

John Fordham Law School Constitutional Law Master Class

Australia's Constitutional Evolution

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20 January 2010

Introduction – A many storied people

Many histories lie across the contemporary Australian landscape. The oldest of them stretches back 40 millennia. It is told in the Dreamings, songs, traditions and ceremonies of indigenous Australians. The second history is that of the British colonisers. It began formally on 26 January 1788 when Arthur Phillip annexed the eastern half of Australia in the name of the British Crown. It continued with successive annexations of the rest of the continent by Britain, the evolution of the colonies into self-governing polities, and their union in a Federal Commonwealth in 1901. After Federation and predominantly in the second half of the twentieth century, there followed a wave of new histories, those of the many people of non-British origin who migrated to this country from all parts of the world. Some sought refuge from oppression and persecution. They brought with them a rich diversity of cultural heritage. Nearly one quarter of the people living in Australia today were born overseas. Forty three per cent of Australians were either born overseas or have at least one parent who was born overseas. In recent years migrants to Australia have come from over 180 different countries.¹

Taken together, these histories belong to all Australia and taken together they define us. Australia's Constitution which is rooted in the history of its British colonisers and their descendents, has delivered a system of democratic government, and structures to protect the rule of law and the freedoms and opportunities which that offers to all. Despite the

¹ Australian Immigration Fact Sheet 4 – More than Sixty Years of Post War Migration – Revised 30 January 2007 www.migration.gov.au/media/fact-sheets/04fifty.htm.

sometimes trenchant criticisms that are properly made of government and its institutions, Australia has one of the most durable and successful democracies in the modern world.

The drafting of our Constitution was inspired in part by the Constitution of the United States, in part by the model of responsible government in the United Kingdom and in part by the provisions for popular amendment of the Constitution to be found in the Constitution of Switzerland at the turn of the century. Australian nationhood is rooted in evolutionary, rather than revolutionary events. This has a connection to the absence of a Bill of Rights in the Constitution and current contemporary debate as to whether even a statutory provision for the national protection of human rights generally is necessary. The evolution of Australia's nationhood is in the eyes of some still incomplete. For Australia is a constitutional monarchy under the Queen of England in her capacity as Queen of Australia. If a significant amendment is to be made to the Constitution in the foreseeable future, it is most likely to be made with a view to creating a Republic of Australia.

Those remarks provide a broad framework within which to review the history of Australia's constitutional development.

A Brief Pre-History

Australia's constitutional history, from the perspective of its colonisers, began with the taking of the possession of the eastern part of the continent by James Cook in 1770.² In 1786, New South Wales was designated as a place to which British convicts might be transported.³ In 1788 Governor Philip arrived in that colony as the embodiment of the authority of the British Crown,⁴ the same year that thirteen American colonies voted upon the

² See generally RD Lumb, *The Constitutions of the Australian States*, University of Queensland Press 4th Edition (1977) Chapter 1.

³ Declaration by Order in Council in 1786 pursuant to 24 Geo III c 56 (1784).

⁴ Derived from 27 Geo III c 2 (1787) providing that the Governor should have authority from time to time to constitute a Court of Civil Justice, Quere whether it allowed establishment of a civil government.

Constitution of the United States. 1823 saw the first appointed local legislative body in New South Wales and the establishment in that colony of a Supreme Court.⁵ Tasmania was separated from New South Wales in 1825.⁶ A partly elective legislative body was created for New South Wales in 1842 under the *Australian Constitutions Act 1842*, an Imperial Statute which provided for the establishment of a Representative Legislative Council for New South Wales and Van Diemen's Land.⁷ Because transportation of convicts from the United Kingdom was continuing in Van Diemen's Land, representative government was not extended to it until 1854.

Following a report by a committee of the Privy Council in 1849, which inquired into the constitutional position of the Australian Colonies, the *Australian Constitutions Act 1850* (Imp) was passed. It provided for the enactment and alteration by colonial legislatures of their own constitutions. It also provided for the separation of Victoria from New South Wales which took effect in January 1851. In 1854 the Legislative Council of Tasmania enacted a *Constitution Act* in terms authorised by the 1850 Act. It became effective upon receiving the Royal Assent. It established a bi-cameral legislature.⁸ In 1855, common form constitutions were established in New South Wales and Victoria albeit they exceeded the powers conferred by the 1850 statute in respect of the waste lands of the Crown and required express statutory authorisation by the UK Parliament. Responsible government was adopted within the framework of those constitutions as a matter of convention. The *Australian Constitutions Act 1842* and *1850* authorised the creation of Queensland out of New South Wales as a separate colony on the Petition of householders of the area above the 30 degree of south latitude. The separation was effected by Letters Patent in 1859 and an Order in Council of that year established the constitution of the colony in terms similar to that of the 1855 New

⁵ Pursuant to the Imperial Statute Geo IV c 96.

⁶ This occurred by Order in Council pursuant to s 44 of the Act of 1823 which authorised separation of Van Diemen's Land from New South Wales.

⁷ 5 and 6 Vic c 76 (1842).

⁸ 18 Vic No 17.

South Wales Constitution. South Australia was created as a province in 1834 by Imperial statute.⁹ That statute authorised the King in Council to take necessary steps to establish a legislative body whose enactments were to be the subject of disallowance. The Act was repealed and replaced by another Imperial Statute in 1842.¹⁰ It authorised the establishment of a bi-cameral legislature. South Australia was covered by the *Australian Constitutions Act 1850* and a Legislative Council with representative government set up in July 1851. Subsequently a *South Australian Constitution Act 1855* was passed by the South Australian Legislature and received royal assent.¹¹

Western Australia was established as a colony by an Imperial statute in 1829 but did not achieve representative government until 1890 when the *Constitution Act 1889* was authorised by Imperial Statute. It established a bi-cameral legislature, including a nominated Legislative Council. That was replaced by an elective Council in 1893.¹² The *Constitution Act 1899* passed by the Western Australian Parliament consolidated its predecessor enactments.

