ROUND TABLE OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW MELBOURNE, 4 OCTOBER 2003 "THE HIGH COURT OF AUSTRALIA"

Those of us who live and work in legal systems that are rooted in a written Constitution take great pride in the Constitution of our country. Often, to the external observer, it may seem as if we treat it with reverential awe. Whatever criticisms we may make of it, we will often be heard to deplore what we see as an unfortunate lack of knowledge about, or interest in, the foundational text for our legal system.

Often, because we take pride in our Constitution, we think that the constitutional problems which we confront are unique. We are different; our Constitution is different; therefore, our constitutional problems are different, is an all too familiar and seductive chain of reasoning.

Conferences like this therefore serve several purposes. They serve to focus attention on fundamental legal and constitutional norms. In doing so they may cause others to reflect on the role and importance of the Constitution and the institutions for which the Constitution provides. If that happens, knowledge about, and interest in, the Constitution is promoted. But that is not the only kind of benefit which this Conference may bring. This present gathering may also reinforce what is apparent to any who pause to consider the lessons of history. History reveals that the problems which we face are seldom unique. One or more aspects of the problem will almost always have arisen elsewhere. The solution adopted elsewhere may not be apt here, but seldom indeed is there nothing to be learned from considering what others have done when confronted by such a problem. This Conference may stimulate us all to learn more from the experience of other countries and other legal systems.

In this Conference you will examine three themes in exploring the role of constitutional courts and the difficulties that they face in fulfilling that role. Those themes of federalism, rights, and national security and integrity will present ample scope for examination of the many problems that constitutional courts confront.

As you may know, the High Court of Australia celebrates its Centenary this year. It is 100 years ago, next Monday, 6 October that the Court first sat. That sitting, in Melbourne, marked the beginning of the development of what has become a distinctively Australian body of constitutional and other decisions. Formed in the traditions of the common law of England, influenced greatly by constitutional structures taken from the United States Constitution, that body of law has, nonetheless, now become distinctively Australian. Let me attempt to sketch an outline of how and why that has been so and, in the course of doing that, touch upon each of the three themes which you will consider over the next sessions. First, federalism and the structural arrangements made in our Constitution.

The Commonwealth was formed as a federation of six selfgoverning colonies of Great Britain. Although the Constitution was enacted as a Schedule to an Act of the Parliament at Westminster, the Constitution was drafted in Australia by Australians and was adopted by referendums held in each of the colonies. Those who drafted the Constitution drew heavily on the United States model. Just as "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress from time to time ordain and establish" [1]"the judicial power of the Commonwealth shall be vested in a Federal Supreme Court to be called the High Court of Australia, and in such other federal courts as the Parliament creates"[2] but, in addition, "in such other courts as it invests with federal jurisdiction". Thus the State courts could be and were invested with federal jurisdiction. In this respect the Australian judicial system is radically different from the United States system.

But even more significant to the development of a distinctively Australian body of law than the socalled "autochthonous expedient"[3] has been the fact that the jurisdiction of the federal supreme court for which s 71 provided was not confined to constitutional matters or to matters originating in the exercise of federal jurisdiction. The High Court's jurisdiction has always been wider than that.

In particular, the High Court of Australia has always exercised appellate jurisdiction from the State Supreme Courts. Now, of course, the High Court is the final appellate court for Australia and it spends much of its time dealing with matters other than those which arise under the Constitution or involve its interpretation. It is inevitable, then, that the Court's approach to constitutional matters has been informed by its approach to other matters in which it has jurisdiction. Those matters include those involving the development of the common law of Australia, those which depend upon the construction of statutes, as well as its constitutional jurisdiction under s 75(v) of the Constitution to judicially review the lawfulness of the actions of officers of the Commonwealth.

It may well be that the form in which the debate (no doubt the continuing debate) about methods of constitutional interpretation has been conducted and, in particular, the debate about constitutional implications owes much to the influence that the Court's work in the general law has had on the development of its constitutional doctrine.

It is an inevitable and necessary consequence of any system of government in which power is divided between

levels of government that there be a means of resolving whether powers have been properly exercised. To an American, Canadian, German or citizen of another federal state, this is commonplace. To an Australian it should be commonplace. To citizens of the United Kingdom, as power is devolved to Scotland and Wales, it will become commonplace. There are, however, some further important corollaries of the division of power between integers of a federation. In Australia they have led to emphasising the importance of the role assigned to the High Court in the exercise of the judicial power of the Commonwealth. In *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* it was said[4] that "[t]he fundamental principle upon which federalism proceeds is the allocation of the powers of government" and that[5] "the ultimate responsibility of deciding upon the limits of the respective powers of the governments [of the integers of the federation] [was] placed in the federal judicature".

