

Illegitimately Re-Writing the Music?

The Jack Richardson Oration

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It is an honour to deliver the Jack Richardson 2019 Oration. The outlines of Jack Richardson's career are well-known to this audience. He was a foundation Professor of the, then new, Faculty of Law at the Australian National University. And subsequently, as my predecessor, the Honourable Michael Kirby AC CMG has described him, "the First and Perfect Commonwealth Ombudsman"¹.

Perhaps less well-known today is the work that Jack Richardson did when still a young government lawyer as the Legal Secretary to the Parliamentary Joint Committee on Constitutional Review ("the Joint Committee"). In 1956, the Joint Committee was appointed by both Houses of the twenty-second Commonwealth Parliament. Its brief was to review the workings of the *Constitution* and to make such recommendations for its amendment as the Joint Committee thought necessary in the light of experience. It was an all-party Committee. Prime Minister Menzies and Arthur Calwell, the leader of the Opposition, were *ex officio* members of the Joint

¹ Michael Kirby, "The Development of the 'New' Administrative Law" (Jack Richardson Oration on the Public Lawyer and Public Governance, Law Society of the ACT, 12 September 2012).

Committee, but neither attended its meetings or participated in the preparation of its Final Report².

The Joint Committee's work spanned three years. Its Final Report was drafted by Jack Richardson. It was presented to the twenty-third Parliament in 1959³. It remains an impressive work, displaying an intimate understanding of the interplay of the provisions and drafting history. It is also notable for the acute appreciation of the practical working-out in the mid-twentieth century of a scheme of federal government that was designed at the close of the nineteenth century.

This was not the first review of the *Constitution*. In August 1927, the Royal Commission on the Constitution was appointed by the Bruce government, to inquire into the workings of the *Constitution* since federation⁴. Professor John Peden chaired the Commission and was assisted by six fellow Commissioners. The Royal Commission delivered its Report in September 1929⁵. The

² Richardson, "The Parliamentary Joint Committee on Constitutional Review" (1986) *Canberra Bulletin of Public Administration* 154.

³ Richardson, "The Parliamentary Joint Committee on Constitutional Review" (1986) *Canberra Bulletin of Public Administration* 154 at 155.

⁴ Royal Commission on the Constitution of the Commonwealth of Australia, *Report of the Royal Commission on the Constitution together with Appendixes and Index* (1929) at v.

⁵ Royal Commission on the Constitution of the Commonwealth of Australia, *Report of the Royal Commission on the Constitution*

Commissioners were closely divided over a large question: should Australia retain the Federal system or should it move to a unitary system? Professor John Peden and three other commissioners⁶ favoured retention of the existing system. The three remaining commissioners⁷ urged the adoption of a unitary system of government⁸. In their minority report, they observed that the division of powers under the *Constitution* had led to a considerable amount of litigation. They considered that the authority of the Commonwealth Parliament had been impaired by "the paramount and incalculable power of the High Court in its capacity as arbiter" of the *Constitution*⁹. The adjudication of these "political issues" was said to have the tendency to lessen the Court's prestige¹⁰. They favoured giving the Commonwealth Parliament power to amend the *Constitution* from time to time as it saw fit, with the result that it

together with Appendixes and Index (1929); Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 5.

⁶ Senator Percy Abbott, the Hon Eric Bowden MP and the Hon Sir Hal Colebatch.

⁷ Thomas Ashworth, Maurice Duffy and the Hon Daniel McNamara.

⁸ Royal Commission on the Constitution of the Commonwealth of Australia, *Report of the Royal Commission on the Constitution together with Appendixes and Index* (1929) at 243-247.

⁹ Royal Commission on the Constitution of the Commonwealth of Australia, *Report of the Royal Commission on the Constitution together with Appendixes and Index* (1929) at 245.

¹⁰ Royal Commission on the Constitution of the Commonwealth of Australia, *Report of the Royal Commission on the Constitution together with Appendixes and Index* (1929) at 243.

would come to be "invested with full control over the matters that the people desired"¹¹.

