (1947) 74 CLR 31.
44 *Work Choices Case* (2006) 231 ALR 1, 212-14 [740]-[747] (Callinan J).
45 (1976) 136 CLR 1.
46 *Work Choices Case* (2006) 231 ALR 1, 185-86 [677]-[680], 263 [882]-[883] (Callinan J).
47 Ibid 232 [791], 267 [894].
48 Ibid 267 [894].
49 Ibid 242 [819].

heeded. But Justice Kirby's concern that the corporations power could in practice be used to give the Commonwealth almost plenary power over education and public health, for example, calls for further comment. It is of course true that the Commonwealth already has great interest and influence in these and other areas by use of its financial powers relating to taxation, grants to the States and appropriations. The concern therefore is direct regulation and control by the Commonwealth, governing corporate universities, hospitals and State governmental activities that have been corporatised.[50]

A lot, however, will depend on what a future court decides as to the nature of a trading or financial corporation. There has hitherto been a dispute amongst judges on this question. Some, such as Gibbs CJ, Stephen, Dawson and Wilson JJ, looked to the overall character of the corporation, its prime or characteristic object. If it was, for example, the advancement of education, or public health, the promotion of sport or the carrying on of a governmental activity, it was not a trading corporation even though it engaged in a large amount of trading. They held therefore that the St George County Council, the Western Australian Football League, the Victorian Superannuation Board and the Tasmanian Hydro-Electric Commission were not trading corporations, although their trading was considerable. In all these instances, except the first, however, the majority of the Court held that they were trading corporations. The favoured test was whether the corporation engaged in significant trading activities in relation to its overall activities, whatever its primary or dominant object.[51]

It is, I think, significant that the joint judgment mentioned on four occasions that the characteristics of constitutional corporations was not in issue. No one called into question the earlier cases.[52] Justice Callinan said it was 'a very big question indeed, and which will occupy, I believe, a deal of the time of the courts in the future'.[53] The extent to which the Commonwealth can, under s 51(xx), take out of the hands of the State the matters raised by Kirby J will depend on the answer to that question. I should also mention that if certain State statutory corporations come within the scope of the corporations power it is open to a State to convert them into government departments or other non-corporate entities. That is what Tasmania would probably have done if it had lost the *Tasmanian Dam Case* only on the basis of the corporations power.

II ORIGINAL INTENT

In *XYZ* Callinan and Heydon JJ, in their dissenting judgment, firmly supported an originalist approach and interpretation. They rejected the view that the external affairs power extended to extra-territorial laws because they considered,

50 Ibid 146 [539] (Kirby J).

51 Leslie Zines, *The High Court and the Constitution* (4th ed, 1997), 85-90. Different considerations were applied where a corporation had not begun, or had just begun, to carry on business: *Fencott v Muller* (1983) 152 CLR 570.

52 *Work Choices Case* (2006) 231 ALR 1, 20-21 [55], 21-22 [58], 49-50 [158], 56 [185] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

53 Ibid 266 [892].

on the basis of historical evidence, that 'external affairs' was the equivalent to 'foreign affairs' and referred to relations with other states or international bodies. The meaning of a term was that which skilled lawyers and other informed observers of the federation period would have attributed to it.[54] They rejected the view expressed by McHugh J in *Re Wakim; Ex parte McNally*[55] that some terms such as 'external affairs' were expressed at such a degree of generality that the test of meaning is 'simply what do these words mean to us as late twentieth century Australians?'[56]

While it is traditional to say that the connotation of a term is that which it had in 1900, a number of cases in recent years have concluded that, in the case of some terms, they were in 1900 in an evolving or fluid state, so that post-1900 developments were accommodated. That approach has been applied to the patents power,[57] the concept of trial by jury in s 80,[58] the grounds of judicial review under s 75(v),[59] standing for the purpose of Chapter III[60] and the concept of alien.[61]

In upholding the validity of the provisions of the *Service and Execution of Process Act 1992* (Cth) in respect of the process of the Crimes Commission of NSW, the Court in *Dalton* emphasised the investigative functions exercised by courts before and after federation. They said that the concept of 'process' was not fixed but develops over time. However, in *XYZ*, Callinan and Heydon JJ said that in order to take in later developments, the modern meaning must be one that informed observers of the federation period would reasonably have considered the term might bear in the future.[62] This seems to deny the notion of a constitution intended to endure and to cover changing circumstances that the framers could not have foreseen. That was made plain by Callinan J in the *Work Choices Case* when he expressed 'deep concern' about a passage in the joint judgment which referred to the changes in the place occupied by corporations now compared with early last century.[63] He was concerned that reference to changing contemporary circumstances would intrude on the role of the people under s 128, which he described as 'sacred'.[64]

