

## What the Courts have done to Australian Federalism

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The Commonwealth of Australia Constitution Act which first rolled off the presses in 1900, and which came into operation on 1 January 1901, is for the most part the same legal instrument that provides the framework of government in Australia today. The Commonwealth Parliament was, by that Act, given powers with respect to specified subjects, and no others. With two additions (relating to social security and people of the Aboriginal race) the powers then granted to the Commonwealth remain the totality of its powers today.

Yet the Constitution has proved sufficiently adequate to bring the nation through events and circumstances which none of those who framed it could have entirely foreseen or envisaged. Two world wars, the Great Depression, advances in transport, communication and technology, the disappearance of the British Empire and the emergence of Australia as a sovereign nation, the change in the ethnic and cultural composition of the population and the alteration of political and social attitudes throughout the twentieth century have all had a great effect on our perceptions of the role of the Commonwealth and the States, respectively, and the relationship between government and the citizen.

How can one reconcile a ninety-year-old, relatively unchanged, instrument of government with the obvious process of growth and evolution of our system? No objective observer, no matter how keen on constitutional reform and no matter how dissatisfied with our present constitutional arrangements, can deny that our nineteenth century Constitution has proved remarkably adaptable and resilient.

Its survival into a new and different age can be seen, quite rightly, as a tribute to the founders, some of whom have been the subject of earlier lectures in this series. But it would be wrong to attribute to them a superhuman prescience or ability. One should not downgrade the efforts of those who came later and who, by exploring the meaning of the Constitution in the light of the issues and problems of their times, gave it life and vitality.

While the words of the Constitution have ruled us, while they are a major premise in all policy-making and law creation, it was the issues that arose from time to time which provided the testing-ground of meaning and operation. Each new generation kept going back to the document and, of necessity, reading it in the light of their particular social and political problems, expectations and goals. In this process, the High Court of Australia has played a leading role.

It is a characteristic feature of countries with rigid constitutions - particularly federal constitutions - that major issues which elsewhere are purely matters for political debate and resolution appear as questions of law for decision by the courts. Moving across the arena of the High Court - like an historical cavalcade - have appeared many of the great forces and interests whose conflict and resolution have been major themes of our federal history and therefore of the story of twentieth century Australia.

These have included the efforts of Deakin and the Labor Party, in the first decade, to control industrial conditions and to strengthen organised labour, social and

economic controls in wartime, immigration and deportation policies, the clashes between J T Lang and the federal government over how to deal with the depression, organised marketing schemes for primary produce, the attempted nationalisation of airlines and banks under the Chifley Government, social welfare legislation, government borrowing and expenditure, Federal and State taxation policies, attempts by the Menzies Government and earlier governments to deal with Communism and subversion, the struggle for and against aid to church schools, the development of air and road transport, the control of monopolies and restrictive trade practices, marriage and divorce, the dissolution of both Houses of Parliament, electoral redistributions, issues of the environment (including the conservation of Fraser Island, South-West Tasmania and Queensland rainforests), racial discrimination and war crimes. Special mention should be made of the continued and continuing efforts from the beginning of the Commonwealth to deal with an issue that has hag-ridden most Governments: industrial relations and industrial disputes.

Opposing interests in relation to all these issues, and more, have been arrayed before the forum of the High Court of Australia, with the Constitution as the centrepiece of argument.

The result of the High Court's handiwork is that while the Constitution, as words on paper, has remained much the same for ninety years, it has, as an organic instrument of government, changed very much. It will no doubt continue to change even if no formal alterations are made to it.

