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LAW AND CHANGE

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Many kinds of change affect the law, and many laws are designed to promote change. My present concern is with a particular kind of change, and its effect on the shape of the law. It might be described as contextual change. A case may be presented to a court as though it calls for a decision about a discrete issue: perhaps the interpretation of a statutory provision, or the operation of some aspect of the Constitution, or the application, and possible refinement or development, of a rule of common law. Yet the issue always exists in a wider legal context. Understanding context, and appreciating the effect of changes in context, is one of the challenges of judging.

The context in which the meaning of a provision in a statute is to be decided may include other provisions in the same Act; the general scheme of legislation of which the Act forms a part; the constitutional power pursuant to which the legislation was enacted; the provisions of cognate legislation; the history of the enactment, including the previous law, and legal problems the section was designed to remedy; the common law with which the legislation may intersect; and the rules of procedure and evidence that govern the practical application of the law.

The purpose of this paper is to reflect upon the importance of the wider legal and institutional environment in which particular rules of law exist and in which particular legal problems arise for decision. I will attempt to demonstrate the complexity and dynamism of that environment, beginning with fairly technical and uncontroversial examples and moving on to some examples which are of wider public interest.

People, and institutions, sometimes change in order to improve. Sometimes change takes the form of degeneration, and corruption. Nobody aged 70 believes that all change is progress. To suggest that all legal and institutional change is progressive would be absurd. Moral or political judgments are necessary for discrimination between change and progress, but such judgments are not relevant to my present purpose.

It is convenient to start with the idea of coherence, and its significance in the development of the common law. This may be illustrated by a commonplace problem of tort law. The law of negligence may require a court to decide whether, in some novel situation, (that is, a situation for which there is no existing judicial authority), a defendant owed a duty of care to a plaintiff. There have been few developments in the common law that could compare, in their impact, with that of the decision of the House of Lords in *Donoghue v Stevenson*.¹ Yet, at the time, it was a close-run thing. It was a decision of a 3-2 majority. I wonder how many modern barristers, or judges for that matter, have ever read the dissenting judgments. (They are interesting, because they foretell some problems that the law of negligence to this day has not resolved satisfactorily). I wonder how many law students are invited to read them. In one respect, the decision was a change in the direction of simplification. An overarching principle of liability in negligence, based on the concept of a duty

of care, and reasonable foreseeability of harm, was identified as the conceptual foundation of previous instances of liability, and as a predictor of liability in future cases. Is the law of negligence simpler now than it was in 1933, following that decision? I think not. It may be better: more principled, and more just. Yet appellate courts in Australia and elsewhere are still struggling with issues of duty of care. One reason is that the legal context in which the issue arises is complex. Courts seek to maintain coherence in the face of that complexity; but as the complexity of the legal context increases the task becomes more difficult.

In a fairly recent South Australian case, there was a question whether welfare authorities and medical and social workers with a statutory responsibility to care for victims of child abuse owed a legal duty of care to persons suspected of being perpetrators. The question was answered in the negative by the Supreme Court of South Australia,² and by the High Court,³ substantially because of a need to maintain legal coherence. The legal setting in which the defendants worked included legislation that subjected them to certain obligations and priorities. It was decided that it would have been incongruous to impose on them to a common law duty of care of the kind claimed.

A similar problem of coherence arises in another area in which issues of duty of care arise. Health and local government authorities have power and responsibilities, under statutes, for public safety. Citizens who suffer harm may blame the authorities for lack of care. In deciding whether there is potential liability in negligence, based upon a duty of care to an individual plaintiff, courts are influenced by the wider legislative context in which the authorities function.⁴

If a defendant's carelessness is capable of being a cause of reasonably foreseeable harm to a plaintiff, then why should not the law accept that the defendant owed the plaintiff a duty of care? Why do we not all owe each of our fellow citizens a duty to take reasonable care to avoid causing foreseeable harm? Part of the answer is that, if we did, we would live under an intolerable burden of legal responsibility. Another part is the web of rights and obligations created by the law, and freedoms which the law respects. The law of negligence applies in that broader context.