The Colonial Constitutions whose development is outlined above, all derived their legal authority directly or indirectly from Acts of the Imperial Parliament. They did not however spring fully formed from the brow of Britannia. They were the result of local initiatives by the colonists. Indeed attempts by the British Colonial Secretary, Earl Grey to develop 'top down' constitutional models including provision for an inter-colonial General Assembly came to grief for want of local support.

In a despatch of 31 July 1847, Earl Grey had foreshadowed the *Australian*

⁹ 'An Act to empower his Majesty to erect South Australia into a British province or provinces, and to provide for the colonisation and government thereof' - 4 and 5 Will, IVc 95.

¹⁰ 5 and 6 Vict c 61.

¹¹ *South Australian Constitution Act* (No 2) 1855-56.

¹² *Constitution Amendment Act 1893* 57 Vict No 14.

Constitutions Act 1850. He proposed a number of matters including a General Assembly to deal with matters of common Australian interest. The despatch was greeted in New South Wales 'with a storm of indignation'.¹³ The colonists had not been consulted about the constitutional changes proposed. They were 'especially alarmed at the suggestion of indirect election which would take away the instalment of representative institutions which they had lately won'. In the debate that followed however little was said about the federal proposal. When mentioned at all it was "...usually in a tone of mild approval - as being unobjectionable, and possibly even useful, but of little immediate importance".¹⁴

On 31 July 1848, in another despatch Earl Grey said he had no wish to impose unwelcome constitutional changes. He maintained the idea of an inter-colonial legislature pointing out, in particular, the extreme inconvenience of tariff differences generated by independent legislatures. The Privy Council Committee in 1849 also addressed the tariff question arising from the establishment of separate legislatures in each of the colonies. It recommended a uniform tariff and that one of the Governors of the Australian Colonies should always hold a commission constituting him Governor-General of Australia. The Committee recommended he be authorised to convene a body to be called "The General Assembly of Australia". The General Assembly was to have legislative power on a number of matters.

In the event the General Assembly proposal did not proceed. The federal clauses were rejected in the United Kingdom Parliament on the bases that they had not been asked for, that they were opposed by the colonies and that the scheme was premature.¹⁵ Even though the federal idea did not proceed at that time, when Earl Grey commissioned Sir Charles Fitzroy as Governor of New South Wales he gave him four separate commissions appointing him Governor of each of New South Wales, Tasmania, South Australia and

¹³ Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, at 82.

¹⁴ Ibid at 82.

¹⁵ Ibid at 87.

Victoria and another commission appointing him "Governor-General of all her Majesty's Australian possessions including the colony of Western Australia". Quick and Garran, who wrote the first authoritative commentary upon the Australian Constitution and its prehistory observed:¹⁶

The Governor of New South Wales was thus constituted a sort of advisory overlord of the whole of Australia

A kind of Federal Executive was in name at least actually constituted. The movement towards federation thereafter came from within Australia. For as Professor Lumb has observed:¹⁷

The co-existence of six colonies on the Australian continent independent of each other in local policies, although united by common law, nationality and similar institutions of government, could not be the basis for a permanent constitutional system.

The "nationality" cited by Professor Lumb as a unifying factor among the colonists was a reference to their common status as British subjects. There was a wider perception of a people or race mixed up with the concept of nationality which developed over this time. Bob Birrell observes in his *Federation: The Secret Story* that at the turn of the nineteenth century Australians used the term "people" or "race" interchangeably. Immediately after federation in 1901, an *Immigration Restriction Act 1901* was passed, which was to be the buttress of the white Australia policy. Alfred Deakin, the first Commonwealth Attorney-General, who introduced the Bill which became the Act into the parliament, spoke of a desire to be one people without the admixture of other races which he described as a "note of nationality".¹⁸ It reflected what Birrell described as an aspiration for "a shared sense of peoplehood...to be

¹⁶ R Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books 1976, reprint 1901 ed) at 90.

¹⁷ RD Lumb, *Australian Constitutionalism* (Butterworths, 1983) at 47.

¹⁸ Birrell, *Federation: The Secret Story*, Duffy and Snellgrove (2001) at 287.

expected from a nationalist initiating the process of nation-building."¹⁹

The Conventions

Conventions of colonial representatives came together to discuss and draft an Australian Federal Constitution in the 1890s. The concerns that brought them together involved foreign affairs, immigration, defence, trade and commerce and industrial relations. France and Germany had been active in the region in the 1880s. The French had begun to colonise New Caledonia and Vanuatu. Germany colonised portions of New Guinea in spite of an abortive attempt by the Premier of Queensland to annex it, an attempt disclaimed by the United Kingdom government. Broadly speaking, the impulse to federation derived from concerns about these developments, the need for an Australian Defence Force, the desire to keep Australia white and the impact of strikes which spread from one colony to another. There were trade barriers between the colonies which were the subject of much debate between free traders and protectionists. And, as the Constitutional Commission said in 1987:²⁰

There was also a self-confidence in Australia which was probably a factor in the push for Australia to become a nation. This self-confidence was largely due to economic prosperity. It was reinforced by Australian cricketers who showed they could beat Great Britain at her own game, and by Australian artists, writers and poets and agricultural investors.

A formal first step, which flowed from an Intercolonial Convention held in Sydney in 1883 was the establishment of the Federal Council of Australasia. This was done by an Imperial Statute.²¹ It comprised the Australian Colonies, New Zealand and Fiji. In the event that Council failed. Neither New South Wales nor New Zealand attended any of its meetings.

¹⁹ Ibid at 287.

²⁰ *Australia's Constitution - Time to Update*, Summary of the Report of the Advisory Committees to the Constitutional Commission 1987 at 7-8.

²¹ 48 and 49 Vict c 60.

Fiji came to one. South Australia only participated between 1889 and 1891. As Professor Sharwood observed, its authority was limited, it had no executive and no revenue and was branded as a Victorian invention foisted on the other colonies.²²

In 1889 however, Sir Henry Parkes, dismissing the Federal Council as "a rickety body", proposed an Intercolonial Conference to frame a constitution claiming that the Federal Council was "a rickety body". After various vicissitudes a conference was convened in Melbourne in February 1890. It was resolved to open the conference to the public, a step of which Professor Sharwood said:²³

This may well have been one of the most important decisions the conference was to make, as it allowed for extensive, even lavish press coverage of its proceedings.