How has this come about? Does it mean that the unelected judges have exceeded their function of interpreting and applying the existing law, and have usurped the power given, in s 128, only to Parliament and to the electorate to alter the Constitution? Occasionally suggestions are made to that effect. One commentator in 1985 referred to two decisions of the High Court upholding, under the external affairs power, the *Racial Discrimination Act* and the *World Heritage Properties Conservation Act*. He said:

The entire spirit of the Constitution has been undermined and in effect it has been rewritten. It has been rewritten by four judges of the High Court, against the wishes of the three others, under pressure from a Commonwealth government exploiting racial discrimination and the environment. The irresponsibility and arrogance of the four judges of the High Court who permitted this cannot be underestimated, forgiven or condemned too highly. They have permitted in effect a rewriting of the Constitution, contravening Section 128 ... By a cunning conjuring trick, as it were, four judges ... have swept away the restrictions contained in the Constitution.<sup>1</sup>

It seems to me, however, that such a view rests on a misunderstanding of the role of the judiciary and the nature of constitutional interpretation. What I want to briefly discuss is how the Court managed, while keeping to its proper role of constitutional interpretation and application, to produce results that might have startled some of the framers at the time that they completed their handiwork.

The answer lies largely in the general, rather abstract language used in much of the Constitution. We do not find in it the detailed provisions and lengthy definitions one is accustomed to in ordinary legislation, such as the Companies Law or the Income Assessment Act. The coverage of the main commercial power of the

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<sup>1</sup> Cooray, 'Human Rights in Australia', Australians for Consensus, *Freedom and Responsibility*, 1985, quoted in Michael Coper, *Encounters with the Australian Constitution*, CCH Australia Limited, 1987, p 187.

Commonwealth is described in ten words, namely, 'trade and commerce with other countries and among the States'. The power designed to deal with international relations is contained in two words, namely, 'external affairs'. The shorter the phrases and the more general and abstract the terms used, the more scope there is for dispute as to meaning, when it is necessary to apply them to practical situations - and, therefore, the greater is the scope for judicial discretion. Sir Owen Dixon summed this up by referring to the Constitution as 'an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances'.<sup>2</sup>

Two events which occurred in the same week in Sydney in 1934 illustrate some of these issues. Commonwealth law required the owner of a radio (and later television set) to obtain a broadcasting receivers licence - popularly known in the early days as a wireless licence. On 26 September 1934 Mrs Dulcie Williams of Surry Hills in Sydney, while listening to her wireless, was visited by departmental inspectors who demanded to see her licence. She claimed she was not required to have one because the relevant law was invalid. The Commonwealth, she argued, had only the express power given to it by the Constitution.

Nowhere in the Constitution was there any reference to broadcasting, and indeed it was unknown when the Constitution was enacted. The inspectors might have drawn her attention to s 51 (v) of the Constitution which confers power on the Commonwealth to make laws with respect to postal, telegraphic, telephonic and other like services. At any rate her reply was that a broadcasting service was nothing like those named in the Constitution. The dispute went to the High Court. The majority found in favour of the Commonwealth. They said that a broadcasting service was like a telegraphic or telephonic service in that all involved the sending of communications from a distance by electronic means. But Dixon J dissented. He pointed out that the services named in s 51 (v) permitted individuals to communicate with each other. The broadcasting service did not provide for interpersonal communication. For the majority, that feature was *not* essential; for Sir Owen Dixon it was.<sup>3</sup>

This case illustrates a number of aspects of constitutional review of legislation. First, it is useless to consider what the framers intended in relation to broadcasting. They did not know of it. Secondly, no amount of empirical examination of the services involved can ultimately resolve the issue, yet the judges have a duty to come to a decision. Thirdly, there is no way that one can positively affirm that either view was, in any absolute sense, right or wrong.

Assuming that the Constitution leaves the judge with a choice - in the sense that more than one possible interpretation can each be regarded as rational when judged against the words of the Constitution - it is obvious that the choice of meaning cannot be based on the Constitution. One has to look further afield. It is in this area that it is impossible to exclude broader policy considerations or value judgments if one is to give a rational judgment.

Two days after Mrs Williams was discovered illegally listening to her radio, Mr Goya Henry, an aviator, had his aviation licence suspended. Two days after that he nevertheless flew a plane, setting off from Mascot airport and then flying around, over and under Sydney Harbour Bridge. He was convicted of breach of the federal Air

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<sup>2</sup> *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 Commonwealth Law Reports 29 at 81.

