5. And your petitioners will ever pray.

END QUOTE

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Hansard *27-1-1898* Constitution Convention Debates

QUOTE

Sir EDWARD BRADDON (Tasmania).-**While, I quite agree with the, views of the leader of, the Convention as to this power so far as regards the immigration of coloured races and aliens,** I cannot see the force of his argument with reference to the local management of these people. Aliens who have been admitted within our shores will more or less permanently settle in one state or the other, and they should, I think, be entirely under the Government of the state in which for the time being they reside. Mr. Deakin has hinted at some grave objections to giving the Federal Government an exclusive power over these people. The Attorney-General of Victoria has given one very striking example of the necessity of the Governments of the states having authority in this matter, and that is as regards, the licensing of Afghans as hawkers. It is the practice to issue to them a licence different from that which is given to other races. That might very well constitute a difficult question in the state of Victoria, whilst it might not be of the same importance in other states. In Tasmania it is quite possible that it may come to be a grave question whether the Hindostanese who are **British subjects** shall be allowed to continue the practice of hawking as they have been doing for some time past. That might develop into a very large question indeed in Tasmania, and it should be a matter for settlement by the state and not by the Federal Government.

Sir GEORGE TURNER (Victoria).-**I trust the leader of the Convention, will carefully reconsider his position, and the apparently strong views be holds with regard to persons of foreign race**.

END QUOTE

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Hansard *27-1-1898* Constitution Convention Debates

QUOTE

Mr. TRENWITH.-Suppose that is the case, and that this clause is included in clause 52, the Federal Parliament will have all the powers which it is proposed to give it here, except that it will have to act after instead of before. That is all the difference. Whenever a necessity arises on behalf of the interests of the Commonwealth to deal with the question of aliens by one authority, the Federal Parliament can deal with it, and at once. I object to taking away powers from the states now that may or may not be exercised by the Federal Parliament. I feel that this question of the treatment of aliens will be more difficult in the future than in the past. We have an indication of that from what was said by the right honorable member (Sir Edward Braddon) as to the difficulty in Tasmania in dealing satisfactorily with **British subjects coming from Hindostan**. He says that is a difficulty there, and that it will have to be met by special legislation. That has happened in the past. Other colonies have seen the necessity for special legislation, and it might as easily have happened that in some other colonies, on account of evils arising therefrom **the influx of this alien population, they had instituted special legislation**. Tasmania might not pass such legislation, because within its borders the evil had not previously arisen. The aliens legislated against might pass into Tasmania; then the Federal Parliament, having the power, would prevent the state which was being embarrassed by the influx of a number of these aliens from taking action on its own account so as to prevent the inflow of the aliens.

An HONORABLE MEMBER.-Cannot you give us credit for more intelligence, so that if we saw an evil existing in me part of Australia we would recognise it?

Mr. TRENWITH.-My experience has shown in this Convention that the intelligence which honorable members possess is very much circumscribed, and their mental horizon reaches their own border, but goes with great difficulty beyond it. We have seen that in the discussion we have had lately. We have had it in other discussions, and dealing with difficulties which we have not yet been able to solve. I do not see that there is any great reflection cast upon honorable members by making those remarks. It is very difficult for people to see from a distance The evils that other people are suffering. It is only another illustration of the old adage that no person can tell where the shoe pinches except the man who wears it. We are as a rule very indifferent about the pinching when we do. not wear the shoe ourselves.

[start page 238]

Mr. HOLDER.-Why not take the broad view of the question?

END QUOTE

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Hansard *27-1-1898* Constitution Convention Debates

QUOTE

Sir JOHN FORREST (Western Australia).-The difficulty, to me, seems to be as to what is meant by the word **affairs**." Perhaps the leader of the Convention will tell us. I take it that it means the control of those people after they have arrived in Australia. If it was intended to mean their introductions I have no doubt that the most of us would be in accord, because I think every one is of the opinion **that the introduction of people of any race, especially coloured races**, is a matter which should be in the control of the Federal Parliament. I take it that the word affairs" **would mean the control of alien races after they have arrived in this continent**. In my opinion the control of the people, of what ever colour they are, of whatever nationality they are, living in a state, should be in the control of the state, and for that reason I should like to see this sub-section omitted.

MY. SYMON.-Why did you vote for the question of conciliation and arbitration being a federal subject then?

Sir JOHN FORREST.-I am not dealing with that question at this moment. I do not see myself that this sub-section is necessary, because I hold that if it is passed the control of every one living in the state should be within the province of that state. Take the colony which I represent. We have made laws controlling a certain class of people**. We have made a law that no Asiatic or African alien can get a miner's right or do any gold mining**. Does the Convention wish to take away from us, or, at any rate, not to give us, the power to continue to legislate in that direction? We have also made laws regarding hawking. Certainly they apply to every one, I believe, at the present time. We have had to abolish hawking-not liking to offend the susceptibilities of **British subjects**, we had to abolish hawking altogether. But we would much rather have applied our legislation to a certain class of the people. I think I have some right to speak on this subject; and, no one, at any rate, will be able to say of me, or of the colony I represent, that we desire to encourage the introduction of coloured races, because ours if; the only colony in Australia with a law at the present time **which excludes from its territory coloured people**. Other colonies have talked about it a great deal.

Mr. REID.-You don't exclude them.

Sir JOHN FORREST.-Yes, we can exclude them.

[start page 241]

Mr. REID.-Under the Natal Act?

Sir JOHN FORREST.-Yes, unless they can read and write English they certainly can be excluded. I think that there is no desire on our part to do anything to encourage either in Western Australia, or any other part of Australia, **undesirable immigrants**. I take it that under clause 52 immigration is a subject within the power of the Federal Parliament to deal with. I would not mind if it were one of its exclusive powers. There may be difficulties in regard to the introduction of persons who are not altogether desirable. But I cannot for the life of me see why we should desire to give to the Federal Parliament the control of any person, whatever may be his nationality or his colour who is living in a state. Surely the state can look after its own affairs. It may require to place a restriction on a certain class of people. As I said, we place a restriction in regard to the issue of miners' rights. **We also provide that no Asiatic or African alien shall go on a township on our goldfields.** These are local matters which I think should not be taken away from the control of the state Parliament. For that reason I would like not to give this subject a place in either clause 52 or clause 53, but to leave it as a matter to be dealt with by the local Parliaments in their wisdom and discretion.

Mr. REID (New South Wales).-I think the remarks which have been, made within the last 30 minutes only show how easy it is even for men of very profound knowledge to make very serious mistakes, and I include myself, not, as a man of profound knowledge, but as one who is apt to make mistakes. I think the general idea all through has-been that this sub-section of clause 53 was intended to deal with the admission of **aliens**.

Mr. BARTON.-**Not with the admission of aliens, but with aliens after they are here.**

Mr. REID.-No; but there has been as we have seen here lately, considerable confusion on that point, because I know that quite a number of commentators on this Bill have always looked on this sub-section **as a provision which handed over to the Federal Parliament the exclusive power of dealing with aliens**, and even this afternoon I have heard more than one observation to that effect. In fact, it is only within the last few minutes that the discussion has gone away from that view. I venture to say that the view which Sir John Forrest expressed is the correct one, and that this sub-section really refers to the method in which aliens shall be dealt with when they become members of the community in the physical sense.

Mr. BARTON.-I don't think the speakers generally have been making the mistake you mention. Certainly Mr. Isaacs and Sir George Turner did not.

Mr. REID.-I have heard observations that would have been perfectly correct if this sub-section had not that meaning. However, that sort of thing has been happening all through; there is nothing unusual in it. I agree with Sir John Forrest that it is certainly a very serious question whether the internal management of these coloured persons, once they have arrived in a state, should be taken away from the state. I am prepared, however, to give that power to the Commonwealth, because I quite see that it might be desirable that there should be uniform laws in regard to those persons, **who are more or less unfortunate persons when they arrive here.** Therefore, in that sense I am prepared to say that the clause should stand as it is. But I do not know that the difficulty does not still remain-that if there is no federal law, and until there is a federal law, the local law would not go.

Mr.-KINGSTON.-**No, the local laws are preserved under section 100.**

END QUOTE

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Hansard *31-1-1898* Constitution Convention Debates

QUOTE **Sir EDWARD BRADDON** (Tasmania).-

All the people from end to end of the colonies profess the greatest possible loyalty to the Throne and to the Sovereign who sits upon it. We all, I believe, desire to remain members of the great British Empire, and we wish to continue **British subjects** with all the rights of **British subjects**, and of those rights this appeal to the Privy Council is a very considerable one. I would repeat what was urged at the Convention in 1891, that by depriving the people of these colonies of the right of appeal to the Privy Council, we should be sapping the foundation of that Constitution, which is avowedly a Constitution under the Crown. I hope, and hope with every possible confidence, that in this, our final dealing with this matter, we shall by a large majority decide to retain the right of appeal to the Privy Council.

END QUOTE

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Hansard *31-1-1898* Constitution Convention Debates

QUOTE

Mr. HIGGINS.-There might be a Bill passed decreeing that the honorable member (Sir John Forrest) and his Ministry in Western Australia **should be suspended by the neck until they were dead.** I am not sure that in that extreme case Her Majesty would refuse to give her consent. I believe that with tears in her eyes and with much regret she would give her consent to such a law. The consent of the Queen to an ordinary Act of Parliament is given, very properly under constitutional government, almost as a matter of course. It is only in those cases where there is any interference with the rights of states or with other **British subjects** that there is ever a refusal to give assent. If there is any difficulty with regard to the matter, I think the honorable member (Mr. Wise's) suggestion to adopt the same words as are in the Canadian Act would not be taken amiss, although, with all respect, I think they are perfectly useless. I have here the case of *Prince v. Gagnon*, vol. 8, Appeal Cases before the Privy Council, in which the Canadian Act giving the right of appeal to the Privy Council on Her Majesty's prerogative was discussed. It was a case involving £1,000, and the question was whether a transaction between father and son amounted to a gift or a sale. There was first a decision in the court that it amounted to a gift. There was then an appeal in Canada to the Queen's Bench, and they held upon the same particulars that it was a sale. There was an appeal again to the Federal Court in Canada, and they held that it was a gift. It then went to the Privy Council, the members of which said it was only a question involving £1,000; it did not involve any question of magnitude, of law, or of public interest. The report says-

Their Lordships, having looked into the case, see that it involves nothing whatever beyond this £1,000. There is no grave question of law or of public interest involved in its decision that carries with it any after consequences, nor is it clear that beyond the litigants there are parties interested in it.

Their Lordships then proceeded to apply the principles laid down in certain cases, and said-

They are of opinion that they ought not to advise Her Majesty to exercise her prerogative by admitting an appeal in a case depending upon a disputed matter of fact in which there is no question involved of any magnitude.

Of course, when they speak of magnitude, they are referring to the amount of money involved. They say-

In which there is no question involved of any magnitude, or of any public interest or importance, their Lordships will humbly advise Her Majesty to refuse liberty to appeal in this case.

END QUOTE

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Hansard *31-1-1898* Constitution Convention Debates

QUOTE

Mr. SYMON.-Yes. The expense of these delays is, of course, enormous. There is one more point to which I should like to call attention. It is said that we are denying to the people of Australia a right possessed by all other **British subjects**. Now, there are 40,000,000 people in the British Islands who have no right of appeal to the Privy Council. A Privy Council appeal is really an anachronism and an absurdity. Law reformers in England think there should be one final Court of Appeal for the British Islands, instead of having the House of Lords and the Privy Council with concurrent jurisdictions. But when it is said that rights are being taken away, we ought to remember that the Privy Council is no more specially favoured, so far as it happens to be a court, than any other court that exists. The small sum of money for which the suit of the poor man is brought is just as important to him as a large sum is to a rich man, and there are many more cases in which poor men are concerned than there are cases in which rich men are concerned. When we talk about uniformity of decision, what becomes of the thousands of cases under £500 in which there is no appeal? The people interested in these cases are left without that splendid palladium of liberty which the Privy Council is described to be. The honorable and learned members (Mr. Isaacs and Mr. Higgins) very well pointed out that the High Court must gradually grow in strength. We want it to possess, from the first, integrity, learning, independence, and firmness, and we believe that it will possess all these qualities from the moment that it is endowed with federal jurisdiction. But I hold with my honorable and learned friend that immense power and capacity grow with responsibility; and, although I am satisfied that from the outset the court will be competent to do the high work intrusted to it, I believe that if it was not there would be no better way of securing that it should rise to the highest limits of its duties than by extending its functions and increasing its jurisdiction, so as to make it in the final resort the source of unspotted justice to all the people of this country.

Mr. Wise's amendment was agreed to.

Question-That the words "saving any right which Her Majesty may be graciously pleased to exercise by virtue of her Royal prerogative," proposed to be inserted after the word "conclusive," be so inserted-put.

The committee divided-

Ayes 14

Noes 22

Majority against the amendment 8

END QUOTE

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Hansard *31-1-1898* Constitution Convention Debates

QUOTE

Mr. GLYNN (South Australia).-I would like, in order to have this point a little more carefully considered, to point out that this is one of the original amendments which were put in the American Constitution. At the meeting of nine states in New York in 1765, in the

Declaration of Rights against England, **it was declared that trial by jury, which it was then feared was being attacked by England, was one of the inalienable rights of every British subject in the colonies, and many of the states which took part in that Declaration of Rights in 1765 subsequently refused to join unless a similar provision was put in the American Constitution.** I ask on what grounds are we to follow the precedent of America in this matter? There is no reason why we should do so. It is simply the copying, without the existence of the same necessity, of a clause in the American Constitution. On the ground that you should not fetter the omnipotence of Parliament, I hold that the words ought to be struck out.

Mr. SYMON (South Australia).-I shall vote with my honorable friend (Mr. Glynn). Although at first I was inclined to say that these words ought to be put in, I think now they are very much better left out. I think that in cases where it is desirable that a man should be tried by a jury the Federal Parliament will confer that right. If there are cases in which some other mode of trial ought to be prescribed, I think we may rest assured that the necessary provision will be made by the Federal Parliament.

Question-That the words proposed to be omitted stand part of the clause-put.

The committee divided-

Ayes 17

Noes 8

Majority against the amendment 9

END QUOTE

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Hansard *31-1-1898* Constitution Convention Debates

QUOTE

Mr. HIGGINS (Victoria).-I beg to move-

That, after the words "every such trial shall," the words "unless Parliament otherwise provides" be inserted.

Mr. WISE-That gives the Executive power to change the venue.

Mr. HIGGINS.-**No-the Parliament.** It will simply give Parliament the power to declare under what circumstances and in what cases there shall be a discretion to have the trial in any other state. The law as it stands in the present Bill **is that the trial, as a matter of constitutional law, shall be held in the particular state where the offence was committed.** I propose to enable the Federal Parliament to say that in certain cases and on certain Contingencies, and with certain restrictions and limitations, the trial may be held in some other place. I think that is simply another instance of trusting the Federal Parliament to put the matter on the best basis.

Mr. WISE (New South Wales).-**The only class of cases contemplated by this section are offences committed against the criminal law of the Federal Parliament, [start page 354] and the only cases to which Mr. Higgins' amendment would apply are those in which the criminal law of the state was in conflict with the criminal law of the Commonwealth; in any other cases there would be no necessity to change the venue, and select a jury of citizens of another state.** Now, I do not know any power, whether in modern or in ancient times, which has given more just offence to the community than the power possessed by an Executive, always under Act of Parliament, to change the venue for

the trial of criminal offences, and I do not at all view with the same apprehension that possesses the mind of the honorable member a state of affairs in which a jury of one state would refuse to convict a person indicted at the instance-of the Federal Executive. It might be that a law passed by the Federal Parliament was so counter to the popular feeling of a particular state, and so calculated to injure the interests of that state, **that it would become the duty of every citizen to exercise his practical power of nullification of that law by refusing to convict persons of offences against it. That is a means by which the public obtains a very striking opportunity of manifesting its condemnation of a law, and a method which has never been known to fail, if the law itself was originally unjust**. I think it is a measure of protection to the states and to the **citizens** of the states which should be preserved, and that the Federal Government should not have the power to interfere and prevent the **citizens** of a state adjudicating on the guilt or innocence of one of their fellow **citizens** conferred upon it by this Constitution.

The amendment was negatived.

END QUOTE

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Hansard *8-2-1898* Constitution Convention Debates

QUOTE

Sir JOHN FORREST (Western Australia).-I have no doubt that the Commonwealth will legislate in regard to these matters, but in the meantime it seems to me that there will be a difficulty in regard to coloured aliens and to coloured persons who have become **British subjects**. In Western Australia no Asiatic or African alien can get a miner's right or go mining on a gold-field. We have also passed-an Immigration Act which prohibits, even undesirable **British subjects**, from entering the colony. I do not know how this clause will act in regard to these matters but it seems tome that the word "**citizen**" should be defined. **In Western Australia an alien can hold land in just the same way as he could if he were a British subject-no doubt that is the case in other colonies, probably in thins colony-and he would probably think himself a citizen, whatever nationality he belonged to, having resided for a long time in the colony, and having acquired property [start page 666] therein.** It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes with-out saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons. **It seems to me that should the clause be passed in its present shape, if a person, whatever his nationality, his colour, or his character may be, happens to live in one state, another state could not legislate in any way to prohibit his entrance into that state. I think there is a great deal to be said against the state being allowed to do that, but until the Federal Parliament legislates in regard to it, it certainly ought to be in the power of the state not only to maintain the laws existing, but also to legislate further if it should so desire.**

END QUOTE

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Hansard *1-3-1898* Constitution Convention Debates

QUOTE

Mr. SYMON.-That is not the point we are discussing. Clause 2 says that the Act shall bind the Crown. Of course it does; but where is there a word in the Act that says that a **British subject**, a **citizen**, shall be unable to bring any action against the Crown that he is entitled to bring now?

Mr. GLYNN.-That is not the point.

END QUOTE

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Hansard *2-3-1898* Constitution Convention Debates

QUOTE

Dr. QUICK.-I am disposed to think that there ought to be something in the nature of a definition in the Constitution. In my mind, a reasonably approximate definition would be that which I have drafted, to the effect that all persons resident in the Commonwealth, being natural-born or naturalized subjects of the Queen, and not under any disability imposed by the Federal Parliament, should be **citizens** of the Commonwealth. That is not a complete definition, it is only an approximation of what I consider a definition. The conditions of **citizenship** seem to me to be that the **citizen** shall be either a natural-born or naturalized subject of Her Majesty the Queen, and resident within the Commonwealth, and that he shall not be under any disability imposed by the Federal Parliament. Such a disability might be imposed under the clause which we put into the Bill some time ago, empowering the Federal Parliament to deal with foreign races and undesirable immigrants. The Federal Parliament is empowered to declare that these races shall be placed under certain disabilities, among which might be that they shall not be capable of acquiring **citizenship**. The definition which I have suggested would not open the door to members of those undesirable races, and it would empower the Federal Parliament to exclude from the enjoyment of and participation in the privileges of federal **citizenship** people of any undesirable race or of undesirable antecedents. I hope that this proposal will not be opposed and denounced in the manner which has become somewhat fashionable in the Convention. Every generalization which is brought forward to interpret the Constitution, and to set forward more plainly the advantages that it is supposed will accrue from the union, if it goes an iota beyond what is absolutely or technically necessary, is denounced as a proposal to placard the Constitution. I hope that a proposal to define federal **citizenship** and the status of members of this new political organization will not be pooh-poohed, and spoken of as a proposal to placard the Constitution. In my opinion, there are certain substantial rights and advantages which would accrue from the placing in the Constitution of an expressed recognition of the federal **citizenship**. The Constitution empowers the Federal Parliament to deal with certain external affairs, among which would probably be the right to negotiate for commercial **treaties** with foreign countries, in the same way as Canada has negotiated for such **treaties**. **These treaties could only confer rights and privileges upon the citizens of the Commonwealth, because the Federal Government, in the exercise of its power,** [start page 1753] **could only act for and on behalf of its citizens.** Therefore, it is desirable that the Constitution should define the class of persons for whom these rights and privileges would be gained. By placing in the Constitution a definition of **citizenship**, or by providing for its creation, we do not interfere with the **citizenship** of the states, which I propose to leave exclusively within the jurisdiction of the states themselves, nor do we interfere with that wider relationship which affects us all as subjects of Her Majesty and members of the great British Empire. We are affected by this relationship by virtue of our position as **British subjects**. It is, however, a relationship entirely different from that which will be created by this Constitution. A **citizenship** of the Commonwealth will, of course, be much narrower than our subject-ship of the empire. In my opinion, it would be a manifest imperfection in the scheme of union not to make provision in some shape or other to enable the Federal Parliament to deal with and legislate upon the subject of membership of the Commonwealth. Without in any way dealing with the questions to which reference is made by the other amendments and clauses on the notice-paper, and without in any way suggesting that federal **citizenship** should come into conflict with state **citizenship**, or that state **citizenship** should overlap federal **citizenship**, I propose to give to the Federal

Parliament power to deal with this important question. Without such a provision as I wish to insert, I think the Constitution would be manifestly defective.

Mr. OCONNOR (New South Wales).-I am sure that the honorable member will have no reason to apprehend that the exceedingly important question which be has raised will not be properly dealt with. We all recognised, when we were dealing with clause 110, the extreme importance of the question which has been raised. I am entirely in sympathy with my honorable and learned friend as to the necessity for dealing with this question, but I think that it would be a mistake to deal with it in the way he proposes. I think it would be a mistake to give to the Federal Parliament the power of determining the qualifications of **citizenship** under the Commonwealth. In my opinion, the honorable and learned member's quotations from the other Constitutions all bear out the principle that in the making of a Constitution that which gives the right of **citizenship** and which includes **citizenship** is defined. Let me for a moment consider the proposal to give this power to the Federal Parliament. The Federal Parliament could do nothing in the way of defining the qualification of **citizenship** or the rights of **citizenship** beyond the limits of the Constitution. Now, you may regard the **citizen** from two points of view. In the first place, as regards his rights as a member of the Commonwealth, and in the second place, as regards his rights as a member of the state. The latter aspect seems to me much the more important. **But let us take first his position in regard to the Commonwealth. Under the power which you have given to the Federal Parliament to make laws regulating immigration and aliens, you embrace every possible set of circumstances under which any person may enter the bounds of the Commonwealth. As you have power to prevent any person from entering any part of the Commonwealth, you have also the power to prevent any person from becoming a member of the Commonwealth community. There is no territorial entity coincident with the Commonwealth. Every part of the Commonwealth territory is part of the state, and it is only by virtue of his citizenship of a state that any person within the bounds of the Commonwealth will have any political rights under the Constitution. Of course, when I speak of a state, I include also any territory occupying the position of quasi-state, which, of course, stands in exactly the same position.**

Mr. WISE-Is that clear?

[start page 1754]

Mr. OCONNOR.-**If the territory does not stand in the same position as a state, it is admitted to political rights at the will of the Commonwealth, and upon such terms as the Commonwealth may impose. Every person who has rights as a member of the Commonwealth must be a citizen either of some state or some territory. It is only by virtue of his citizenship of a state or of a territory that he has any political rights in the Commonwealth.**

Mr. WISE.-Before the 14th amendment was passed it was very much questioned whether a **citizen** of Washington had any rights at all, because Washington was only a territory.

Mr. OCONNOR.-**Yes; but what the honorable and learned member says really supports my argument. The thirteen original states occupied a very small portion of the area now forming the United States of America, and of course the question might arise as to what the position of a person who is not resident of or a citizen of any state, but a resident of a territory, might be in relation to the Commonwealth. But I do not think that that question will arise here, because we cannot imagine, I think, any portion of the Commonwealth becoming a territory now, unless it has been a state at**

one time-unless it is some portion of a state which has been ceded to the Commonwealth, and in the cession to the Commonwealth there is no doubt that care will be taken to define what the rights of the residents of the territory would be in regard to the political rights of the Commonwealth. It appears to me quite clear, as regards the right of any person from the outside to become a member of the Commonwealth, that the power to regulate immigration and emigration, and the power to deal with aliens, give the right to define who shall be citizens, as coming from the outside world. Now, in regard to the citizens of the states-that is, those who are here already, apart from these laws-every citizen of a state having certain political rights is entitled to all the rights of citizenship in the Commonwealth, necessarily without a definition at all.