It was at this conference during a banquet held on 6 February 1890 at Parliament House in Melbourne that Parkes, responding to a toast, coined the famous phrase:

The crimson thread of kinship runs through us all.

This was an adaptation and toning down of a metaphor which he had used at the opening of the Sydney/Brisbane railway in 1889 at which he spoke of "the crimson fluid of kinship pulsing through all iron veins".²⁴ After much debate on Thursday, 13 February 1890, the Conference passed a motion in the following terms:

That in the opinion of this Conference, the best interests and the present and future prosperity of the Australian colonies will be promoted by an early union under the Crown, and while fully recognising the valuable services of the Members of the Convention of 1883 in founding the Federal Council, it declares its opinion that the seven years which have elapsed have developed the national life of Australia in

²² Sharwood, *The Australian Federal Conference of 1890*, Craven (ed) *The Convention Debates - Commentaries, Indices and Guide* Vol 6, 41-42.

²³ Sharwood, op cit, at 52.

²⁴ Sharwood, op cit, at 55 citing F Crowley, *Colonial Australia 1875-1900*, Nelson, 1980, 290-291.

population, in wealth, in the discovery of resources, and in self-governing capacity, to an extent which justifies the higher act, at all times contemplated of the union of these colonies, under one legislative and executive government on principles just to the several colonies.

It was then resolved on Deakin's motion that the members of the conference should take such steps as might be necessary to persuade the Legislatures of their respective colonies to appoint delegates to a National Australasian Convention empowered to consider and report upon an adequate scheme for a federal constitution. In the event the Conference led to the establishment of the 1891 Convention comprising delegates elected by colonial parliaments and held in Sydney.

The critical importance of popular support for any constitutional proposal was formally recognised early in the Convention. On the second day at Sydney on 3 March 1891 when a motion was debated that the press and the public be admitted, George Dibbs MP, one of the six delegates from New South Wales said:²⁵

We want to build up a nation, and in order to do so we must take into our confidence the people who are the principal factors and the press also.

The initial focus of the debates was on resolutions submitted by the Chairman of the Convention, Sir Henry Parkes, which set out the essential principles of the proposed Commonwealth Constitution.²⁶ On the second day of the debate on the resolutions, Alfred Deakin reminded the delegates that the people would determine the fate of their proposals:²⁷

We know from the outset the bar of public opinion before which we are to be judged, and we know from the commencement of our labours that the conclusion of them rests in other hands than ours - in hands of no less a body than the assembled peoples

²⁵ Conv Deb, Syd, 1891 at 12.

²⁶ Conv Deb, Syd, 1891 at 23.

²⁷ Conv Deb, Syd, 1891 at 70.

of all the Australasian colonies.

This required a consideration not only of the interests of the people as a whole:²⁸

...but also the different and sometimes conflicting localisms which are created owing to the fact that this people is at present bound up with artificial boundaries into a certain number of communities.

Deakin and the other delegates, when referring to the people who would determine by referendum the acceptability of any proposed constitution, referred to the electors of the various colonies. These were defined by the franchises applicable in the colonies. At that time women did not have the vote in any of the colonies although they acquired the franchise in South Australia and Western Australia in 1894 and 1899 respectively. And although Aboriginal people were entitled to vote in New South Wales, Victoria, South Australia and Tasmania, they were excluded if in receipt of charitable aid. Western Australia and Queensland denied the vote to 'any Aboriginal native of Australia, Asia or Africa or person of the half blood' save for those who satisfied a property qualification.

The place of indigenous people was little mentioned in 1891 save by Captain Russell, the New Zealand Minister for Defence, who proposed a very loose federation and cautioned against federal interference with outlying areas. In that context he said of New Zealand and its Maori peoples:

...we, in our own colony, have what may be determined a foreign policy, in as much as we deal with an alien race, that we have laws affecting them, that the questions of native title are matters of very grave moment and that any interruption in our relations with these people might be of the most serious importance to the colony.

He observed by contrast, that "...it is true that the native races of the more settled portions of Australia have given you but little trouble, and you have dealt with them summarily, but possibly when you go to Northern Australia, you may find a race more resolute and more

²⁸ Conv Deb, Syd, 1891 at 70.

difficult to deal with."²⁹ To which the Hon Thomas Playford MP of South Australia called out "No". These early debates disclosed a view of 'the people' confined by the culture of the time but capable of constituting a platform for the proposition that the Constitution and the institutions which it proposed would have to derive legitimacy from their support. This was emphasised by Deakin in speaking of the necessity of direct election for the Senate, notwithstanding it would be the States' House. Although Sir Samuel Griffith, who was to become the first Chief Justice of the new Australian Commonwealth, challenged him, he could not conceive of an entity called the State, apart from the people whose interest it embodied, nor could he conceive anything within the State which could claim an equal authority with the final verdict after solemn consideration of the majority of its citizens.³⁰

The *Constitution Bill* adopted by the 1891 Convention failed to gain acceptance. Quick and Garran record:³¹

It soon became clear that neither the parliaments nor the people would accept the work of the Convention as final.

They attributed its failure to gain popular acceptance to "...a vague feeling of distrust of the Constitution, as the work of a body somewhat conservative in composition, only indirectly representative of the people, and entrusted with no very definite or detailed mandate even by the parliaments which created it".³²

It was, in the event, a popular movement which restored momentum to the drive for federation. The 1891 Bill had opened the topic for discussion and raised issues for debate. Other facts came into play such as the apparent economic interdependence of the colonies, the benefit of a co-operative approach and what Quick and Garran called "...the folly of inter

²⁹ Conv Deb, Syd, 1891 at 66.

³⁰ Conv Deb, Syd, 1891 at 74.

³¹ Quick and Garran at 144.

³² Ibid at 144.

colonial barriers".

A conference was organised in 1893 at Corowa by the Australian Federation League and the Australian Natives' Association. That conference passed a motion, moved by John Quick, in the following terms:

That in the opinion of this conference the Legislature of each Australasian colony should pass an act providing for the election of representatives to attend a statutory convention or congress to consider and adopt a bill to establish a federal constitution for Australia and upon the adoption of such bill or measure it be submitted by some process of referendum to the verdict of each colony.