<sup>3</sup> *R v Breslan; Ex parte Williams* (1935) 54 Commonwealth Law Reports 262.

Navigation Regulations. He then appealed to the High Court.<sup>4</sup> The Constitution gave no express power to the Commonwealth to regulate aviation, which again did not exist when the Constitution was enacted. The Commonwealth argued that its rules were made in pursuance of an international convention and were, therefore, laws with respect to external affairs. The Court held, however, that the regulations were not consistent with that Convention. The only other power that seemed available was 'trade and commerce with other countries and among the States'. But Mr Henry had not been flying from or to any other state or country. The Commonwealth argued that the commingling in air routes and airports of aircraft proceeding intrastate with those travelling interstate, enabled it to control all aircraft. That submission was summarily dismissed. Mr Henry could not be prevented by the Commonwealth from stunt-flying around Sydney Harbour under the commerce power. The Constitution clearly distinguished between intrastate and interstate commerce, and confined the Commonwealth to the latter. An attempt by the Commonwealth in 1936 to have the Constitution amended to give it power over aviation astoundingly failed to obtain majorities in four states.

Nearly thirty years later, in 1965, the High Court had no difficulty in upholding federal power to license all air navigation on the basis of safety, regularity and efficiency of the operations, including purely intrastate operations.<sup>5</sup> One of the reasons relied on was that, whatever the situation in the 1930s, the safety of interstate and overseas air navigation in the 1960s could only be assured by the Commonwealth regulating the safety aspects of all air navigation in Australia. A law therefore operating on purely intrastate carriage of goods and passengers by air was held to be a law with respect to trade and commerce with other countries and among the states. No doubt, if the Founding Fathers had been asked whether they could conceive of a situation where the power they had given the Commonwealth could be used to control an entire area of domestic trade and commerce within a state, they would have said 'No'. But that is because they were unaware of the hazards, speeds and complexity of modern forms of travel. It is probable that the framers certainly intended that the Commonwealth should be empowered to protect interstate and overseas trade. What has changed since then are simply the facts of the world not the nature or object of the power.

While I imagine that there would be few people today who would disagree with the result of that case, even those in state government, the broad principle invoked can lead to issues that are intractable if we confine our consideration to the text of the Constitution. This is because the principle asserts that in certain circumstances the Commonwealth may control matters that do not come within the subject of a federal power because of the effect they have on that subject. Intrastate air navigation could be licensed because of the consequences to interstate and overseas trade and commerce. But, of course, almost anything can affect interstate or overseas trade and commerce, including birth, marriage and death. Questions of degree and of the intimacy or remoteness of cause and effect are necessarily involved in making judgments in this area. In many cases, a rational conclusion can be arrived at only by having regard to matters that may be described as 'political' or 'social', in a broad, rather than partisan, sense.

For example, in 1973 the Commonwealth Parliament purported to authorise TAA (as it then was) to carry goods and passengers between places in the same state if it was for the purpose of the 'efficient, competitive and profitable conduct' of the

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4 *R v Burgess; Ex parte Henry* (1936) 55 Commonwealth Law Reports 608.

5 *Airlines of NSW Pty Ltd v New South Wales* (No.2) (1965) 113 Commonwealth Law Reports 54.

airline's interstate or overseas services. The court split on the validity of the provision. It was held invalid, but only three judges out of five constituted the majority.<sup>6</sup> The majority declared that while the Commonwealth could regulate intrastate trade in order to ensure the *physical* survival and safety of interstate trade, it could not do so for the purpose of ensuring the economic viability and commercial success of interstate trade. The minority considered that this was unrealistic. The present Chief Justice (who felt he did not have to decide the issue in the circumstances of the case) declared that if one had any regard to practical reality, consideration had to be given to the economics of the operation. Both physical and economic considerations were indispensable elements in determining what was reasonably necessary to achieve the legitimate object of protecting and fostering interstate and overseas trade and commerce. Again, the text of the Constitution does not resolve the issue.