It is important, in Australia, to recall the consequences that were seen as following from these two propositions. In *Boilermakers* they were described as follows[6]:

"The demarcation of the powers of the judicature, the constitution of the courts of which it consists and the maintenance of its distinct functions become therefore a consideration of equal importance to the States and the Commonwealth. While the constitutional sphere of the judicature of the States must be secured from encroachment, it cannot be left to the judicial power of the States to determine either the ambit of federal power or the extent of the residuary power of the States. The powers of the federal judicature must therefore be at once paramount and limited. The organs to which federal judicial power may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained."

To Australian constitutional lawyers these notions are, or should be, basic. But there is a further passage in *Boilermakers*, not often cited, to which reference might usefully be made today. Reference was made[7], in the joint reasons, to the course of constitutional development in the United States with respect to the separation of powers. Of those developments the joint judgment went on to say:

"It is enough to say that an unfortunate rigidity in the conception of the boundaries between the three great functions of government led for a time [in the United States] to difficulties both of practice and of theory and that the practical expedients by which the difficulties have been met have left the constitutional theorists somewhat at a loss in reconciling them with *a priori* principle. It is, however, a broad division of power and the division, although it was taken immediately from an American original, is a division of powers whose character is determined [in Australia] according to traditional British conceptions ... So understood difficulties as between executive and legislative power are not to be expected and none has arisen. It is in connection with judicial power that questions are apt to occur."

Notice that here, in one of the leading cases decided by the Court, the problem is identified as one which other legal systems have considered and as one about which lessons may usefully be drawn from what has been done elsewhere. That process is repeated constantly in the work of the Court.

What of the second of your themes: rights? Unlike many written constitutions, Australia does not have a comprehensive statement of fundamental rights in its Constitution. That is not to say that the Constitution does not address some questions which are commonly dealt with by Bills of Rights. Section 116 of the Australian Constitution, for example, deals with the establishment of religion and religious tests in a way which reveals that the drafters had the First Amendment to the United States Constitution before them. Other provisions like s 117 concerning the rights of residents in States can be understood as directed towards the position of individuals in the new governmental structures created by the Constitution.

One consequence of the absence of a Bill of Rights is that the Court has not had to wrestle with broad aspirational statements of the kind that are found in the United States Bill of Rights or the Canadian Charter. The treatment of such aspirational statements often provokes commentary couched in the language of the political rather than the legal process. Thus, to take but one example, the Court has not had to attempt to reconcile the constitutional prohibition against abridging the freedom of speech or of the press with the requirement that an accused enjoy the right to a speedy and public trial by an impartial jury[8]. Rather, debates about fundamental values have often been conducted in the context of construing legislation which might infringe fundamental freedoms or values. It has, therefore, been conducted in a distinctively legal context. By adopting the rule that, if Parliament wishes to cut down such freedoms, it must use clear and unambiguous language, the problems associated with the introduction of such legislation are seen as primarily legal, not primarily political.

That is not to say, however, that the courts cannot and do not become involved in such questions. First, there is the question whether and what detrimental consequences can be visited upon an individual by exercise of the

legislative or executive power as distinct from the judicial power. Secondly, there always remains the Court's powers under s 75(v) of the Constitution to review the lawfulness of the actions of Commonwealth officers. And thirdly, in appropriate cases, there is the availability of habeas corpus. To say more, however, runs the risk of trespassing upon matters of current controversy and I will say nothing more about them.

Your third topic concerns national security and integrity. Every constitutional court, every court of final appeal, confronts the fact that it is required to make decisions about issues in which competing views may reasonably be held. A case should not reach a court of final appeal unless it is a case about which reasonable minds might differ. Few constitutional issues admit of only one answer. That the Court divides on such questions should therefore come as no surprise to the observer. That the division may be 4:3 should, again, come as no surprise. Yet it is surprising how often the fact of division in opinion is a matter for remark.

The issues at stake in constitutional questions are often very large. If the question concerns the division of powers between integers of the federation, the political consequences of the decision are obvious. When the issues concern issues of national security, the political sensitivity of the issue is no less obvious. What does a court do when confronted by causes of this kind? As history reveals, the High Court has always resolved such issues by open hearing of the argument followed by publication of its reasons for decision for public debate and examination. There can be no sharper spur to intellectual rigour. And, in the end, the Court must justify what it decides by the cogency of its reasons.