Quick and Garran described the plan foreshadowed by the resolution as the best guarantee of interest and confidence in a federal constitution because it ensured that "the people should be asked to chose for themselves the men to whom the task was to be entrusted."³³ Again in language which resonates with contemporary debate, Quick and Garran said:³⁴

The adherents of the parliamentary system had thought that the people would be less likely than the parliaments to select men who by ability and training were most suited for the work of constitution-making; but they had forgotten that more important even than the personnel of the convention was the public confidence in the convention. The result showed that the chosen representatives of the people were for the most part those would have been the chosen representatives of the parliaments; but from the fact of their election by the people they had a power, and they enjoyed a confidence, which election by the parliaments could never have given them.

The Corowa plan was considered by a conference of colonial Premiers held in Hobart in 1895. That conference decided that each colony would pass enabling acts to choose ten delegates to meet in a convention to draft a federal constitution for consideration by each colonial parliament. The Convention would reconvene to consider proposed amendments and the constitution would be put to the people at a referendum before being submitted to the

³³ Irving, *To Constitute a Nation, A Cultural History of Australia's Constitution*, Cambridge University Press, 1999 at p 135 and citing Quick and Garran p 154.

³⁴ Quick and Garran at 154.

Crown. Queensland and Western Australia opposed popular election of delegates. It was agreed that this would not be mandatory. The colonies could adopt their own means of selection. Because Queensland could not agree on the mechanism for selection, it was unrepresented at the Second Federal Convention. The Western Australian parliament chose its own delegates without reference to its electors. As it turned out, in those colonies where direct election occurred most of those elected to the Convention were serving or former politicians who would have been chosen by their parliaments had that method of selection been adopted.³⁵

The legitimacy of the proposed constitution was seen by those who devised the process for its adoption as critically dependent upon its acceptance by popular vote.

The drafting process to emerge from the new Convention which first met in Adelaide in March 1897, involved consideration by all colonial parliaments with amendments to be referred back to the Convention. The Convention reconvened in Sydney in September 1897. There were some 286 amendments suggested by ten Houses of Parliament. In the event the Sydney Convention closed before more than half of the clauses of the Constitution had been considered. It resolved to convene its final session at Melbourne on 20 January 1898. That session, which extended from 20 January to 17 March, was described by Quick and Garran as "the longest and most important of all."³⁶ The whole Bill was reconsidered and revised by the drafting committee.

The revised *Constitution Bill* having been adopted by the Convention in March 1898 it was, according to the enabling Acts, to be submitted to the electors of each of the colonies. Referenda were held in Victoria, Tasmania and South Australia where it was approved by majorities. But it did not obtain the minimum number of voters required in New South Wales. Amendments were agreed at a Premiers' conference held in Melbourne in January

³⁵ Irving at 142.

³⁶ Quick and Garran at 194.

1899 where all six colonies were represented. Further referenda were required. These were held and the Bill was approved by electors in New South Wales, Victoria, South Australia and Tasmania. Queensland approved it in September 1899. Western Australia did not proceed to referendum at that time. The five colonies which had approved the Bill then submitted it to the Imperial Parliament together with addresses from their respective Legislatures. Subject to changes to covering cls 5 and 6 and s 74 relating to appeals to the Privy Council from the High Court, the Bill was passed by both the House of Commons and the House of Lords. On 9 July 1900, it received the Royal Assent.

Western Australian passed its Enabling Act in June and its referendum was conducted on 31 July 1900. By that referendum electors approved the proposed constitution, 44,800 votes to 19,691 votes. Addresses to the Queen, praying that Western Australia be included as an original State of the Commonwealth in the proclamation of the Constitution, were passed on 21 August.

In the referenda held in all the colonies to determine whether their people were in favour of federation and the proposed Constitution, 52% of those eligible to vote actually voted. 57% of those voting in New South Wales supported the federation, along with 55% in Queensland, 94% in Victoria and Tasmania, 79% in South Australia and, on 31 July 1900, 69% in Western Australia.

On 17 September 1900, Queen Victoria signed a Proclamation establishing the Commonwealth as and from 1 January 1901. Quick and Garran commented on the completion of the long process to federation:³⁷

The Commonwealth as few dared to hope it would, comes into existence complete from the first - "A Nation for a Continent and a Continent for a Nation". The delays at which federalists have chafed have been tedious, and perhaps dangerous, but they have been providential; they have given time for the gradual but sure development of the national spirit in the great colonies of Queensland and Western Australia and have

³⁷ Quick and Garran at 251.

prevented the establishment of a Commonwealth of Australia with half the continent of Australia left, for a time outside.

The Authority of the Constitution

The formal legal authority of the Constitution on 1 January 1901 derived from the legislative power of the Imperial Parliament. Andrew Inglis Clark, a leading Convention delegate, described it as contained in a written document which is an Act of the Imperial Parliament of the United Kingdom of Great Britain and Ireland.³⁸ It was seen by a leading constitutional lawyer at the time, Professor Harrison-Moore, as "first and foremost a law declared by the Imperial Parliament to be 'binding on the Courts, Judges and people of every State and of every part of the Commonwealth'."³⁹ Sir Owen Dixon, a former Chief Justice of the High Court generally regarded as Australia's greatest jurist, said of it:⁴⁰

It is not a supreme law purporting to obtain its force from the direct expression of a peoples inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's dominions.

Dixon attached to this characterisation of the Constitution a consequence for interpretation. The organs of government are simply institutions established by law. This contrasted with the position in the United States where they are agents for the people who are the source of the power.

The position in 1900 was that the Constitution was seen to be legally binding because of the status accorded to British Statutes as an original source of the law and because of the

³⁸ Inglis Clark, *Studies in Australian Constitutional Law* (1901) Legal Books (repr) 1977 at 14.

³⁹ Harrison-Moore, *The Constitution of the Commonwealth of Australia* 2nd Edition (1910) Legal Books (repr) 1977 at 66.