Behind this disagreement loomed the United States' experience. From the time of President Roosevelt's second term, the United States Supreme Court performed a constitutional volte face and permitted Congress, under a commerce power similar to our own, to control all processes of manufacture, agriculture and domestic trade if there was a rational basis for concluding that they had a substantial economic effect on interstate or overseas commerce. The result is that, for over 50 years, no law controlling any aspect of the economic life of that country has been held invalid on the ground that it does not have a sufficient relevance to interstate commerce. For example, it was held that a federal law can prohibit a farmer from growing wheat to feed his own pigs.<sup>7</sup> The rationale was that wheat grown for domestic consumption had nationally an appreciable practical effect on the price of wheat moving in interstate commerce. Therefore wheat locally consumed was subject to federal regulation, although it did not move into commerce at all. Some of our judges are wary of importing American decisions. To accept that the Commonwealth can control activities merely because they have an economic effect on interstate or overseas trade and commerce could, they fear, be to set their feet on a slippery slope. It could lead to the obliteration of the distinction between interstate and intrastate trade and between trade and production. But for those judges, who obviously wish to cleave closely to the terms of the Constitution, it doesn't seem to trouble them that the distinction made between economic and physical effects is nowhere mentioned in the Constitution. It is purely a judicial creation. The dispute and tension between preserving the distinction between the forms of trade and applying realistic criteria goes on.

In Australia, the High Court partially achieved a result of greater federal economic control by a different route. It is one which avoided the court having to examine economic and social facts. The vehicle for this result was s 51 (xx) which confers power on the Commonwealth to make laws with respect to 'foreign corporations and trading and financial corporations formed within the limits of the Commonwealth'. The Commonwealth's early attempt to use this power to control monopolistic and restrictive trade practices by these corporations in relation to intrastate trade failed in 1908. The court, consisting entirely, it should be noted, of Founding Fathers, produced four different interpretations of the power.<sup>8</sup> The resulting confusion meant that the power lay dormant for about 60 years. It was rediscovered in the 1960s, and in 1971 the court unanimously declared that the Commonwealth could, under that provision, control all the trading activities of trading corporations, without regard to the distinction between the forms of trade referred to in the trade and commerce

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6 *Attorney-General (WA); Ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 Commonwealth Law Reports 492.

7 *Wickard v Filburn* 317 United States Reports 111 (1942).

8 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 Commonwealth Law Reports 330.

power.<sup>9</sup> In 1983, a majority went further and held the Commonwealth could also control all acts of those corporations done for the purposes of trade, such as manufacture.<sup>10</sup> These decisions have achieved *some* of the results which in the United States was achieved by a broad construction of the commerce power; but in Australia it is limited to activities concerning the kinds of corporations specified. The corporations power has therefore limited scope for federal control of those sectors of the economy not dominated by bodies incorporated under the Companies Law, such as agriculture, stockbroking, pharmaceutical chemists, the professions and so on.

The corporations power has been used to control restrictive trade practices, to provide consumer protection, to penalise industrial boycotts and to prevent the Hydro-Electric Commission of Tasmania from building a dam for the production of electricity. It is available, however, for a wide variety of other purposes, including wage and price control, the law of defamation in relation to the press, newspaper advertisements and the prescribing of manufacturing or packaging standards. But this only applies (as I have said) where corporations carry out the transactions or activities regulated. I should add that no amount of study of the Convention Debates provides a clear answer to the question of original intent.