The Joint Committee to which Jack Richardson was attached did not work on such a large canvass. Its workmanlike recommendations assumed the continuance of our federal system of government. The Joint Committee was mindful that the Royal Commission was reporting in the early years of the federation before the enactment of the *Statute of Westminster 1932* (UK)¹². By contrast, the Joint Committee observed that¹³:

"It is interesting to reflect on the many developments indicative of a maturing Commonwealth which have since taken place and to compare our contemporary national life with that depicted in the pages of the Commission's Report."

The Joint Committee made recommendations with respect to the composition and functioning of the Commonwealth Parliament, for an increase in its concurrent legislative powers over eleven discrete subject matters and to permit alteration of the *Constitution* on a somewhat less restrictive basis than is provided under s 128.

¹¹ Royal Commission on the Constitution of the Commonwealth of Australia, *Report of the Royal Commission on the Constitution together with Appendixes and Index* (1929) at 246.

¹² Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 5.

¹³ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 5.

The first of its recommendations on legislative power concerned navigation and shipping. Section 98 of the *Constitution* states that the power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State. The Joint Committee explained that, before 1910, the view widely held, and acted upon, was that the whole subject of navigation and shipping was within the legislative competence of the Commonwealth¹⁴. In that year, the High Court held that s 98 did not enlarge the trade and commerce power¹⁵. It followed that the provisions of the *Seamen's Compensation Act 1909* (Cth), insofar as they purported to regulate intra-state trade, were invalid. A few years later, provisions of the *Navigation Act 1912* (Cth) and Regulations made under it concerning the manning of, and accommodation on, ships, were held to be invalid to the extent that they purported to apply to ships engaged solely in domestic trade¹⁶.

Fittingly, the subject matter of navigation and shipping was included among the enumerated legislative powers of the Commonwealth in the Constitution Bill drafted in the spring of 1891

¹⁴ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 58 [408].

¹⁵ *Owners of the SS Kalibia v Wilson* (1910) 11 CLR 689.

¹⁶ *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth* (1921) 29 CLR 357.

on board the motor launch, *Lucinda*¹⁷. It appears that, at the Melbourne Session of the 1898 Convention, the concern to remove any doubt that State owned railways would be subject to the trade and commerce power led to the inclusion of the declaratory clause that became s 98. The Joint Committee considered that the members attending the Convention had not appreciated that the effect of locating the navigation and shipping power in clause 98 was to cut down the Commonwealth's power over that subject. So much, at least, was the view of the Solicitor-General, Sir Robert Garran, in his advice to Commonwealth and State Ministers when they met to consider constitutional matters in 1934¹⁸. The absence of an express power over navigation and shipping was, in Sir Robert's view, an oversight¹⁹.

The Joint Committee considered it completely illogical to have a legal power divided over a subject which, by its nature, is undivided. It endorsed the views of Sir John Latham and Professor Geoffrey Sawer, that the case in favour of amending the

¹⁷ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 58-59 [415].

¹⁸ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 58-59 [415]-[416].

¹⁹ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 59 [416] citing Solicitor-General, Robert Garran's Memorandum to the Conference of Commonwealth and State Ministers on Constitutional Matters (1934).

Constitution to confer power on the Commonwealth to legislate in this area was overwhelming²⁰.

If the case for the Commonwealth to have power to regulate navigation and shipping was overwhelming, so much more so was the case for the Commonwealth to have power to regulate aviation. Aviation, of course, did not exist at Federation. The first scheduled passenger airline flight took place across Tampa Bay in the United States in 1914. By the end of World War I, lively questions had arisen with respect to sovereignty over airspace. At the Paris Peace Conference in 1919, the Convention Relating to the Regulation of Aerial Navigation ("the Convention") was drawn up. It was subsequently ratified by King George V on behalf of the British Empire. The Convention recognised the absolute sovereignty that every nation possesses over the airspace above its territory and waters. At the Premiers' Conference in 1920, the States resolved to refer power to make laws with respect to air navigation to the Commonwealth²¹. The *Air Navigation Act 1920* (Cth) anticipated that referral. It purported to authorise the making of regulations for the purpose of giving effect to the Convention and to provide for the control of air navigation in the Commonwealth and its territories. In

²⁰ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 61 [435].

²¹ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 68 [492].

the event, a majority of States failed to implement the terms of the referral resolution.