⁴⁰ Dixon, *The Law and the Constitution* (1935) 51 LQR 590 at 597.

supremacy accorded to those statutes.⁴¹ Justice Dawson dissenting in the *Australian Capital Television* case⁴² reflected a similar view as the contemporary reality of the Constitution:⁴³

No doubt it may be said as an abstract proposition of political theory that the Constitution ultimately depends for its continuing validity upon the acceptance of the people, but the same may be said of any form of government which is not arbitrary. The legal foundation of the Australian Constitution is an exercise of sovereign power by the Imperial Parliament. The significance of this in the interpretation of the Constitution is that the Constitution is to be construed as a law passed pursuant to the legislative power to do so.

This approach was relevant to the question whether there could be implied in the Constitution a freedom of political communication. Dawson J saw it as a consequence of the legal character of the Constitution that implications must appear from its terms and not from extrinsic circumstances.⁴⁴ For his Honour "...the interpretation of the Australian Constitution" was "the interpretation of a statute of the Imperial Parliament".⁴⁵ In a Newtonian universe of legal discourse this position is quite comprehensible but the universe of constitutional discourse, like the physical universe, has developed from the Newtonian to something more complex.

An early departure from that original view of the source of legal authority for the Constitution was expressed by Murphy J in *Bisricic v Rokov*⁴⁶ where his Honour said bluntly:⁴⁷

⁴¹ G Lindell, 'Why is Australia's Constitution Binding?' (1986) 16 *Federal Law Review* 29 at 32-33.

⁴² *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

⁴³ (1992) 177 CLR 106 at 181.

⁴⁴ (1992) 177 CLR 106 at 181.

⁴⁵ (1992) 177 CLR 106 at 183.

⁴⁶ (1976) 135 CLR 522.

⁴⁷ (1976) 135 CLR 522 at 567.

In my opinion (notwithstanding many statements to the contrary) Australia's independence and freedom from the United Kingdom Legislative Authority should be taken as dating from 1901. The United Kingdom Parliament ceased to be an Imperial Parliament in relation to Australia at the inauguration of the Commonwealth. Provisions of statutes directed to regulating the Imperial-Colonial relations ... then ceased to be applicable. There are strong grounds for considering that cases which held Commonwealth legislation ultra vires because of inconsistency with any law other than the Constitution...were wrongly decided.

Underpinning this, was the proposition that if the original authority for the Constitution had been the United Kingdom Parliament, its existing authority "...is its continuing acceptance by the Australian people."

The acceptance as at 1901 of the Imperial Parliament as legal authority for the Constitution is hardly surprising. It was entirely in accord with the way in which colonial constitutions had evolved. They received their stamp of legal legitimacy either because they were authorised by a pre-existing Imperial Act or were authorised by an Act specifically passed for that purpose. All to a greater or lesser extent however evolved from local movements for self-government.

Australia's evolution to independent nationhood

It is widely accepted that Australia did not become an independent nation in the full sense of that term upon the creation of the Commonwealth on 1 January 1901. Rather it came into existence and entered the 20th century as a self-governing colony of the United Kingdom. Indeed the United Kingdom parliament had continued power to legislate for Australia. Australia remained subject to paramount British legislation.

Australia lacked executive independence in the conduct of its foreign relations at the time of federation. These were carried on through the British government. Eventually that executive independence was recognised for all Dominions at an Imperial conference held in 1926. The resolutions passed at that conference were sufficient "... to secure the

independence of Dominion executives, in the conduct of both domestic and foreign affairs".⁴⁸

Legislative independence from Great Britain did not come to pass until the adoption by the Australian Parliament in 1942, retrospective to 1939, of the Statute of Westminster 1931 (UK). That was a British statute which gave effect to the wishes of Dominions to lift fetters on their legislative powers imposed by an Imperial Act known as the *Colonial Laws Validity Act 1865* (UK).⁴⁹ The Statute of Westminster also affirmed the powers of Dominion parliaments to make laws having extraterritorial effect. It repealed the *Colonial Laws Validity Act 1865* in relation to Dominion laws. That Act continued to apply to the States of Australia until 1986.

Even after the Statute of Westminster it remained theoretically possible for the United Kingdom parliament to make laws affecting Australia. The position with respect to the States was bizarre. As Professor Anne Twomey has pointed out, independence granted to the Dominions at the national level by the Statute of Westminster, did not apply to the Australian States:⁵⁰

State Governors continue to be appointed by the Queen on the advice of British (rather than State) Ministers. When State laws were reserved for the Queen's assent, it was British Ministers who advised her whether or not to assent. The *Colonial Laws Validity Act* still prevented the States from legislating in a manner that was "repugnant" to British laws of paramount force. British laws on such subjects as merchant shipping and the reservation of certain Bills for the sovereign's assent continued to apply by paramount force to the States. Despite forming part of an independent Federation, the Australian States were regarded by the British government as "colonial dependencies of the British Crown" and, when the Queen performed State

⁴⁸ G Winterton, 'The Acquisition of Independence' in French, Lindell & Saunders (eds) *Reflections on the Australian Constitution* (Federation Press, 2003) at 84-85.

⁴⁹ Paradoxically, the *Colonial Laws Validity Act* was enacted to overcome objections taken by Justice Boothby in the Supreme Court of South Australia to local laws said to be merely inconsistent with Imperial law. Justice Boothby's persistent objections led to his removal from that Court.

⁵⁰ A Twomey, 'The Making of the Australia Acts 1986' in Winterton (ed) *State Constitutional Landmarks* (Federation Press, 2006) at 267-268.

functions (such as the appointment of a governor), she acted as the Queen of the United Kingdom rather than the Queen of Australia.

The final severance of the legislative and executive umbilical cord between Australia and the United Kingdom did not occur until 1986 with the passage of the *Australia Act 1986* (UK) by the United Kingdom parliament and the corresponding Australia Acts of the Commonwealth and the State parliaments. It was then also that the last vestige of judicial dependence disappeared. For until 1986 a litigant in a State Supreme Court could seek leave of that Court to appeal to the Privy Council in England against decisions of the Supreme Court. Although such appeals were not permitted where they involved matters arising under the Constitution or involving its interpretation, there were, for many years, effectively two final appellate courts for Australia, the High Court and the Privy Council.