On one occasion the High Court looked at the Convention Debates to determine another issue arising under the corporations power, namely, whether the Parliament could provide for the creation of trading corporations, and held, by a majority of 6 to 1, that it could not. For many, it was a dubious exercise in historical interpretation, as the court found the historical intention to be clear, whereas it seemed highly ambiguous to others.<sup>11</sup>

There has, for most of our history, been little criticism, from a social or political viewpoint, of the work of the High Court. That was not true of one aspect of the *Franklin Dam* case in 1983.<sup>12</sup> Under our system only the Commonwealth government may enter into treaties, and its executive power extends to treaties on any subject. But the mere existence of a treaty does not, generally speaking, change the law of the land. In so far as the treaty requires Australia to change the domestic law, that can only be accomplished by legislation. In the *Franklin Dam* case it was held by a majority that the Commonwealth Parliament, under its power to make laws with respect to external affairs, could validly enact legislation to give effect to an international treaty obligation, whatever the subject matter of the treaty. In that case the treaty was the World Heritage Convention, and the issue deeply divided the judges of the court - as it did politicians, the press and the public. It had earlier been established that one of the major objects of the external affairs power was to enable the Commonwealth to deal effectively with relations between Australia and other countries. For the majority of the court the existence of an international agreement established that relationship. A law giving effect to it was therefore within the power. To deny the Commonwealth the authority to implement any international agreement, would, in their view, be to cripple Australia in its international relations and prevent it from taking a full part in the burgeoning development of international law and an evolving world order. National need and national concern loomed large in the majority's judgments. The evidence of existing treaties and United Nations activity indicated that there was no subject that could be regarded as being, of its nature, outside the area of international interest. In any case it seemed clear to the majority

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9 *Strickland v Rocla Concrete Pipes Pty Ltd* (1971) 124 Commonwealth Law Reports 468.

10 *Commonwealth v Tasmania* (1983) 158 Commonwealth Law Reports 1.

11 *NSW v Commonwealth* (1990) 169 Commonwealth Law Reports 482.

12 *Op. cit.*, n 10.

that giving effect to an obligation which bound Australia under international law concerned Australia's relations with other countries and, therefore, came within the plain meaning of the words of the Constitution, namely, a law with respect to 'external affairs'.

If the majority concentrated on the place of the nation in the world, the minority emphasised the position of the states in relation to the nation. Those judges declared that, as the Commonwealth government had the clear power to enter into international agreements on any subject, the external affairs power in relation to the legislative implementation of treaties was capable of unlimited expansion. The minority was of the view that the position taken by the majority would enable the Commonwealth to pass a law on any subject dependent only on the decision of the executive to become a party to an international agreement. This threat to the federal system was, they said, reinforced by the fact that in modern times there was no area that might not be the subject of an international treaty. Emphasis was placed on a new notion in constitutional interpretation, namely, 'the federal balance'. What was the point, they said, of carefully delimiting the powers of the Commonwealth if one single power was interpreted so as to embrace everything and so render the others superfluous. The minority would have preferred to confine federal power to the implementation of treaties that concerned only the people, enterprises and governments of other countries. However, an earlier decision in 1982 had upheld, under the external affairs power, the *Racial Discrimination Act* which was primarily concerned with discrimination by and against Australians.<sup>13</sup> They adopted, therefore, the view of one of the majority judges in the earlier case, Sir Ninian Stephen, that to give effect to a treaty under the external affairs power, it had to relate to a matter of sufficient international concern. The minority found that while the subject of racial discrimination had been in that category, the World Heritage Convention, drafted in less mandatory terms and requiring a balancing of interests, was not of sufficient international concern to bring it within the scope of the external affairs power.

For the majority, the principle applied by the dissenting judges would have involved the court in an invidious task. It raised questions of fact and degree which were primarily the function of governments to determine. How was the degree of international concern to be proved? How could a court justifiably declare that the matter was not of international concern when the nations of the world, by entering into a binding international convention, had clearly indicated that, in their view, it was? Mason J pointed out that the court would be substituting its judgment for that of the other branches of government which were in a far better position to arrive at an informed opinion.