In 1936, the validity of Regulations made under the *Air Navigation Act* were successfully challenged in the High Court²². It was a moment prefiguring "The Castle". A daredevil, one-legged, aviator, Henry Goya Henry, famed for flying his Australian-made biplane, the Jolly Roger, under Sydney Harbour Bridge, was convicted before the Court of Petty Sessions of an offence under the Regulations. The offence was particularised as flying within the limits of the Commonwealth, namely near Mascot in the State of New South Wales, without being licensed in the prescribed manner. Henry brought proceedings in the High Court's original jurisdiction contending that the Regulations were invalid. Evatt J granted an order nisi for a writ of prohibition to restrain the informant and the Magistrate from proceeding on the conviction.

In the Full Court, the Commonwealth sought to defend the Regulations, submitting, among other arguments, that under the trade and commerce power it must have the capacity to protect inter-state and foreign aviation from interference²³. Aviation was still in its infancy when the case was decided. Rejecting this plank of the Commonwealth's case, Latham CJ observed that considerations of

²² *R v Burgess; Ex parte Henry* (1936) 55 CLR 608.

²³ *The King v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 627.

expediency could not control the construction of the statutory language: the *Constitution* confers on the Commonwealth power over inter-state and foreign trade and commerce. It did not give power over intra-state trade and commerce²⁴. In 1937, a proposal to give the Commonwealth power with respect to air navigation and aircraft was the subject of a referendum. The proposal was approved by a majority of voters but it failed to obtain the necessary majority of States²⁵.

Looking at the matter in 1959, the Joint Committee said that it was absurd that legal power over aviation should be determined by the physical boundaries of the States²⁶. It recommended that the *Constitution* be amended to vest express power over aviation in the Commonwealth Parliament.

The Commonwealth's power over industrial matters under s 51(xxxv) is "to make laws ... with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". The Joint Committee pointed out that at Federation the six colonies each possessed its

²⁴ *The King v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 628.

²⁵ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 69 [495].

²⁶ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 69 [497].

own distinct economy and that, over the succeeding half-century, a single economy had emerged. The state of that single economy was, in the Joint Committee's view, a matter of national importance²⁷. It drew attention to the problems occasioned by the division of industrial powers between the Commonwealth and the States and the particular difficulties caused by the technical and restrictive language of s 51(xxxv). It proposed that the Commonwealth have power to make laws with respect to the terms and conditions of industrial employment and the prevention and settlement of industrial disputes²⁸.

A little over five years after its first sitting, the High Court held in *Huddart Parker & Co Pty Ltd v Moorehead*²⁹ that provisions of the *Australian Industries Preservation Act 1906* (Cth) were ultra vires insofar as they purported to apply prohibitions on restraint of trade to corporations engaged in intra-state trade. The Joint Committee was critical of the decision. It again drew on Sir Robert Garran's 1934 advice to the Commonwealth and State Ministers. Sir Robert had drawn attention to the differences in the analysis of each of the

²⁷ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 86 [625].

²⁸ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 105 [766].

²⁹ (1909) 8 CLR 330 ("*Huddart Parker*").

Justices as to the scope of the corporations power³⁰. He had explained that there had been little debate on the clause that became s 51(xx) at the Convention of 1897-98, which he believed had been intended to give the Commonwealth power to enact a general "company law"³¹.

For its part, the Joint Committee inclined to the view that it was uncertain what the framers intended. It did note that counsel assisting the Royal Commission on the Constitution, later to become the Chief Judge in Equity of the Supreme Court of New South Wales, described the discovery that there was no general power to legislate with respect to companies as "one of the surprises of litigation"³². The Joint Committee concluded that there was nothing to be lost and a good deal to be gained by having a uniform company law for the whole of Australia³³.

³⁰ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 108 [787].

³¹ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 109 [792].

³² Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 109 [790] citing Nicholas, *The Australian Constitution*, 2nd ed (1952) at 59.

³³ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 111 [811].

The Joint Committee also recommended that the Commonwealth Parliament have express powers to legislate with respect to restrictive trade practices³⁴ and with respect to marketing schemes for primary produce. It was evident that the marketing of several important primary products required uniform national policies. Such a scheme was often only possible if the Commonwealth and all six States agreed to it. Even then, as the Joint Committee noted, s 92 would still "stand above any agreement"³⁵. It recommended that the Commonwealth be given power to make laws with respect to marketing primary produce, free from the constraints of s 92³⁶.