Distribution of powers under the Australian Constitution

Australia is a federation. Federalism is a solution to the problem of combining different political communities in a national polity while allowing them to retain their identities. There are different ways of distributing power between the components of a federation. Any such distribution will set limits to their legislative competencies. When a national policy is necessary to meet a need, perhaps not foreseen as such when the Constitution was created, the legislative and other powers necessary to implement such a policy may cross those boundaries. A Constitution may of course be amended to take account of changes in circumstances since it was created. Australia, however, as in some other federations, amendment is a difficult process. It requires the assent of a majority of electors in a majority of States and a majority of electors overall. Alternatives to amendment involve cooperative approaches between the components of the federation. Broadly these cooperative approaches fall into two categories. They may involve the coordinated exercise of powers by all components or the referral of legislative power by the States to the Commonwealth Parliament pursuant to s 51(xxxvii) of the Constitution.

The *Commonwealth of Australia Constitution Act 1900* created the Commonwealth of Australia as a federation. It conferred on the Commonwealth Parliament law-making powers with respect to particular topics. The Constitutions of the former Australian colonies, which

became States in the Federation, were continued in force subject to the Commonwealth Constitution. So too were their law-making powers, save for those vested exclusively in the Commonwealth Parliament or withdrawn from the Parliaments of the States.⁵¹ The legislative powers of the Commonwealth are mostly concurrent with those of the States. In the areas of concurrent legislative competency Commonwealth law is paramount. If a law of a State is inconsistent with a law of the Commonwealth, the Commonwealth law shall prevail and the State law shall, to the extent of the inconsistency, be invalid.⁵²

The existence of Federal and State polities and the division of legislative powers between them, together with the scope for concurrent laws dealing with the same subject matter, must be taken into account when establishing national policies requiring legislative implementation. This is particularly so in the area of infrastructure of national significance and activities seen as requiring regulation which cross State and Territory boundaries.

Important powers conferred upon the Commonwealth Parliament under s 51 of the Constitution, relevant to national infrastructure and regulation, include but are not limited to the following:

- (i) Trade and commerce with other countries, and among the States.
- (ii) Taxation; but so as not to discriminate between States or parts of States.
- (x) Fisheries in Australian waters beyond territorial limits.
- (xx) Foreign corporations and trading or financial corporations formed within the limits of the Commonwealth.
- (xxix) External affairs.
- (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.
- (xxxiv) Railway construction and extension in any State, with the consent of that

⁵¹ Constitution, ss 106 and 107.

⁵² Constitution, s 109.

State.

- (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliament the matter is referred, or which afterwards adopt the law.
- (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.
- (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth or in the Federal Judicature or in any department or officer of the Commonwealth .

Section 61 provides for the executive power of the Commonwealth:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

It supports Commonwealth entry into intergovernmental agreements and may be supplemented by the use of the incidental power under s 51(xxxix). It is also in the exercise of executive power that the Commonwealth enters into treaties and conventions including international trading conventions and free trade agreements. It may then, pursuant to the external affairs power under s 51(xxix), give legislative effect to treaties or conventions to which it has become a party and therefore pass laws to implement them in the exercise of the external affairs power.

Section 96 confers upon the Commonwealth significant financial power over the States by authorising conditional grants in the following terms:

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and condition as the Parliament

thinks fit.

Additional grants by the Commonwealth to the States under s 96 of the Constitution have been seen as part of a mechanism sanctioned by the High Court, to allow the Commonwealth to enter, through the conditions it imposes, into fields of regulation otherwise beyond its legislative powers. In this way, the Commonwealth has been able to play an important role in areas such as secondary and tertiary education, hospitals, roads, and many others. It has also been able to use its grant powers to cause the States to vacate particular taxing fields. Professor Kenneth Bailey, a former Solicitor-General of the Commonwealth, wrote of s 96:⁵³

A constitution that contains a section 96 contains within itself a mechanism of Commonwealth supremacy.

The extension of the trade and commerce powers to navigation and State railways is provided for in s 98:

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.

There are also, of course, restrictions on the legislative powers of the Commonwealth. These include the requirement in s 92 (also applicable to the States) that trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. There is a further restriction under s 99 which prevents the Commonwealth by any law or regulation of trade, commerce or revenue from giving preference to one State or any part thereof over another State or any part thereof. Section 100 protects States or their residents from 'a law or regulation of commerce' abridging their right to the reasonable use of the waters of rivers for conservation or irrigation. It has been little litigated but has come before the Court recently in connection with Commonwealth funding of States engaged in restricting water access rights in the context of a diminishing resource.

⁵³ Bailey, 'The Uniform Tax Plan', 1942-1944 20 Econ Record 170 at 185.

Section 116 places restrictions on the Commonwealth's ability to legislate in respect of religion.

Section 106 continues the Constitution of each State of the Commonwealth as at the establishment of the Commonwealth until altered in accordance with the Constitution of the State. By s 107 every power of the Parliament of the Colony which becomes a State shall, unless exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State continue as at the establishment of the Commonwealth. State laws are saved and continued in effect, subject to the Constitution, by s 108. Of particular significance is the paramountcy provision, s 109, which provides:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Constitutional interpretation and judicial review of legislation by the High Court

Political scientists and the constitutional lawyers may debate whether economic and political factors have been of greater significance to Federal/State relations in Australia than decisions of the High Court. However, the power of the High Court on judicial review to determine whether laws enacted by the Commonwealth Parliament or by State Parliaments are valid under the Commonwealth Constitution has been of major significance.

The judicial power of the Commonwealth is vested, by s 71 of the Constitution, in the High Court of Australia and in such other Federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction. Through the *Judiciary Act* 1903 (Cth) the Parliament has invested the High Court and the Federal Court and the courts of the various States with jurisdiction in matters arising under the Constitution, or involving its interpretation.⁵⁴ The use of the State Supreme Courts in particular to exercise jurisdiction in federal matters reflected the standing which they had at the time of federation.

⁵⁴ *Judiciary Act* 1903 (Cth), s 39B.