Coherence or reasonable consistency is only one of the objectives of a rational legal order, but it bears heavily upon judicial development and application of the common law, and upon legislative policy. What are sometimes called unintended consequences of an Act of Parliament, or a judicial decision, are likely to be the product of insufficient understanding of the context in which a particular rule of law is to operate. Changes in context may be of controlling importance for development in more particular areas.

For modern courts, the legal environment in which a principle of common law operates has become increasingly dominated by legislation. Parliaments, federal and State, are now active in areas of the law that once were left to judges. Law reform is a matter of popular and political interest. Most Australian jurisdictions have standing Law Reform Commissions. All Australian Parliaments produce an output of legislation that would have been regarded as astonishing in former times. There is now no such thing as "lawyers' law". Very little of this legislation takes the form of codification. Most of it modifies, and is designed to interact with, established common law. Obviously, when legislation dictates the answer to a legal question, and the meaning of the legislation is clear, a court's duty is simply to understand and apply the legislation. Even where legislation may not dictate an answer, it

may nevertheless form part of the setting in which the question is to be considered; and that setting may change over time.

The symbiotic relationship between judge-made law and statute is a dominant feature of modern legal culture.⁵ It is now commonplace for parliaments to enter into fields such as sentencing, assessment of damages, regulation of civil liability, proscription of unconscionable dealings and other areas that once were largely occupied by judge-made rules. Parliaments respond to judicial decisions, and judges in turn, striving to maintain legal coherence, take account of the indirect as well as the direct consequences of legislation.

There is a practical matter that should be mentioned in passing. In our adversarial system of civil and criminal justice, courts rely upon counsel to bring to notice contextual information relevant to the issues presented for decision. The increasing volume of legislation and other regulatory material that forms part of the background to a legal issue means that the expectations of judges about the assistance they need from counsel have increased.

Let me now turn to an example of contextual change at work in development of judge-made law. The rule in *Rylands v Fletcher*⁶ has disappeared from the common law of Australia. Perhaps best regarded as a part of the law of nuisance, this rule, developed in the 19th century, operated in some circumstances to impose strict liability, that is, liability even though there was no negligence, for damage caused by an occupier of land to a neighbouring occupier by reason of the escape of dangerous substances. In a 2004 case in the House of Lords, Lord Hobhouse said the approach “was entirely in keeping with the economic and political culture of the 19th century”, and that it

accorded with the existing legal theory at the time.⁷ The circumstances in which the rule applied were not clearly defined, and the rule was subject to much criticism. In 1994, in *Burnie Port Authority v General Jones Pty Ltd*,⁸ the High Court held that the rule was no longer part of Australian law. This decision was based not only on dissatisfaction with the rule's lack of clarity, but also upon two contextual considerations. First, many forms of hazardous activity are now regulated by statutes which have their own schemes for adjusting the rights and liabilities of neighbouring landowners. Secondly, the developments in the law of negligence that occurred in, and following, *Donoghue v Stevenson*, had changed the legal landscape. The High Court held that the rule in *Rylands v Fletcher* had been absorbed in the more recently developed principles of negligence, under which a person who takes advantage of the control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do any of these things, owes a duty to take reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another.

I have chosen this example because, although the change in context was undeniable, its consequence was not self-evident. A few years later, in the United Kingdom, where similar changes had occurred, the House of Lords came to the opposite conclusion.⁹ The United Kingdom kept the rule in *Rylands v Fletcher*. Obviously, the matter is one upon which judgments may differ. The rule, it should be remembered, resulted in a form of liability additional to liability in negligence. Where it applied, it created liability even where the defendant was not negligent. The boundaries of actionable negligence have expanded, but a cause of action in negligence depends upon carelessness by a defendant, whereas *Rylands v Fletcher* liability applied even without negligence. Both the High Court and the House of Lords were confronted by change. Their responses were different. Which was the

better view? If I were a law teacher wanting to assess students of tort law, or jurisprudence, I would invite them to explain which of those two decisions they thought was the better. It would be an interesting exercise in evaluating legal change. This leads me to some remarks about the common law judicial method, and the way in which it deals with change.