The Joint Committee concluded its Final Report with one acknowledgment³⁷:

"The Committee deems itself fortunate to have had as its Legal Secretary a brilliant young lawyer of outstanding ability, character and personality in Mr J.E. Richardson, B.A., LL.M. The Committee expresses its keen appreciation of the action of the Solicitor-General in

³⁴ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 117 [856].

³⁵ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 126 [924].

³⁶ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 133 [978].

³⁷ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 172 [1310].

making Mr. Richardson's services available. His numerous written submissions on aspects of the Constitution, his efficient help to the Committee in its deliberations and his preparation of draft reports were invaluable and were matched by his complete devotion to the work of the Committee throughout the past three years."

Thirty years after the publication of the Final Report, Jack Richardson reflected on the Joint Committee's work in a paper published in the *Canberra Bulletin of Public Administration*³⁸. The lapse of time permitted him to write frankly about the Joint Committee's deliberations and his perception of the political forces that had led to its establishment and which had seen its work largely buried. He explained that, in government circles at the time, many believed that Prime Minister Menzies' interest in constitutional reform was confined to the possible amendment of s 57. The experience of the double dissolution in 1951 and the continued prospect of a hostile Senate had led him to believe that there should be a better mechanism for the resolution of deadlocks between the two Houses³⁹.

Richardson explained that the initial Chairman of the Joint Committee was the then Attorney-General, Senator Spicer. Shortly after its establishment, Senator Spicer was appointed Chief Justice

³⁸ Richardson, "The Parliamentary Joint Committee on Constitutional Review" (1986) *Canberra Bulletin of Public Administration* 154.

³⁹ Richardson, "The Parliamentary Joint Committee on Constitutional Review" (1986) *Canberra Bulletin of Public Administration* 154.

of the newly-formed Commonwealth Industrial Court and his successor, Senator O'Sullivan, took over the Chairmanship. Richardson neutrally explained that under Senator Spicer's leadership there had been a degree of uncertainty as to how extensive the review should be. Under the "genial chairmanship" of Senator O'Sullivan, the Committee had felt "less inhibited"⁴⁰. In the result, the Committee had undertaken a wide-ranging review and away from party pressures it had succeeded in achieving near unanimity in its recommendations.

At the general election following the publication of the Final Report, the Menzies Government was returned, and Sir Garfield Barwick became the Attorney-General. Richardson said that he had been summoned by Sir Kenneth Bailey, the Solicitor-General, and was informed that, apart from interest in a federal law on restrictive trade practices, the Attorney-General was not attracted in the least to much of the work of the Joint Committee⁴¹. The Joint Committee had hoped that it would be reconvened to finish work on outstanding matters. It was not reconvened, its Final Report was not debated in the Parliament and none of its recommendations were submitted to the electorate by way of referendum. By 1986, Jack Richardson had

⁴⁰ Richardson, "The Parliamentary Joint Committee on Constitutional Review" (1986) *Canberra Bulletin of Public Administration* 154.

⁴¹ Richardson, "The Parliamentary Joint Committee on Constitutional Review" (1986) *Canberra Bulletin of Public Administration* 154 at 155.

come to the view that parliamentary committees and constitutional conventions had "had their day"⁴².

Richardson accepted with equanimity that the mechanism under s 128 for alteration of the *Constitution* has produced "impressively conservative" results⁴³. He observed with equal equanimity that the Joint Committee's recommendations for increase in the Commonwealth's concurrent legislative power had been largely rendered unnecessary by decisions of the High Court over the succeeding 30 years. He characterised those decisions as a striking commentary on how the *Constitution* had been "amended" by the judicial process rather than by formal legislative change⁴⁴. I infer from the tenor of his writing on the topic that Jack Richardson was not troubled by this development.

Apart from constitutional law, Jack Richardson's area of specialty was aviation law. He welcomed the High Court's recognition in 1965 that the world had moved on in the matter of

⁴² Richardson, "The Parliamentary Joint Committee on Constitutional Review" (1986) *Canberra Bulletin of Public Administration* 154 at 156.