There is no provision of the Constitution which expressly confers upon the courts the power to declare legislation of the Commonwealth or of the States unconstitutional. Nevertheless, the Australian Constitutional Convention Debates and Records indicate that most, if not all, of the delegates assumed that the Courts would be able to declare Commonwealth and State legislation unconstitutional.⁵⁵

As Professor Geoffrey Sawer has written it was certain from the beginning that the Australian courts would have the power of judicial review, including the power to hold Acts of Parliament void for unconstitutionality. He said:⁵⁶

The Australian Constitution does not in specific terms confer this power on the courts, but it has many provisions which are unintelligible unless such a power was intended; for example, the reference to courts and judges as bound by the Constitution (covering Clause 5), the provision for cases involving *inter se* questions (s 74) and the provision for High Court jurisdiction in matters arising under the Constitution or involving its interpretation (s 76).

The High Court asserted, early in its existence and without elaborate exposition, its power to declare legislation invalid.⁵⁷ In the exercise of that power and its necessary premise, the power to interpret the Constitution, it has had a significant influence upon the relationship between the Commonwealth and the States under the Constitution.

Of general importance to that relationship was the reversal by the High Court in 1920 of the reserved powers doctrine which had held sway for the first two decades of the federation. That doctrine required that Commonwealth legislative powers be construed narrowly where they impinged upon areas of legislative competency left (albeit not specifically enumerated) to the States. For example, the power of the Commonwealth to make laws with respect to trade and commerce conferred by s 51(i) of the Constitution

⁵⁵ Thomson, *Judicial Review in Australia: The Courts and the Constitution*, (1988) at 166-167.

⁵⁶ Sawer, *Australian Federalism in the Courts*, (1967) at 76.

⁵⁷ *D'Emden v Pedder* (1904) 1 CLR 91; *Commonwealth v State of New South Wales* (1906) 3 CLR 807.

related to trade and commerce with other countries and among the States. Sections 100 and 107 continued the constitutions and powers of the State parliaments. By implication, the States retained to themselves the power to legislate with respect to trade and commerce within their own boundaries. On the reserve powers doctrine the Commonwealth legislative power was to be construed narrowly so as to minimise the intrusion of Commonwealth law into the area of intra-State trade.⁵⁸ This approach also supported a narrow construction of the corporations power.⁵⁹ Prior to 1920 there was another prevailing doctrine that the Commonwealth could not make legislation affecting governmental functions of the States and that the States could not pass legislation affecting the functions of the Commonwealth. This was referred to as the doctrine of 'implied immunity of instrumentalities'. Both doctrines were disposed of by the decision of the Court in the *Engineer's Case* in 1920.⁶⁰ The principle emerging from that case required a broad interpretation of Commonwealth legislative power unconstrained by the continuing legislative powers of the States. It also allowed for the application to the States and their agencies of Commonwealth legislation. The case represented a major widening of Commonwealth power.

One particular result of the overthrow of the doctrine of implied immunity of instrumentalities was that the States had no general immunity from the taxation power of the Commonwealth. The imposition of income tax on the salaries of members of Parliament, State Ministers and judges did not infringe any implied prohibition. Similarly, the States themselves could pass laws which might affect Commonwealth officials. For example, a Commonwealth official driving in the course of his or her duties would be subject to State road traffic laws. An implied limitation was developed in subsequent litigation.⁶¹ It provided that the Commonwealth could not pass a law which had the effect of destroying or weakening the capacity or functions of the States. That doctrine has been applied in recent

⁵⁸ *R v Barger* (1908) 6 CLR 41 at 54 per Griffiths CJ.

⁵⁹ *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

⁶⁰ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

⁶¹ *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.

years to set aside the imposition by Commonwealth law of surcharges payable on the pensions or superannuation entitlements, provided by State law, of State judges and parliamentarians.⁶²

Another area in which the legislative competence of the Commonwealth has been given an expansive interpretation by the High Court is that covered by the power under s 51(xx) to make laws with respect to 'foreign corporations and trading or financial corporations formed within the limits of the Commonwealth'.⁶³ The expansive interpretation became possible after the overthrow of the reserve powers doctrine. The application of the corporations power has extended beyond mere regulation to such areas as competition law, unfair trading practices and industrial relations law.

The interpretation given by the High Court to the power of the Commonwealth to make laws with respect to external affairs has enabled a number of laws to be supported which give effect to treaties entered into by the Executive Government of the Commonwealth with other countries.⁶⁴ The subject of those treaties could not otherwise have fallen within the scope of Commonwealth legislative power. An example is the *Racial Discrimination Act 1975* (Cth) which gave effect to the Convention for the Elimination of all Forms of Racial Discrimination.

Cooperative federalism

Notwithstanding the enhancement of Commonwealth power beyond anything contemplated by the federating colonists, there has been a significant increase in recent years in the phenomenon of cooperative federalism. There are an increasing number of cooperative arrangements between the Commonwealth and the States covering areas which neither Commonwealth nor State legislatures could comprehensively cover within the ambit of their

⁶² *Austin v The Commonwealth* (2003) 215 CLR 185; *Clarke v Commissioner of Taxation* (2009) 258 CLR 623.

⁶³ Constitution, s 51(xx).

⁶⁴ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

own legislative powers. Because it involves the creation of national agencies it has, although cooperatively based, a natural centralising tendency. Much of the development of cooperative agreements between the Commonwealth and the States occurs through the mechanism of the Council of Australian Governments, which is a Council comprising the Prime Minister and the Premiers of the various States and the Chief Ministers of the Northern Territory and the Australian Capital Territory. Since it was established the Council of Australian Governments has set up programs for cooperative development in many areas of regulatory interest. One of those currently under consideration is the establishment of a national regulatory scheme for the legal profession. Currently the regulation of the legal profession is done on a State-by-State and Territory basis.

The techniques of cooperative federalism directed to national or uniform regulation include the following:

1. Intergovernmental agreements providing for:
 - (a) uniform legislation enacted separately by each participating polity;
 - (b) enactment by one unit in the federation of a standard law which can then be adopted by other parties to the intergovernmental agreement.
2. The referral of State legislative powers authorising Commonwealth law-making under s 51(xxxvii) of the Constitution. Such referral may be on a particular topic or according to the text of a proposed Bill.
3. Executive cooperation by way of intergovernmental agreement.