First, in our adversarial system of litigation, courts decide issues presented by the parties, and argued by their counsel. If a party wants to argue that a change in the legal environment dictates a change in, or modification of, a previously accepted principle of common law, then as a minimum requirement the parties and the judges must have adequate information about the suggested change and its legal and practical consequences. A court does not have the facilities of a Law Reform Commission.¹⁰ Generally, it depends upon the information provided by counsel. Fairness requires that counsel be given an opportunity to consider, and deal with, any information that the court thinks may affect the outcome.

Secondly, an argument for a modification or development of common law principle will normally be one for an intermediate or ultimate appellate court, not a judge of first instance. Yet it is at trial that the evidence will be presented. Of course, if all that is involved is information about Acts of Parliament, or other judicial decisions, there should be no problem. But the assessment of some forms of change may require evidence about other changes. For example, one might want to know a good deal about modern practices of storing toxic waste before concluding that statutes and developments in the common law of negligence provide adequate protection to a neighbour of someone who stores such waste. There is no evidence about that subject referred to in the reports of either of the decisions earlier mentioned.

Thirdly, the decision in a given case often has consequences for many people who were not parties to the proceedings, and whose interests may be quite different from those of the parties. This may affect both the efficiency and the fairness of judicial law reform.

Fourthly, consistently with existing High Court authority,¹¹ when an Australian court alters the common law it does so for the past as well as the future. It declares what the law always has been; it does not change it only for the future. This may cause injustice to people who have conducted their affairs on the faith of the existing state of the law. Parliament, on the other hand, can change the law for the future only, giving people due notice of what is to happen.

Judicial response to contextual change is sometimes necessary, but it takes place within the limitations imposed by the judicial method. Even within those limitations, there is room for legitimate difference in judgment as to the appropriateness of a response.

Change in context may influence, not the formulation of a legal principle, but the flexibility with which it is applied. An example is the approach of the criminal law to the location of an offence. Trans-jurisdictional activity, giving rise to the possibility that conduct may be in breach of the laws of two or more law areas, such as the Australian States, is not novel, but it has increased greatly. Commerce and intercourse across jurisdictional boundaries, whether within the Australian Federation or internationally, is now conducted with such speed and facility that for many purposes those boundaries are irrelevant. The boundaries are still relevant when a court has to decide whether the law of a particular jurisdiction applies, but the courts

now act in a manner that accommodates the reality, and the modern law rejects a rigid, single-situs, rule of territoriality.¹²

The Australian Constitution may act as a contextual influence upon common law in the area of private international law. The decision of the High Court in *Pfeiffer (John) Pty Ltd v Rogerson*,¹³ concerning the law to be applied in an action in tort, was influenced by the constitutional context within the Australian Federation. This had an unintended forensic consequence. In a series of cases thereafter, State Solicitors-General assembled for the evident purpose of deterring the High Court from “constitutionalising” private international law. Boundary-riding is a proper, and often useful, function of interveners, and it can be diverting to watch them at it, but I doubt that their fears were justified.

Statutory interpretation is commonly influenced by context. The context may be narrow and textual, or broad. There may be a question of the effect of a change in context which occurs after the enactment of a statute. I am not referring to the straightforward case of a change of facts or circumstances that alters the practical operation of a provision that retains a consistent meaning. Thus, in a statute dealing with the confiscation of enemy property in wartime, the meaning of “enemy” may remain the same, but the countries and the people who fall within that meaning may change. This is the kind of thing that was held to have occurred within the Australian Constitution in relation to the expression “foreign power”. In *Sue v Hill*,¹⁴ the High Court held that, in 1999, a citizen of the United Kingdom was a subject of a foreign power within the meaning of s 44(i). This was not because the words “foreign power” had changed their meaning since 1901, when the United Kingdom was not regarded as foreign. It was because the legal and institutional background, including Australia’s relations with the United Kingdom, and the

United Kingdom's relations with Europe, had altered. The effect of this kind of change upon the meaning of words in an Act of Parliament, or even a Constitution, is commonplace.