It is clear in all the judgments that policy views as to the nature of our federal system played a major part. Mere contemplation of the words of the Constitution, in or out of context, provided no conclusive answer. Nor did contemplation of the framers intention, as distinct, perhaps, from their expectations. In the light of the criticism of the majority's position by some, it should be pointed out that it was not new. Three out of five judges expressed a similar view in the *Goya Henry* case in 1935. Secondly, to say that, as a result of the case, the Commonwealth has unlimited power as to subject matter is a caricature of the true position. The Commonwealth must first find a treaty or convention which deals with the matter in the way it desires. Thirdly, the law must conform to the objects of the treaty. In fact, in the *Franklin Dam* case, various provisions were held invalid because they went beyond the obligations imposed. Nevertheless, while government by treaty may not be as easy

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13 *Koowarta v Bjelke-Petersen* (1987) 153 Commonwealth Law Reports 168.

as some suggest, the interpretation adopted in the *Franklin Dam* case enhanced federal power and made the area of state power more vulnerable to being pre-empted by inconsistent federal law.

Is the decision, as some claim, inconsistent with the federal system that the framers intended? For the minority, it obviously was, because of the increasing interest of the nations of the world and international bodies in an ever-expanding list of matters. This might result in the steady deprivation of state power in areas thought to have been within their exclusive competence. Indeed, as indicated earlier, some critics declared that the majority had illegitimately amended the Constitution. A number of newspaper editorials expressed the same view.

It is clear, however, that whatever the framers intended, they could not, in the circumstances of the 1890s, have regarded a power to implement any treaty as inconsistent with a federal system in which the states had substantial power. They knew nothing of, and could not have predicted, the enormous expansion of international activity in the twentieth century. In their day, treaties were confined to few subjects. The nations saw no need to enter into relations in respect of a large range of matters. For the framers, therefore, the investing of power in the Commonwealth to implement any international agreement did not raise any question of whether the states could be deprived of all or nearly all exclusive legislative power. It was not an issue. On this argument, what has changed is not the object or meaning of the power, but, again, the facts of the world and, therefore, the provision's application to those facts.

To talk of the judges illicitly altering the Constitution, in this or in any other case that the High Court has decided, is little more than propaganda. It would equally be open to those who oppose the minority's approach in the *Franklin Dam* case to say that *they* had attempted to alter the Constitution for political ends. The open-ended texture of the language of the Constitution means that there is brought to bear many considerations in the process of interpretation, including textual and contextual elements, the legal principles of interpretation, and such factors as the judges' view of the object of the provision under review and of the Constitution as a whole. The issue of characterising a federal law in relation to a subject of federal power is as Kitto J once put it, 'to ask a question which is not so precise that different answers may not appeal to different minds.'<sup>14</sup> While the Constitution does not list any state exclusive powers, and although it does not refer to national interest or national need, the policy considerations relied on by the various judges in the *Franklin Dam* case are part of the stuff of constitutional interpretation.

Conflicts of political values and goals involving our federal system have arisen outside the area of distribution of legislative powers. Having regard to the sponsor of these lectures the most appropriate illustration is the *Territories Representation* case in 1975.<sup>15</sup> What was at stake was, in part, the resolution of an apparent inconsistency in the Constitution. Section 7 provides, so far as relevant, that 'the Senate shall be *composed* of Senators for each State, directly chosen by the people of the State ...'. Section 122 provides, so far as relevant, 'that Parliament may make laws for the government of any territory ... and may allow the representation of such territory in either House of Parliament to the extent and on the terms which it thinks fit.' The *Senate (Representation of Territories) Act 1973* provided for the representation in the Senate of the Australian Capital Territory and of the Northern Territory by two

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14 *Airlines of NSW Pty Ltd v New South Wales* (No.2)(1965) 113 Commonwealth Law Reports 54 at 115.

15 *Western Australia v Commonwealth* (1975) 134 Commonwealth Law Reports 201.