END QUOTE

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Hansard *2-3-1898* Constitution Convention Debates

QUOTE

Mr. KINGSTON (South Australia).-I shall also support the amendment of Dr. Quick, and I trust that it will be carried. I cannot conceive that in the adoption of legislation on this subject Parliament would do aught else than make the definition uniform and of general application. If there was any necessity for making that clear, the insertion of the words "uniform **citizenship** of the Commonwealth" would accomplish that, but I hardly think it is necessary. **I am impressed with the importance of taking power as occasion arises to define what shall constitute citizenship of the Commonwealth; and the Bill at present is altogether deficient in regard to giving any power to the Commonwealth Parliament to legislate on this subject.** It seems to me it is a very difficult matter, and one with which we should not attempt to deal here, but rather should refer it to those who, when necessity arises to adopt some legislation on the subject, will have all the facts before them, and may reasonably be supposed to be able to make the best provision for the purpose in connexion with the subject. My honorable friend (Mr. Glynn) referred to the principle which he said obtained, I think, in Germany, where only native-born Germans, or those who are naturalized in the empire, are admitted to the privileges of **citizenship**. I asked in the course of his remarks how would that apply to **citizens** of the Commonwealth. It is a very difficult thing to deal with. If you provide that only those shall be **citizens** of the Commonwealth who were born in it or have been naturalized, you will undoubtedly be putting too strict a limitation on **citizenship**. **It would be simply monstrous that those who are born in England should in any way be subjected to the slightest disabilities. It is impossible to contemplate the exclusion of natural-born subjects of this character; but, on the other hand, we must not forget, that there are other native-born British subjects whom we are far from desiring to see come here in any considerable numbers.** For instance, I may refer to Hong Kong Chinamen. They are born within the realm of Her Majesty, and are therefore native-born **British subjects**.

Sir EDWARD BRADDON.-Are British **treaty** ports British territory?

Mr. KINGSTON.-Hong Kong is undoubtedly a British possession, and a Hong Kong Chinaman is undoubtedly a native-born **British subject**. Thus, honorable members will see what difficulties might arise if the privileges of **citizenship** of the Commonwealth were extended to all **British subjects**. If that were done, we should be landed in a difficulty against which it is well to provide. I think the very best, thing under all the circumstances is to do-what is recommended by Dr. Quick, and give to the Federal Parliament power to, legislate on this subject as occasion arises. I have no fear whatever but that they will make wise provisions on the subject-provisions uniform throughout the Commonwealth-for

extending to all **British subjects** those privileges which they ought to possess, while at the same time safeguarding the rights of the Commonwealth.

Mr. OCONNOR (New South Wales).-I would like to point out to Dr. Quick that he proposes to give a power to the Commonwealth to legislate in regard to a matter which is not mentioned from the beginning to the end of the Constitution. The word "citizen" is not used from beginning to end in this Constitution, and it is now proposed to give power to legislate regarding **citizenship**.

[start page 1761]

Mr. KINGSTON.-It was in the Bill.

Mr. OCONNOR.-There is no portion of the Bill which gives any right of **citizenship**, or points out what **citizenship** is.

Mr. HIGGINS.-The word "**citizen** " occurred in clause 110, although it is now struck out.

Mr. OCONNOR.-The words in clause 110 do not define any right of **citizenship**; they prevent certain restrictions upon it. I would point out to Dr. Quick that he is proposing to give a power to regulate or describe rights of **citizenship**, when we really do not know at present what is meant by a citizen. I confess I do not know what the honorable and learned member means by that term. Does he mean only the political rights which you give to every inhabitant of a state who is qualified to vote, or does he go beyond that, as the American decisions have gone, and describe every person who is under the protection of your laws as a citizen? The citizens, the persons under the protection of your laws, are not the only persons who are entitled to take part in your elections or in your government, but every person who resides in your community has a right to the protection of your laws and to the protection of the laws of all the states, and has the right of access to your courts. If you are going to define **citizenship** for the purpose of giving these rights, you must say clearly what you mean by **citizenship**. You leave it to the Federal Parliament to say what **citizenship** is; and I think there is a great deal in what Mr. Glynn says, that we must not hand over to the Federal Parliament the power to cut down the rights the inhabitants of these states have at the present time. If we do not know what you mean by **citizenship**-

Mr. ISAACS.-Commonwealth **citizenship**.

Mr. OCONNOR.-Exactly. But if we do not know what you mean by **citizenship**-whether you mean to restrict it to political rights or to the right of protection under your laws, which every person, whether a naturalized subject or a person for the time being resident in one of these communities, possesses-we may drive the Federal Parliament into some difficulty, in which it is not at all unlikely that some cutting down of what we believe to be the rights of **citizenship** may take place. **I would point out that under the Bill the power of dealing with aliens and immigration gives an abundant right to the Commonwealth to protect itself, and, of course, the right of defining citizenship will have to be exercised with due regard to any laws which might be made regarding the position of aliens.** I would ask my honorable friend (Dr. Quick) to say if he has considered how far he means the Federal Parliament to go in the definition of **citizenship**, and what he means by **citizenship**? Because, unless we have a clear idea of that, it seems to me that we are handing over to the Federal Parliament something which is vague in the extreme, and which might be misused.

END QUOTE

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Mr. WISE.-Either this clause will be utterly ineffective or it will give the Federal Parliament power to outlaw certain persons.

Mr. SYMON.-Mr. Trenwith has said he was not at first inclined to support this amendment, and I think that if he gives it further consideration he will feel that it is utterly unnecessary to do so, and that it is unwise to put into the hands of the Commonwealth Parliament a power which might be likely to be exercised, as my honorable and learned friend (Mr. Wise) has said, for the purpose of outlawing **citizens** of the state who are **citizens** of the Commonwealth. Of course the Federal Parliament would not do such a thing as [start page 1763] that, and, therefore, it seems to me that it is unnecessary to put in such a power. Is there any person whom the Federal Parliament, by virtue of this provision, could make a **citizen** of the Commonwealth who would not already be a **citizen** of a state? You cannot do it. There is nothing to which this can possibly apply. You have given the Federal Parliament power to deal with the question of aliens, immigration, and so on, to prevent the introduction of undesirable races. Under that provision you enable the Federal Parliament **to legislate within certain limits, and in a certain direction**. **Under that they may, within those limits, take away, or they may restrict, the rights of citizenship in a particular case**. That is what we intend them to do. I am not going to give *carte blanche* to the Federal Parliament to say who shall and who shall not be citizens. **The object of all who are represented here is that the Union of these states is of itself to confer upon the citizens of the states the rights of citizens of the Commonwealth.**

Mr. HIGGINS.-**You may depend upon it that the states will see that this is kept up.**

Mr. SYMON.-I agree with the honorable member, and I also think it is unlikely that the Commonwealth will seek to derogate from it, but I will not place a power in the hands of the Commonwealth which will enable them to derogate from it, and if that is not done it will be merely a dead letter. Is there any **citizen** of the Commonwealth who is not already a **citizen** of the state? State **citizenship** is his birthright, and by virtue of it he is entitled to the **citizenship** of the Commonwealth. **When you have immigration, and allow different people to come in who belong to nations not of the same blood as we are, they become naturalized, and thereby are entitled to the rights of citizenship.**

Sir EDWARD BRADDON.-They are **citizens** if they are **British subjects** before they come here.

Mr. SYMON.-That is a point I do not wish to deal with. **But they become citizens of the states, and it is by virtue of their citizenship of the states that they become citizens of the Commonwealth. Are you going to have citizens of the state who are not citizens of the Commonwealth?**

Mr. KINGSTON.-In some states they naturalize; but they do not in others.

Mr. SYMON.-Then I think they ought to. **The whole object of legislating for aliens is that there should be uniformity.**

Sir EDWARD BRADDON.-They would not have that in the Federal Council.

Mr. SYMON.-Very likely not. What I want to know is, if there is anybody who will come under the operation of the law, so as to be a **citizen** of the Commonwealth, who would not also be entitled to be a **citizen** of the state? There ought to be no opportunity for such discrimination as would allow a section of a state to remain outside the pale of the

Commonwealth, **except with regard to legislation as to aliens.** Dual **citizenship** exists, but it is not dual **citizenship** of persons, it is dual **citizenship** in each person. **There may be two men-Jones and Smith-in one state, both of whom are citizens of the state, but one only is a citizen of the Commonwealth. That would not be the dual citizenship meant. What is meant is a dual citizenship in Mr. Trenwith and myself. That is to say, I am a citizen of the state and I am also a citizen of the Commonwealth; that is the dual citizenship.** That does not affect the operation of this clause at all. But if we introduce this clause, it is open to the whole of the powerful criticism of Mr. O'Connor and those who say that it is putting on the face of the Constitution an unnecessary provision, and one which we do not expect will be exercised adversely or improperly, and, therefore, it is much better to be left out. Let us, in dealing with this question, be as careful as we possibly, can that we do not qualify the **citizenship** of this Commonwealth in any way or exclude anybody [start page 1764] from it, and let us do that with precision and clearness. **As a citizen of a state I claim the right to be a citizen of the Commonwealth. I do not want to place in the hands of the Commonwealth Parliament, however much I may be prepared to trust it, the right of depriving me of citizenship.** I put this only as an argument, because no one would anticipate such a thing, but the Commonwealth Parliament might say that nobody possessed of less than £1,000 a year should be a **citizen** of the Federation. You are putting that power in the hands of Parliament.

Mr. HIGGINS.-Why not?

Mr. SYMON.-I would not put such a power in the hands of any Parliament. **We must rest this Constitution on a foundation that we understand, and we mean that every citizen of a state shall be a citizen of the Commonwealth, and that the Commonwealth shall have no right to withdraw, qualify, or restrict those rights of citizenship, except with regard to one particular set of people who are subject to disabilities, as aliens, and so on.** Subject to that limitation, we ought not, under this Constitution, to hand over our birth right as **citizens** to anybody, Federal Parliament or any one else, and I hope the amendment will not be accepted.

Dr. COCKBURN (South Australia).-I think the Commonwealth should keep in its own hands the key of its own **citizenship**. Some colonies are somewhat colourblind with regard to immigration, other colonies may be somewhat deficient in their ideas as to naturalization. If we place in the hands of any state the power of forcing on the Commonwealth an obnoxious **citizenship**, we shall be doing very great evil to the Commonwealth. This power should be in the hands of the Commonwealth; it should itself possess power to define the conditions on which the **citizenship** of the Commonwealth shall be given; and the **citizenship** of the Commonwealth should not necessarily follow upon the **citizenship** of any particular state.

Mr. BARTON (New South Wales).-We have provided in this Constitution for the exercise of the rights of **citizenship**, so far as the choice of representatives is concerned, and we have given various safe-guards to individual liberty in the Constitution. We have, therefore, given each resident in the Commonwealth his political rights, so far as the powers of legislation and administration intrusted to the Commonwealth are concerned. Let us consider the position. Before the establishment of the Commonwealth, each subject is the subject of a state. After the Commonwealth is established, every one who acquires political rights-in fact, every one who is a subject in a state, having certain political rights, has like political rights in the Commonwealth. The only difference between the position before the institution of the Commonwealth and afterwards is that, so far as there are additional political powers given to any subject or citizen, be has the right to exercise these, and the method of exercising them is defined. **So far the right of citizenship, if there is a**

right of citizenship under the empire, is defined in the Constitution. Now, each citizen of a state is, without definition, a citizen of the Commonwealth if there is such a term as citizenship to be applied to a subject of the empire. I must admit, after looking at a standard authority-*Stroud's Judicial Dictionary*-that I cannot find any definition of **citizenship** as applied to a **British subject**. **No such term as citizen or citizenship is to be found in the long roll of enactments, so far as I can recollect, that deal with the position of subjects of the United Kingdom, and I do not think we have been in the habit of using that term under our own enactments in any of our colonies.**

Mr. HIGGINS.-You had it in the Draft Bill.

Mr. BARTON.-Yes; but the term has since disappeared, and it disappeared owing to objections from members of the Convention. I am inclined to think that the Convention is right in not applying [start page 1765] the term "citizens" to subjects residing in the Commonwealth or in the states, but in leaving them to their ordinary definition as subjects of the Crown. If, however, we make an amendment of this character, inasmuch as **citizens** of the state must be **citizens** of the Commonwealth by the very terms of the Constitution, **we shall simply be enabling the Commonwealth to deal with the political rights of the citizens of the states. The one thing follows from the other. If you once admit that a citizen or subject of the state is a citizen or subject of the Commonwealth, the power conferred in these wide terms would enable the Federal Parliament to deal with the political rights of subjects of the states. I do not think the honorable member intends to go so far as that, but his amendment is open to that misconception.**

Mr. HOWE.-Trust to the Federal Parliament.

Mr. BARTON.-When we confer a right of legislation on the Federal Parliament we trust them to exercise it with wisdom, but we still keep as the subject of debate the question of whether a particular legislative right should be conferred on the Federal Parliament. When you give them the right then you may trust them to exercise it fully.

Mr. HOWE.-And wisely.

Mr. BARTON.-If the honorable member's exclamation means more than I have explained, then the best thing to do is to confide to the Commonwealth the right of dealing with the lives, liberty, and property of all the persons residing in the Commonwealth, independently of any law of any state. That is not intended, but that is what the expression "Trust the Federal Parliament" would mean unless it was limited by the consideration I have laid down. I am sure Dr. Quick will see that he is using a word that has not a definition in English constitutional law, and which is not otherwise defined in this Constitution. **He will be giving to the Commonwealth Parliament a power, not only of dealing with the rights of citizenship, but of defining those rights even within the very narrowest limits, so that the citizenship of a state might be worth nothing; or of extending them in one direction, and narrowing them in another, so that a subject living in one of the states would scarcely know whether he was on his head or his heels.** Under the Constitution we give subjects political rights to enable the Parliament to legislate with regard to the suffrage, and pending that legislation we give the qualification of electors. It is that qualification of electors which is really the sum and substance of political liberty, and we have defined that. **If we are going to give the Federal Parliament power to legislate as it pleases with regard to Commonwealth citizenship, not having defined it, we may be enabling the Parliament to pass legislation that would really defeat all the principles inserted elsewhere in the Constitution, and, in fact, to play ducks and drakes with it. That is not what is meant by the term "Trust the Federal Parliament."**

Mr. HIGGINS.-You give the Federal Parliament power to naturalize.

Mr. BARTON.-Yes; and in doing that we give them power to make persons subjects of the British Empire. Have we not done enough? **We allow them to naturalize aliens. That is a power which, with the consent of the Imperial authority, has been carried into legislation by the various colonies, and, of course, we cannot do less for the Commonwealth than we have done for the colonies.**

Mr. KINGSTON.-Such legislation is only good within the limits of each state.

Mr. BARTON.-**Yes; and here we have a totally different position, because the actual right which a person has as a British subject-the right of personal liberty and protection under the laws-is secured by being a citizen of the states. It must be recollected that the ordinary rights of liberty and protection by the laws are not among the subjects confided to the Commonwealth. The administration of [start page 1766] the laws regarding property and personal liberty is still left with the states.** We do not propose to interfere with them in this Constitution. We leave that amongst the reserved powers of the states, and, therefore, having done nothing to make insecure the rights of property and the rights of liberty which at present exist in the states, and having also said that the political rights exercisable in the states are to be exercisable also in the Commonwealth in the election of representatives, we have done all that is necessary. It is better to rest there than to plunge ourselves into what may be a sea of difficulties. We do not know to what extent a power like this may be exercised, and we should pause before we take any such leap in the dark.

Dr. QUICK (Victoria).-I understood that, under the Federal Constitution we are creating, we would have a dual **citizenship**, not only a **citizenship** of the states, but also a **citizenship** of the higher political organization-that of the Commonwealth. It seems now, from what the Hon. Mr. Barton has said, that we are not to have that dual **citizenship**; we are to have only a **citizenship** of the states.

Mr. BARTON.-I did not say that. **I say that our real status is as subjects, and that we are all alike subjects of the British Crown.**

Dr. QUICK.-If we are to have a **citizenship** of the Commonwealth higher, more comprehensive, and nobler than that of the states, I would ask why is it not implanted in the Constitution? Mr. Barton was not present when I made my remarks in proposing the clause. I then-anticipated the point he has raised as to the position we occupy as subjects of the British Empire. **I took occasion to indicate that in creating a federal citizenship, and in defining the qualifications of that federal citizenship, we were not in any way interfering with our position as subjects of the British Empire. It would be beyond the scope of the Constitution to do that. We might be citizens of a city, citizens of a colony, or citizens of a Commonwealth, but we would still be, subjects of the Queen.** I see therefore nothing unconstitutional, nothing contrary to our instincts as **British subjects**, in proposing to place power in this Constitution to enable the Federal Parliament to deal with the question of federal **citizenship**. An objection has been raised in various quarters-as by the honorable and learned members (Mr. O'Connor and Mr. Wise)-to the effect that we ought to define federal citizenship in the Constitution itself. I have considered this matter very carefully, and it has seemed to me that it would be most difficult and invidious, if not almost impossible, to frame a satisfactory definition. **There is in the Constitution of the United States of America a cast-iron definition of citizenship, which has been found to be absolutely unworkable, because, among other things, it says that a citizen of the United States shall be a natural-born or naturalized citizen within the jurisdiction of the United States, and it has been found that that excludes the children of citizens**

born outside the limits of this jurisdiction. That shows the danger of attempting definitions, and although I have placed a proposed clause defining federal citizenship upon the notice-paper, the subject, seems to me surrounded with the greatest difficulty, and no doubt the honorable and learned members (Mr. Wise, Mr. O'Connor, and Mr. Symon) would be the first to attack any definition, and would be able to perforate it. In my opinion, it would be undesirable to implant a cast-iron definition of citizenship in the Constitution, because it would be better to leave the question more elastic, more open to consideration, and more yielding to the advancing changes and requirements of the times.

Mr. SYMON.-I agree with the honorable member, and I also think it is unlikely that the Commonwealth will seek to derogate from it, but I will not place a power in the hands of the Commonwealth which will enable them to derogate from it, and if that is not done it will be merely a dead letter. Is there any citizen of the Commonwealth who is not already a citizen of the state? State **citizenship** is his birthright, and by virtue of it he is entitled to the **citizenship** of the Commonwealth. **When you have immigration, and allow different people to come in who belong to nations not of the same blood as we are, they become naturalized, and thereby are entitled to the rights of citizenship.**

Sir EDWARD BRADDON.-They are **citizens** if they are **British subjects** before they come here.

Mr. SYMON.-That is a point I do not wish to deal with. **But they become citizens of the states, and it is by virtue of their citizenship of the states that they become citizens of the Commonwealth. Are you going to have citizens of the state who are not citizens of the Commonwealth?**

Mr. KINGSTON.-In some states they naturalize; but they do not in others.

Mr. WALKER.-**Is not a citizen of the state, *ipso facto*, a citizen of the Commonwealth?**

Dr. QUICK.-It required the 14th amendment to place that beyond doubt in the American Constitution. In the [start page 1767] proposition which I have put before the Convention I do not desire at all to interfere with state **citizenship**. I leave that entirely to the states. In my opinion, it is in no way desirable to trench upon state **citizenship**. But I think we are entitled to place in the Constitution a provision empowering the Federal Parliament to deal with the incidence of Commonwealth **citizenship**, its mode of acquisition, the status it confers, and the manner in which it may be lost. **It has been suggested by, I think, the honorable and learned member (Mr. Glynn), that a definition of citizenship should be accompanied by something in the nature of inter-state citizenship, that is, that the citizens of one state should be entitled to all the privileges and immunities of the citizens of another state. But I would point out that such a provision would be inconsistent with an amendment already placed in the Constitution. We have already eliminated interstate citizenship, upon the ground that it might interfere with the right of each state to impose disabilities and disqualifications upon certain races.** I am sure that the Federal Parliament would not be able, under the provision which I wish to insert, to legislate in regard to state **citizenship** or to in any way enlarge the Commonwealth rights or privileges at the expense of the rights of the states. The power of the Federal Parliament could only be exercised in regard to the privileges and rights contemplated by the Constitution itself. I may point out roughly some of the rights which are contemplated by the Constitution. There is the right to assert any claim which a **citizen** might have upon the Government, the right to transact any business he might have, the right to seek the protection of the Government, to share its offices, to engage in its administrative

functions, **to have free access** to the ports of the Commonwealth and to its public offices and courts of justice, to use its navigable waters, and to all the privileges and benefits secured by the Commonwealth for its **citizens** by **treaties with foreign nations. In my earlier remarks I did not enumerate more than the last of these rights. When the Federal Government is negotiating with foreign nations, say for treaties of commerce, and certain rights and privileges are obtained thereby for the citizens of the Commonwealth**, it ought to be able to point to a definition of Commonwealth **citizenship**. I am amazed at the force and the consistency with which technical objections are being raised against every proposal calculated to improve and popularize the Constitution. One would imagine that this was to be a mere lawyers Constitution, and that everything that seems to go beyond mere legal literalism must be rejected. Again, I ask are we to have a Commonwealth **citizenship**? If we are, why is it not to be implanted in the Constitution? Why is it to be merely a legal inference? It is all nonsense to say that the Commonwealth Parliament is going to cut down and reduce the state **citizenship**. It will only deal with federal **citizenship**. Why should not the Federal Parliament be able to deprive any person who broke the Commonwealth laws of the Commonwealth **citizenship**? Would not that be within the functions and jurisdiction of the Commonwealth Parliament? I think that it would be strictly within its functions. **If we are not to provide for this Commonwealth citizenship, what will be the position of those residing in territories which may hereafter be created? The honorable member (Mr. Walker), among others, is desirous that a certain portion of territory shall be set apart as within the exclusive jurisdiction of the Commonwealth for a federal capital. That is a view which I share with him. But I ask what will be the civic status of the inhabitants of the federal territory? I hope that the provision which I have brought forward will be dealt with by the Convention, not from a strictly legal aspect, but from the broad and [start page 1768] comprehensive point of view from which we have been accustomed to deal with it when upon the public platform we have informed our people that by federation they will be placed upon a higher plane of citizenship. I would ask is a provision of this kind to be rejected merely upon technical grounds?**

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Mr. BARTON.-Certainly there is a decision in the United States to the effect that it is a Christian nation. What does that decision amount to? Is it not really a decision based on the fact that the institutions of England, under the **common law**, are Christian institutions, which, so far as they are not interfered with by any written Constitution, belong to **citizens** of the United States, as having been brought over by them as **British subjects**, and kept by them from that day to this? If that is the ground of the American decision, which I suspect it is, the same thing applies in some of these colonies. Decisions have been given to the effect that there colonies are Christian communities. I remember a case in which that doctrine was expounded at length by the late Chief Justice Martin, of New South Wales. Now, if the colonies are Christian communities, the **common law** of England will apply to the Commonwealth, except so far as this Constitution alters that law; and if it is part of the **common law** of England that we shall be regarded as a Christian community, what fear is there of our suffering any dangers of the kind indicated in the amendment, simply because we are a Christian community? I do not see any danger of the [start page 1771] kind to be anticipated. I think that because we are a Christian community we ought to have advanced so much since the days of State aid and the days of making a law for the establishment of a religion, since the days for imposing religious observances or exacting a religious test as a qualification for any office of the State, as to render any such dangers practically

impossible, and we will be going a little too far if we attempt to load this Constitution with a provision for dangers which are practically nonexistent.

Mr. HIGGINS.-That is the question-are those dangers non-existent?