A more unusual question concerns a case where the problem of meaning that arises is not merely one of applying words that have a consistent signification to an alteration in facts, including what are sometimes called constitutional facts, but a question whether the signification itself should be taken to have altered. The simplest example is one of a change in the immediate textual context of a provision. Amendment of one provision of an Act may have consequential effects upon other provisions that take their meaning from a statutory context that has altered. What, however, of a change in legal context that does not directly control the meaning of a provision but forms part of a background that affects interpretation?

An example of this kind of problem in the case of the Constitution may be seen in s 80, concerning trial by jury of federal indictable offences. In 1993, the High Court had to decide, in *Cheatle v The Queen*,¹⁵ whether the concept of trial by jury in s 80 embraced the possibility of majority verdicts. The Court answered the question in the negative, relying in part upon the historical fact that, in 1901, throughout Australia, jury verdicts had to be unanimous. The Court acknowledged that other features of jury trial, such as property qualifications, or the fact that all jurors were male, had changed, and accepted that these changes could be accommodated. But it held that, partly by reason of the legal context in 1901, the expression trial by jury signified a unanimous verdict, and was not sufficiently flexible to embrace majority verdicts. Since 1901, and since the decision in *Cheatle*, there has been a change. In a number of Australian States majority verdicts are now possible. If the question in *Cheatle* had arisen in 2007, not 1993, would that change be

relevant to the interpretation of s 80? If the facts had been different, and the High Court had observed that in 1901 jury verdicts in all jurisdictions had to be unanimous, but the changes I mentioned had occurred before 1993, would that have had any relevance to the Court's reasoning? Would it have supported a view that unanimity, like property qualifications and the sex of jurors, was an inessential feature of jury trial, and that the expression trial by jury in s 80 is flexible enough to embrace majority verdicts in federal cases?

That example of a problem of legal interpretation as affected by contextual change leads me to a wider question – contextual change and the legal and practical effect of the Constitution. Here I am concerned, not only with the way change may affect legal disputes about the meaning of the Constitution, but also with the profound legal and institutional changes that have affected the shape of Australian federalism. These are not always sufficiently acknowledged. In fact, on occasion, they seem to be deliberately ignored.

The Australian Constitution, although it took effect as an Act of the United Kingdom Parliament, stands apart from ordinary Acts in certain respects. The Constitution is the basic law of our body politic; it contains the terms (or, to be more accurate, almost all of the terms) upon which the people of a number of self-governing colonies agreed to unite; it allocates legislative, executive and judicial power according to a certain scheme; and it establishes certain rights and safeguards, including the rule of law and an independent judiciary. It was intentionally made difficult to alter. Its fundamental nature and its enduring quality make it resistant to change.

At the same time, its very durability means that the context in which it operates undergoes great change. Like all legal instruments, the Australian Constitution was influenced, in what it says and in what it does not say, by

the legal and institutional background from which it emerged. Yet its framers understood that it was to operate, as a practical instrument of government, in a world of change. They were providing for a future they could not foresee. Alfred Deakin said, in 1902:¹⁶

“[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”.

I have sought, on another occasion,¹⁷ by reference to the judicial decisions of five influential framers of the Constitution, who became the first five members of the High Court, to demonstrate that in important respects they had different understandings of the meaning of the instrument they helped to create, and even of the legal principles by which courts were to discover that meaning. On occasion, they accused one another of subverting the intentions of the framers. The modern High Court is grateful for any assistance it can get, on issues of constitutional interpretation, from references to the Convention Debates, but for most of the 20th century such references were regarded as impermissible. There was thought to be a good reason for this. The judicial Founding Fathers and their successors understood the difficulties of examining subjective intentions and understandings as an aid to interpretation. Yet even on topics on which they felt reasonably sure they had an agreed common purpose, they recognised that circumstances would change, and that they did not know what those changes might be.

The opening words of the Constitution recite that the people of certain named colonies (which did not include Western Australia) had agreed to unite in one

indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland and under the Constitution. Since then, both the United Kingdom and the Crown have changed in some respects, but I will leave that to one side. The people agreed that their union would be indissoluble and federal. As to what a federal union entailed, they did not have many precedents. The framers looked mainly to the United States of America, and also to Canada. The great European movement towards federalism, of which the United Kingdom itself is a part, was nearly a century ahead of them, and probably beyond their imagination. In the words of Alfred Deakin, they designed their plan for federalism on large and simple lines, and they knew they could not foretell the changes that would affect the way their design would work. The changes have been internal and external. It is useful to recall some of them.