Senators for each Territory. The Territory Senators were given all the powers, including voting powers, of state Senators. Queensland and Western Australia challenged the legislation and argued that s 7 and other provisions relating to the Senate constituted the Senate as a States' House. Therefore the representation of the Territories referred to in s 122 must be less than full membership and entail no voting powers. The court upheld the Act, but split four to three. The majority consisted of McTiernan, Mason, Jacobs and Murphy JJ. The dissenters were Barwick CJ, Gibbs and Stephen JJ. While all the judges relied on textual arguments, it is, of course, clear from the disagreement that those reasons were not decisive. Each judge bolstered them by reference to values they regarded as inherent in the Constitution. The dissenters declared that s 122 was, of its nature, incidental to the dominant purpose or character of the Constitution, namely a federal state. It could hardly be intended that this purpose should be undermined by an incidental provision such as s 122. The dissenters took the view that the concept of an upper house representing the states was 'indispensable' to our federal system. To alter the nature of the Senate was to alter 'the essential features of the federation'. For Sir Garfield Barwick, to uphold the legislation would 'be to subvert the Constitution and seriously impair its federal character'. Sir Harry Gibbs declared that the framers obviously intended the Senate to be a means of the states protecting their interests. The fact that the Senate may not have fulfilled that role was irrelevant.

A further consideration was that, if s 122 were given a literal interpretation, the Senate could be swamped by an excessive number of Territory representatives. The minority concluded, therefore, that the only way to reconcile s 7 and s 122 was to interpret the latter to mean that the representatives of the Territories could not have voting rights.

If federalism as a basic value favoured Territories that did not have full representation, the democratic nature of the Constitution led to the opposite result, and to a literal interpretation of s 122. It seemed to the majority judges difficult to believe that the framers intended that the people of the Capital Territory and the other Territories should be permanently disenfranchised in relation to a body that made laws for them and levied taxes on them. In their view, the framers foresaw and made provision for the political evolution of the Territories, in some cases towards full statehood.

The view that Parliament might swamp the Senate was met by the argument that possible abuse of power by Parliament was not a proper judicial consideration. The political checks of our system were designed to deal with abuse. The Founding Fathers, by giving power to a democratic Parliament assumed it would not act in a grossly unreasonably manner, as suggested by the minority. Jacobs J declared that it was a 'preposterous suggestion'. The framers 'trusted a system of parliamentary government in which they were mostly immersed'. In any case there was nothing to stop Parliament doing the same in relation to new states (the representation of which was also left to the Commonwealth). Further, unless there was a joint sitting following a double dissolution, the Senate would have to agree to its own dilution of state representation.

It is clear from these arguments that textual considerations were not decisive. In the judgments taken as a whole, the nature of our system and the competing principles and premises were debated and argued. Each judgment rested finally on what, within the limits prescribed by the terms of the Constitution, was considered by the judge to be the proper framework of our governmental system. No argument or series of arguments could be regarded as 'compelling'. Indeed in a later case, when this decision was unsuccessfully challenged, both Stephen and Mason JJ recognised

that this was a decision that could not be called, in any true sense, right or wrong, but only as persuasive or otherwise.

And so it goes on. Judicial decisions are shaped, of necessity, by clashes of values and policies - but always within the limits of the rather open-ended text of the Constitution. I do not want to give the impression that even in an area of choice the judge is left at large, in the position of a legislator. The terms of the Constitution, the requirements of reasoning, respect for past decisions (which even in constitutional law are not lightly overruled), the need for consistency of argument, as well as legal training and tradition, all distinguish reasoned judicial decisions from those based on personal predilections and from arbitrary pronouncements.

Also I think it is important not to see the judiciary as the only influence in determining the nature of our federal society. Despite, for example, the financial dominance of the Commonwealth and the trend toward greater power for the Commonwealth, the states have not disappeared and are showing no signs of disappearing. Political and social forces have grown around and out of their institutions, designed for independent regions of a federal country. As every government and every governmental adviser knows, for the Commonwealth to have power is one thing, to be able, politically, to exercise it (or to exercise it in a particular way) is another. The federal principle is deeply embedded in Australian society. It permeates all our organisations, whether sporting bodies, trade unions or, most importantly, political parties, where state branches and state parties are strong and influential. The resilience of the states and the great number and variety of inter-governmental bodies engaged in negotiating and discussing Commonwealth and state interests is testimony to the federal nature of our community. To that extent the constitutional framers, and our history before that, have done their work for some time to come, whatever the future of judicial review or formal constitutional amendment.