Mr. BARTON.-I do not think the fact that we may be held by law to be a Christian community is any reason for us to anticipate that there will be any longer any fear of a reign of Christian persecution-any fear that there will be any remnant of the old ideas which have caused so much trouble in other ages. The whole of the advancement in English-speaking communities, under English laws and English institutions, has shown a less and less inclination to pass laws for imposing religious tests, or exacting religious observances, or to maintain any religion. We have not done that in Australia. **We have abolished state religion in all these colonies**; we have wiped out every religious test, and we propose now to establish a Government and a Parliament which will be at least as enlightened as the Governments and Parliaments which prevail in various states; therefore, what is the practical fear against which we are fighting? That is the difficulty I have in relation to this proposed clause. If I thought there was any-the least-probability or possibility, taking into consideration the advancement of liberal and tolerant ideas that is constantly going on of any of these various communities utterly and entirely retracing its steps, I might be with the honorable member. If we, in these communities in which we live, have no right whatever to anticipate a return of methods which were practised under a different state or Constitution, under a less liberal measure of progress and advancement; if, as this progress goes on**, the rights of citizenship are more respected; if the divorce between Church and State becomes more pronounced;** if we have no fear of a recurrence of either the ideas or the methods of former days with respect to these colonies, then I do suggest that in framing a Constitution for the Commonwealth of Australia, which we expect to make at least as enlightened, and which we expect to be administered with as much intellectuality as any of the other Constitutions, we are not going to entertain fears in respect of the Commonwealth which we will not attempt to entertain with respect to any one of the states. Now, we have shown that we do not intend these words to apply to our states by striking out clause 109. **That might be a provision that might be held to be too express in its terms, because there may be practices in various religions which are believed in by persons who may enter into the Commonwealth belonging to other races, which practices would be totally abhorrent to the ideas, not only to any Christian, but to any civilized community; and inasmuch as the Commonwealth is armed with the power of legislation in regard to immigration and emigration, and with regard to naturalization, and also with regard to the making of special laws for any race, except the aboriginal races belonging to any state-inasmuch as we have all these provisions under which it would be an advisable thing that the Commonwealth, under its regulative power, should prevent any practices from taking place which are abhorrent to the ideas of humanity and justice of the community; and inasmuch as it is a reasonable thing that these outrages on humanity and justice (if they ever occur) should be prohibited by the Commonwealth, it would be a dangerous thing, perhaps, to place in the Bill a provision which would take out** [start page 1772] **of their hands the power of preventing any such practices.**

Mr. HIGGINS.-Do you think that the Commonwealth has that power under the existing Bill?

Mr. BARTON.-**I am not sure that it has not. I am not sure that it has not power to prevent anything that may seem an inhuman practice by way of religious rite.**

Mr. HIGGINS.-I want to leave such matters to the states.

Mr. BARTON.-But inasmuch as we have given to the Commonwealth the power of regulating the entry of that class of persons, and the power of regulating them when they have entered, is it not desirable that in that process there shall be left to the Commonwealth power of repressing any such practices in the name of religion as I have indicated? If it be necessary that there should be some regulative power left to the Commonwealth, then the argument that we should leave the matter to the states does not apply, because we give such a power to the Commonwealth.

Mr. HIGGINS.-Then all crimes should be left to the Commonwealth?

Mr. BARTON.-**No; because you do not give any power with regard to punishing crime to the Commonwealth**, but you do give power to the Commonwealth to make special laws as to alien races; and the moment you do that the power of making such laws does not remain in the hands of the states; and if you place in the hands of the Commonwealth the power to prevent such practices as I have described you should not defeat that regulative power of the Commonwealth**. I do not think that that applies at all, however, to any power of regulating the lives and proceedings of citizens, because we do not give any such power to the Commonwealth, whilst we do give the Commonwealth power with regard to alien races; and having given that power, we should take care not to take away an incident of it which it may be necessary for the Commonwealth to use by way of regulation.** I have had great hesitation about this matter, but I think I shall be prevented from voting for the first part; and as to establishing any religion, that is so absolutely out of the question, so entirely not to be expected-

Mr. SYMON.-It is part of the unwritten law of the Constitution that a religion shall not be established.

Mr. BARTON.-It is so foreign to the whole idea of the Constitution that we have no right to expect it; and, as my honorable and learned friend (Mr. Symon) suggests by his interruption, I do not think, whatever may be the result of any American case, that any such case can be stretched for a moment in such a way as to give Congress power of passing any law to establish any religion. I do not suppose that there is a man in Congress who would suggest it; and I have no doubt that the same court that decided that the community was a Christian community would say that the United States Congress had no power to establish any religion. The only part of the matter upon which I have had the least doubt (having become more confirmed in my opinion since I have considered the matter further) is the latter part of the proposal, which is that no religious test shall be required for any place of public trust in the Commonwealth. I do not think that any such test would be required, and the only question is whether it is possible. I have come to the conclusion that it is not possible. Therefore, my disposition is to vote against the whole clause.

Mr. REID.-**I suppose that money could not be paid to any church under this Constitution?**

Mr. BARTON.-**No; you have only two powers of spending money, and a church could not receive the funds of the Commonwealth under either of them.**

[start page 1773]

Mr. WISE (New South Wales).-**I can conceive of no matter more fit for state control than that of religious observance, and, therefore, I am utterly unable to follow the leader of the Convention (Mr. Barton) in his contention. There should not be any opening for doubt as to the power of the Commonwealth to exercise control over any religion of the state. I wish I could share Mr. Barton's optimistic views as to the death**

of the spirit of religious persecution. But we have seen in our own time a recrudescence of that evil demon, which, I fear, is only scotched and not killed. At any rate, the period during which we have enjoyed religious liberty is not long enough for us to be able to say with confidence that there will be no swinging back of the pendulum to the spirit of the times from which we have only recently emerged. Consequently there is some reason for the alarms which have been expressed by a very large body of people, who have not been represented in this Convention, by long petitions, but who none the less are entitled to be considered when we are framing this Constitution, and who, rightly or wrongly-for my own part, I believe rather more wrongly than rightly-believe that the agitation for the insertion in the preamble of the words which we have inserted to-day is sufficient to cause alarm among citizens of certain ways of thinking, and that there is an interior design on the part of some people in the community to give the Commonwealth power to interfere with religious observances.

Mr. HIGGINS.-We had 38,000 signatures to a petition from the people in Victoria against the inclusion of these words in the preamble.

Mr. WISE.-**I am very glad to hear it. That strengthens my argument. if 38,000 citizens of Victoria sent a petition against the inclusion of these words, not because they disapproved of the words in themselves, but because I suppose they were afraid that the inclusion of them would confer upon the Commonwealth some power to legislate with regard to religious observances, I say that fears of that sort should be respected.** I know a considerable body of people in New South Wales, who, perhaps, have not made themselves heard in this Convention by petitions, who are actuated by the same alarms. Now, why should we not meet the scruples of these gentlemen as we met the scruples and feelings of another class of the community, when we put the words to, which I have alluded into the preamble? We none of us here believe in our hearts that these words added much to the preamble, but we put them in, as we thought, because they were a just satisfaction of a, certain sentiment. May we not support this on the same ground? May we not say-"We will clear away once and for ever any doubts which you may feel by making it clear that all matters of religious observance and control over religion shall be left to the states to which they naturally belong." Is the fear which is expressed groundless? If it had not been for the speech of Mr. Higgins this morning we might say that the fear was absolutely groundless, and that it was impossible that the Commonwealth should exercise, or seek the power to exercise, any control over religious observances. Yet, when we have the example of the United States, not six years old, I do not think the leader of the Convention can carry the force of conviction to us here, when he asks us to believe that there is no fear whatever of the Commonwealth exercising a power which we cannot believe would be exercised by any state. Supposing the Commonwealth is swayed by some popular feeling, such as swayed Congress in 1892, and some law were passed, say, dealing with Sunday observance, which might reflect the wishes of the majority of the people, but which would be most distasteful and persecuting to a minority. In a matter of religious feeling, a minority are [start page 1774] entitled to the utmost respect and should have their feelings guarded.

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QUOTE

Mr. SYMON.-If you move that, I will accept it.

Sir JOHN FORREST.-What is a citizen? A **British subject**?

Mr. WISE.-I presume so.

Sir JOHN FORREST.-They could not take away the rights of **British subjects**.

Mr. WISE.-I do not think so. I beg to move-

That the words "each state" be omitted, with the view of inserting the words "the Commonwealth."

I apprehend the Commonwealth must have complete power to grant or refuse **citizenship** to any **citizen** within its borders. I think my answer to Sir John Forrest was given a little too hastily when I said that every **citizen** of the British Empire must be a **citizen** of the Commonwealth. **The Commonwealth will have power to determine who is a citizen.** I do not think Dr. Quick's amendment is necessary. If we do not put in a definition of citizenship **every state will have inherent power to decide who is a citizen**. That was the decision of the Privy Council in **Ah Toy's** case.

Sir JOHN FORREST.-He was an alien.

Mr. WISE.-**The Privy Council decided that the Executive of any colony had an inherent right to determine who should have the rights of citizenship within its borders.**

Mr. KINGSTON.-**That it had the right of keeping him out.**

[start page 1786]

Mr. WISE.-In our case he was within our limits, but he was not allowed to sue in our courts.

Mr. BARTON (New South Wales).-If it is a fact that citizens, as they are called, of each state are also **citizens** of the Commonwealth, there may be some little doubt as to whether this is not providing for practically the same thing.

Mr. WISE.-No, there may be territories that is what I want to provide for.

Mr. BARTON.-**In other portions of the Bill we use the words "parts of the Commonwealth" as including territories, so that the object of Mr. Wise would be met by using the words "citizens of every part of the Commonwealth" or "each part of the Commonwealth."**

END QUOTE

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Hansard *3-3-1898* Constitution Convention Debates

QUOTE

Mr. ISAACS (Victoria).-I am afraid that the amendment is far too wide, unless we say that the disabilities imposed by Parliament may extend to birth and race. **This would, notwithstanding the rights conferred under clause 52, deprive Parliament of the power of excluding Chinese, Lascars, or Hindoos who happened to be British subjects.**

Mr. WISE.-Might not place of birth be a disability?

Mr. ISAACS.-It would be difficult to persuade me that place of birth is a disability that could be imposed by Parliament. The amendment provides that a natural-born **subject of the Queen**, unless he is liable to some disability imposed by Parliament, such as lunacy, shall be a **citizen** of the Commonwealth. It does not say except such persons as Parliament

chooses to exempt, and it seems to me, from the very nature of the expression, [start page 1789] that this cannot refer to place of birth. That is not a disability imposed by Parliament, and unless a natural-born or naturalized **subject of the Queen** does something or gets into such a condition as amounts to, so to speak, a disqualification, he would be entitled to be admitted as a **citizen** of the Commonwealth. I am quite sure that the doubt is at all events sufficiently great to cause a very strong feeling against the thing. We could not insure such an interpretation as honorable members desire. The effect of it certainly may be, and I think probably will be, what I have stated, and it seems to me that the only safe course to adopt is to do what Dr. Quick proposed to do yesterday.

Mr. GLYNN (South Australia).-When this matter was before the Convention on a former occasion in connexion with clause 110, I raised this very point, but I did not succeed in getting honorable members to pay any attention to it: Its importance evidently was not recognised. I intended, when Dr. Quick's amendment was proposed, to make an addition to it, so that it would read as follows:-

All persons resident within the Commonwealth, being natural-born or naturalized subjects of the Queen, and not under any disability imposed by the Parliament, shall be **citizens** of the Commonwealth and of the state in which they reside, and shall be entitled to all the privileges and immunities of **citizens** in the several states.

The one clause would then cover everything, and I put this forward for the consideration of the honorable member. He may not wish to go to the extent of saying that they shall be **citizens** of the state in which they reside, but the latter words would embody the principle Mr. Symon is now suggesting, and which I suggested on clause 110.

Mr. BARTON.-**What about territories?**

Mr. GLYNN.-**There is power under the Bill to make special laws with regard to territories, and I am not sure that we could not constitute a certain class of citizenship for the territories.**

Mr. BARTON.-That power would be exercised subject to the Constitution. If you make the matter safe so far as the **citizens** of the territories are concerned in the Constitution, legislative power could not interfere with them.

Mr. GLYNN.-**I understand that you can make any provision you like as to representation and otherwise until the territories become states.** Their position in the Constitution is purely provisional. I can see the force of the point, and I admit that my amendment does not cover it. The proposal I have suggested puts the definition in the same position as in America. **Citizens** of the Commonwealth are **citizens** of the state in which they reside, and they also have, as Mr. Symon suggests, the privileges and immunities of **citizens** of the several states. There is only one other means by which you could do what is wanted, and perhaps it is the best: That is to adopt the principle of the German Constitution, which says that there shall be a common **citizenship**, and that the rights of the **citizens** in one state shall attach to the **citizens** in the other states. That would place it in the power of the Federal Parliament to declare what are the conditions of **citizenship**. **There would be power under a provision of this kind to say that an alien should not be a citizen until he had resided five years in the colony, while the citizenship would be uniform in its character throughout the Commonwealth.** In America, aliens have been prevented from becoming **citizens** unless they have resided in the place for five years. They must then be **citizens** for seven years before they can stand for Parliament. Honorable members will see that by adopting the principle of the German Constitution **we could prevent any special rights being given to aliens, and I think it would be better in that form. I desire to call**

attention to this point also, that even if you do not define citizenship at all in the Constitution there would be very little harm done. It seems to be forgotten [start page 1790] that in the American Constitution the word **citizen** is used. It is not used in our Constitution. In the original American Constitution the word "citizen" is for instance used in connexion with representation in Parliament. A man must be a **citizen** for seven years before he can be returned as a representative, so that there is a special reason for the definition given to the term citizen. **Here we do not use the word citizen. We use the word "resident" only.** The qualification for a Member of Parliament is residence for three years, and very little harm will be done if we leave out "citizen" altogether. If the Convention do not adopt a suggestion such as that I have made, the better plan will be to fall back on the principle of the German Constitution, which would enable us to make special laws regarding aliens**. I would like to mention, in connexion with what Mr. Isaacs said as to aliens, that this provision would not interfere in the slightest degree in the way of preventing aliens from coming in, because it is only when the aliens get inside the Commonwealth that this provision is to apply to them.** The decision of the Privy Council in the case of *Ah Toy* v. *Musgrove* was that an alien had no right to land here, **but that decision does not affect his citizenship after he has landed.** Mr. Musgrove, then Secretary for Customs, prevented Ah Toy from landing. Ah Toy brought an action for assault and battery against him, but the Privy Council held that that action could not be justified.

END QUOTE

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Hansard *3-3-1898* Constitution Convention Debates

QUOTE

Sir EDWARD BRADDON.-The amendment is to omit clause 110, and insert the following now clause:-

The **citizens** of each state, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be **citizens** of the Commonwealth, and shall be entitled to all the privileges and immunities of **citizens** of the Commonwealth in the several states, and a state shall not make or enforce any law abridging any privilege or immunity of **citizens** of the Commonwealth, nor shall a state deprive any person of life, liberty, or property without **due process of law**, or deny to any person within its jurisdiction the equal protection of its laws.

Now, there is a clause that covers the whole ground-a clause that is all-sufficient for the purpose-bearing in mind that every provision is made for securing to the Commonwealth that its **citizens** shall not be people of alien races to any considerable extent. There are in India some 150,000,000 **British subjects**, but of those 150,000,000 people very few indeed could stand the test applied by the Natal Immigration Restriction Act, which I think has been adopted already in Western Australia; which will no doubt be adopted in other colonies. of Australasia, and which will be effective in keeping from our shores the natives of India who cannot pass the education test that is applied under the Natal Act. This education test is one which would debar some 149,000,000 at the least out of 150,000,000 from qualifying, and would so keep them out of Australia. There you have a very much wider disability-and I think a very wholesome disability-which goes far and away beyond that suggested by the learned and honorable member (Mr. Isaacs). I think if we took this clause into our consideration, it might be found to do all that is required for us.

END QUOTE

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Hansard *3-3-1898* Constitution Convention Debates

QUOTE

Mr. BARTON.-A law giving such a right had better not be subject to conflict. If you have a state law for fisheries within the 3-mile limits under the state, and a Commonwealth law beyond the 3-mile limit, the unlucky fisherman who does not always know whether he is $2^1/_2$ or 3 miles away will get into the pickle instead of his fish.

Sir JOHN FORREST.-The state now has no power to legislate.

Mr. BARTON.-Within its territorial limits?

Sir JOHN FORREST.-No, beyond.

Mr. BARTON.-**The state cannot legislate beyond territorial limits**.

Sir JOHN FORREST.-Yes, it can, in regard to **British subjects**.

The CHAIRMAN.-I must ask the honorable member (Sir John Forrest) to allow the honorable member (Mr. Barton) to address the Chair.

Mr. BARTON.-Oh, it is usual when I am speaking. I am afraid there is a great deal of law about the subject, and I thought that was the reason the honorable member asked me the question. I quite agree that every state has the right to legislate as to its own fisheries within the territorial limit of 3 miles, but it has no right to legislate beyond that limit. It is questionable whether the power as it stands in the Bill would enable the Commonwealth to legislate [start page 1858] for anything beyond territorial limits. Although it has been taken and acted upon in regard to the Federal Council, and granted also that the states have power to legislate within territorial limits, it is nevertheless obvious that you come at once into a conflict of laws, because there are vessels which are occupied in fishing within the territorial limits, and which are at the same time often occupied in fishing without those limits, and very often the men having charge of those vessels will be unable to distinguish whether they are within or without the 3-mile limit. It will be very hard on them that there are two sets of laws, because they will not know where they are. **Fishing may sometimes be conducted by wealthy syndicates, but, as a rule, the persons employed in this occupation are a very poor and humble class, who certainly ought not to be bothered by having to ask whether they are under one set of laws or another.** I can understand that the law in regard to fisheries within territorial limits might apply to the regulation of ships engaged in fishing outside those limits. But, in the first place, it is a doubtful subject for legislation, and might lead to conflicts. That is why I have proposed "Sea, fisheries." It will allow the Commonwealth to legislate with regard to the whole area.

Mr. ISAACS.-What are "Australian waters"? How far do they extend?

Mr. BARTON.-**It is impossible to say.** I suppose that with all my honorable and learned friend's ingenuity it would puzzle him to say what are "Australian waters." **I question whether there is a lawyer in the land who could say.** If you insert the word "Sea" before the word "fisheries," and leave out the rest of the provision, you leave one jurisdiction with regard to legislation, and get something clear, and something which the persons conducting, the fishing business can understand; but if you leave the thing as it is you will have something which is not very clear, because you will have a conflict of laws. If you leave the clause out it is possible that it may be done very well without. **I do not know myself how far, even with the authority of the Imperial Parliament, any legislation with regard to fisheries may be applicable beyond territorial limits, except as affecting the regulation of the vessels conducting the trade, and that can be done under the trade and commerce or the navigation sub-sections.**

END QUOTE

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QUOTE **Mr. KINGSTON** (South Australia).-

. It seems to me that if we retain a clause of this description we ought to amend the previous clause, which regulates the application of the laws of the Commonwealth, by providing that they shall run in Australian waters. Of course they only apply to **British subjects** and to British ships. **That provision will necessitate either a definition of "Australian waters," or the constitution of Some authority by which this definition may be framed.**

END QUOTE

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Hansard *3-3-1898* Constitution Convention Debates

QUOTE

Mr. BARTON.-That is what I say. The words here are "Australian waters." The words in the Federal Council Act were "Australasian waters." **Will any honorable member point out the difference between Australasian waters and Australian waters? Can he tell me where be finds the line of demarcation?**

Sir JOHN FORREST.-You can legislate for **British subjects**.

Mr. BARTON.-You can; but that is shipping law, and you have power already to do that under the Constitution. **You would not get any additional power from the words "beyond territorial limits."**

Mr. KINGSTON.-You would have to define the waters.

Mr. BARTON.-**Will any honorable member assist me in defining, within the limits of the law, what Australian or Australasian waters are? It would be idle to take a power to legislate which would break down immediately it was tested.**

Mr. ISAACS.-**Can there be any Australian waters beyond the territorial limits?**

Mr. BARTON.-**No.** But in connexion with an Act like the Naval Agreement Act you may make an agreement for the purpose of effectuating your compact. You may say that certain ships shall not be taken beyond Australian waters, and you may define those waters, but the Act would simply be a contract between the two parties. **If you were to attempt to define Australian waters except within the limits of a contract you would have no *locus standi* or *aqua standi* at all.** The Queensland Fisheries Act does define Australian waters in the schedule. That is a Federal Council Act, and so far as it applies beyond the 3-mile limit it would if tested break down**. Surely we are too sensible to take powers here which would break down in their exercise, and would make the Commonwealth not a power but a laughing-stock. I would suggest strongly that the words "in Australian waters beyond territorial limits" would have no application in law [start page 1861] to give them any validity. It would be an attempt to transfer power from the British authority to the Australian authority, which the British authority does not possess.**

Dr. COCKBURN.-It is the highway of Great Britain.

Mr. BARTON.-Yes; Britannia rules the waves. The sea is a highway that belongs to all nations. We have a right of passage on it under international law; but how does that help us? Your jurisdiction is limited to the land and 3 miles of water around it. You have no more jurisdiction, and the Imperial authority could not give it to you.

Mr. SYMON.-How could you regulate a fishery to which all the nations of the earth have access as well as yourself?

Mr. BARTON.-Yes, and this was suggested to me. Supposing that the Commonwealth did pass such a law, and a German ship over 3 miles from land took no notice of that law, what could be done? I replied in the words which were attributed to a certain speaker when he was asked what would happen if he "named" a member. **Then I was informed that the only thing the Federal Council ever did was to pass a law which, if it was tested, would be laughed at. We had better alter these words to "Fisheries," if we do not strike them out altogether. That will give the Commonwealth the power of legislating within its own limits, and outside them, if there is any power to legislate outside its limits.** Is it not better, after all, that we should leave the state to legislate within its own borders? There can be no legislation outside that 3-mile limit, except under the navigation and shipping law, under which we have sufficient power to regulate matters for all practical purposes.

Mr. DOUGLAS (Tasmania).-The original Act gives the power to the Federal Council to regulate the pearl-shell and beche-de-mer fisheries in Australian waters beyond the territorial limits. Then, in pursuance of that Act, in 1889 an Act was passed by the Federal Council limiting the power of the original Act by providing that-

This Act applies only to British ships and boats attached to British ships.

Therefore, the jurisdiction is complete. There was a very elaborate and most important decision delivered some years ago by Judge Cockburn with respect to a murder on the high seas. The question was whether in England a foreigner, a Dutchman, could be tried for a murder on the high seas committed beyond 3 miles from the territory. Although the man had been found guilty of murder, Judge Cockburn, one of our best, Judges, held on appeal that he could not be found guilty according to the English law, the murder not having been committed within the 3-mile limit. But this only refers to **British subjects**, and it is most important as regards Queensland and Western Australia that this power should be retained. Therefore, why not retain the words used in the British Act of Parliament giving the Federal Council the power? I see no difficulty in adopting the clause in the Bill as it now stands.

Mr. KINGSTON (South Australia).-I take it that a British ship is floating British territory, and just as the British Parliament has the right to legislate in reference to that ship, so it has the right to delegate its right of legislation to another Legislature. That is what was done in connexion with the Federal Council, and it is what is proposed to be done here. Therefore, I hope we shall adhere to it. As pointed out by Mr. Douglas, that is the limitation affecting Queensland, and no doubt Western Australia, namely, that their control applies only to **British subject**s and to British ships.

Mr. BARTON.-**Then the navigation and shipping law goes beyond that power.**

END QUOTE

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Hansard *3-3-1898* Constitution Convention Debates

QUOTE

Mr. BARTON (New South Wales).-I will ask, in a few moments, that progress be reported, because I think a little thought over this matter will lead us to a very early determination tomorrow morning. **The position is that, under the commerce clause and the navigation and shipping clause, there is a right to deal with a British subject carrying on a trade.** If people go fishing for pearl-shell, schnapper, or anything else, when they come back, and the fish is marketable, then the trade and commerce clause will apply.

If the trade is conducted purely within the limits of the territory, then the state itself can deal with it. That is so far as licences are concerned-the mere licence for carrying on trade. **The registration of the vessels themselves comes clearly under the navigation and shipping law, so that it seems, one way or another, there are already powers in the Commonwealth and the state which render any question unnecessary.** I cannot see how the addition of the words would give any added powers or any particular validity to a law if the law exceeded that for the regulation of trade apart from it, and for the regulation of navigation and shipping. Decisions would be liable to be tested, and there would arise the danger of litigation, which honorable members deprecate.