Throughout the history of the High Court there have been many cases which have provoked great controversy. If I confine my attention to cases in the second half of the Court's life, I need mention only *Bank Nationalisation*, *Communist Party Dissolution*, *Tasmanian Dam*, *Patrick Stevedoring*, to remind an Australian audience of some cases of that kind. The decision in the *Bank Nationalisation Case* directly affected the way in which the postWorld War II economy of Australia was to be shaped. The *Banking Act* 1947 which would have enabled the Governmentowned bank, the Commonwealth Bank, to take over the banking business of Australia's private banks, was struck down. The political, economic and social ramifications of that decision were very large. Only a few years later when a government of the opposite political persuasion was in power the Court struck down the *Communist Party Dissolution Act*, an Act to dissolve the Australian Communist Party and declare it an unlawful association. There the Court confronted that most vexing of questions, how far can a democratically elected Government go in protecting the Constitution and institutions of Government from subversion. We hear echoes of these debates today.

What marks cases like *Bank Nationalisation* and *Communist Party Dissolution* as different from other cases with which the Court has dealt is not the difficulty of the issues involved. Many of the cases which the Court decides are difficult. What marks them apart is that they are cases which generated intense public interest and debate. They were cases about *the* political topic of the day. In circumstances like those, it is often important to emphasise that, despite the public interest that a case generates, the case will be decided in the ordinary way. That is, the case will be decided by judges independent of external pressures, whose sole obligation is to do justice according to law.

One might hope that it went without saying that the only loyalty which a judge has is to the Constitution and to the law but often, at least in recent years, some have thought it useful to apply descriptive labels to individual members of the Court and seek to argue, via unstated assumptions about the content of that label, to a conclusion about past or likely future dispositions either generally or in particular cases. For my own part I would have thought that analysis of reasons for decision would have revealed far more than a one word label laden with unstated assumptions. Be that as it may, we are, perhaps, doing no more than replicating forms of analysis commonly employed in the United States. In this context, then, it is necessary to keep at the forefront of debate some fundamental tenets of the legal system which such processes of labelling may appear, to some, to deny. No doubt, that is why for example in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) the Court published a statement about the effect of its decision in which it said[9] that the questions before the Court were "strictly legal questions" and that:

"The Court is in no way concerned with the question whether it is desirable or undesirable, either on the whole or from any particular point of view, that the construction of the dam should proceed. The assessment of the possible advantages and disadvantages of constructing the dam, and the balancing of the one against the other, are not matters for the Court, and the Court's judgment does not reflect any view of the merits of the dispute."

More recently, in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*[10], Brennan CJ, before pronouncing the orders of the Court, pointed out that:

"The courts do not – indeed, they cannot – resolve disputes that involve issues wider than legal rights and

obligations. They are confined to the ascertainment and declaration of legal rights and obligations and, when legal rights are in competition, the courts do no more than define which rights take priority over others."
When political debate about issues connected with legal disputes is intense and heated, it is all too easy for observers to lose sight of this fundamentally important consideration. The fact that a case may have political consequences does not mean that it is decided as if it were a political controversy. Nor does it mean that the judges are to be held accountable in the same ways as politicians. Judges are held accountable by sitting in open court and stating publicly the reasons they have for reaching the conclusion they do.
The courts, of course, cannot themselves enter the debate that may swirl about a particular case. The High Court's function is to exercise the judicial power of the Commonwealth. It has no other function. Often, then, the task of articulating the proper role of the courts will fall to others. Doing that effectively often takes great care and considerable skill. Otherwise, the attempted articulation of the proper role of the court is seen as no more than another political contribution to an essentially political debate. Nevertheless it is important that the proper role of the courts is articulated and understood.
In the end, the proper disposition of the controversial case depends , as does the proper disposition of any case, upon the fidelity of the judges. The judges' obligation, to do justice according to law, is fulfilled if they are faithful to the Constitution and to the law. The public performance of their task and the public articulation of reason for judgment allows others to judge how well we do that.
All of us can and do draw daily upon the accumulated wisdom of those who have gone before us as judges. All of us can and do draw daily upon the judicial methods which have been developed and refined over so many years. All of us can and do strive daily to be faithful and do justice according to law. At the end of your deliberations in this Conference you will, I hope, find that it is that which must be the unifying principle by which problems of the kind you are to discuss must be solved. I wish you well in your deliberations.

[1] Constitution of the United States, Art III, s 1.
[2] Constitution of the Commonwealth, s 71.
[3] *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268.
[4] (1956) 94 CLR 254 at 276.
[5] (1956) 94 CLR 254 at 268.
[6] (1956) 94 CLR 254 at 268.
[7] (1956) 94 CLR 254 at 276.
[8] Constitution of the United States, First and Sixth Amendments.
[9] (1983) 158 CLR 1 at 58-59.

[10] (1998) 195 CLR 1 at 16.