Of all these techniques, the referral power offers the possibility of achieving on a cooperative basis one law from one source of legislative power, namely the Commonwealth Parliament, provided that it is subject to mechanisms to protect the referring States from abuse of the power by the Commonwealth. The enthusiasm of the States for referrals of power ebbs and flows. At present there seems to be a preference for intergovernmental agreements involving the adoption by various States of model legislation passed in a lead State. There are now in Australia a number of cooperative schemes which cover, inter alia, corporations law,

competition law, and gas, electricity and water regulation. Other areas under consideration include national transport arrangements and infrastructure development. There is also a cooperatively based legislative arrangement providing for access regimes to essential facilities constituting natural monopolies, specifically gas pipelines and railways.

The Trend

The recent history of cooperative federalism in Australia demonstrates a tendency to treat as national a range of issues which, not so long ago, would have been regarded as local. As discussed earlier, the concentration of central power to which this trend contributes began many years ago.

Cooperative federalism today is, in a sense, extra-constitutional. Driven by political imperatives it yields results on a consensual basis which go well beyond those achievable by the exercise of Commonwealth legislative power and the separate exercise by the States of their powers. In that sense the cooperative federalism movement may be seen to overshadow expansive judicial interpretations of Commonwealth power. And in my opinion, although cooperative and thus respecting the formal constitutional position of the States, it contributes towards centralisation.

Mixed jurisdictional cooperative schemes may appear to be fragile because they depend upon a consensus. But once in place it is arguable that there is a ratchet effect. Once a topic has been designated as one of national significance and requiring a cooperative approach, it is difficult to imagine circumstances in which it becomes politically acceptable to the parties to go backwards and fragment responsibility for it. The pressure seems to be in one direction only. There can be associated with complex cooperative arrangements difficulties in the ready location of accountability. A commentary by political journalist Jack Waterford in the Canberra Times on the complex Murray-Darling Basin Water Agreement, made the point about the Authority which is established pursuant to the Agreement:⁶⁵

⁶⁵ J Waterford, 'Black hole in the basin 'fix'' Canberra Times, 9 July 2008.

Who's in charge and who will we hang if it doesn't work out? Who's actually deciding things?

It is reasonably arguable that accountability is optimised under a cooperative scheme when one government and one minister has to be responsible for its administration. An electorate well versed by long experience in the arts of blame shifting between governments is likely to require no less when things go wrong. This suggests an ongoing pressure, albeit over a period of years, to simplify complex cooperative arrangements where accountability is not well located. That simplification can occur in at least two ways:

1. Use by the Commonwealth Parliament of broad constitutional powers to take over control of the relevant area. In this respect there may be unused potential particularly in the corporations power, trade and commerce power, the external affairs power and the incidental power to enter into areas previously untouched by Commonwealth law.
2. Reference by the States of the power to make laws in relation to the relevant subject matter. Such references are likely in the foreseeable future to be text-based with in extremis escape mechanisms for the States, underpinned by ministerial agreements and, perhaps, a ministerial council and an official advisory body. The law which emerges will be a Commonwealth law and any regulatory agency set up under that law will be a Commonwealth agency. Accountability for its actions will reside ordinarily with the agency and the relevant minister although at least in policy development the Ministerial Council and official advisory bodies will have an important role to play. Such an agency will also be subject to judicial review. ASIC, as corporations regulator, is an example of this class of case.

Most people prefer to see cooperation between the components of a federation rather than conflict. But when the trend of cooperation is ultimately to centralise power, then the price of cooperation may ultimately involve a risk of losing some of the benefits of federation. A number of those benefits were listed by Professor Anne Twomey and Withers

in a paper published in April 2007:⁶⁶

- . protection for the individual by checking the concentration of power;
- . choice and diversity;
- . the customisation of policies to meet local needs;
- . incentives to reform and improve in order to compete with other jurisdictions;
- . incentives to innovate and experiment; and
- . greater scrutiny of policies as a result of the need to achieve concentration.

They gave a number of examples of State and Territory innovations which have led reform in Australia in areas such as:⁶⁷

- . road safety campaigns and the compulsory use of seat belts;
- . the establishment of the first environmental protection authority in Australia and the second in the world after California;
- . the enactment of various kinds of anti-discrimination laws;
- . the use of commercialisation and corporatisation to improve the performance of government enterprises;
- . the development of trade relations with Indonesia;

⁶⁶ A Twomey and G Withers, 'Federalist Paper 1 Australia's Federal Future' a Report for the Council for the Australian Federation, April 2007 at 8.

- . the creation of mechanisms for the review of business regulators;
- . the use of casemix funding of public hospitals;
- . the establishment of health care call centres;
- . the development of private financing initiatives;
- . the development of the mutual recognition scheme;
- . the reform of financial regulation;
- . the development of the National Reform Agenda to enhance human capital;
- . the development of regional migration schemes;
- . the development of markets for the trading of salinity credits and biodiversity credits;
- . the creation of carbon rights and the development of a national carbon emissions trading scheme; and
- . the development of population policies.

The continuance of the benefits to federation in Australia assumes the existence of reasonably efficient, effective and accountable governments at all levels of the Federation. There is no doubt however that some State governments, despite the best efforts of committed ministers and officials, are regarded by a significant proportion of electors as not adequately discharging their constitutional functions. Such negative views of State governments where they exist can feed into an increasing sympathy for assumption by the Commonwealth Government of power and responsibility for matters left to the States under the Commonwealth Constitution. If that observation, which is at best impressionistic be correct, then there is little to be done to stop the drift short of a substantial revitalisation of

⁶⁷ Twomey and Withers, *op cit*, at 15.

those governments.

Conclusion

Australian constitutional evolution has been marked by a series of events post-dating federation which enabled Australia to take its place as a fully independent nation in the global community. Judicial interpretation has significantly affected the balance of powers between the Commonwealth and the States. Extra-constitutional cooperative movements are themselves reshaping those relationships and are perhaps the most significant current development under Australia's Constitution.