END QUOTE

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Hansard *11-3-1898* Constitution Convention Debates

QUOTE

Sir JOSEPH ABBOTT.-When we adjourned for lunch I was about to point out that during the last summer sitting of the Judicial Committee the whole of the work of the committee was cleared off, with the [start page 2293] exception of a few reserved judgments. It has been pointed out in the press and elsewhere that if a High Court of Appeal were established in Australia it would be found that the cases would come before it only when it was convenient for counsel to attend, and that probably counsel would prefer to attend the sittings of the state courts if there was any clashing between those sittings and the sittings of the High Court of Appeal. Under these circumstances, it is hardly likely that suitors would be able to procure the very best counsel to appear for them in the High Court of Appeal, and to give up their business in the state courts, except upon the payment of enormous fees. As honorable members know, in the North American Constitution power was reserved to the Dominion to establish a High Court. The Parliament there introduced a Bill to establish a High Court, and, in reference to this matter, *Todd*, at page 184, says-

Furthermore, upon the introduction into the Canadian Parliament, in 1875, of a Bill to create a Supreme Court for the Dominion, it was the expressed intention of Ministers to have prohibited any further appeals to Her Majesty's Privy Council. They were notified, however, that the Bill could not be sanctioned, unless it preserved to the Crown its right to hear the appeals of all **British subjects** who might desire to appeal, in the ultimate resort, to the Queen in Council. Accordingly, a saving clause to that effect was inserted in the Bill, and it received the Royal assent.

The same author, speaking with regard to this appellate jurisdiction, says-and I would ask honorable members to pay particular attention to this passage:-

The appellate jurisdiction of the Queen in Council is retained for the benefit of the colonies, not for that of the mother country. It secures to every **British subject** a right to claim redress of grievances from the Throne.

He continues:-

It is true that in a colony which possesses an efficient court of appeal it may be seldom necessary to have recourse to this supreme tribunal.

No doubt if a High Court of Appeal is established here, and it is what those who propose to found it anticipate that it will be, there will be very few appeals to the Privy Council. Still, I think that the right of ultimate appeal to the Privy Council should continue to exist. *Todd* goes on to say:-

Nevertheless, its controlling power, though dormant, and rarely invoked, is felt by every judge in the empire, because he knows his decisions are liable to be submitted to it. Under these circumstances it is not surprising that British colonists have uniformly exhibited a strong desire not to part with the right of appeal from colonial courts to the Queen in Council.

I submit, with great confidence, that it is for those who propose to take away this right to show that there is no need for it. There has not been a single petition presented to the Convention in favour of the clause as it stands. I suppose that those who so earnestly desire the retention of the clause as it stands would, if they could get petitions in favour of their proposal, inundate us with them. Since we have been sitting in Melbourne, no less than 26 petitions have been presented to us, praying that the right of appeal to the Privy Council may be retained; but not one petition has been presented in favour of doing away with this right.

END QUOTE

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Hansard *11-3-1898* Constitution Convention Debates

QUOTE

Sir JOSEPH ABBOTT.-The North American Bill. I have quoted *Todd* but perhaps he is not a good enough authority, and I will now quote Lord Norton, who, writing in 1879, said-

The late Canadian Government brought in a Bill creating a Supreme Court, and prohibiting appeal to the Privy Council here. They were told that the Bill could not be sanctioned unless it preserved to the Crown its rights to hear the appeals of all **British subjects** if they should desire to appeal in the ultimate resort to Her Majesty in Council; and the Dominion Government gave way and amended the Bill accordingly.

END QUOTE

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Hansard *11-3-1898* Constitution Convention Debates

QUOTE

Mr. SYMON.-That was the purpose for which he was sent. The Chief Justice of South Australia was chosen, not with a view of instructing the Privy Council upon the **common law** of England, or with regard to the cations of interpretation of statute law, but for the purpose of instructing the Privy Council in relation to Australian ideas, so that they might be better able to enter into the condition of things in reference to which the questions for decision arose. Then my honorable friend referred to what he called local influence. Now, I would ask him how does that argument apply to the thousands of cases under £500? If local influence is bad, how are you going to free the multitudes of people of the country whose cases never go beyond £500 from the baneful effect upon our Judges of that local influence?

Mr. ISAACS.-They are **British subjects**.

Mr. SYMON.-Yes, **but they are only poor people**, and therefore they are to be subject to the consequences of all this improper local influence, to this bias, without any hope of redress. Was there ever a proposal that was so utterly unjust as this? Then my honorable friend said that the Judges of the High Court would have less experience. Surely the Judges of the Federal High Court will have as much experience as the Judge we have sent to the Privy Council? Why should we reflect on his qualifications, or on the qualifications of any Judge who is sent to take part in the work of the Privy Council? I wish to tell honorable members this-now, when we come to speak of the question of experience-that Lord

Watson, probably the strongest Judge on the Bench of the Judicial Committee, was a Scotch Judge, who passed the whole of his earlier career at the Scotch Bar, and on the Scotch Bench, and who learned and administered a system of [start page 2308] law totally opposed to the system of English law. He was nevertheless put on the Privy Council Bench to decide appeals from the colonies affecting and depending upon a law of which he could have had no possible experience before, and yet so powerful is the education which every one undergoes with responsibility, and the necessity of exercising responsibility, that he has become a conspicuous success on that Privy Council Bench. So it will be with the Judges of our High Court. **Their strength, their knowledge, their judicial experience, will grow with the opportunities that come to them.** Uniformity, it is said, will not be preserved. Well, the law, of course, is always proverbially uncertain. We are guided by the House of Lords, not by the Privy Council. We are bound by the decisions of the House of Lords as long as we are part of the empire. **The High Court of Justice here-the Federal High Court will be bound to give effect to English law as expounded in the highest court available to English-speaking people, and the uniformity will be maintained just as effectually without the intervention of the Privy Council upon a discretionary appeal, such as is proposed, as if the right of appeal were retained in its fall force.**

END QUOTE

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Hansard *11-3-1898* Constitution Convention Debates

QUOTE **Mr. CARRUTHERS** (continuing)

Now, my honorable friend, in the course of his argument, asked why should not Germans and Americans claim to have a court of their own to decide their cases. But my honorable friend forgets that the objections raised against this proposal in the Bill are that it is doing away with an existing right of **British subjects**. The Germans and Americans residing in the colonies have never had the right of appeal to a court of their own from the decisions of any of the Australian courts. His arguments would be good and valid if we were taking away from the Germans and Americans a right they now possessed- [start page 2314] if we were denying to them the rights which they now have. But we are not doing anything of the kind. Therefore, that argument absolutely falls to the ground.

END QUOTE

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Hansard *3-3-1898* Constitution Convention Debates

QUOTE

Dr. COCKBURN (South Australia).-**If the word "citizen" simply means resident or inhabitant, why should we go to all this trouble about it? If it means inhabitant, what is the use of saying the inhabitant of one state going to another state shall be an inhabitant of that other state? It seems to me that if you are going to use the word "citizen" in the sense of being equal to resident or inhabitant, and it is to have no other meaning such as has always been attached to it, we had better leave out the clause.**

END QUOTE

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Hansard *3-3-1898* Constitution Convention Debates

QUOTE

Mr. ISAACS.-**In a sense which is "not synonymous with resident, inhabitant, or person."**

Mr. OCONNOR.-**Exactly. It has two meanings, but we are only dealing now with the one meaning-the general meaning. Mr. Isaacs' reference shows the danger that might be incurred by using the word "citizen," because it might have the restrictive**

meaning the last decision imposes. All we mean now is a member of the community or of the nation, and the accurate description of a member of the community under our circumstances is a subject of the Queen resident within the Commonwealth."

Mr. SYMON.-**A person for the time being under the law of the Commonwealth.**

Mr. OCONNOR.-**A person for the time being entitled to the benefits of the law of the Commonwealth.**

END QUOTE

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Dr Quick's amendment to allow the Commonwealth to define/declare "citizenship" was defeated!

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It must be clear however that the term "**British subject**" very much is a constitutional terms and was used frequently buy the Framers of the Constitution.

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Hansard *11-3-1898* Constitution Convention Debates
Not quoted to conserve space

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QUOTE 19-7-2006 ADDRESS TO THE COURT

The aliens power, however, gives the Parliament greater power over immigrants than the immigration power. In *Nolan v Minister for Immigration and Ethnic Affairs* HYPERLINK "http://www.austlii.edu.au/au/cases/cth/high_ct/2003/" \l "fn51" [52] , this Court held that any immigrant who has not taken out Australian citizenship is an alien for the purpose of HYPERLINK "http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s51.html" s 51 (xix) of the Constitution**. On that view of the aliens power, the Parliament can legislate for the deportation of persons who are British citizens and have been permanent residents of Australia for many years.** In *Nolan*, the Court upheld an order of the Minister deporting Nolan, a citizen of the United Kingdom who had lived permanently in Australia since 1967 **but who had not taken out Australian citizenship.**

END QUOTE 19-6-2006 ADDRESS TO THE COURT

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Main v. Thiboutot, 100 S. Ct. 2502 (1980).

QUOTE

"The law provides that once State and Federal jurisdiction has been challenged, it must be proven."

END QUOTE

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Thompson v. Tolmie, 2 Pet. 157, 7 L.Ed. 381; Griffith v. Frazier, 8 Cr. 9, 3L. Ed. 471.

QUOTE

"Where there is absence of jurisdiction, all administrative and judicial proceedings are a nullity and confer no right, offer no protection, and afford no justification, and may be rejected upon direct collateral attack."

END QUOTE

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I did so extensively and again succeeded on all constitutional grounds UNCHALLENGED by the Crown! Both State and federal.

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QUOTE 16-11-2005 ADDRESS TO THE COURT

The documents also show that one is charged GST for buying a copy of the Gazette, something which is validating any enactment to come into force. It appears to me that to charge GST on

something essential to the process of enacting legislation is sheer and utter nonsense, and if anything underlines that the government is out of step with what is constitutionally and otherwise legally required, that is to complete enactments as to ensure that the general public is aware of it by providing copies of the Gazette free of charge. Is the general public next going to be charged GST on legislation being drafted?

I take the view that unless the Gazette is available over the counter free of any GST, the Commonwealth in effect fails to appropriately publish the Gazette in that regard also.

END QUOTE 16-11-2005 ADDRESS TO THE COURT

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The publication of certain legislation is essential to validate it as without publication in the Gazette not even a federal election can take place. Indeed, I successfully challenged the validity of the proclamation of the Governor-General where the proclamation was not actually published until at earliest on 9 October 2001, while the writs already had been issued on 8 October 2008. The error by the Federal Government not to publish the proclamation before the writs were issued resulted there never were valid writs issued..

Likewise in the 2007 purported federal election the writs were not showing a date of return as is constitutionally required but a date "on or before" which is no date at all.

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I have, so to say, proven to be able to defeat the Crown despite its army of highly paid lawyers because they simply lacked the constitutional knowledge to appropriate litigate.

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I may not have had any formal legal education but again proved my worth in self-education.

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While I have been compiling this interim limited response (just consider what a real response may amount to in number of pages) grandma is still sitting there with her scones. It turns out the poor old woman hasn't got any teeth to bite into the scones and so is sucking on the scones as the ATO is sucking taxpayers of their money. Just, that grandma at least isn't sucking anyone dry, so to say. The poor woman can't afford the cost of the false teeth +GST as I understand it to be on every both that is required to produce the false teeth for her.

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As I previously stated;

Hansard 3-3-1898 **Constitution Convention Debates** (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE

> **Mr. ISAACS** (Victoria).-What I am going to say may be a little out of order, but I would like to draw the Drafting Committee's attention to the fact that in clause 52, sub-section (2), there has been [start page 1856] a considerable change. Two matters in that sub-section seem to me to deserve attention. **First, it is provided that all taxation shall be uniform throughout the Commonwealth. That means direct as well as indirect taxation, and the object I apprehend is that there shall be no discrimination between the states; that an income tax or land tax shall not be made higher in one state than in another.** I should like the Drafting Committee to consider whether saying the tax shall be uniform would not prevent a graduated tax of any kind? A tax is said to be uniform that falls with the same weight on the same class of property, wherever it is found. It affects all kinds of direct taxation. I am extremely afraid, that if we are not very careful, we shall get into a difficulty. **It might not touch the question of exemption; but any direct tax sought to be imposed might be held to be unconstitutional, or, in other words, illegal, if it were not absolutely uniform.**

END QUOTE

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Again;

QUOTE

It might not touch the question of exemption; but any direct tax sought to be imposed might be held to be unconstitutional, or, in other words, illegal, if it were not absolutely uniform.

END QUOTE

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Hansard *3-3-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE

Mr. BARTON.-**We were inclined to the opinion that "uniform" would not apply so as to prevent the graduating of a tax. I am glad to have the suggestion from the honorable member, because the committee will be going into the matter again.**

END QUOTE

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Hansard *1-3-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE

Mr. HIGGINS.-If that were the idea-that the Commonwealth were to be responsible for these debts, and were to have no recourse as against the states-that would be something like a guarantee, and, perhaps, it might be a wrong thing; but what are we to say about a guarantee of this class when we find the Commonwealth can come back on the states for any difference? Where is the guarantee there? It is an instance of what I referred to the other day, as keeping the promise to the ear and breaking it to the hope in a remarkable degree. If the Commonwealth feels that it can come upon the states for any deficiency, where is the motive to the Commonwealth to impose the requisite taxation to obtain a sufficient amount to meet the necessities of the state Treasurer? Although I voted in the minority, I am very glad that the committee has so strong a sense of the importance of giving some guarantee to the states Treasurers, but this is not the way to do it. **It has been said that we must trust the Federal Parliament, and the influences upon the Federal Parliament, to secure that there shall be a sufficient guarantee to the states-a sufficient surplus to the states. I would go as far as any one in trusting the Federal Parliament, but I want to see that there is a sufficient motive in the Federal Parliament to provide the necessary surplus to, the state Treasurers, and I cannot find it.** The Federal Parliament may be trusted to do its best for its taxpayers-its constituents-but then the Federal Parliament has no sufficient motive to see that a state Treasurer is not embarrassed. The Federal Parliament will know that if it does not provide a sufficient surplus to the state Treasurers, the latter will have to tax the people but it is a very different thing for the Federal Treasurer to feel that he must tax the people, and to feel that he must leave the taxation to the state Treasurers. When you have to deal with a cantankerous dog, I would far rather not tread on his tail myself-I would let the next fellow do it; and it is the taxpayers' tail that has to be trodden upon. There are occasions which I can conceive when the Federal Treasurer might say: I should like to put state Treasurers, or some state Treasurer, under the obligation of treading upon the taxpayers' tail.

Mr. REID.-Some taxpayers think that taxes are the readiest method of getting rich.

END QUOTE

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Hansard *28-2-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE

Sir GEORGE TURNER.-No; the security of New South Wales, to my mind, is as good as the security of the Commonwealth, but it is no better. New South Wales has power to tax, but the Commonwealth has power to tax for any purpose by any mode of taxation; and when the [start page 1583] Commonwealth puts on its tax it, no doubt, will take priority over any state tax. I am not prepared to say that the security of New South Wales is better than the security of the Commonwealth, although, in my opinion, it is equally as good.

END QUOTE

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The statement "but the Commonwealth has power to tax for any purpose by any mode of taxation" must be understood to be limited by the intentions of the Framers of the Constitution as otherwise expressed during the debates and so also by the Constitution itself, stated or embedded as a principle.

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Hansard *28-2-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE

Mr. HOLDER.-I want to show that it will not even do that. I am as conscious of the difficulty of which the honorable member is thinking as he can be. I know the danger connected with entrusting any Treasurer with a surplus, and the danger of leading him into extravagance, If I could see an way, through the debts or any other method, of preventing him from having a large unappropriated surplus, I would adopt every means to attain that object, but I do not think that can be attained by this proposal, because, as soon as you provide that the fluctuating difference shall be paid to or by the state, you find yourself in this position: Then the Treasurer can expend as much as he likes, and he may spend almost nothing, or he may spend the whole; he simply has to make a larger or smaller levy upon the state account, according to the circumstances.

END QUOTE

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Hansard *31-3-1897* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE

Mr. ISAACS: The Bill may pass and someone take exception to it, with the result that the Supreme Court may set it aside.

Mr. BARTON: There is enough ability in this Convention to define that matter in such a way that we may have still the advantage of such a provision. Then comes in another sub-section to which much exception has been taken in this Convention. It reads:

In the case of a proposed Law which the Senate may not amend, the Senate may at any stage return it to the House of Representatives with a message requesting the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make such omissions or amendments, or any of them, with or without modifications.

The objection my friends, Sir George Turner and Mr. McMillan, have taken to this clause is that if the suggestions are rejected the States House would be belittled. I do not follow that at all. I do not see how if one House rejects the proposition of the other, as must continually be the case in matters where their powers are co-ordinate, the other House is belittled.

Mr. SYMON: Make it "amendment" straight out.

Mr. BARTON: You must look at it in this way, that you would then give power to amend Taxation Bills and the Appropriation Bill, but I do not think a majority of members will agree to that. We have to make our machine workable whatever we do, and I for one think that if the Bill contains only the annual expenditure for ordinary services of the year, it would be not only a very serious thing, but an extremely culpable thing, for any House to reject the ordinary annual services for the year. If you come to a Bill for the ordinary annual services under provisions like these, which put "tacking" out of the question, there can be no excuse except resentment or revenge for rejecting it. If, therefore, you take this power of suggestion as applying merely to a Taxation Act and the ordinary annual Appropriation Act -for those are the only cases in which amendments under this proposition of 1891 are not allowed-surely it is power enough to give when you remember that a veto or rejection would be a thing which would throw the whole country into confusion, and would only be proposed on account of resentment or revenge. The government of the country must be carried on, and with the government its public and annual services, and if those Bills which involve the salaries of the **public service** and ordinary appropriations were to be rejected, why-Senate or no Senate-the whole country of Australia, with a voice as strong in the smaller States as in the larger States, would condemn such a course. It is only in respect to these two matters this power of suggestion has been proposed. I find in the "Practice of the Legislative Council of South Australia," written by the very learned Clerk of this Convention, Mr. Blackmore, the nature of the compact which has actually been between the two Houses from 1857. It is not a Statute, but it exists in such a way that it can be understood. Hon. members will find it on pages 182 and 183 of that book. I will refer hon. members to another book, the "Practice of the House of Assembly," in which Mr. Blackmore, on pages beginning at 333 and going on for some dozen pages or more, has defined the whole process of the negotiations which took [start page 384] place, and has given in full the resolutions and messages of both Chambers. I am informed-and I think there are gentlemen in this Chamber who can say whether I am right or wrong-that this plan has worked with considerable success in South Australia. Mr. Playford, now Agent-General for the colony in London, but then Premier of South Australia, made strong reference in the debates in 1891 to the question, and I am further informed that while there have been occasional differences in the carrying out of this work of legislation, and making suggestions-the House to whom the suggestion is made either adopting or rejecting them-the average result has been an improvement in the relations of the two Houses, and a considerable improvement in many cases of the legislation sent from one House to the other. I really cannot see why the adoption of the process of suggestion should belittle either House. In those cases in which suggestion was provided in the 1891 Bill I would not concede the power of amendment, but the power of suggestion there sought to be given to the Senate is one that we might well import into the Constitution as a means of settling differences, to prevent such a calamity as a deadlock or the rejection of the ordinary Appropriation Bill.

Mr. REID: It is just possible that the power of suggesting these amendments might provoke that calamity.

Mr. BARTON: We must not be so conservative as all that; and I do not think my friend is generally so conservative. I do not think if we see a proposition made which has worked well in the light of experience-

Mr. REID: We do not get it here.

Mr. BARTON: Well, we have very good authorities. We have such authorities here as Sir Richard Baker.

Mr. REID: Hear, hear.

Mr. BARTON: And Mr. Playford. Mr. REID: Hear, hear, and Mr. Blackmore.

Mr. BARTON: Mr. Playford is a politician of long experience, and has held high positions here. I say why should we hesitate to adopt such a plan when it is a proposal which, on the face of it, is consistent with, and has a tendency to, courtesy and good feeling between the two branches of the Legislature? Surely we will adopt that proposal, instead of running away from any difficulties which we cannot very well state, but only imagine, while we have before us the fact that it has promoted courtesy and good faith in legislation.

Sir JOHN DOWNER: That is only compromise.

Mr. BARTON: I dare say it is compromise. I am not so uncompromising as my hon. friend Sir John Downer, or some other gentlemen who sit near him; but I may say that I honour gentlemen who, having once arrived at opinions, are reluctant to give them up readily. I think, however, that we are here to compromise, and, that we shall have to compromise to obtain the assent of those who sent us here to do what we are doing. It is said that to concede the powers of which I have spoken, would impair responsible government. I cannot say, nor can any man, that that would be the effect. If the object is to have responsibility to one House alone, I say the responsibility is not taken away from that House. **We should not withhold the power to amend in the case of Bills which are not strictly Money Bills.** The additional power is in the cases of certain classes of Money Bills, to have them sent up separately as to the objects which each defines with the power of rejection or veto as to each Bill separately sent up, instead of having them sent up in such a state that the Second Chamber would only have the intolerable and unfair alternative of either rejecting the Bill-which, though it might contain a legislative proposal which would be distasteful, might also contain a quite separable proposal with which it would agree - or else [start page 385] accepting a taxation they believed to be injurious to the community in order to pass the proposal to which they did not object. **We should at all hazards avoid this.** Why should there be such a difficulty about there being a veto allowed in matters of detail. Veto is no such uncommon thing. I believe it exists in the Imperial Parliament. May, under the head of "Rejection by the House of Lords of Provisions Creating a Charge," says:

> The right of the Lords to reject a Money Bill has been hold to include a right to admit provisions creating charges upon the people when such provisions form a separate subject in a Bill which the Lords are otherwise entitled to amend. The claim of privilege cannot therefore be raised by the Commons regarding amendments of such Bills, whereby a whole clause, or series of clauses, has been omitted by the Lords; which, though relating to a charge and not admitting of amendment, yet concerned a subject separable from the general objects of the Bill.

So it is here, if two legislative proposals **for expenditure outside the annual services of the year**, **or two propositions for taxation are submitted**. **If they are embodied in one Bill, I take it, it is an unfair provision, because it does not enable the Senate to exercise its power of veto on one proposal, though it may not be in favor of both.**

Sir GEORGE TURNER: One might depend entirely on the other.

Mr. BARTON: That would not be a case of two separable propositions.

Sir GEORGE TURNER: **Take the Land and Income Tax Bill.**

Mr. BARTON: **They are proposals which should never be in one Bill together.** If there are two propositions more dissimilar in their incidence than a land and an income tax they are hard to suggest. **One of them-the income tax-comes from the earnings or profits of the people, or of that portion of the people who, I was almost guilty of saying, are to "hump the swag" -at any rate they are to bear the burden. But the other-if a tax on the unimproved value of land-has no relation to the earnings or the thrift or the solvency of the person owning the land, and taxes that land on its unimproved value whether the owner makes a profit out of it or not.** I am not attacking these forms of taxation, but I do say this: that it is impossible to imagine two taxes more diverse their very root, and I think Sir George Turner could not have selected a better example of two taxes which ought not to be included in one Bill. I venture to say this is undoubtedly cutting down the right of the Senate to protect the State, and preventing them from voting upon matters that should be put separately. I believe most of these matters have been well, and fairly dealt with in the Bill of 1891. I know some members are ready to accept the proposal providing that a referendum is also prescribed. I will go into that directly. have heard it said that if there are two Chambers in the Federation, and a proposal is carried in one by a majority, and in the other Chamber, representing the States, the majority of the representatives, who do not represent the larger population, negative the proposal, that House takes control. **We have heard it said that veto means control**; I think we have heard it argued here, and I ask those who think the right of veto means the right of control to consider this question: Will they in their own colony allow the second Chamber to have the sole right of initiation and amendment of Money Bills, and agree that they keep control of the Government by giving only the veto to the Lower House?