⁴³ Richardson, "Reform of the Constitution" in Evans (ed), *Labor and the Constitution 1972-1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam years in Australian Government* (1977) 76.

⁴⁴ Richardson, "The Parliamentary Joint Committee on Constitutional Review" (1986) *Canberra Bulletin of Public Administration* 154 at 155.

aviation⁴⁵. Regulations that prohibited the use of an aircraft in public transport operations without a licence issued by the Director-General of Civil Aviation were held to be valid in relation to intra-state aviation. Windeyer J explained that the real strength of the Commonwealth's case lay in the simple proposition that inter-state and overseas air navigation could only be effectively regulated if all aircraft using the air over Australia were subject to the same code of rules⁴⁶. As his Honour had earlier explained, "measures that at one time might have been unnecessary may, with changing circumstances, become necessary"⁴⁷. It was not that the nature of the power changed. Rather, what changed were the conditions and circumstances within which the power is exercisable⁴⁸.

Jack Richardson was equally pleased to see *Huddart Parker* overruled in the *Strickland v Rocla Concrete Pipes Ltd*⁴⁹, which decision served to address many of the concerns that the Joint

⁴⁵ *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54.

⁴⁶ *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 at 151.

⁴⁷ *Airlines of New South Wales Pty Ltd v New South Wales* (1964) 113 CLR 1 at 51.

⁴⁸ *Airlines of New South Wales Pty Ltd v New South Wales* (1964) 113 CLR 1 at 51.

⁴⁹ (1971) 124 CLR 468.

Committee had identified as to the Commonwealth's capacity to legislate with respect to restrictive trade practices⁵⁰.

Jack Richardson's benign reflections on the work of the High Court supplanting the need for legislative amendment of the *Constitution* were made two years before *Cole v Whitfield*⁵¹ was decided⁵². I suspect that Richardson, like many practising lawyers, might have welcomed *Cole v Whitfield* as a secular miracle: a unanimous judgment settling the scope of s 92 after so many failed attempts.

This was not a universal view. The Hon PD Connolly, a retired judge of the Supreme Court of Queensland, was prompted to write⁵³:

"[T]he question is whether it is open to seven lawyers, no matter how eminent the office which they hold, to reverse well-established law by reason of a personal

⁵⁰ Richardson, "Reform of the Constitution" in Evans (ed), *Labor and the Constitution 1972-1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam years in Australian Government* (1977) 76 at 77, citing *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

⁵¹ *Cole v Whitfield* (1988) 165 CLR 360.

⁵² Richardson, "The Parliamentary Joint Committee on Constitutional Review" (1986) *Canberra Bulletin of Public Administration* 154.

⁵³ Connolly, "*Cole v Whitfield* – The Repeal of Section 92 of the Constitution?" (1991) 16 *University of Queensland Law Journal* 290 at 295-296.

preference. ... Sad though it may be for the High Court to apply decisions with which they are in personal disagreement, that is the lot of judges everywhere and at all times. One asks oneself however what a democracy is to do when its judges deliberately depart from the law so as to deprive the people of existing rights under a Constitution which, in theory, the people alone can alter."

Perhaps no one so much as the late Professor Michael Coper is entitled to take umbrage with the decision in *Cole v Whitfield*. When the decision was handed down, Professor Coper's scholarly monograph on s 92⁵⁴ was still new and might have been expected to have some years of profitable life left in it. As he observed in the preface, no other area of the *Constitution* had excited the imagination quite like s 92, from WA Holman's image of the provision "charging like a torpedo through a bay of crowded shipping"⁵⁵ to GL Hart's image of it as "an unruly team that has bolted out of the last century"⁵⁶. Commentators had groped for one metaphor after another to convey the controversy which the provision had generated⁵⁷.

⁵⁴ Coper, *Freedom of Interstate Trade under the Australian Constitution* (1983).

⁵⁵ Holman, "Section 92 – Should it be Retained?" (1933) 7 *Australian Law Journal* 140 at 142.

⁵⁶ Hart, "Some Aspects of Section 92 of the Constitution" (1957) 30 *Australian Law Journal* 551 at 563.