The search for original intent can be fraught with difficulty. In the *Work Choices Case* the majority judges and Callinan J examined the Convention Debates and came to different conclusions. In *NSW v Commonwealth*[65] the majority concluded from the Debates that the framers did not intend to confer

54 (2006) 227 ALR 495, 537 [153].
55 (1999) 198 CLR 511, 552-53.
56 *XZY* (2006) 227 ALR 495 [152]-[173]
57 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479.
58 *Brownlee v The Queen* (2001) 207 CLR 278, 291 [34] (Gaudron, Gummow and Hayne JJ).
59 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 97 (Gaudron and Gummow JJ).
60 *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Pty Ltd* (2000) 200 CLR 591, 629 [99] (Gummow J).
61 *Singh v Commonwealth* (2004) 222 CLR 322
62 (2006) 227 ALR 495, 537 [153].
63 (2006) 231 ALR 1, 248 [835].
64 Ibid, 226 [779].
65 (1990) 169 CLR 482 ('*Incorporation Case*').

power under s 51(xx) to create trading and financial corporations. That interpretation of the record has been much disputed.

There can also be dispute about what constitutes evidence of that intent. In *XYZ* Callinan and Heydon JJ in a search for original intent referred to the views of Latham CJ, Dixon, Starke, Evatt and McTiernan JJ in *R v Burgess; Ex parte Henry*.[66] It is important to grasp that they were not quoted simply as legal authorities but as providing evidence of what the framers intended. They were not themselves framers nor were their pronouncements made near the turn of the century. For this purpose Latham CJ was described as a lawyer who was studying law when the Constitution was enacted. Dixon J, they said, began his adult life after federation, but his legal education and early professional life commenced only a short time later.[67] Justices Evatt and McTiernan were in the same position as Dixon J, although a little younger. Their remarks were therefore evidence of original intent, even though they were made in 1936. It may be that by then their views were the product of their experience and thought since they studied law or began their professional careers. If their views are taken to be those of the framers, one gets into some difficulty when referring to judges who were themselves framers and who sharply disagreed on what the Constitution meant, as occurred between 1906 and 1919.

Justice Kirby has on many occasions argued against any attempt to search out and apply the meaning of terms intended by the framers,[68] which he referred to as 'ancestor worship', adopting a phrase used by the Chief Justice of Canada to describe American originalism, as propounded by Scalia J.[69] He said that the words of the Constitution were 'set free' from the framers. Yet in the *Work Choices Case* he referred to the Convention Debates to show that it was not intended that s 51(xx) should extend to conditions of employment. After referring to structural considerations he said '[h]istory, and the Convention Debates suggest the same conclusion'.[70]

In *Forge* Heydon J explored in depth the appointment of acting judges to colonial Supreme Courts in the 19th century and concluded in relation to one extraordinary situation in Queensland in 1892 that it 'cannot have been forgotten by Barton, Griffith and anyone else involved in drafting Chapter III'.[71] On this occasion Kirby J, referring to Justice Heydon's comments, remarked that 'pre-federation colonial debates and assumptions in Australia are … of very limited utility in judging what the Federal Constitution requires, and permits, in contemporary Australia'.[72]

The competing demands of applying original meaning and ensuring that the Constitution is adequate to changing circumstances and unforeseen developments

66 (1936) 55 CLR 608.
67 *XYZ* (2006) 227 ALR 495 [166].
68 See, eg, *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 523-30.
69 Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1.
70 (2006) 231 ALR 1, 139 [515].
71 Ibid 298 [266].
72 Ibid 278 [190].

has been met by a variety of means, such as distinguishing between connotation and denotation, emphasising the evolving nature of the particular concept in 1900 (referred to earlier), or applying the meaning to changing circumstances such as the alteration of Australia's status in the world and the nature of the Crown.

Justice Gummow has said, rightly in my view, that '[q]uestions of construction are not to be answered by the adoption and application of any particular all-embracing and revelatory theory or doctrine of interpretation'.[73] He went on to say that 'questions of constitutional interpretation are not determined simply by linguistic considerations which pertained a century ago. Nevertheless those considerations are not irrelevant'.[74]

Clearly original intent is a useless criterion if it cannot be ascertained, as is often the case, or is a matter of dispute. In other cases, as in *Sue v Hill* [75] or the cases on the meaning of 'alien' or 'subject of the Queen',[76] the original intent is known, but that intent assumed a political and social background that has been swept away. On the other hand it would be wrong, for example, as Jeffrey Goldsworthy has said, to interpret the phrase 'peace, order and good government' as if it had no history signifying plenary power.[77] The same applies to many other parts of the Constitution.