END QUOTE

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Hansard *13-4-1897* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE

Mr. HIGGINS: It is simply this, be cause the practice as to the rights of the two Houses has become so settled, so stereotyped, that there have been less conflicts about Money Bills than formerly. But although my friend, Mr. Wise, says the main questions which divide the people to-day are social questions-although that is quite true-still you cannot dissever the Money Bills from the policy upon which the money is spent. **You cannot dissever Taxation Bills from Appropriation Bills.**

Sir JOSEPH ABBOTT: Hear, hear.

Mr. HIGGINS: **The whole power of appropriation is based upon taxation, and you cannot draw the line between them in that arbitrary way.**

Sir JOSEPH ABBOTT: Hear, hear.

Mr. HIGGINS: You may take it in any way you like. Suppose there is a certain scale of payment to the federal servants. Suppose the Appropriation Bill says you must pay a servant of the Federation so much, and the Treasurer finds that he must get so much money to meet those payments, he brings in a Taxation Bill for this purpose, the Senate says "We cannot amend an Appropriation Bill, but we can amend a Taxation Bill," and they knock off this and that item, and thereby stop the appropriation in an equally efficient manner. I feel this is not the time for a long debate. Holding strongly, as I do, my views on the subject, I am very anxious that there shall not be the semblance of stone-walling to prevent Sir John Forrest obtaining a vote upon the clauses. I am determined he shall have his vote as far as I am concerned, and let the public see that it is by means of that vote that Federation will be wrecked, if it is wrecked. I cannot go to the full extent of my feelings in

this matter, but I would appeal to hon. members, before it is too late, to say that they will follow out that compromise, at the very least, which was suggested in the Convention of 1891.

END QUOTE

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Hansard *14-4-1897* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE

Sir JOHN FORREST: Do you expect to have everything your own way?

Mr. BARTON: I am not saying that: I am saying the very contrary. I am not going largely into the practical conditions which may arise if the States Assembly or Senate is allowed the power to amend Tax Bills. I hold rather strongly that if we are to have two Houses, and intend to act upon the principles of responsible government, and conserve those principles, we ought not to put in the hands of one House the ability to utterly destroy the financial policy of the Government**. The expenditure depends upon the taxation, and if the taxation is so altered in its passage through a Second Chamber that the expenditure, which is perhaps sanctioned upon the Estimates, or about to be sanctioned upon the Estimates, proposed by the government is lessened, that right to amend the Taxation Bill practically means the right to cut down the Appropriation Bill, too.**

Mr. DEAKIN: Hear, hear.

Mr. BARTON: Supposing that with the raising of £300,000 of taxation the Government will be enabled to make ends meet for certain items of expenditure by the Commonwealth**, and supposing that they cannot get a Bill providing for that taxation through the Senate,** but that the amount is cut down by £100,000, that must mean a corresponding reduction in the expenditure embodied in the Appropriation Bill. One hinges upon the other. It may be subtle enough for some of our friends to say they do not claim the right to amend the Appropriation Bill, but they really want the right to do so without saying a word about it. They may say "We will take your Appropriation Bill with its provision for so much expenditure," and leave you in the lurch to find some means of taxation to make that amount up. That makes them masters of the situation. It is not like the right of veto, because in exercising that right and taking the extreme course of vetoing such a measure right out, a House takes on itself the whole responsibility. If, however, it is merely a question of amendment, that House can say, "Oh, it is merely a matter of arrangement." But all the same the question is whether the policy of the Government shall proceed or not. If we come to that pass, such an alteration in the policy of the Government means that there is a divided responsibility. Because what is the position? If those who are in the House of Representatives-Ministers and members-have to accept these amendments, and then say to the people who sent them there, and who must according to their numbers pay the taxation- "Oh, well, we wanted to carry out our policy, but the strong Senate which exists has cut it [start page 555] down, and we thought we had better take all we could rather than get none"-where is the principle of responsibility? Instead of Ministers being responsible to the people through the House of Representatives they are responsible, some may say, to the people through both Houses. That is a divided responsibility; that is not carrying out the principle of responsible government with responsibility to one House. Although some may argue that the ultimate responsibility is to the people, we are not here to consider the process to be arrived at at very long last. A machine that will only work with a very much larger expenditure for oil than the machine itself originally cost is not an effective machine in the work-a-day sense of the term. And that is the difficulty that is in front of us, and

which I submit, if we do not adopt this amendment, we cannot get over. Look at the position of this matter. We are told by Sir Edward Braddon that we who are not agreed with him are capable of seeing a thing applicable to ourselves, but are entirely blind to it when urged on behalf of the smaller States. There is not, however, and has not been, a difficulty in getting the smaller States to accept the Bill in the light of the compromise of 1891. I believe before this debate closes there will be evidence produced that there has not been a difficulty either in South Australia or Tasmania in getting the clauses passed in the shape of the compromise of 1891. That is the answer to my friend Sir Edward Braddon, because his people have been able to see this matter in the light of the honest compromise of 1891. They have shown they are able to accept a Bill in that shape, but in New South Wales there has been the very greatest difficulty in obtaining from meetings of electors any approval of the 1891 compromise, and if matters are to be taken further than that I only put to my fellow members the difficulty that will arise in endeavoring to get the electors to go that one step further. Certainly, as has been pointed out, the Parliament can suggest an amendment, but if that comes to the Convention the latter will say, "That is only a suggestion from the Parliament of New South Wales. We are not going to abide by that." If the evidence at the mouths of men who cannot be disbelieved is of any practical value-and I take it that the experience of the large majority of representatives from New South Wales will outweigh the view of my friend Mr. McMillan, much as I respect him-then I say it has been a difficulty of the greatest character from the first to obtain an approval of this form of compromise which was made in 1891 from the electors of a colony such as New South Wales. I will not speak about Victoria, because I am not so conversant with the circumstances of Victoria, and I will leave members of that colony to speak for themselves. How, then, when this compromise has been arrived at, after much argument, after much exhaustion of practical effort by experienced men on both sides-how, then, if there is a colony entitled to be considered here which is not like other colonies that have signified their approval, but which has by criticism in the press and in various other ways manifested some repugnance to the scheme-how can it be said that to drag that colony over the line will be a step towards Federation? If you alienate the public feeling of those who are entitled largely to be considered, how can you say that you are moving towards Federation? If you alienate colonies which are difficult to move from certain principles of settled government how can you minimise the difficulty which we, who belong to those colonies, must have in endeavoring to obtain approval of the work of this Convention if it is marked by what they consider is an indelible stain upon it? That is a matter which relates to the whole of the processes under this Convention, because if you alienate the public feeling at this early stage, just fancy the Herculean task afterwards in pulling back that feeling into its proper place. How can we underrate the difficul- [start page 556] ties that beset us in a matter of this kind? Are we not entitled to plead for such a course of action as will not lead to disastrous results? That is the position I take up in reference to this matter in arguing strongly one way or the other as to the effect of this amendment on constitutional government. I have placed on record before this morning what I think about that. I have been one of the first, as the records of 1891 and since will show, to lay down that there is a measure of justice which must be conceded to the less populous States. I have faced public opinion as far as any man can face it for the purpose of ensuring that there shall be justice done, so long as we preserve the principles of responsible government. Now, what was done in the Convention of 1891? And let it be recollected that there were extremists on both sides. Let us take the argument of Sir Edward Braddon, who stated that:

> They are capable of seeing a thing as applicable to themselves, but entirely blind to it when urged on behalf of the smaller States.

The argument is endless if used on both sides, and simply amounts to a turn-about and turn-about. In 1891 there were those who upheld the *ultimo ratio* of responsible government, and there were those who upheld the *ultimo ratio* of State dominance. One side claimed entirely co-ordinate powers of the Senate, while the other side stipulated that the Senate should have practically none. There was a long debate, out of which the middle line of demarcation was arrived at.

END QUOTE

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QUOTE

The expenditure depends upon the taxation, and if the taxation is so altered in its passage through a Second Chamber that the expenditure, which is perhaps sanctioned upon the Estimates, or about to be sanctioned upon the Estimates, proposed by the government is lessened, that right to amend the Taxation Bill practically means the right to cut down the Appropriation Bill, too.

END QUOTE

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There would be absolutely no need for the whole of the argument in this debate about taxation Bills if they were intended to be to be applicable from whenever they were enacted. The truth is that Taxation Bills only apply for the financial year they are enacted for in support of that years Appropriation Bills and no longer.

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Hansard *14-4-1897* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE

Mr. BARTON: As the hon. member who has just sat down has referred so fully to what I have said, I should like to put myself in the right position. I lay down two principles. The one is that a question of mere procedure, where rights are given by our Constitutional law, is to be settled between the Houses themselves, and that there never was a Constitution in the world which gave any judiciary the power to inquire into the manner in which the Houses settled their procedure in those matters; **but where it is a question of the presentation of a law, when passed, in such a shape, on the face of it, that one House is deprived of its fundamental rights as a component part of the Constitution, that should be settled by the arbiter of the Constitution.** Was it ever attempted in this world, on a question whether a Bill originated in this House or that, or whether that House amended it or not, which is a question of fact, to allow a Supreme Court to be the arbiter of its validity? **That has never occurred, and never can. No Court should be allowed to inquire into the manner in which two Houses adjust relations between themselves.** If we give these two Houses the privileges which, according to the decision of the Committees in 1891, according to the decision of the Convention of 1891, and according to the decision of the Committee now, it is intended to give-the powers, privileges, and immunities of the House of Commons-they will stand, as the House of Commons has ever stood, against any encroachment or infringement by any Court whatever inquiring into its method of regulating its procedure.

Sir EDWARD BRADDON: Hear, hear.

Mr. SYMON: It is not within the power of the judiciary to do so.

Mr. BARTON: It is not in the judiciary's power, as given in this Bill. **But the question whether, what appears on the face of a law is within the provisions of the Constitution or not, is a totally different one, and that question alone the arbiter of the Constitution**

has a right to decide. I desire to adhere to the compromise of 1891. I have been endeavoring to do so against some delegates, who, however, will now find me faithful in adhering to it on their behalf. Where there are matters not matters of procedure-where the effective rights of a [start page 585] component part of the Constitution are involved-the Constitutional principle is that the arbiter of the Constitution-must be allowed to protect those rights**. You have not it so in England because the Parliament there is Sovereign, but you have it in the Federal Constitution, because you have a Parliament that is only a part of the Constitution, and that Constitution must protect those provisions of the Constitution which are threatened with infringement.** I shall resist all amendments in these respects because I consider the principles, which are altogether principles of justice, ought to protect Parliament in the exercise of its internal powers, and protect the people as to what is on the face of a law a breach of the Constitution

END QUOTE

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It should be understood that the federal Parliament and the State Parliaments are "constitutional Parliaments!

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Hansard *14-9-1897* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE

The Hon. A. DOUGLAS: You have had more than you ever gave; therefore, you need not complain. In 1841 Victoria formed a part of this colony, and then what happened? It found that it was badly represented in New South Wales. It was determined in some way or other to show its opinion of New South Wales and the Government of New South Wales. What did it do? Earl Grey, the Secretary of State for the Colonies, was elected to represent Melbourne in the Legislative Council of New South Wales. Shortly after that year they had a constitution of their own, **New South Wales had constitutional government, and Tasmania had constitutional government.**

END QUOTE

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Hansard *10-3-1891* Constitution Convention Debates

QUOTE

Dr. COCKBURN: There have been only four amendments in this century. The hon. member, Mr. Inglis Clark, is a good authority on America, and I am sure he will agree with me that out of sixteen amendments only four have been agreed to in this century. All the other amendments which have been made were really amend- [start page 198] ments which were indicated almost at the very framing of the constitution, and they may be said to be amendments which were embodied in the constitution at the first start. The very element, the very essence, of federation is rigidity, and it is no use expecting that under a rigid and written constitution we can still preserve those advantages which we have reaped under an elastic constitution. All our experience hitherto has been under the condition of parliamentary sovereignty. Parliament has been the supreme body. **But when we embark on federation we throw parliamentary sovereignty overboard. Parliament is no longer supreme. Our parliaments at present are not only legislative, but constituent bodies. They have not only the power of legislation, but the power of amending their constitutions. That must disappear at once on the abolition of parliamentary sovereignty. No parliament under a federation can be a constituent body; it will cease to have the power of changing its constitution at its own will. Again, instead of parliament being supreme, the parliaments of a federation are coordinate bodies-the main power is split up, instead of being vested in one body. More than all that, there is this difference: When parliamentary sovereignty is dispensed with, instead of there being a high court of parliament, you bring into existence a powerful judiciary which**

towers above all powers, legislative and executive, and which is the sole arbiter and interpreter of the constitution.

END QUOTE

Again;

QUOTE:-

No parliament under a federation can be a constituent body; it will cease to have the power of changing its constitution at its own will.

END QUOTE

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"Subject to this constitution" means it must be interpreted to the intentions of the Framers of the ***Constitution*** allowing for amendments made with approval by referendums.

With other words, the NSW Colonial Constitution Act effectively became amended by the ***Commonwealth of Australia Act 1900*** (UK) by legislatives powers belonging to all Colonies being invested in the Federation (Commonwealth of Australia) which were specifically listed in the Commonwealth of Australia Constitution Act 1900 (UK).

By colonial referendums this was approved by all Colonies electors.

Therefore, since Federation no State Parliament could amend its own State Constitution as it no longer was a "sovereign Parliaments" but a "constitutional Parliament", as like the Federal Parliament. This means that the State Parliament (as like the Federal Parliament) can only propose to the State electors to amend the State constitution and then the State electors must decide to approve or to VETO this proposed amendments(s).

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Hence, ask which State Parliament since Federation actually pursued this way to amend its State constitution?

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You may find that NSW amended its State Constitution in 1902 but was it with the required approval of the State electors by State referendum?

You find that the State of Victoria purportedly amended its State Constitution without a State referendum in 1975, etc.

Likewise so in regard of any other subsequent purported State Constitution amendments!

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Hansard *14-4-1897* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE

Mr. ISAACS: Would the hon. member mind looking at clause 54 with regard to that?

Mr. CARRUTHERS: My hon. friend, Mr. Barton, forgets that he has already consented to a departure from the principle of the 1891 Bill. If he looks at clause 52 he will find we have amended that clause in the very direction that he objects to amend clause 53. The Bill of 1891 uses the words:

Laws appropriating any part of the public revenue

An amendment has been carried which effects the very purpose which Mr. Barton is contending against now. So that if there is any strength in the contention of the wisdom of the 1891 proviso, the hon. member has given his case away. For the sake of consistency, he should either support the proposal now made or else go back and have clause 52 brought into harmony with clause 53. Mr. Barton speaks of the English Constitution**. That is an unwritten Constitution**, and no court of law has, therefore, any statute to guide it in its interpretation of that Constitution**. But here we have a written Constitution.** In clause 71 I see that-

The judicial power shall extend to all matters arising under this Constitution or involving its interpretation.

My hon. friend, Sir John Downer, smiles, but if these words had not this meaning: that the Federal Judiciary should have the power of construing, I am at a loss to understand what they mean. It says so, and I take the words in cold type rather than listen to arguments based on a Constitution which is unwritten. Mr. Wise says that we may nave the case of a minority overriding a majority, coercing the Senate, and passing laws despite of this regulation. Does not the hon. member know this, and I appeal to this Constitution to support my argument**, that any solitary member, either in the Senate or in the House of Representatives, can immediately wreck a Bill infringing these provisions by drawing the attention of the presiding officer to it.** It is in the hands of any one representative in either Chamber at any stage up to the final stage of that Bill to call attention to the infringement of the Constitution, and to have the Bill ruled out of order. **I may be told that you may have a corrupt Speaker or a corrupt President, who will not rule it out of order, but you are just as likely to have a corrupt Judge.** So far as regards this matter, any one solitary member of a minority-and it would be a very small minority that could not number one-can, by drawing attention to the infringement of the Constitution, have the Bill ruled out of order. Where can there be the coercion of a minority then, when it will be in the hands of the minority to protect themselves by this simple appeal to the Chair? In such a case, I say the Bill will have to pass unanimously, and where it passes unanimously why leave it to the judiciary to wreck that which is the opinion of both Houses of the Legislature?

Mr. WISE: Why have a judiciary at all?

Mr. CARRUTHERS: If it is the sole argument for a Judiciary that we should have such a tribunal to wreck laws made with the approval of both Houses of Legislature, then let us have no judiciary [start page 586] at all. If my hon. friend Mr. Wise wants a judiciary to wreck the work of the Legislature, I do not think the people of Australia will support him in that contention. This clause was never intended, as far as the people have read it, to give effect to the arguments of either Mr. Wise or Mr. Barton. I hope that Mr. Reid will stand to his amendment, and that if he does not move it others will do it. We shall have this point decided by a test division.

Mr. WISE: I would suggest to Mr. Carruthers that the amendment should be rather in this form: instead of saying that no law passed under this section should be inquired into by the Supreme Court say:

No law passed by the Federal Parliament shall ever be inquired into by the Supreme Court.

Mr. REID: **The question just put by Mr. Wise shows the very strange position he occupies. He does not seem to draw any distinction between the case he referred to in America, where the Supreme Court of the United States ruled a Bill out of order on the grounds that it was a violation of the principle of the Constitution as to a principle on which taxation should be imposed, and not a mere case of procedure between the two Houses. It seems to me that too much has been made of this point, which is represented as an attempt to take away from the smaller States their protection. That is a very good catch cry for, an argument, especially from New South Wales, when a speaker is hard up for one. There is absolutely nothing whatever in it, as the Hon. Mr. Carruthers has pointed out, and any member in either House can surely put a simple question to the Speaker to decide the fate of a Bill that is contrary to the provisions of the Constitution. My hon. friend Mr. Barton put a view just now which would wreck**

any Taxation Bill in the world. He said that by the words "Laws imposing taxation shall deal with the imposition of taxation only" in a Bill you can put any number of clauses in there which would have nothing to do with the actual imposition of taxation. If that were so it would mean a rich harvest for the lawyers of the Federation, and I hold the view with others that our finances might be brought into serious confusion thereby. Lately some taxation was imposed in a colony and it was done in two ways-by a Machinery Bill and by a Taxation Bill. Under provisions of that kind you would have the courts of the Federation flooded with applicants for litigation. We do not want the legislation of the Commonwealth to be degraded to that level. If we put in the Constitution a safeguard for the Senate that the Bill shall not be more than is specified here, is the Senate going to be such a decrepit, helpless creature, that, having a constitutional safeguard for its protection, it will be absolutely too blind to see it? Not only that, but they say that every senator from all the States will be so absolutely incapable as to give away one of the safeguards of the rights of the Senate. Unless this Senate that we are about to create is going to be such a despicable object such arguments as those used by Mr. Wise would have no weight. While Parliament is legislating for the people, and when the two Houses have come to an agreement that a certain thing should be law we do not want the High Courts to come into the Parliaments of the country and shipwreck that which both Houses have deliberately passed. With reference to the bogey raised about the referendum, there are provisions in this amendment, which dispose of that argument, because in the amendment I proposed to submit Money Bills should be liable to be questioned until they become law, so that at any time when the referendum is going on, a Bill could be easily questioned on a point of law in the courts. The absurdity of the contention of some is shown in the fact that in America in neither of the two Houses would a glaring violation of the Constitution be called attention to. I say further, if there is so much importance attached to this we must go back and put the clause which [start page 587] safeguards the other House in absolutely the same position. I have no feeling in this matter except a desire that Acts of Parliament, when they become law, should have the force of law and should not merely become food for lawyers. That is my only desire. Anyone who has occupied the position of Treasurer can tell of the loss that might be brought about if, after a policy had been brought into force, perhaps four or five years afterwards, a point is taken on some innocent formal words of the Bill, and the judges are compelled to declare that all of the money collected under the Act during those years had been improperly collected.

Mr. BARTON: Would that justify a sweeping amendment?

Mr. REID: My object was such a simple one that I did not apprehend so much importance would be attached to it. At first blush I thought everyone would be as anxious as I was to prevent the possibility of such difficulties, but I see now that there is a great deal more importance attached to it than I thought. **The importance, I think, disappears when we remember that any member of the House of Representatives, upon calling the attention of the chair to the breach of the provisions, would kill the Bill there, and any one senator, upon drawing attention to the same clause in the Upper House, could kill the Bill there too.**

Mr. WISE: Have you considered the position in America with regard to the Speaker, who happens to bear the same name as yourself?

Mr. REID: The Speaker of the House of Representatives in America is really the leader of a political party sitting in the chair, and surely we are going to draw a distinction

between the Speaker of our House and the partisan officer sitting in the chair there and pulling the wires for the benefit of his party.

Mr. BARTON: Would you let the Constitution rest upon this matter?

Mr. REID: **Clearly no Ministry would bring in a Taxation Bill and allow it to be so amended.** In America they move under a different set of circumstances altogether. As I pointed out, there is a great difference between the procedure as to whether a Bill contains clauses too many or not, and taxation itself in clear violation of the principle of taxation put in the Constitution. I was pointing out that I look upon this merely as a matter of procedure.

Mr. WISE: It is not a matter of procedure.

Mr. MCMILLAN: Is not the amendment to be limited to procedure?

Mr. REID: Entirely as between the two Houses, and that is my only desire.

Mr. WISE: Would not the defect, if there was a defect, under this sub-section appear on the face of the Bill?

Mr. REID: **If it appeared on the face of the Bill, we have to assume first that the Government would bring in a Bill which on the face of it was illegal, and that there would not be one pure soul in the House to call attention to it, and that even the immaculate Senate would not contain an angelic mind that would do its duty to the Constitution. Heaven help the Constitution if it is to be run on these lines! The Upper House will not allow its rights to be violated if they are put in the Constitution, and the object of the amendment is simply to prevent an unfortunate accident, which would happen over and over again in Acts of Parliament, from rendering an Act after it has received the Royal assent, and which might be, perhaps, the deliberate policy of the country, accepted by vast majorities in both Houses, invalid. I would not have proposed this amendment in face of the serious debate it has provoked. I proposed, if no member of the Convention has a previous amendment:**

To insert at the end of sub-section 4: "Money Bills shall not be liable to be called in question in respect to any breach of the provisions of this section after the same have become law."

[start page 588]

That would allow any exception to be taken to a Money Bill till it has received the Royal assent, after which no such question shall be raised.

Sir GEORGE TURNER: We have devoted considerably over an hour to this discussion.

Mr. REID: Perhaps Sir George Turner will allow me, and in order to get this matter tested, I will apply the very same test which was applied to clause 52. I propose:

Before the word "laws," in sub-section 2, to insert the word "proposed."

I shall thus challenge the sense of the Convention in exactly the same manner as in the previous instance.

Sir GEORGE TURNER: **We have been discussing this matter for considerably over an hour, and if we take as long over all questions we shall be here for some weeks, and**

it seems the more we discuss it the more confused members will undoubtedly become in connection with it. I do not propose to add to that confusion to any great extent. I think there is some misapprehension with regard to the defects which might arise under this subsection. It may be that if the Parliament did not follow out the course here laid down the Federal Court would have the right to declare the whole law to be void. Well, that would never do. It would never do after a law had been passed voluntarily, without any compulsion such as Mr. Wise speaks of, the Parliament fully believing that they were doing everything right, and the Treasurer had acted on it, and collected a large amount of revenue, for him to find, because some small slip had been made, that the law was absolutely void. At the same time we do not want it to appear that in making any alteration we desire to, take away from the smaller States any protection which they may think they have under this. No one desires to give any ground for it, and I do not think any alteration we could make would take away the protection, because the protection is undoubtedly with the Senate. The only difficulty which might arise would be that the point in question might be overlooked. Therefore if we would lay on somebody the duty of certifying before the law passes that it was in compliance with this section we could give all the protection required.

Mr. O'CONNOR: **Then you would leave it to the person who certifies to interpret the law.**

Sir GEORGE TURNER: **No; when the law has once passed the court should not have the liberty to interfere, and say on some small question of procedure that the law should be upset I would leave it to the Senate.**

Mr. REID: They will take care of themselves.

Sir GEORGE TURNER: Let it be the duty of the President for the time being to certify that the proposed law was in compliance with this section. It will then be his duty before putting in such law-

Mr. REID: The Senate could make a Standing Order to meet that.