⁵⁷ Coper, *Freedom of Interstate Trade under the Australian Constitution* (1983) at iii.

Nonetheless, when Professor Coper addressed the topic of constitutional change as the product of judicial interpretation his tone was sanguine⁵⁸. Not one to fawn, Professor Coper said one does not have to be blind to the limits of judges in order to recognise "the appropriateness and inevitability of the creative element in judge-made law"⁵⁹. Professor Coper was not inclined to inhibit judges from using "their usual wizardry" to arrive at decisions blending history, text, precedent, purpose and policy that are in tune with the perceived needs of the day⁶⁰. As he characterised the product of judicial interpretation of the *Constitution*, "while the lyrics ... have remained virtually unchanged, the judges, by making their choices, have substantially rewritten the music"⁶¹.

An alternative view is that much of the Court's work in constitutional cases has involved the illegitimate usurpation of the power which the *Constitution* vests in the people of the

⁵⁸ Coper, "The People and the Judges: Constitutional Referendums and Judicial Interpretation" in Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 73.

⁵⁹ Coper, "The People and the Judges: Constitutional Referendums and Judicial Interpretation" in Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 73 at 74.

⁶⁰ Coper, "The People and the Judges: Constitutional Referendums and Judicial Interpretation" in Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 73 at 74.

⁶¹ Coper, *Encounters with the Australian Constitution* (1987) at 401.

Commonwealth⁶². It is a view that may attribute to the people of the Commonwealth a more active democratic role than the one for which s 128 of the *Constitution* provides⁶³. Nonetheless, it is a view which might have commended itself to Sir Harrison Moore in the afterglow of Federation, before the establishment of the Federal Supreme Court to be called the High Court of Australia. In the first edition of his celebrated work, *The Constitution of the Commonwealth of Australia*, published in 1902, Sir Harrison stated⁶⁴:

"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."

As Professor Twomey has drily noted, this prediction was excluded from the second edition of Harrison Moore's work published in 1910⁶⁵.

⁶² Craven, "The High Court of Australia: A Study in the Abuse of Power" (1999) 22 *University of New South Wales Law Journal* 216; Goldsworthy, "Interpreting the Constitution in its Second Century" (2000) 24 *Melbourne University Law Review* 677 at 684.

⁶³ See Saunders, "Oration: Sir Daryl Dawson" (1998) 20 *Adelaide Law Review* 1 at 9.

⁶⁴ Moore, *The Constitution of the Commonwealth of Australia* (1902) at 332.

⁶⁵ Twomey, "Constitutional Alteration and the High Court: The Jurisprudence of Justice Callinan" (2008) 27 *The University of*

Criticism of the Court for overreach, of course, must acknowledge its interpretive role, for which the *Constitution* itself provides⁶⁶. As Alfred Deakin explained in his speech on the Bill which became the *Judiciary Act 1903* (Cth)⁶⁷:

"The Constitution was drawn, and inevitably so, on large and simple lines, and its provisions were embodied in general language, because it was felt to be an instrument not to be altered lightly, and indeed incapable of being readily altered; and, at the same time, was designed to remain in force for more years than any of us can foretell, and to apply under circumstances probably differing most widely from the expectations now cherished by any of us."

Mr Connolly's criticism of *Cole v Whitfield* accepts that it was the duty of the High Court to interpret the deceptively simple terms of s 92. Mr Connolly's charge of judicial overreach was not to the assignment of legal meaning to the text, but to the decision to depart from the meaning once pronounced.

Queensland Law Journal 47 at 50, citing Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 621-622.

⁶⁶ *Constitution*, s 76(i).

⁶⁷ Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10965.

One rejoinder to such criticism was given in 1913 by Isaacs J⁶⁸:

"The oath of a Justice of this Court is 'to do right to all manner of people *according to law*'. Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right".

One suspects that Sir Isaac Isaacs, a judge of very great ability, was rarely troubled by doubt that his view of the law may not be the correct view. A less assured approach to constitutional interpretation was articulated by Sir Harry Gibbs in the *Second Territories Representation Case*; it is only after the most careful and respectful consideration of an earlier decision that a Justice may give effect to his or her own opinion in preference to that earlier decision⁶⁹.