An example of an institutional development affecting the structure of the federal arrangements established in 1901 is the role of the Senate. In a bicameral Parliament, the Senate was meant to be the States' house, protecting their interests.¹⁸ In practice, it has never worked that way, in part because of the party system of politics. As early as 1911, a commentator wrote:¹⁹

“It is doubtful if at any time the Senate has really occupied the position contemplated by the framers of the Constitution . . . that of guardian of the interests of the States in all matters within Federal control . . . [I]t succumbed to selfish party ends, and abrogated the distinctive character which had been projected for it.”

This is, perhaps, yet another example of the historical inaccuracy of attributing a single, or simple, intention to “the framers”. Alfred Deakin anticipated the development remarked upon by the commentator I have quoted. He said, in 1897:²⁰

“I have always contended that we shall never find in the future federation certain states ranked against certain other states, or that party lines will be drawn between certain states which happen to be the more populous and those which do not happen to be so populous. I have said before that this appears to me a wholly mistaken reading of the situation. What is absolutely certain is that, as soon as this federation is formed, parties will begin to declare themselves in every state. Every state will be divided. Our form of government is not susceptible of continuous or successful working without parties.”

The development of the party political system has been an important part of the context in which the parliamentary structure designed for our federation has operated. Plainly, at the time of Federation, different people had different expectations about this, and about its effect on the role of the Senate. They all regarded the Senate as a vital part of their design, but to attribute to them a clear and common understanding of how it was going to work would be fanciful.

A second example of a change in what at least some of the framers of the Constitution envisaged as the structure of the federal system they devised is perhaps not so much a change as something that never happened. The Constitution provides for the great institutions of government such as the office of Governor-General, the Parliament, and a supreme Federal Court to be called the High Court of Australia. It is silent on other institutions. For example, it says nothing about Cabinet, or the office of Prime Minister. Chapter IV, dealing with the key topics of Finance and Trade, contains s 101, which provides:

“101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.”

It is clear from the drafting history of the Constitution that some of the framers (including Edmund Barton) contemplated that the Commission would be an important feature of the constitutional landscape, exercising large powers and functions in respect of matters central to the federal compact.²¹ Where is it? An Inter-State Commission was established in 1912, but a divided High Court held that it could not validly exercise some of the important powers given to it²² and thereafter s 101 has been a dead letter. Whether it could be revived is an interesting question. What is revealed by the disagreement in the High Court is that among the Founding Fathers there were very different ideas about what an Inter-State Commission could do, and also about basic principles of separation of powers.

The topic of separation of powers is a third example of change going to the root of the federal system. It was not until the middle of the 20th century that the High Court held that there was a flaw in the system of conciliation and arbitration set up soon after federation; a decision that had much wider implications for the whole question of the nature of judicial power and the relationship between the three arms of government. That this issue had been simmering for years is evidenced by the dissent of Barton J in the *Wheat Case* mentioned earlier. The Inter-State Commission, and the role envisaged for it by some of the framers, including Mr Barton, is difficult to reconcile with the strict idea of separation of powers developed by Sir Owen Dixon in the *Boilermakers Case*,²³ and since applied by the High Court on many occasions.

A fourth example concerns the financial relations between the Commonwealth and the States. The topic was regarded as essential by the framers, but they had no clear idea, or at least no clear shared understanding, of what lay beyond the immediate future. How could it have

been otherwise? The provisions of the Constitution about transitional arrangements concerning revenues and payments were the subject of close negotiation. For example, s 87 of the Constitution provided that, for the first 10 years, a limited amount of the net revenue of the Commonwealth from customs and excise duties was to be applied towards Commonwealth expenditure and the balance was to be paid to the States. Yet one of the great political achievements of the Constitution was that it established a framework for government that was of sufficient resilience and strength to operate in an unknown, and unknowable, future. Without doubt, the principal features of modern federal-State financial arrangements are different from anything that was known to, or foreseen by the founders: uniform taxation; Commonwealth dominance of revenue-raising; vertical fiscal imbalance; a hugely expanded Commonwealth budget. What follows from that? The founders were producing a Constitution, not a five-year plan. They took infinite pains over details of certain temporary financial arrangements, but they well understood that their design for a political structure would be subjected to stress, and change, in an unknowable future.