Sir GEORGE TURNER: No; in order to prevent any doubt arising among the representatives of the smaller colonies that they might be injured, I would suggest to Mr. Barton to adopt that mode, and make it appear that, **while the Court had no right to interfere with the Act when it was once law, yet before it became law every opportunity should be taken to see that that section is not infringed.** I would leave it to the President of the Senate to certify, either by himself or on a resolution of the Senate, that the proposed law was in accordance with this section, so that there would be a statutory duty on him to consider before the law was passed that there was no infringement of it.

Mr. GORDON: It might be passed in one, sitting.

Mr. BARTON: Would you prevent the Governor giving his consent without the certificate?

[start page 589]

Sir GEORGE TURNER: Something like that. I quite agree with the smaller States that there should be some provision by which they could not be injured, but I feel very loth to go the full length of giving the court power to interfere with the Bill when it is passed.

Mr. MCMILLAN: Perhaps a bewildered layman might mention what I understand to be the exact position. I understand if we add the word "proposed" before "laws" it would then

be really a matter of procedure, and that the introduction of the word "proposed" before "laws" would make it practically a Bill, and that otherwise the question of whether the measure is constitutional could not be dealt with.

Mr. BARTON: It will prevent the High Court from inquiring into it.

Mr. MCMILLAN: According to the amendment proposed, it would prevent any mere slip of procedure from making invalid an Act which may affect the whole country and its financial operations, **but nothing which we may enact with regard to procedure will prevent any suitor from going to the High Court if the Act is essentially unconstitutional.** That is the way I look at it, and it seems to me that either putting in "proposed" before "laws," or adding an amendment somewhere or other making it clear that no mere slip of procedure can invalidate the law, would meet all the difficulties.

Mr. BARTON: This is not proposed to cover mere slips, but everything.

Mr. MCMILLAN: I do not think that could be the intention. We are attempting to legislate for a very limited possibility. **You will get disputes so long as there are lawyers in the world. I do not know whether Federation will do away with lawyers.**

Mr. BARTON: Not until merchants will cease to quarrel.

Mr. MCMILLAN: If so it would simplify our arrangements very much. At the same time it does seem that there ought to be something introduced to prevent the law being put into operation for a mere breach of procedure, if there is such a chance.

Mr. SYMON: There is no chance.

Mr. MCMILLAN: I do not suppose that any ordinary moral layman would do it, unless he were instructed by a less moral lawyer.

Mr. HIGGINS: There seems to have been infused in this debate an amount of spirit, and I am going to incur the risk of the ordinary peacemaker. There has been no reference to the common-sense provisions which are put into all articles of association with regard to digressions from the prescribed routine. On the one hand, there is no doubt that there is no covert design to injure the smaller States and their representatives, by attempting to impose upon them laws which are not in the ordinary course as prescribed. I think the members for the minor States will accept that assurance. But, on the other band, there is no desire on the part of the minor States advocates to give the lawyers more work than they can possibly help. But there is no doubt that these sub-sections 2 and 3 of section 53 are calculated to lead to questions in the courts which ought to be avoided if possible. Take sub-section 3:

Laws imposing taxation, except laws imposing duties Customs on imports, shall deal with one subject of taxation only.

What is meant by one subject of taxation? Suppose a land tax is imposed, you tax posts and rails. That may be argued not to be a law dealing with one subject. There are questions which will certainly arise which will be fruitful in litigation unless we take great care. Therefore, I am in thorough accord with the desire of the Premier of New South Wales to have some clause which will obviate the bringing of these trivial matters into the court, and under which a great wrong will be done on the ground of some trifling breach of the Act. What is done in the case of articles of association? There are in articles of association pro- [start page 590] visions for meetings to be held, for the holding of meetings in a certain manner, and for a number of directors, and so forth. But there is always a clause for any accidental omissions; to comply with the articles is not to invalidate the resolutions of the

meeting. I would suggest this should be done here. All we want to provide against is accident, mere accidental omissions. I would suggest the following:

Any accidental failure to comply with the foregoing provisions of this section shall not invalidate any proposed law to which the Federal Parliament has assented.

Mr. REID: That would make it worse.

Mr. HIGGINS: But I would provide that the failure shall be treated as accidental, in this way. I would go on to add:

The failure shall be treated as accidental if it has not been brought to the attention of the President of the Senate or of the Speaker of the House of Representatives.

Mr. BARTON: This procedure is to be brought before the court by way of affidavit, then.

Mr. HIGGINS: It is a simple matter. The mere fact that you define the accident in this form-that is to say, when no one has brought it before the Speaker or President-is quite sufficient. Even if the word "accidental" were not defined, it is a regular expression used in articles of companies, and there has never been any question of difficulty raised with regard to it. It would be very easy to say that it should be treated as accidental unless some member of either House brings it before the Speaker of the House of Representatives or the President of the Senate. I feel-sure that the experience of companies for many years past is the best experience we can have for dealing with any irregularity of this sort. I do not want to move this as an amendment, but if the honorable the Premier of New South Wales would accept it I would be very glad. It might be better for us to leave it to the Drafting Committee, with instructions that some form of words to carry out this idea should be adopted. I am not prepared to move anything on the spur of the moment, but I feel sure something of the kind I have suggested would be the correct way of getting over the difficulty.

Mr. O'CONNOR: I think it is a misapprehension on this question to say that it is a matter for lawyers, and not of sufficient importance to be considered worthy of a full discussion. But I think it is a matter of the utmost importance, because it is one of the guarantees in this Constitution to the people represented in the Senate. I wish to put it as shortly as possible from that point of view. **The Senate, by section 53, have certain limitations upon their powers. They are not allowed to deal with an Appropriation Bill appropriating the necessary supplies for the ordinary annual services of the year; they are not allowed to amend a Tax Bill; and they are not allowed to amend any Appropriation Bill so as to increase any charges upon the people. That is the limitation which is put upon the power, not only of the members of the Senate, but it indirectly affects the rights of the people of the different States they represent, inasmuch as you have your States represented in the Senate.** That is a limitation on the power of the States, and therefore in that limitation not only the members who represent the States at a particular time, but every member of the States interested has a direct interest in that portion of the Constitution. Now, in order that that right shall be exercised only in the strictest possible way you must surround it with some safeguards, and these safeguards become necessary for this reason, that it is well known where legislation is carried on by two Houses it is a common practice to evade laws of this kind, which are merely laws of procedure, and it is very easy to evade them. **For instance, it is very easy to evade a law imposing taxation by inserting some provision in the Bill which it will be very difficult for the** [start page 591] **Senate to reject, and which would put the Senate in a very awkward position in the public eye if it did reject it, but which at the same time make**

it necessary if they pass it to pass an obnoxious system of taxation. A proposal of that kind is not unknown. Take the next sub-section-

Laws imposing taxation, except laws imposing duties customs on imports, shall deal with one subject of taxation only.

It is not an uncommon thing to introduce a Tax Bill containing a tax on land which might or might not be objectionable, or a tax on income which might or might not be objectionable.

Mr. REID: Where is there a law against it?

Mr. O'CONNOR: I will deal with that by-and-by. I point out that in the absence of a law, and the very absence of a sanction which will enforce the law, provisions for getting over the procedure of the House are very common. The next provision is:

The expenditure for services other than the ordinary annual services of the Government shall not be authorised by the same law as that which appropriates the supplies for the ordinary annual services, but shall be authorised by a separate law or laws.

That is meant to be directed to the provision of tacking which is very often met with in the process between the two Houses. **Tacking to the Appropriation Bill is not a device that is unknown in these colonies.**

Mr. REID: Is it forbidden in this section?

Mr. GLYNN: It is not prevented by this section.

Mr. O'CONNOR: It is not excepted in the way which I will point out now, by making an infringement of this Act a penalty, that is to say, a penalty that the Act which infringes shall be of no validity. It is only in that way that you can ensure compliance with these provisions, **or if you make it so obligatory that if they are not complied with the Act shall be void.** I point out, in regard to these three different matters, that these are ways in which proposals of this kind between the two Houses are affected. It is said that is only between the two Houses. In any question between two Houses you will always be brought face to face with the condition of things which exists between the two Houses now. A law which may be introduced in violation of one of these sub-sections maybe believed to be a violation by the Senate, and thrown out on that ground, and be sent back. It may be sent up again by the House of Representatives, and so by that way you have a question which, instead of being settled, becomes a matter of contest between the two Houses. Another matter of difference between the two Houses we know. It is where one House happens to take an unpopular view of a question-a view which for the time being is not the view of the majority of the people. We know it is easy to bring the pressure of the majority of public opinion on one House for the purpose of obtaining a violation of the law. This is not intended to be a protection to the House or the Representatives of the House, but to the States represented in the House; that no matters of tactics between the Houses, or no playing off of public opinion by one House against another, shall ever take away the protection embedded in the Constitution for the States. I have heard of the argument of the inconvenience of laws being upset on account of some invalidity being discovered-some trifling invalidity, perhaps. I say you must submit to that inconvenience if you wish to enter a Federal Constitution. **The very principle of the Federal Constitution is this: that the Constitution is above both Houses of Parliament.** That is the difference between it and our Houses of Parliament now. **The Federal Parliament must be above both Houses of Parliament, and they must conform to it, because it is in the charter under which**

union takes place, and the guarantee of rights under which union takes place; and, unless you have some authority for them to interpret [start page 592] that, what guarantee have you for preserving their rights at all. It is very necessary to insert this provision in the Constitution, because if you do not do that then these questions are questions of procedure between the two Houses in which undue pressure may be brought to bear at any time on one House or other for the purpose of vetoing a law and doing injustice to the States represented in that House in the different ways in which the States are represented. As to the inconvenience, there are thirty-two different subjects of legislation here which may be dealt with by the federal authority, and in regard to any one of these if an error is made which takes the law outside the authority which is given to the federal power it is invalid-absolutely void-no matter what inconvenience may follow.

Mr. ISAACS: That is not a rule of procedure; that is jurisdiction.

Mr. O'CONNOR: With every respect, that is begging the question to put that as an argument.

Mr. ISAACS: That touches on State rights.

Mr. O'CONNOR: I admit that. In fact the whole thing is founded on State rights because if your amendment, using the word "proposed," is carried it is a matter of procedure; but if the word "laws" remains it is not a matter of procedure.

Mr. ISAACS: That is what you have done on clause 62.

Mr. REID: Why did the Drafting Committee alter that from the Bill of 1891?

Mr. O'CONNOR: With all respect to that hon. member, the Drafting Committee did not alter that. It was altered by the Constitutional Committee, and I think very properly, because the initiation of a Bill is a different thing altogether from any of these questions. The initiation of a Bill is a matter which does not limit the powers which are given under section 53 to the States.

Mr ISAACS: Surely the initiation of Money Bills gives much more to the liberties and rights of the people.

Mr. O'CONNOR: That goes really into a legal question. The difficulty of dealing with a matter of that kind is the manner in which it has to be raised before a court.

Mr. ISAACS: Same principle.

Mr. O'CONNOR: So long as you have a principle that if a law, on the face of it, is invalid, it is a matter which the Court can decide, the matter of initiation is not a matter of that kind. The principle involved here is exactly the same principle involved in the question decided in America as to the uniformity of taxation laws. **The populations of the States had a right to insist that no tax which was not uniform should be imposed.** And no matter what the rights of the Senate, for the time being, that was the protection in the Constitution against any action which might be taken, whether with the consent of the Senate or without. **I ask the Committee to adhere to the proposal in its present form, not because it is a matter of protection to the Senate or the other House, but because it is a matter of protection to the States that have entered into this union that that limitation which is placed upon their power of amending a certain class of Bills cannot be infringed or enlarged by the adoption of any ordinary tactics which may be used under our present Constitution between the two Houses.**

Mr. SYMON: I do not wish to detain the Committee more than a moment or two, but I feel I ought to set myself right in regard to this proposed amendment. In doing so I wish, as I have already done personally, to express my regret that perhaps it was owing to a suggestion of mine that Mr. Reid's amendment assumed the shape it did. I accept any responsibility on that score, but I hope he will forgive me if I am unable to follow it up by voting for the amendment. I am, in this instance, an illustration of the value of discussions of this sort, and I desire to express my in- [start page 593] debtedness to Mr. Wise and Mr. Reid for their arguments, which have satisfied me it would be exceedingly unwise and dangerous for us to introduce this amendment in this clause. I rather come back to my original view that, substantially at least, the provisions of this section are intended as provisions of procedure. So far as they are provisions of procedure, Mr. Reid has shown conclusively that we have absolutely nothing to fear, because the House of Representatives may be relied upon, and the Senate may be relied upon to see that the ordinary preliminaries and the ordinary technical provisions are observed before the Bills are finally dealt with. I was led away by a consideration of the inconveniences that might flow from a taxation or some other Bill being declared invalid by the High Court some time after it became law. But exactly the same inconveniences may possibly arise from any single Bill passed under the thirty-five heads of legislation with which the Federal Parliament will have to deal. Therefore it seems to me that, whilst undoubtedly inconveniences may arise, still these inconveniences do not militate against a very salutary power which as a Federation we propose to vest in the High Court of the Commonwealth. **I will only add this-without going into the details applied in so masterly a way by my hon. friend Mr. O'Connor, when he pointed out the real safeguard in relation to these sections which the High Court might be at the instance of a suitor-that we must remember if we seek to derogate from the power we vest in the High Court of dealing with all laws which any citizen of the Federation may claim to be unconstitutional,** we are not invading State rights, because it is not a question of small States or large States, but it is a question of the liberty and rights of every subject throughout Australia. It is the subject that is concerned in this; it is not the body politic, but every taxpayer-every individual who may be assailed either in his liberty-

Mr. REID: But if both Houses are favorable to the taxes, is there anything in that?

Mr. SYMON: That does not matter. The moment you override or coerce the Senate-

Mr. REID: Coerce! Why, one man has only to get up and point out that it is contrary to the Constitution.

Mr. SYMON: Suppose you have a majority in the Senate willing to override the law, how is the minority to be protected, how is the State represented by that minority to be protected, and every dissentient **citizen** in any of the other States, large or small? But the point I wish to call the particular attention of the Committee to is that if we seek to prevent redress being obtained in the High Court with regard to the constitutional position of any law, we are invading one of the first principles underlying any system of Federation. My hon. friend Mr. Carruthers seems to forget that we are dealing with Federation when he talks about a High Court to wreck the work of legislation. First of all, that is an inappropriate expression. If he means we are constituting a High Court to decide whether the laws are constitutional or not, undoubtedly we are. If not we had better sweep this Federation away at once-we are here on a wild goose chase. Were we to adopt the amendment, I do not see that it would have the effect which Mr. Carruthers urged, if it were hedged round with such limitations as Mr. Higgins alluded to; but if we pass this amendment in its present form we run the risk of making Parliament, in regard to Money Bills, the judge of whether it is acting within the Constitution or not. If we do that we are

striking at the root of a just Federation, and it is from that point of view, which was brought very clearly before the committee by my hon. friend Mr. Wise, that I feel it impossible to vote for an amendment which at the first blush seemed to get over some [start page 594] practical difficulty. I think we had better omit it altogether. If we omit it we shall be acting consistently in this: that we shall be making no exception to the power of the High Court to interpret the law of the Constitution, and declaring whether an Act of Parliament is contrary to that or not. Parliament is not supreme, and the very essence of the Federation is that it should not be so. Parliament, as far as constitutional questions are concerned, is under the law, and it must obey the law. If we make an exception in regard to Money Bills we had better make an exception in the case of all other Bills which may arise under the provisions of clause 51, and thus sweep away the High Court. I thought that we were all, agreed that the reason for the establishment of the High Court was a salutary one, and that it would determine constitutional law and practice. We must all remember that at one portion of the history of England a question of liberty was raised by a humble individual named John Hampden, who put forward a point on the subject of taxation. We do not know but that we may have John Hampdens in Australia raising questions of liberty; it would be well to leave the High Court of Australia to deal with such matters as that.

Mr. Reid's amendment, by leave, withdrawn.

Sub-section 2 as read, agreed to.

Sub-section 3.

Sir GEORGE TURNER: I desire to draw Mr. Barton's attention to these words in the subsection:

Laws imposing taxation, except laws imposing duties of Customs on imports, shall deal with one subject only.

That would require that every time you desire to deal with the duty of excise it should be done by a separate measure. That cannot be the intention. It would very often happen that the question of duty of Customs and the duty of excise would have to be discussed together, and that it would be impossible to decide what ought to be done with regard to the one unless you know what you will do with reference to the other. If we are to deal with the large number of items included in a Customs Bill, I fail to see why we should not be able to include in the same measure all duties of excise. I would ask the hon. member to consider the matter, and either make an amendment or give us a reason for the retention of the words as they stand.

Mr. BARTON: The reason why it has not been done so far is this: Sub-sections 2 and 3, in consideration of the fact that laws imposing taxation are not subject to amendment by the Senate, have been put in the form of protecting the Senate from the coercion which might be involved in a taxation measure having added to it something which was not a taxation measure**, or a taxation measure having two distinct subjects of taxation brought into the measure together.** That protection is of course a counterpoise to preventing the Senate from amending such measures. If what I might call the other side, in a genial way, had their way this morning, it would be a question whether protection of this kind remains in the compromise of 1891. The hon. member raises an important point, and that is whether there is to be permission in the Customs Bill to have a corresponding excise. That is a matter I must leave in the hands of the Convention entirely**. For myself, I have no strong feeling about it, except that we ought to keep as strong and inviolate as possible those protections which are afforded not only to the Senate, but to the people themselves** to consider what under the Federal Government is involved in so separating the subjects of

taxation, and, as the next sub-section shows, the subject of appropriation, as to enable the Senate to deal with them separately. The object of this, of course, is that inasmuch as amendment is prevented the subjects should be so divided that no two subjects could come before [start page 595] the Parliament together as matters of taxation, so that where the Senate cannot amend they have the right of veto, and veto as far as possible in detail**. Of course they cannot have Customs or excise law in respect of so many items** so that there could be veto in regard to each, because veto in detail with all of these would mean interference with the financial policy of the whole Government. **But it has been unanimously agreed in respect of taxation that the Senate should have a veto, and the object of this clause is to divide into their proper categories all laws imposing taxation**, so that that veto may be exercised without interference and as a protection to the smaller States and a protection of those rights which every Second Chamber ought to have, whether it is the Senate of a Federation or a House made under the ordinary Constitution. That is my object, and I am sure that the object would be infringed if the provision were to allow the question to be considered in the same Bill. My position is this: that until I see very strong reasons for doing otherwise it is my intention to adhere to the terms-I do not want to bind anyone else-but I desire to adhere individually to the conclusions of 1891, because I think they are the best basis upon which Federation can be secured. I think very strong reasons should be adduced to allow the two subjects of taxation to be introduced into the one Bill, and we should adhere as nearly possible to the Bill of 1891. Most of us contend that the compromise or the conclusions of 1891 should be adhered to, and as we have succeeded in our argument in showing that they should be adhered to in respect of one portion of the clauses I think we should stick to them in regard to the other.

Sir EDWARD BRADDON: Although I entirely agree with the object of the clause in one respect, I think it fails in the object intended to be given to it, and that is in the exception as to laws for imposing duties of Customs. I question whether that exception is sufficiently and carefully safeguarded. There is no doubt as an ordinary layman reads it that under the laws imposing duties of Customs or on imports they can go on and impose taxation in any other form. There is nothing to prevent the imposition of excise duties, and there is nothing to prevent the law seeking to impose land or income taxes or anything else, and therefore I hope, when the clause comes to be finally accepted, as I trust it will be, that some limitation will be placed upon the exception in regard to duties. I think we all understand what is meant, that a Bill imposing duties may necessarily have to deal with any number of subjects liable to such duties, but as the subsection is worded it will go much further.

Mr. ISAACS: An instant before Sir Edward Braddon called attention to this matter I was directing Sir George Turner's attention to the same point. The intention is perfectly plain to us at all events, but what may be done and what in future times may be contended is not quite so clear. The sub-section reads:

Laws imposing taxation shall deal with one subject of taxation only.

Bills which impose duties of Customs on imports are entirely excepted from that provision.

Mr. GLYNN: We can amend it.

Mr. ISAACS: Yes; and I think it should be made to read:

Laws imposing taxation shall deal with one subject of taxation only, provided laws imposing duties of Customs on imports and of excise may deal with more than one item.

Sir WILLIAM ZEAL: I suggest that the best plan would be to postpone the clause afterwards, and recommit it in order that the draughtsmen may re-cast it. We have now been discussing the clause for a couple of hours, and have made little progress.

Mr. REID: I assure my friend Sir William Zeal that the matter raised by Sir George Turner is very important.

[start page 596]

Sir WILLIAM ZEAL: Refer it to the draughtsmen.

Sir GEORGE TURNER: It is not a question of drafting.

Mr. REID: I would point out to Sir William Zeal that recommitting the clause might mean fighting the matter all over again, and we want to get rid of it altogether. The point raised by Sir George Turner is an important one. There may be a Customs Bill introduced, and it may involve duties of excise on a large number of goods, and at present each excise duty would have to be included in a separate Bill, and then a most unfair thing might be done. Ten duties might be proposed, and eight, because they were popular, might be agreed to, and the remaining two thrown out because they were less popular. If you have the Customs as a whole you must have the excise as a whole.

Mr. FRASER: Surely duties of Customs on imports should be dealt with at the same time as excise. That is only common sense, and might be agreed to at once, as we have been wasting a tremendous lot of time

Sir GEORGE TURNER: I hope Mr. Barton will not mind me proposing to alter the sub-section, as I know the difficulty of interfering with drafting, and I do not like to have my own drafting interfered with. I will move:

That after the words "Customs on imports" there shall be added the words "and excise."

Mr. MCMILLAN: Do you mean that they should be in one Bill or two Bills?

Sir GEORGE TURNER: I think that they should be in one Bill.

Mr. MCMILLAN: Then you are making it necessary that there should be one Bill of Customs and excise combined.

Sir GEORGE TURNER: I would not go that length.

Mr. WISE: I think the sub-section might be made to read:

Laws imposing taxation shall deal with one subject of taxation, and laws imposing duties on imports shall deal only with duties of Customs and excise.

The difficulty my friend Sir George Turner suggests is that if you add laws imposing duties on exports and laws imposing duties on excise you leave it this way: that you would have to have as one Bill a Bill imposing duties on exports, and you would have to have another separate Bill imposing duties on excise. I understand my friend may do this where a Customs tariff is introduced and there are a number of balances in the same tariff at the same time-Customs duties with excise duties.

Sir GEORGE TURNER: If necessary.

Mr. BARTON: Do we do that in our ordinary legislation? We bring in a separate Bill.

Sir GEORGE TURNER: We do not.

Mr. BARTON: I do not think it is the practice in New South Wales to go into Committee of Ways and Means, both for Customs and excise, at the one, time; I think that is the Flame in South Australia. It may mean a very important question to both Houses whether the Customs duties should be in one Bill, and the duties on excise in another, or whether they should both be in one Bill, and it is a question after all whether we should depart from the arrangement here. I will put this case. It is easy to balance the duties on Customs and duties on excise in one Bill if you do not regard certain contingencies which may arise, but if you have another House to deal with and you have regard to the policy of taxation, then, in a House to which you have conceded the right of veto, it is a different matter**. If you include several subjects in one Bill you will find the Senate ready to grant an excise on beer, but not on tobacco, and it will not have the power to provide for that excise on beer, without assenting to that on tobacco, inasmuch as the power of amendment is taken from it. It would not have an opportunity of declaring itself on this, inasmuch as these were placed in a sort of balance.** So it remains a question whether these [start page 597] duties of excise should not be in one Bill and Customs in another, and also whether-

END QUOTE
And
QUOTE

Mr. GLYNN: Yes. The clause is open to that construction. Look at section 52; it is there provided that you cannot originate a Bill in the Senate whose main object is the appropriation of supplies; but supposing you have a Bill whose main object is something else, but whose collateral or minor object is appropriation, what is to prevent you from originating that in the Senate?

Mr. BARTON: I do not quite follow my hon. friend's objection, but I take it to be this the sub-section only forbids expenditure for services other than the ordinary services of the Government in the Appropriation Act, and that inasmuch as those extra services are the only ones forbidden, things which are not extra services, but independent matters of legislation may be included in the Appropriation Act. The answer to that is that the Appropriation Act can only include appropriation.