Original intent also raises the issue of comparative law, that is, the assistance that may be obtained from examining cases in the courts of other countries or international tribunals. In *Forge*, the majority, understandably enough, considered that various overseas sources which were referred to in argument provided little guidance. As they saw it, the issue was whether the practice of New South Wales in appointing acting judges to the Supreme Court undermined its independence and impartiality, so falling foul of the *Kable* principle.[78] The reason for rejecting comparative material was that the question depended on the particular historical and governmental setting. The appointment of recorders in England and of temporary or part-time judicial officers in Scotland was referred to in order to illustrate that.

Justice Heydon, however, went much further in his reasons for refusing to examine foreign or international cases. After saying that considerable reliance had been placed on cases on the European Convention, the Canadian Charter and the South African Constitution, he dismissed them because they post-dated Chapter III and were not based on it.[79] This of course runs counter to the practice of the Court in looking to such cases in relation to a variety of constitutional

73 *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 [41-42].
74 Ibid 75 [44].
75 (1999) 199 CLR 462.
76 See, eg, *Street v Queensland Bar Association* (1989) 168 CLR 461; *Shar v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.
77 Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677.
78 *Kable* (1996) 189 CLR 1 [80].
79 *Forge* (2006) 229 ALR 223, 293-94 [250].

issues.[80] For example, the fact that we do not have an express constitutional provision relating to freedom of speech should not prevent us from examining what other courts, which have to deal with an express provision, say about such a freedom in respect of representative government. Ultimately democratic values play a part in such decisions, and we share those with other countries, whatever the precise constitutional provisions and whenever they came into operation. That does not mean, of course, that foreign decisions will always be followed or useful.

III POLICY, VALUES AND CONSEQUENCES

For some years it has been customary to compare and contrast the Court as it existed for the past eight years or so with that of the 1980s and early 1990s, during most of which Sir Anthony Mason was Chief Justice. During that period the old formulaic manner of attempting to decide cases, particularly those relating to ss 90, 92 and 117, was changed. The Court declared it was essential to look at substance not form, to have regard to the social context and to recognise that at times resort to policy, values and the balancing of interests will be necessary.

Some of that approach persists. In *Forge*, for example, concern was expressed that if acting judges could not be appointed there would be difficulties for State Supreme Courts. Chief Justice Gleeson declared that in determining minimum standards of judicial independence and impartiality it was necessary to take into account the exigencies of government and other practical considerations. He said that if the principle in *Kable* led to the conclusion argued by the plaintiffs 'then the principle would require reconsideration'.[81] Similarly, in *XYZ* the Chief Justice examined the difficulty of protecting Australian property, people or interests abroad if it was necessary to rely on State laws.[82] For example, would State laws need to be confined to residents of the State and property in or originating in that State? The joint judgment took a similar view. This is reminiscent of the approach of the majority in *Abebe v Commonwealth*,[83] where it was held that Parliament could limit the grounds on which an administrative decision could be reviewed by the Federal Court, even though full review was available in the High Court. The majority were influenced by the fact that to hold the provision invalid would result in the Commonwealth not being able to establish specialist courts to deal with particular issues. The joint judgment of Gleeson CJ and McHugh J referred to the immense practical problems that would otherwise result. They said that while consequences could not alter the meaning of the Constitution 'they may throw light on its meaning'.[84]

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80 See, eg, *Street v Queensland Bar Association* (1989) 168 CLR 461; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Grollo v Palmer* (1995) 184 CLR 348; *Coleman v Power* (2004) 220 CLR 1.

81 *Forge* (2006) 229 ALR 223, 234 [40].

82 *XYZ* (2006) 227 ALR 495 [15]-[17].

83 (1999) 197 CLR 510.