A fifth example concerns external affairs, and the related subject of defence. The desire of the people of the federating colonies that these should be the responsibilities of the new central government was one of the principal moving forces for a federal union. Yet who, in 1901, would have foreseen the changes in world order that have given a power to legislate on these subjects its modern importance? I leave to one side, for the moment, the fact that, in 1901, Australia's external affairs and defence were bound up with its role as part of the British Empire, and were to a substantial extent controlled from London. That is a matter to which I will return. The globalisation of the closing years of the 20th century has transformed the federal Parliament's power to make laws with respect to external affairs. Australia's external affairs,

including its relations with foreign countries and its international commitments in pursuit of those relations, now affect its citizens in almost every aspect of their lives, and the federal Parliament's power to make laws with respect to external affairs has transformed Commonwealth-State relations.

This brings me to a final example of change affecting the federal system. I do not mean to suggest that the examples I have given are comprehensive. Many others could be offered. The ones I have chosen are only some of the most obvious. The most obvious of all, however, goes directly to the idea of power-sharing between political entities. When our Constitution was established, political, legislative and executive power in Australia was not something to be divided just between the Commonwealth and the States. There was an elephant in the room. Australia was part of the British Empire. The people of the federating colonies regarded themselves as British. Then, and for another 50 years or more, many of them called the United Kingdom "home". Large areas of government power were exercised, and for many years continued to be exercised, in the United Kingdom. Australia entered two World Wars in consequence of decisions made in London, not in Australia. For most of the 20th century, and indeed, for most of my time as a barrister, Australia's final court of appeal was the Privy Council. The withdrawal of Imperial authorities from Australia's government was gradual, and was not complete until the *Australia Acts* 1986. The consequence of that withdrawal was that powers that previously had been exercised by neither the Commonwealth nor the States – Imperial powers – came to be exercised in Australia. By whom? They came to be exercised according to the allocation of powers provided in the Constitution. So, for example, when the Privy Council ceased to be Australia's final court of appeal, that role was taken up by the court which, under the Constitution, was at the apex of the Australian judicial system – the Federal Supreme Court, called the High

Court. The background, or contextual change, was the disappearance of Imperial judicial authority. The legal effect of the Constitution, operating upon the change, was to increase the authority of the nation's highest federal court. Earlier, when the Imperial government withdrew from the conduct of Australia's external affairs, the legal effect of the Constitution, operating upon the change, was to enhance the power of the federal Parliament. When, in the course of World War II, relations between Australia and Great Britain in respect of defence changed under pressure of external circumstances, the responsibility of the Commonwealth Government expanded.

On the matter of institutional change, I should make a further reference to a topic I have already mentioned, that is, the role of the High Court of Australia. The great achievement of Alfred Deakin, in 1902 and 1903, in persuading the Federal Parliament to enact the *Judiciary Act* 1903 (Cth), and to establish the High Court, may tend to obscure the fact that, in the lead-up to Federation, and at the time of Federation, there was no common understanding of what the role of the High Court was to be, or even as to how it was to be constituted. One of the most interesting aspects of Alfred Deakin's speech on the Judiciary Bill was the effort he devoted to advocacy of a proposal that we now take for granted. Yet at the time of Federation there was a serious suggestion that the High Court should not be a permanent, full-time court, but that it should be a scratch court composed of State Chief Justices. There was doubt as to whether it would be fully occupied, and, if it were to be a permanent full-time court, as to how many members it needed. And after the Constitution had been drafted in Australia, and approved by the colonial parliaments, and approved by the referendum process in the Australian colonies, its provisions concerning the role of the High Court, and the future of appeals to the Privy Council, were altered before the Constitution was enacted by the Imperial Parliament. If one were to ask what the intended

nature and role of the High Court was to be, to whose intentions would the question be referring? Chapter III of the Constitution enacted by the Imperial Parliament was not the same as that which had been drafted and agreed in the colonies.