The two *Territories Representation Cases*⁷⁰ test some of the arguments of those who accuse the High Court of overreach. In

⁶⁸ *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278.

⁶⁹ *Queensland v Commonwealth* (1977) 139 CLR 585 at 599.

⁷⁰ *Western Australia v Commonwealth* (1975) 134 CLR 201; *Queensland v Commonwealth* (1977) 139 CLR 585.

issue on each occasion was the evident tension between ss 7 and 122 of the *Constitution*. Section 7 relevantly provides for the equal representation of the several "Original States" in the Senate, and s 122 confers power on the Commonwealth Parliament to make laws for the government of any Territory including by allowing the representation of a Territory in either House to the extent, and on the terms, that it thinks fit. It was necessary for the Court to reconcile the two; a task which required determining the leading provision.

In the first *Territories Representation Case*, Gibbs J concluded that the provisions governing the composition of the Senate were "indispensable features" of the constitutional scheme and it followed that s 122 was merely "subsidiary"⁷¹. As Professor Stellios has suggested, the conclusion did not depend on what the *Constitution*, in terms, provides, but on Gibbs J's assessment of the importance of the federal principle over that of the principle of representation. Professor Stellios is not critical of his Honour's conclusion, but is critical of the suggestion that the *Constitution* itself pointed to an inevitable result⁷². Notably, both Stephen and Mason JJ acknowledged in the *Second Territories Representation Case* that

⁷¹ *Western Australia v Commonwealth* (1975) 134 CLR 201 at 246, 248-249.

⁷² Stellios, *Zines's The High Court and the Constitution*, 5th ed (2015) at 680.

either view as to the resolution of the apparent conflict between the two provisions was plausible⁷³.

The arguments that judicial interpretation has stepped over the line and supplanted the formal mechanism for alteration of the *Constitution* are most fully developed in Callinan J's dissenting reasons in *New South Wales v Commonwealth* ("*Work Choices*")⁷⁴. It will be recalled that the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) was introduced with the object of creating a national workplace relations system, relying on the corporations power⁷⁵.

In dealing with the challenge to the validity of the scheme, Callinan J reasoned that early Federal Parliaments well-understood that the industrial affairs power was limited by the language and intent of s 51(xxxv)⁷⁶:

"To make laws ... with respect to ... conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

⁷³ *Queensland v Commonwealth* (1977) 139 CLR 585 at 603 per Stephen J, 606 per Mason J.

⁷⁴ (2006) 229 CLR 1.

⁷⁵ Explanatory Memorandum, *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) at 7.

⁷⁶ *New South Wales v Commonwealth* (2006) 229 CLR 1 at 275-276.

His Honour reviewed the Convention Debates along with the judgments and extra curial statements of the Justices who had participated in those Debates and concluded that there had been no intention to confer any intra-state industrial power on the Commonwealth⁷⁷.

It is uncontroversial that the scope of the Commonwealth's power to regulate industrial relations declared by the majority in *Work Choices* was not within the expectations of the framers. As the Joint Committee observed, the framers had in mind that the prevention and settlement of strikes of the kind that had beset the colonies in the 1890s, and the regulation of industrial conditions, would continue primarily to be a State function⁷⁸.

The joint reasons in *Work Choices* rejected the utility of determining the scope of the Commonwealth's legislative power by inquiring whether a proposed construction would have surprised the framers⁷⁹. Their Honours' reasons in this respect echoed Sir Robert Garran's criticism of *Huddart Parker*, to which the Joint Committee

⁷⁷ *New South Wales v Commonwealth* (2006) 229 CLR 1 at 284 [706].

⁷⁸ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 88 [642].

⁷⁹ (2006) 229 CLR 1 at 97 [120].

had referred.⁸⁰ The five Justices who decided *Huddart Parker* had all been leading participants in the Convention debates. Yet each Justice had a different understanding of the meaning of s 51(xx) and no one view commanded the assent of even a majority⁸¹.

Speaking extra-curially, not long after *Work Choices* was handed down, Gleeson CJ observed that, if one accepts the accuracy of the argument in the Commonwealth Law Reports, it is evident that these five founding fathers entertained between them six different conceptions of the scope of the corporations power. His Honour thought this unsurprising, since the meaning of s 51(xx) is not self-evident, and the participants in the Convention debates did not give close attention to its operation⁸².