Mr. GLYNN: Where is that provided for?

Mr. BARTON: It need not be provided for, as far as I can understand. I think there are understandings about these matters. When we speak of Bills of this kind, and that to which the Convention has so long been accustomed, it would be idle and endless if we endeavored to give definitions to all these matters, which would preclude the possibility of any objection being raised.

[start page 606]

The things which are ordinarily understood are defined by an Act of this kind, and inasmuch as the Appropriation Act is a law for the appropriation of the neecessary supplies for the ordinary annual services of the Government, and inasmuch as that is a proposal of legislation which is thoroughly understood, it would be perfectly beside the question to contend that that Act could include services beyond the ordinary annual services of the Government**. It is conceded that it cannot include money services beyond the ordinary services of the year**, and inasmuch as it is a Money Bill it would be perfectly absurd if it were attempted to be reasoned before a Court of Justice-if it ever came there-that, as the only prohibition upon the extension of the Appropriation Act is that it cannot go beyond the ordinary annual services, therefore there is an implied permission given to include in the

Appropriation Act matters of legislation which have nothing to do with monetary matters at all. If the hon. member will look at section 53 he will see that, after providing that the Senate shall have equal power with the House of Representatives, there is a preclusion of amendment against the interests of the people in the way of increased taxes or appropriation. The Appropriation Act is fairly defined in the clause. One must read the first part of clause 53 with the sub-section to which the hon. member refers. It is clear, therefore, if you read the two together, that the one Bill is to provide for the ordinary annual services of the Government, and that beyond the ordinary annual services of the Government, which are all matters of expenditure, there must be another Bill.

Mr. GLYNN: The way I read this section-and I think if hon. members look into it closely they will agree with me-is that in the light of clause 52 you can introduce into the Senate an Appropriation Bill, as long as you put in the same Bill matters of general legislation whose importance overbalances the importance of the Appropriation portion of the Bill. I would ask hon. members to read section 52. It says:

> Proposed laws having for their main object the appropriation of any part of the public revenue, or the imposition of any tax or impost, shall originate in the House of Representatives.

I take the rule of construction to be this that you cannot have an affirmation without an opposite-an implied exception without something not excepted-and in these clauses mentioning certain things for their main object there must be something the opposite of that. You may have Bills with appropriation for their main object, and Bills with appropriation for their minor object, and something else for the main object. It would, therefore, be possible to initiate in the Senate appropriations which are joined with matters of big general legislation. That was never intended, but it is possible. Further, under section 53, you confer a power upon the House of Representatives of introducing matters obnoxious to the Senate in conjunction with an Appropriation Bill, and of sending up at the latter end of the Session the Appropriation Bill with this obnoxious matter in it for acceptance or rejection by the Senate. You can, under the necessity of passing the general supplies, force the hands of the Senate to accept a policy they do not believe in. This is the history of legislation in the colonies, particularly in Victoria, but I am sure it was never intended by the Committee that anything of the sort should be done. I would ask the Leader of the House, Mr. Barton, if there is anything in this section to get rid of the implied effect of section 52? He says that in the Appropriation Bill matters appertaining **to the annual supplies** only can be dealt with. Section 52 speaks of-I will read it again:

> Proposed laws having for their main object the appropriation of any part of the public revenue, or the imposition of any tax or impost, shall originate in the House of Representatives.

You may therefore have a Bill which is an Appropriation Bill in a subsidiary or secondary sense, and dealing as its main object with mattters of general legislation, If that is go you may [start page 607] force the hands of the senators into accepting a matter of general policy, or rejecting through incapacity to amend the Bill altogether.

Mr. DEAKIN: Is there not set out practically a definition of the Appropriation Bill in the several sub-sections of clause 53?

Mr. GLYNN: I think there is no implied limitation of its application to Bills appropriating revenue, or which excludes the power of joining other matters.

Mr. DEAKIN: Does it not speak of appropriating the necessary **supplies for the ordinary annual services of the Government**?

Mr. GLYNN: That is not a definition limiting its general purport, but excludes the joining to two classes of supplies.

Mr. BARTON: Did you ever hear of the House passing a resolution after the Committee of Ways and Means has sanctioned the expenditure, taking upon itself the responsibility of amplifying that resolution to put other matters into the measure except-

Mr. GLYNN: I think the resolutions generally apply to supplies, but do not exclude inclusion in a Bill with other matters.

Mr. BARTON: I think the hon. member is right in one sense and not in another. The Committee of Ways and Means carries certain resolutions, which are received and read a second and third time, and upon which the Bill is founded. Did the hon. member ever hear of a Bill founded upon these resolutions that went beyond them?

Mr. GLYNN: Whether I did or not, my knowledge does not limit the possibility of things. I know it would be possible after these resolutions were passed to introduce a Bill dealing with the matter of the resolution and general legislation as well. No resolution would be required to the latter. Is that not possible? I move to cure this by adding to the end of sub-section 4 the words;

And no law appropriating any part of the public revenue shall have anything but such appropriation for this object.

Mr. BARTON: **What is the ordinary parliamentary process in these matters? I cannot conceive of the Parliament of the Commonwealth doing other than accepting the ordinary process, and if we do not conceive of this we had better not have these clauses at all.**

Mr. ISAACS: We would have to make a code.

Mr. BARTON: **As my hon. friend puts it, we should have to make a code. How is the Appropriation Act brought about? After a message from the Governor recommending that provision be made for the ordinary annual supplies the House resolves itself into a Committee of Supply, and then it passes its estimates, and after these estimates are covered by the ordinary resolutions, at a later stage of the session the Appropriation Bill is brought in. That Act cannot cover anything but these matters which have in the ordinary estimates been passed.** How can the hon. member's argument apply in such a case. If the ordinary process is observed, and which we agree must be observed, or else this machine which we are constructing will not work, then you will have the estimates passed in a more or less mutilated form and covered by the Appropriation Bill, which covers nothing more nor less than these estimates. If that Appropriation Bill is brought in framed on the estimates, how can the question arise. It cannot possibly arise, and I do not think we need waste our words in discussing it. **The question is so unsubstantial, I say it with respect, and of so remote a character, that I think we had better leave the matter as one of ordinary common sense.**

Sir GEORGE TURNER: Question, question!

Question-To insert at the end of subsection 4: "And no law appropriating any part of the public revenue shall have anything but such appropriation for this object"-put and negatived.

[start page 608]

Sub-section 4 as read agreed to.

END QUOTE

And

QUOTE

Clause 54.-**It shall not be lawful for the States Assembly or the House of Representatives to pass any vote, resolution, or law for the appropriation of any part of the public revenue, or of the produce of any tax or impost, to any purpose which has not been first recommended to that House by message of the Governor-General in the Session in which the vote, resolution, or law is proposed.**

Mr. REID: I think we should make it quite clear if it is really to be provided that Money Bills, Bills appropriating revenue, or the produce of any tax or impost, are to be introduced in the Senate.

Mr. BARTON: Perhaps my hon. friend will allow me to explain this clause. This was inserted in consequence of the carriage of an amendment in the Constitutional Committee, as you will no doubt remember, sir. Instead of the clause relating to Bills appropriating public money, it was altered so as to refer to Bills having for their main object the appropriation of public money. The result was that, as a different class of Bills would be introduced into the Senate, it was thought necessary that a message must also be addressed to the Senate. It is desirable that these words should be retained; otherwise it would be possible for the Senate, or any members of the Senate, to initiate Bills dealing in a very large measure with the financial policy of the Government, notwithstanding that they might deal first with matters of policy, and incidentally only with matters of appropriation. It would be possible for them to deal with them without any message, and to my mind it is necessary that there should be a conservation of the powers of the Executive in this matter, and therefore it should rest with the Executive alone to bring down a message. For that reason I am quite sure hon. members will agree that this provision should be retained.

Mr. KINGSTON: Would it not be well to alter this section to make it correspond with section 52 in its altered form Clause 52 we have extended **to apply to the appropriation of public money from whatever source derived, including loan funds.** I think that a similar extension should be made in the provisions of section 54, so as to harmonise the two. As one section has been extended I suggest that the other should be extended.

Mr. ISAACS: I would draw hon. members' attention to that and one or two other things in connection with this clause. The insertion of the word "moneys" has occurred since we have been sitting in this Committee. I would [start page 612] like to call attention to the necessity of making the language uniform throughout these sections. In clause 52 undoubtedly it will be public revenue or moneys, but it does not add the expression "or of the produce of any tax or impost." While that is being done I would also draw attention to clause 79. The expression there is "**one consolidated revenue fund**." Now that seems to be the term which is most in consonance with our colonial Constitutions, and Mr. Barton might consider the advisability of having one uniform expression which would comprehend the necessary term in all these clauses. I would also draw attention to the position of the word "law" in the second line of clause 54. That should be "proposed law," or something of that kind. I observe that the Drafting Committee have to a large extent taken advantage of the criticism of Mr. Bourinot in his pamphlet commenting on the inexactness in the language of the Bill of 1891 in certain clauses. I refer particularly to the next clause, in which we find the expression-"proposed law passed." Mr. Bourinot made some keen observations on that, and the Drafting Committee have to some extent followed that, but

they have not in all their conclusions, and this clause is one case in which they have not. **He has pointed out the obvious fact that one House does not pass a law, and that it is not law until it has received the Royal assent, and to speak of it as a law until it has is wrong.**

Mr. BARTON: The best place to put it in would be to say:

To pass any proposed vote, resolution, or law. That would be almost the best English.

Sir GEORGE TURNER: No.

Mr. BARTON: The word "proposed" would be the governing word.

Mr. ISAACS: They can pass a vote, and they can pass a resolution, **but a House cannot pass a law by itself.** That same observation would apply to various other sections-in both portions of clause 55. In the last line of the first sub-section the word "law" is wrong.

Mr. BARTON: I do not think it is wrong there, because "the law," means "the proposed law."

Mr. ISAACS: It has been altered in other portions.

Mr. BARTON: I do not think we need trouble about legal verbiage. "The law" means the law which has been mentioned before.

Mr. ISAACS: The alteration has been made in some sections; but there are some portions in which it has not been made.

Mr. BROWN: Perhaps one of the observations of Mr. Isaacs might be met by using the word "consider" instead of the word "pass." That part of the clause would then read:

It shall not be lawful for the Senate or the House of Representatives to consider any vote, resolution, or law, for the appropriation of any part of the public revenue.

Mr. ISAACS: That would not meet it.

Mr. BROWN: I make the suggestion because, if I recollect rightly, it is provided in the Standing Orders of the Tasmanian Parliament. No one can there propose a vote for a sum of money or for expenditure of any kind unless it has been first recommended by the Governor. They not only cannot pass, but they cannot consider it.

Mr. BARTON: I am not quite sure, upon such consideration as I have been able to give it, whether that would be an improvement. I think there would be many cases in which the proposed vote, or resolution, or law would thus fail of accomplishment, simply because of the want of a message, which message might be sent at a late stage of the consideration of a question. **I understand that in the House of Commons the ordinary practice is for a Minister to state that the resolution or vote is with Her Majesty's consent, but that the ordinary message from the Crown can be brought down at any time before the question "that the Bill do now pass" is put.**

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Mr. KINGSTON: The same thing obtains here.

Mr. HIGGINS: In Victoria, too.

Mr. BARTON: In New South Wales the practice is more strict; but I have always thought that the strictness of that practice is not really a compliance with our Constitution Act.

Sir JOSEPH ABBOTT: In New South Wales the Act says "to originate."

Mr. BARTON: **That is quite true; I had forgotten that.** I have always thought that the practice in New South Wales has been a perplexing and hampering one. **I think it is very much better to make the law read as it is, that the passage shall not occur until there has been a message.** There are many circumstances under which a message might not be obtained by a Government, although they might find it necessary in an emergency to propose a vote or resolution. **So long as the Queen's assent is given to that proposed procedure by message before the final act is taken of carrying it into law, the prerogative of the Crown is sufficiently guarded.** And if we try to apply restrictions of this kind, so as to hamper the very origination of matters, we are extending the application of the prerogative of the Crown, instead of really exercising the popular right, and then applying that prerogative to the effectuation of the popular right.

Mr. REID: You will have to knockout one word in this clause, or else the same trouble will exist.

Mr. BARTON: I will give an instance. It does happen, and it has happened within my Parliamentary experience several times, that a point has been taken in Committee of the whole during the passage of a Bill, where it has been discovered before anybody bad thought much about it that an expenditure was involved. Under our practice, where we have the word "originate" instead of the word "pass," the Bill has been ruled out of order, the Order of the Day discharged, and the Bill thrown under the table Under the words we have here such a contingency could not occur, because until the very passage of the Bill it would be within the competence of the Ministry of the day to bring down a message which would authorise it.

Mr. REID: The clause says:

Which has not been first recommended.

You will have to leave out one word there.

Mr. BARTON: **I have that word clearly in my mind, but the word "first' relates to the word "pass." You cannot pass a thing which has not been first recommended; that is first recommended before you pass it.**

Mr. SYMON: Precisely.

Mr. BARTON: **With regard to a vote or resolution, it would be necessary to have a message before you pass such vote or resolution; with regard to a Bill, you must have a message before you pass the Bill. This clause gives greater liberty to Parliament than the restrictive application proposed, and I am therefore entirely in favor of retaining the words of the clause.** Mr. Isaacs has raised a question with reference to "proposed law."

Mr. ISAACS: I do not like the words "proposed laws," because it has a technical meaning in other parts of the bill. The word "Bill" ought to be there.

Mr. BARTON: I do not propose to alter without very good reason the phraseology of this Constitution Bill to which we are accustomed. A Bill is a proposed law until it becomes an Act.

Mr. ISAACS: **It is not a law until both Houses have passed it and it has been assented to by the Queen.**

Mr. BARTON: The hon. member has raised the question in line 38, that the word "Proposed" should be put before the word "law." I am not very curious about that, and I have no particular objection to it. The words used in the beginning of the section are "a proposed law." The word "**the**," if I must be very particular, which occurs in the fifth [start page 614] line of clause 55 is generally known as the "definite article," and specifies the thing related to. Therefore, "*the* law" means "the proposed law." But I have not the least objection to it, if my hon. friend thinks there may be the least technical difficulty about it, if he will move in the direction indicated.

Mr. ISAACS: We have not come to that yet.

Mr. BARTON: I have not the least objection to the insertion of the word proposed "before" law."

Mr. ISAACS: We want this Bill to pass in a form that we shall not have any objection to it.

Mr. BARTON: To meet my hon. friend's view, I would like to insert the word "proposed" before "law" in the second line of the clause,

Mr. ISAACS: That is better than "law."

Mr. BARTON: I think the point is really unsubstantial, but I am perfectly content to put in the word "proposed" before "vote" or "law" and I leave it to some honorable member to move one or the other.

Sir WILLIAM ZEAL: It seems to me this difficulty would be met if the words, "or law" were struck out and the word "or" placed before "resolution." I move:

That the words "or law" be struck out.

Mr. SYMON: **I would ask the hon. member Mr. Barton whether it is really worth while to alter it. We know perfectly well what "law" means. You must interpret the words by the context, and if you read the whole section there is no doubt that it applies to a "proposed law," a "Bill," or anything which has for its object the appropriation of public money-**

Mr. BARTON: **That is to say the thing is inchoate until a message is obtained.**

Mr. SYMON: Exactly. There can be no misapprehension of the meaning. It does not mean a law after it has become a completed Act-after the assent of Her Majesty-it is something short of that.

Mr. ISAACS: It is quite immaterial to me what words are used, so long as we understand them, but I do like to see words referring to the same things consistently employed. **We have heard a great deal even from Mr. Symon of the necessity of preserving a distinction between the expression "law" and "proposed law." Here we are using the word "law" when it is understood that it is to be a proposed law.**

Mr. REID: **Will any human being have any difficulty with it to the end of the world?**

Mr. BARTON: **My friend is right to this extent, that he says it is not a "law" till there has been a message, and it has received the assent of the Governor.**

Mr. ISAACS: Well, what objection to put it in? I move:

To insert the word "proposed" before "law" in the second line of the clause.

The CHAIRMAN: I would point out that Sir William Zeal has moved a prior amendment.

Mr. BARTON: I will ask Sir William Zeal to withdraw his amendment to make room for a prior amendment by Mr. Isaacs.

Sir WILLIAM ZEAL: I agree.

Leave given.

Mr. Isaacs' amendment agreed to.

Mr. KINGSTON: **I ask the Committee to consider the propriety of altering the phraseology of section 53 to correspond with the phraesology of section 52, which we made to apply to all public moneys, but here we have limited it to revenue or tax or impost.**

Mr. BARTON: I do not see that there is any serious necessity for making the amendment.

Mr. KINGSTON: Will the Chairman kindly inform me the alteration made in section 52?

The CHAIRMAN: The words "or moneys" was inserted after "revenue."

[start page 615]

Mr. BARTON: I beg the hon. member's pardon. I thought he was referring to another clause altogether. **I quite agree with him that it is essential to bring the two things into conformity with one another. I move:**

To add the words "I or moneys" after "revenue" in the third line of the clause.

Sir JOHN DOWNER: I do not think it is necessary. I do not see that there is any necessity for a message in relation to loan money. I ask the House whether they wish to extend the ministerial authority of the Senate more than is necessary to preserve the legitimate prerogative of the Crown. I venture to submit that it does not.

Amendment agreed to.

Mr. REID: I was going to suggest that it would be very inconvenient to have different sets of things in the two Houses with regard to these messages. As to the procedure of the Senate perhaps **it would not be contrary to this provision if a message were introduced before the Act left that Chamber.** Under this language, if the message came down after the first resolution had been passed the whole measure would be ruled out of order, because it is provided that in the case of any vote or resolution, &c., it shall not be lawful for the House of Representatives to pass any vote or resolution which has not been first

recommended to that House. **Under these words I remember the Speaker of the Assembly of New South Wales ruling a Bill out of order for the reason that the message had not been presented to the Assembly before the stage of going into Committee was reached.** What does "first" mean? If it means "afterwards," then it is all right, and there need be no trouble about it.

Mr. BARTON: I am not going to make a speech about it. It seems to me whether you retain "first" or take it out it does not matter much. It seems to me to be just the same thing, because it appears to be quite clear that a message must be there before anything final is done.

Mr. KINGSTON: We have got some words there that appear to me to be unnecessary. They may raise a doubt. The words I refer to are:

Or of the produce of any tax or impost.

They are not wanted. They do not occur in any previous clause, and when we use such large expressions as "public revenue," or "public moneys," we catch all that it is desired to catch, I think. It would make the clause clearer if we struck these words out, but I am not going to move if Mr. Barton will not.

Mr. BARTON: I am a little chary about this sort of thing, and I hope it is not in a conservative spirit. **We have in all Constitution Acts the provision relating to the appropriation of the revenue or of the produce of any tax or impost.** There is an unfortunate misprint in the New South Wales Act, which provides for the appropriation of:

Any part of the revenue or funds or of any tax or impost.

But we know what it means, and it has been corrected in practice. If Mr. Kingston will convince me that the alteration will be safer, then I shall be prepared to accept it.

Mr. HIGGINS: I think to avoid any ambiguity in clause 52 we should not have these words in clause 54, as they cover the same thing exactly. I mean to say they have no object, and we refer to the same thing exactly in clause 52. In clause 52 we

have only got:

Public revenue or moneys,

and we should have:

Public revenue or moneys

here. Obviously they cover the same object.

Mr. SYMON: That amendment has been carried.

Mr. HIGGINS: My point is this-that in addition to the words:

Or moneys

you are keeping in the words:

Or of the produce of any tax or impost.

They ought to be out, and I will move:

To strike out "or of the produce of any tax or impost."

Amendment agreed to.

[start page 616]

Mr. O'CONNOR: There is a necessary amendment in the fifth line. The words used are:

To that House.

As it stands it would mean the House of Representatives only, but the section intends to apply to both Houses. I move:

To strike out "That," with a view of inserting "The."

Mr. ISAACS: "Such House" would distinguish it.

Amendment agreed to.

END QUOTE

.

Hansard *14-9-1897* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE.

The Right Hon. G.H. REID: Yes, in his general financial scheme. That is the principle on which our constitutions rest, and I have to say that that is a principle which the people of Australia-I mean the people of the different colonies would be the last to give up in the management of their own colonial affairs. I think that that is a fair representation of the case. I have, I admit, to come away from that state of things, and to admit that in framing a federal constitution we must deviate. **We cannot frame the same sort of constitution as we would frame if it were a constitution for a unified Australia.** I have never denied that. But the practical point is: can we deviate so far as we are asked to do today by the proposition now before the Convention? We must again look at the facts, and these facts are only facts today. In the course of time, instead of New South Wales and Victoria possessing the largest population, it may be that two colonies now possessing a small population will be infinitely ahead in population of those two colonies. This is to be a federation for all time; consequently, although we today seem to be fighting the battle of New South Wales and Victoria, we are really fighting the battle of the people of the other colonies in days to come.

END QUOTE

.

As I stated from onset, this is a “limited” interim response as I need to go through thousands of pages to deal more extensively with other content of the 29 February 2008 correspondence.

.

I noticed that the 29-1-2008 correspondence stated, “I respectfully defer to your” would this to be read as “I respectfully refer to your”, as the word “**defer**” would unlikely have the right meaning in this sentence.

END QUOTE

.

QUOTE

WITHOUT PREJUDICE

Australian Taxation Office 26-02-2008
C/o James O’Halloran, Deputy Commissioner of Taxation
Fax 1800 060 063

. Re; your correspondence TPALS/PAR
Ref number 5843700

AND TO WHOM IT MAY CONCERN

.

COMPLAINT

.

Sir/Madam,

.

Further to my **20-2-2008** correspondence I add the following;

The ATO provided a cost estimate as to the collection of GST, but has not people trained in taxation matters who are now conducting taxation matters and the collection of the GST. Meaning that, so to say, strict compliance with legislative provisions has gone down the gutter.
A purchaser/client is advised to pay a certain GST and has no way to avail himself/herself as to if the GST charged is as such applicable.

.

The following are quotations of a correspondence where despite my immediate objections there was an overcharge of about $150.00 on GST. After this correspondence this was refunded, still it underlines that untrained persons are charging taxation and people who are not alert, and even if they are alert do not persist, then end up paying GST for which no GST is applicable. The question is how often this is occurring and the customer/client is not aware of this?
The fact that this could occur in the first place underlines that the administration of the **GOODS AND SERVICES TAX** is disorganised and people are charged GST for which none is applicable.

.

QUOTE

WITHOUT PREJUDICE

Mr Brett Archer M.B.B.S. F.R.A.C.S. 24-3-2005
Southbank Plastic Surgery Centre Suite 10
City road, Southbank, Victoria 3006
Tel; 9686 9344 Fax; 9686 1420

AND TO WHOM IT MAY CONCERN

Sir,

My wife Olga Hlavka-Schorel requested me to contact you, which I do hereby.
In September 2004, my wife attended to your surgery regarding facial problems, for which she understood, and advised me, you would charge $3,000.00 plus GST. Later, I discovered that in fact it was $3,300.00 inclusive GST, but as the GST component was not 10% therefore, she was, as I view it, overcharged. I did make this known at the time of payment but found to be told that it was differently charged. However, I for one do believe that what my wife advised me of , just having come from your office, at the time, likely was more correct. In particular where she made known that you had quoted “$3,000.00”, and then seemingly added “and obviously GST” making it $3,300.00. I do not believe my wife would make up such version having just left your office then, neither would it make sense for her to do so.
What this is about is, in my view, “principles” of honesty!

END QUOTE

And

END QUOTE

Had you advised my wife the cost of assistance would be $3,300.00 inclusive GST then I for one would have had no problem with this, however, where the cost, as I understood it, was quoted $3,000.00 plus $300.00 GST, and later it is found it was less GST, but then a different charge was applied (**despite my protest made at the time of payment**) to still arrive at the total $3,300.00, then, I for one question the honesty in this, and obviously then wondered what else you stated would be reliable! I do not want my wife being trapped and

so sucked into paying for other additional treatment to try to get the result she was understanding would have been provided in the first place by you! **My wife is very disillusioned**, and that is an issue to me! She is entitled to a better result, without further cost to her! I ask, Why then the need for a referral, where thew work to be done is, so to say, corrective treatment, free of charge, as she understand it to be? With the next appointment due 21 April 2005, surely matters need to be clarified?