The Constitution is not like a grandfather clock, intricately designed and balanced by 19th-century artisans, to be handed down from generation to generation as an heirloom. As a basic law, meant to be difficult to alter, it is the most enduring part of our legal structure. Yet its powers of endurance depend upon its capacity to accommodate the legal and institutional changes constantly going on within and around it. The central feature of the constitutional design, federalism, drawn on large and simple lines, continues to exist only because of its adaptability to change.

I have outlined earlier some of the radical changes that have affected the shape of Australian federalism. It does no service to federalism to ignore change. If some of the claims made for federalism at various times in the 20th century had prevailed, federalism itself would have collapsed. People would have had to find a different system.

One of the pressures upon our system, like other federal systems, is the constant demand for regulatory uniformity. This exerts a centripetal force which some find alarming. A topical problem may show what I have in mind. At the present time, the world, including Australia, is in a financial crisis. Governments are invoking regulatory powers as part of a possible response. Powers may be important even when they are not exercised. Their very existence may modify behaviour. The Australian Constitution gives the Commonwealth Parliament a power to make laws with respect to financial corporations. I have become familiar, both as a barrister and a judge, with the

arguments that have been advanced over the years in support of a narrow view of that power. The narrow view has not prevailed. Recent High Court authority indicates that the Commonwealth Parliament has ample power to regulate financial corporations, including power to regulate the way in which such corporations remunerate their executives.²⁴ The current debate about political responses to the financial crisis seems to take this for granted. Could I suggest that November 2008 would be a very inauspicious time at which to seek to convince the public that the regulatory power of the Commonwealth over financial corporations is narrow and confined? I would go further, and suggest that in the current economic circumstances such a view would be used as an argument against federalism itself.

Change is part of our natural condition. Environmental change affects the law and all legal institutions. Times are not what they used to be; but, in truth, they never were.

¹ [1932] AC 562.

² *Sullivan v Moody* [2000] SASC 340.

³ *Sullivan v Moody* (2001) 207 CLR 562.

⁴ eg. *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540.

⁵ *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 532[31].

⁶ (1868) LR 3 HL 330.

⁷ *Transco P/L v Stockport MBC* [2004] 2 AC 1 at 23.

⁸ (1994) 179 CLR 520.

⁹ *Transco Plc v Stockport MBC* [2004] 2 AC 1.

¹⁰ See *State Government Insurance Office v Trigwell* (1979) 142 CLR 617 at 633 per Mason J.

¹¹ *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188.

¹² See, for example, *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78; *Lipohar v The Queen* (1999) 200 CLR 485.

¹³ (2000) 203 CLR 503.

¹⁴ (1999) 199 CLR 462 at 487-492.

¹⁵ (1993) 177 CLR 541.

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- ¹⁶ Australia, House of Representatives. Parliamentary Debates (Hansard), 18 March 1902 at 10965.
- ¹⁷ Gleeson, *The Constitutional Decisions of the Founding Fathers*, (2007) 81 ALJ 791.
- ¹⁸ In the 1891 Convention debates, Mr Kingston of South Australia said of the proposed two houses of Federal Parliament, “in one . . . the people at large will be represented, and in the other the state interests shall be particularly conserved”: Official Record of the Debates of the Australian Federal Convention (Sydney), 2 April 1891 pp 596-597.
- ¹⁹ Turner, “*The First Decade of the Australian Commonwealth*”, Mason, Firth & McCutcheon, (1911) at 258-259.
- ²⁰ Official Record of the Debates of the Australian Federal Convention (Sydney), 10 September 1897, Vol 2, p 235.
- ²¹ See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 895-901.
- ²² *State of New South Wales v The Commonwealth (The Wheat Case)* (1915) 20 CLR 54.
- ²³ *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254.
- ²⁴ *Work Choices Case* (2006) 229 CLR 1.