For Callinan J in *Work Choices*, the repeated failure of proposals to enlarge the industrial affairs power at successive referenda reinforced his view of the scope of the power⁸³. The joint reasons were not persuaded by the argument based on the history of

⁸⁰ Commonwealth Parliament, *Report from the Joint Committee on Constitutional Review* (Parliamentary Paper No 108, 1959) at 108 [787].

⁸¹ *New South Wales v Commonwealth* (2006) 229 CLR 1 at 80 [71].

⁸² Gleeson, "The Constitutional Decisions of the Founding Fathers" (University of Notre Dame School of Law (Sydney) Inaugural Annual Lecture, 27 March 2007) at 18.

⁸³ (2006) 229 CLR 1 at 284 [707].

failed referenda. Their Honours considered it difficult to argue from the failure of a particular referendum proposal, to a conclusion about the meaning to be given to the constitutional text. They dismissed as altogether too simple that rejection of a proposal at a referendum is to be viewed as the informed choice of the electors between clearly identified constitutional alternatives. More fundamentally, their Honours questioned whether the rejection of a proposal is to be understood as confirming the meaning of the *Constitution*, or whether the rejection of a proposal is said to have worked some change of meaning⁸⁴.

Professor Zines dismissed the idea of illegitimate judicial "alteration" of the *Constitution* as little more than propaganda⁸⁵. He saw the argument as based on a misunderstanding of the nature of judicial interpretation. He illustrated the point by reference to the *Tasmanian Dams Case*⁸⁶. The majority upheld the Commonwealth's power under s 51(xxix), the external affairs power, to enact legislation to give effect to an international treaty obligation, whatever may be the subject matter of the treaty. The minority

⁸⁴ *New South Wales v Commonwealth* (2006) 229 CLR 1 at 100-101 [131]-[135] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

⁸⁵ Zines, "What the Courts Have Done to Australian Federalism" (Senate Occasional Lecture to commemorate the centenary of the National Australasian Convention 1891, November 1991) at 8.

⁸⁶ *Commonwealth v Tasmania* (1983) 158 CLR 1.

sought to limit the power by consideration of whether the treaty is one relating to a matter of sufficient international concern. In the minority view, the *Convention for the Protection of the World Cultural and National Heritage* was not such a treaty. This was by way of contrast with the *International Convention on the Elimination of All Forms of Racial Discrimination*, which had earlier been held to support the *Racial Discrimination Act 1975* (Cth)⁸⁷.

Professor Zines observed that the majority concentrated on the place of Australia in the world, while the minority emphasised the position of the States in relation to the nation. The text of the *Constitution* did not provide any conclusive answer. His point was that, whatever the framers intended, they could not, in the circumstances of the 1890s, have regarded a power to implement any treaty as inconsistent with a federal system in which the States retain substantial power. What the framers were unlikely to have predicted was the enormous expansion in international activity over the succeeding century⁸⁸.

Responding to criticism of the Court's role in constitutional interpretation, Sir Anthony Mason pointed out that while the framers

⁸⁷ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

⁸⁸ Zines, "What the Courts Have Done to Australian Federalism" (Senate Occasional Lecture to commemorate the centenary of the National Australasian Convention 1891, November 1991) at 8.

wished to preserve the States as strong constituent elements of the federation, this was accompanied by a purpose of giving the Commonwealth all the powers needed to conduct the affairs of a nation in respects that are outside the competence of individual States⁸⁹. On that note, I will close, observing that in Jack Richardson's estimate, the High Court's interpretation of Commonwealth powers was the paramount factor that enabled the *Constitution* to perform an adequate role during the developing and maturing stages of the Australian economy over the second half of the last century⁹⁰.

⁸⁹ Mason, "The role of a constitutional court in a federation: A comparison of the Australian and United States experience" in Lindell (ed), *The Mason Papers* (2007) 110 at 134.

⁹⁰ Richardson, "Reform of the Constitution" in Evans (ed), *Labor and the Constitution 1972-1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam years in Australian Government* (1977) 76 at 77.