84 Ibid 532 [43].

At other times, however, the Court has attempted to confine its considerations to text and structure and to suggest that social and consequential arguments are improper, as in *Re Wakim; Ex parte McNally*.[85] At other times an answer has been derived by a rather simple and wooden interpretation without regard to wider issues and at the expense of historically important principles, as in *Combet v Commonwealth*.[86]

In 2006 an example of this unfortunate approach was *Sweedman v Transport Accident Commission*.[87] My criticism does not relate to the decision itself but to the Court's treatment of s 117. The case was concerned with a car accident in New South Wales involving Mrs Sweedman, a resident of New South Wales, driving a car registered in that State and Mr and Mrs Sutton, Victorian residents, driving a Victorian registered car. The Victorian Transport Accident Commission paid the Sullivans compensation under *Transport Accident Act 1986* (VIC) that provided for a no-fault scheme. The compensation came out of a statutory fund into which was paid a transport accident charge levied on all owners of Victorian-registered vehicles. Under s 94 of the Act owners and drivers of such vehicles were indemnified for loss or injury due to accidents. Section 104 authorised the Commission to seek indemnity from other persons where their fault contributed to the injury or damage. The validity of the application of the Act to Mrs Sweedman was upheld (Callinan J dissenting). Much of the case involved issues of the inconsistency of State laws and conflict of laws rules about which I do not propose to comment. The main constitutional argument related to s 117.

Mrs Sweedman argued that if she were a resident of Victoria she would not have been liable under the Victorian Act for the indemnity because her car would then have been registered in Victoria. In a remarkable throw-back to a pre-Mason Court era the Court rejected the argument because the Victorian provision was not conditional on residence, but on payment for the charge for the registered motor vehicle. It was conceivable, the Court said, that a Victorian resident might fail to pay the charge and that a New South Wales resident might have owned or driven a vehicle registered in Victoria in respect of which the charge had been paid.

This approach of taking the unusual situation, rather than the usual or normal situation, to characterise the provision as not based on residence is precisely what the Court attacked in *Street v Queensland Bar Association*.[88] In that case the rules for admission to the Queensland Bar initially provided that an applicant from another state must be a resident of Queensland and cease to practice in the other State. They were then changed by requiring the applicant to have an intention to practice principally in Queensland. The rules in both forms were held invalid and an earlier case[89] to the opposite effect was overruled. The majority judges reasoned that s 117 was unusual in focusing on the position of the individual and

85 (1999) 198 CLR 511.
86 (2005) 221 ALR 621.
87 (2006) 224 ALR 625.
88 (1989) 168 CLR 461 ('*Street*').
89 *Henry v Boehm* (1973) 128 CLR 482.

was not a mere limitation on power.[90] The plaintiff's actual situation had to be contrasted with the hypothetical situation that assumed he or she was a resident in the legislating State. It was irrelevant that there might be some persons residing in the legislating State who will be affected by the law in the same manner as the out-of-State resident. As Mason CJ pointed out, if the issue were whether the law *necessarily* applies differently to residents of the legislating State the answer will almost invariably be 'no'.[91] The object of the legislation and its effect on the applicant was the issue, whatever the formal criterion of operation.

Of course, even if different treatment was established in respect of residents of Victoria and Mrs Sweedman, there would be a further question whether the legislation was justified by the interest of the state. In *Street*, for example, a number of judges considered that state residence might be required for obtaining state welfare benefits financed by state taxes, as is allowable for voting for state Parliament.[92] The joint judgment gave some hint of this justification when it said that the indemnity paid to the Victorian car owner was 'in a practical if not also legal sense the consideration for payment of the transport accident charge'.[93] However, as the Court considered that there was no discrimination based on residence it did not have to tackle the question of countervailing state interests and the balancing of those interests.

In a trenchant comment on this case, Amelia Simpson has said that this is another instance of the Court resolving disputes by simple characterisation, so avoiding any analysis that might require overt judicial evaluation of policy issues and values.[94] The reasoning in respect of s 117 is reminiscent of *Henry v Boehm*, which reduced the guarantee in s 117 to a formality, allowing a State an easy means of advantaging its own people at the expense of others.

III CONCLUSION

It can be seen from this analysis of cases decided in 2006 that there are deep divisions within the High Court on fundamental principles of constitutional interpretation. That, however, is not a unique situation for it to be in, as the history of the Court shows.

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90 *Street* (1989) 168 CLR 461, 485-86 (Mason CJ), 502-03 (Brennan J) and 541 (Dawson J).

91 Ibid 486-87.

92 Ibid 492 (Mason CJ), 546 (Dawson J) and 528 (Deane J).

93 (1989) 168 CLR 461, 639 [62].

94 Amelia Simpson, 'Sweedman v Transport Accident Commission: State Residence Discrimination in the High Court's Retreat into Characterisation' (2006) 34 *Federal Law Review* 363.