Awaiting your response, **G. H. SCHOREL-HLAVKA**

END QUOTE

.

As referred to in my 20-2-2008 correspondence;

.

Hansard *21-1-1898* Constitution Convention Debates

QUOTE

Dr. COCKBURN (South Australia).-Had the honorable member who moved the insertion of this clause proposed to make it an exclusive power of the Commonwealth, then I think that the arguments used by the honorable member (Mr. Trenwith) would have applied; but I anticipate that the has no such intention, nor has any member of the Convention any intention to make this an exclusive power, but merely to make it one of the concurrent powers of the Commonwealth, under which the Commonwealth can act, at the same time not forbidding any individual state from acting.

Mr. HIGGINS.-**Would the honorable member give two pensions to the same person?**

Dr. COCKBURN.-**Certainly not.**

END QUOTE

.

Yet, we find that there are people who are receiving two different pensions, so to say, to top up another pension.

Clearly this is unconstitutional. As much as a person cannot get a State and a Federal pension then the ongoing pension arrangements with other countries clearly is a unconstitutional conduct where then the person receiving a pension from overseas also is provided with a federal pension.

However, this problem could easily be overcome if the overseas pension is paid to the Commonwealth of Australia to compensate its pension payment to the person concerned. In this manner the person who ends up getting the pension gets only one pension and the monies paid to the Federal Government is to compensate the Commonwealth for the paying out of the pension to that person.

A person who were to hold that the pension payment of his/her country of birth were to be significantly more then that of the Commonwealth of Australia could rely upon that overseas pension and forgo the Australian pension albeit by this would also forgo any pension benefits, such as cheaper travel by public transport, etc.

.

The current system of having a minister of the Crown upon retirement having a huge pension while also being employed for the crown also seems to be a constitutional conflict, as the framers of the Constitution did debate this at length. You cannot have a former Minister having a pension pay-out and then be deemed to be impartial in representing the Government as an Ambassador, etc.

.

The Commonwealth of Australia (the federal executive) as an employer is entitled to make whatever arrangements it desires for its employees, but the Commonwealth executive cannot

provide for tax exemptions and neither has the Federal parliament any constitutional powers to do so in regard of Commonwealth employees, being it soldiers, ambassadors, etc.

.

Hansard 3-3-1897 **Constitution Convention Debates** (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE

> **Mr. ISAACS** (Victoria).-What I am going to say may be a little out of order, but I would like to draw the Drafting Committee's attention to the fact that in clause 52, sub-section (2), there has been [start page 1856] a considerable change. Two matters in that sub-section seem to me to deserve attention. **First, it is provided that all taxation shall be uniform throughout the Commonwealth. That means direct as well as indirect taxation, and the object I apprehend is that there shall be no discrimination between the states; that an income tax or land tax shall not be made higher in one state than in another.** I should like the Drafting Committee to consider whether saying the tax shall be uniform would not prevent a graduated tax of any kind? A tax is said to be uniform that falls with the same weight on the same class of property, wherever it is found. It affects all kinds of direct taxation. I am extremely afraid, that if we are not very careful, we shall get into a difficulty. **It might not touch the question of exemption; but any direct tax sought to be imposed might be held to be unconstitutional, or, in other words, illegal, if it were not absolutely uniform.**

END QUOTE.

Again;

QUOTE

> **It might not touch the question of exemption; but any direct tax sought to be imposed might be held to be unconstitutional, or, in other words, illegal, if it were not absolutely uniform.**

END QUOTE

.

Taxation thresholds that apply to all persons are obviously constitutionally valid, irrespective if this exclude certain persons from paying tax because e they are below a certain threshold. Like the about $28,000.00 threshold now applicable. However, it cannot be that a person on $40,000.00 yearly income is to pay tax while a person having a combined yearly income of $500,000.00 or more can be without paying tax because they happen to be former Government Ministers, former AWB chairman, etc.

Hence, on that basis also taxation cannot be charged against anyone who were to have less then their income if they are excused of paying taxes.

The ATO therefore better address these issues also.

.

Parliament of Australia Senate Committee GST Main Report.htm

QUOTE

> ## Cost of ATO Administration
>
> 15.24 The Commissioner of Taxation, Mr Michael Carmody, appeared before the Committee on 26 March 1999. When he was questioned regarding the likely administration costs for the GST, the following exchange took place:
>
> **Senator Gibson** - In the *Age* on 11 February your Mr Rick Matthews is quoted with regard to compliance costs. He said that the tax office expects it will cost 0.88 per cent of revenue, about $300 million, to collect the GST. This compares with 1.47 per cent in New Zealand and 2.55 per cent in Canada. Would you care to expand on why you believe our costs will be lower than in New Zealand and Canada, and are those estimates correct?
>
> **Mr Carmody** - You need to be careful with revenue, because rates vary and change the amount of revenue. I point out that, in preparing for our administration, we have obviously

had the benefit of implementations around the world. We are doing it at a time when electronic service delivery is much more viable. We are aiming to be the best at administering that. Inevitably, for example, in the UK, which has a very complex set of exemptions - not only zero rating but variations - their costs are significantly higher because of that. Whether that is a universal rule, it comes down to that question of what level of compliance and intrusiveness do you accept. [7]

END QUOTE

.

QUOTE

[7] Evidence: Committee Hansard, 26 March 1999, p.2237.

END QUOTE

.

QUOTE

Legal Services

15.35 The Law Council of Australia raised some of the more important aspects of the goods and services tax that impact on the provision of legal services. The Council submit that consideration should be given to the GST being recognised explicitly as an addition to fees – rather than treated as a deduction from fees rendered. The major costs involved in the provision of legal services are labour costs. Although the GST does not have direct implications for PAYE salaries and wages, these costs will be affected in the legal profession if the full cost of GST collected on legal fees cannot be passed on to purchases of legal services. [9]

15.36 The GST is more easily viewed as applicable in the manufacturing sector where value is added as goods pass through progressive stages of manufacture. In the professional services sector (which includes lawyers, accountants and consultants), value is created almost entirely by owners and employees using their knowledge, skills and experience in the “production process”. Given the low level of non-labour input, the amount of GST that most law firms will be able to offset from input tax credits will be very limited.

15.37 In the Council's view it is therefore necessary for legal firms to try to pass on most, if not all, of the cost of the GST in the form of increased fees. However, there are a number of factors that will limit the capacity of law firms to pass on the impact of the GST to purchasers of legal services. These relate to fixed fee structure and fixed price contracts. Legal practitioners undertake work for legal aid commissions, courts and other clients where fees are fixed by regulation, determination and agreement. Unless governments, courts and tribunals can be persuaded to accept charging of GST on top of fixed fee formulas, legal practitioners will be disadvantaged by having to effectively bear the cost of the tax from their own incomes.

Where fees are regulated by governments, courts and tribunals, specific action will be necessary to increase fees to ensure that legal practitioners do not carry the burden of the GST and that the incidence of the tax is passed on to the user. [10]

15.38 The Council also noted that unless the GST collected on legal services can be fully passed through in increased fees, the tax will effectively reduce the incomes of owners and staff of law firms. In this respect, the GST will amount to an additional income tax.

15.39 Some law firms rely for a significant amount of work on fixed price contracts with certain “threshold” limits. For example, government contracts in NSW have a threshold of $50,000 before public advertisement is required. Unless purchasers are prepared to increase base contract prices, law firms will be disadvantaged as a result of :

- Reduced returns – having to pay the GST which was not previously payable
- Additional work to win tenders in a more competitive environment if thresholds are not increased.

15.40 The Council recommends that government departments and agencies will need to examine and increase contract thresholds to reflect the impact of the GST on the cost of professional services, or specify the threshold exclusive of GST.

15.41 The Council is also concerned that the ACCC and other price surveillance authorities may not be comfortable with the price of goods and services increasing by a full 10 per cent on top of current prices – due to their lack of understanding of the cost structure of legal (and other) professional service practices. It recommends that consideration should be given to explicitly recognising the GST as an *addition* to the price of services rather than a *deduction* from it.

15.42 Freehill Hollingdale & Page noted an instance whereby an offer was made by a third party purchaser, but is only able to be accepted by the vendor during the period 1 January 2002 to 30 September 2002. The terms of the offer for sale of the property were agreed at the time of the offer and no variation is possible without the express consent of the offeror. In particular, the offer price is fixed and does not include any taxes which may be payable. In the event that Freehill's client does not accept the offer during the agreed period, the client is bound to enter into a long-term lease of the property with the offeror, the terms of which have already been agreed and which are particularly unfavourable to the client. That is, there is a deliberate commercial bias towards Freehill's client accepting the offer to sell.

15.43 Freehill submits that the Transition Bill will not apply in these circumstances as there is only an offer, rather than a written contract, in existence prior to 1 July 2000. Therefore, in accordance with the Main Bill, if the offer is accepted and the sale of the property takes place, the vendor (client) will be required to remit GST of one eleventh of the consideration received, ie in the order of $9 million.

15.44 Freehill notes that this is a result that was not intended by the parties at the time they entered the arrangement. GST was not publicly contemplated by the Government at that time. As the Draft GST legislation currently stands, the client would not be able to pass the GST liability on to the purchaser, thereby resulting in a reduced sales proceeds to the client of almost $9 million.

15.45 Freehill submits that greater flexibility is needed in the transitional provisions for GST to remove unintended consequences such as those outlined above, and request the Committee to revisit the transitional provisions for GST and give serious consideration to recommending amendments to these provisions.

Senator Peter Cook

Chairman

END QUOTE

.

Again;

QUOTE

Senator Gibson - In the *Age* on 11 February your Mr Rick Matthews is quoted with regard to compliance costs. He said that the tax office expects it will cost 0.88 per cent of revenue, about $300 million, to collect the GST.

END QUOTE

.

One now has to ask if the **untrained defacto tax collectors** were part of the estimate or not? Did the Commissioner of Taxation deliberately conceal from the Parliament the real cost if the ATO itself had to pursue GST, keep records of every person forced to pay GST and any system that would allow the ATO to track back each and every GST payment made, etc?

.

I for one do not accept that anyone can represent the Federal Government. If they are not employed as tax collectors by the Commonwealth then they have no taxation collecting powers and neither are subjected to confidentiality provisions and as such it is highly inappropriate that

then those people are used for **de facto tax collection**. Being it the banks or others, they have no business to be **de facto tax collectors**.

.

It is totally absurd that some how some "**alien**" could be a **de facto tax collector**.

Excuse me **"alien" de facto tax collectors**?

.

Well, any business proprietor who is an "**alien**" somehow can now be working as a **de facto tax collector** even so not entitled to be employed ads a real tax collector.

.

An "**alien**" who would not have any legal rights as to franchise, etc, can however have the right to dictate Australians what tax they shall pay, regardless this "**alien**" hasn't got a clue how the taxation legislation applies!

As shown above with **Mr Brett Archer M.B.B.S. F.R.A.C.S.** his staff member overcharged on GST, despite of my protest then to do so, and as such I was forced to pursue this in writing.

.

To me this is a total absurdity where a complains as to an overcharge is not at all involving the ATO, a authority that deals specifically with taxation matters, but I had to unsuccessfully deal with an **untrained de facto taxation collector** and then finding no resolve had to pursue the matter further.

.

What a total absurdity we have where the Commissioner of taxation has not got a clue what taxes I have paid and if they were in fact actually collected by the ATO.

After all, where I was charged GST over GST exempt services and in the end the overpayment will not show up in the taxation records because the $3000.00 charge will have a breakdown as to what was to be charged on GST. Hence, in the end the business owner (in this case **Mr Brett Archer M.B.B.S. F.R.A.C.S.**) has an extra earning not taxable as it is received GST but not payable to the ATO.

.

Now it seems to me that before the ATO seeks to make an issue as to what taxes I paid or didn't pay it better get a hold on itself and organise how it enforces taxation legislation that is constitutionally permissible and it refunds all monies paid on taxes that were unlawfully collected from me.

It is not my concern if some business owner acted unlawfully in charging or overcharging GST, as where the ATO enlist **untrained de facto tax collectors** then it is accountable for this.

.

Lets have a look at the meaning of indirect v direct;

QUOTE

Ruddock v Vadarlis (includes corrigendum dated 20 September 2001) [2001] FCA 1329 (18 September 2001)

Last Updated: 21 September 2001

FEDERAL COURT OF AUSTRALIA

Ruddock v Vadarlis [2001] FCA 1329

THE HONOURABLE PHILIP RUDDOCK MP, MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS, THE COMMONWEALTH OF AUSTRALIA AND WILLIAM JOHN FARMER v ERIC VADARLIS, HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION AND AMNESTY INTERNATIONAL LIMITED

V 1007 OF 21001

END QUOTE

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QUOTE

In *Laker Airways Ltd* ***v*** *Department of Trade* [1977] 1 QB 643, the House of Lords held that there was no residual prerogative right to withdraw the designation of an airline, Skytrain, under an international airline treaty between England and the United States (the Bermuda Agreement), where the airline had been duly licensed under a domestic statute regulating civil aviation. On the question of construing the scope of the domestic statute, Roskill LJ said (at 722):

> *"I do not think that the Attorney-General's argument that the prerogative power and the power under municipal law can march side by side, each operating in its own field, is right. The two powers are inextricably interwoven. Where a right to fly is granted by the Authority under the statute by the grant of an air transport licence which has not been lawfully revoked and cannot be lawfully revoked in the manner thus far contemplated by the Secretary of State, I do not see why we should hold that Parliament in 1971 must be taken to have intended that a prerogative power to achieve what is in effect the same result as lawful revocation would achieve, should have survived the passing of the statute unfettered so as to enable the Crown to achieve by what I have called the back door that which cannot lawfully be achieve by entry through the front. I think Parliament must be taken to have intended to fetter the prerogative of the Crown in this relevant respect."*
>
> Lord Denning MR said (at 706-707):
>
> *"Seeing then that ... statutory means were available for stopping Skytrain if there was a proper case for it, the question is whether the Secretary of State can stop it by other means. Can he do it by withdrawing the designation? Can he do indirectly what he cannot do directly? Can he displace the statute by invoking a prerogative? If he could do this, it would mean that, by a side wind, Laker Airways Ltd would be deprived of the protection which the statute affords them ... [T]he Secretary of State was mistaken in thinking that he could do it."*
>
> See also Lawton LJ (at 728) and Mocatta J at first instance (at 678) to the same effect.

36 In *Hunkin* ***v*** *Siebert* (1934) 51 CLR 538, the Commonwealth suspended an employee without pay, prior to dismissing him. It was conceded that the employee was not suspended under or in accordance with the disciplinary procedures (including suspension) provided for under the *Public Service Act 1916* (Cth). The Commonwealth argued that, as another section of the *Public Service Act* reserved the Crown's common law power to dismiss a public servant, and the right of suspension was an incident of that power, there existed outside the statute, alternative common law mode of dealing with the employee. The Court ruled that the express power of suspension "necessarily regulates and controls any prerogative power of the Crown to suspend" (Starke J at 544). Rich, Dixon and McTiernan JJ said (at 542) that "such provisions must be interpreted as restricting the common law right of the Crown to exercise a similar power by other means and in other circumstances."

37 These cases show that, where the prerogative is relied on as an alternative source of power to action under a statute, the prerogative will be held to be displaced when the statute covers the subject matter: See further John Goldring "The Impact of Statutes on the Royal

Prerogative; Australasian Attitudes as to the Rule in *Attorney-General* ***v*** *De Keyser's Royal Hotel Ltd*" (1974) 48 *Australian Law Journal* 434.

END QUOTE

.

Therefore, if the ATO cannot collect GST as to exempt goods and services then it neither can somehow circumvent this by using "**aliens**" or others as **de facto tax collectors** in an indirect manner what cannot be permitted in a direct manner. And this is besides the fact that the **GOODS AND SERVICES TAX** is unconstitutional.

.

The ATO and not some **de facto tax collector** ultimately is accountable that any (valid) taxation legislation is appropriately administered. Yet, I find that not even confidentiality is provided for where even "aliens" can know how much taxation I am paying at certain times, and they even can fail to pay it on to the ATO and the ATO would not know the better of it.

.

As a taxpayers I am entitled to ask for accountability and as set out above and so in previous correspondence there appears to no accountability and by your own admission there appear to be no records by the ATO as to what GST I have been paying over all those years.
As such, the ATO would neither know how much GST I was forced to pay to business actually was paid into the ATO and how much was fraudulently charged but withheld from the ATO!

.

Fancy this, that an "**alien**" who might be unlawfully working in the Commonwealth of Australia and not subjected to any secrecy provisions nevertheless can have access to my personal details how much tax I have to pay in certain instances, being it GST or otherwise, and this by operating as some **de facto tax collector**.

.

Rest assure that my correspondences are being published on the Internet and elsewhere!

Awaiting your response **Mr. G. H. Schorel-Hlavka**

END QUOTE

.

QUOTE

WITHOUT PREJUDICE

Australian Taxation Office 8-04-2008
C/o James O'Halloran, Deputy Commissioner of Taxation
Fax 1800 060 063

Re; your correspondence 19-10-2007 TPALS/PAR
Ref number 5843700 TDMS 5935297

AND TO WHOM IT MAY CONCERN

.

COMPLAINT

.

Sir,

.

thank you for your 26 March 2008 correspondence, and I wish to point out certain matters.

.

As to bogus emails, albeit they show the official logo of the Australian Taxation Office I only reproduced them (with hesitation) so as to be able to forward them to you while the originals received are held on the internet. I did so that in case the ATO does desire to have the original forwarded by email to it, as to perhaps trace the sender of the emails which could be possible by the electronic fingerprints associated with emails. Indeed, in the past I did so myself warning companies not to use my email address where I discovered scam emails having been forwarded

using my email address, and I have noticed that those businesses then stopped using my email address. Therefore, and in particular concerned the harm that can flow to so manny7 who may assume that it is an email from the ATO I hold the ATO has a **DUTY OPF CARE** to ensure that any such scheme operation is acted against forthwith. Because the ATO website failed to show any email reporting address to notify about scams, something I view is a considerable failure by the ATO, it means that a scam can be going on and on before finally the ATO may become aware of it. Hence I view that the ATO on its website should in a prominent manner provide for anyone to click onto a reporting email address and/or to be provided with a "REPORT SCAM/SPAM" email address as to enable the ATO to be immediately being notified and it then can without delay trace the senders to ensure appropriate action is taken..

.

I thank you for your courtesy to warn me about the dangers of the scam email, which I kept in mind.

.

I noted in your correspondence that you stated;

QUOTE 26-3-2008 CORRESPONDENCE

> You have again pointed out that the GST legislation is, in your view unconstitutional and therefore ultra vires. You also assert that the legislation is "ultra vires from the time it was enacted once I made my constitutional objections known".
>
> Chief Justice Latham's comments on the effect of invalid statutes, in ***South Australia v Commonwealth*** [1942] HCA 14; (1942) 65 CLR 373, are worth quoting in full. He said (at CLR p 408);
>
> > "common expressions, such as: "The courts have declared a statute invalid," sometimes lead to misunderstanding. A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he feel safer if he has a decision of a court in his favour-but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it-and thereafter invalid. If it is beyond power it is invalid ***ab initio***."
>
> You are entitled to maintain your view that the GST legislation is invalid ***ab initio*** and your view is entitled to respect. The Tax Office, however, maintains the opposite view. Further more, as an organ of the Administration we are especially not in the position such that we are "entitled to disregard" the GST legislation, particularly as to this time we do not have any court decision to vindicate such a position.
>
> I must therefore advise you that the Tax Office will not be changing its view in response to your representations. Furthermore, as have previously told you, we are not able to refund to you any of the GST that has been included in the price of products and services paid for by you.
>
> It would therefore seem that the only course of action available to you would be to take legal action, but it would be entirely inappropriate for me to provide you with specific advice as to how you might proceed.
>
> However I should point out to you that if you were to embark on legal action on the basis that the GST legislation is not constitutionally valid, you should expect that your claims would be vigorously resisted.

END QUOTE 26-3-2008 CORRESPONDENCE

.

It must be clear that only the ATO as the organ of administration can administer taxation legislation against a citizen. The moment this is abandoned to give the rights over to individuals, such as shop keepers who may or may not be aliens, then the Federal Government has aborted its own constitutional powers. As the High Court of Australia is on record that where a Municipal Council failed to comply with its own by-laws in regard of an application for a building permit it by this abandoned its rights and the by-law no longer could be enforced against the applicant. The applicant was entitled having made an application to have the application appropriately determined, regardless what the final decision would be, however where the council refused to deal with the application altogether then it no longer can enforce this by-law it abandoned itself.

.

The ATO therefore cannot enforce GST legislation where it now has admitted that it does not control the GST as it cannot refund GST charged in excess or otherwise. Clearly this is an admission by the ATO it does not at all appropriately administrate the GST, which is a taxation for which only the Commonwealth purportedly has legislative powers.

.

If the ATO administer GST legislation against anyone, being it businesses or otherwise, then it must ensure it has appropriate records to enable a refund to be made where duly so claimed.

.

The statement of Latham CJ was also referred to in HCA 27 of 1999 ***Wakim*** to which I referred to previously, as well as the Authority quoted again below;

.

QUOTE

The following applies as much to Federal laws of the Commonwealth of Australia as it does to federal laws in the USA; http://familyguardian.tax-tactics.com/Subjects/LawAndGovt/ChallJurisdiction/AuthoritiesArticle/AuthOnJurisdiction.htm

> 37 Am Jur 2d at section 8 states, in part: "Fraud vitiates every transaction and all contracts. Indeed, the principle is often stated, in broad and sweeping language, that fraud destroys the validity of everything into which it enters, and that it vitiates the most solemn contracts, documents, **and even judgments**."

And

> The general misconception is that any statute passed by legislators bearing the appearance of law constitutes the law of the land. The U.S. Constitution is the supreme law of the land, and any statute, to be valid, must be in agreement. It is impossible for both the Constitution and a law violating it to be valid; one must prevail. This is succinctly stated as follows:
>
> > The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it. An unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted. Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. . .
>
> A void act cannot be legally consistent with a valid one. An unconstitutional law cannot operate to supersede any existing valid law. Indeed, insofar as a statute runs counter to the fundamental law of the land, it is superseded thereby.
>
> **No one is bound to obey an unconstitutional law and no courts are bound to enforce it.**

Sixteenth American Jurisprudence
Second Edition, 1998 version, Section 203 (formerly Section 256)

END QUOTE

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Where then I have opposed the application of the GST legislation upon constitutional grounds, despite the O'Meara decision you referred to, and you have acknowledged my objection having been noted then the ATO as an organ of the Administration can no longer in any way allow the GST legislation to be applied, not just against my person but against any other person (natural or otherwise).

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For all purposes and intent the GST legislation is WITHOUT LEGAL FORCE and remains to be so. The ATO can therefore not pursue that somehow I have to litigate, as I do not need to do such a thing. As a citizen I made my objection known and that is the end of the matter in that regard, as the GST legislation for all purposes and intent is ULTRA VIRES and will remain to be so unless and until, if ever at all, a court could pronounce a decision to overrule my objection.

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Lets give a simplified example.

If a police officer comes to your residence and wants to enter your property and you refuses to allow this police officer to do so then unless the police officer first obtains a WARRANT to allow him to enter your property his conduct to nevertheless persist in entering your property despite your objection will be unlawful. It is not that somehow you first have to go to Court to

get an order against the police officer not to trespass, as the moment you make your objection known then that is sufficient.

I have likewise indicated to the ATO not to trespass upon my rights with causing me to be charged GST , and so at times also in additional wrong manner, and as such the ATO cannot argue that merely because it is an organ of the Administration it can nevertheless trespass upon my rights and charge directly and/or indirectly GST unless I obtain some court order as it is not for me to do so. I made my objections known and the ATO seeking to trespass upon my rights therefore has the onus to prove having such a right, failing to do so it must refund all unconstitutionally collected monies.

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QUOTE

> A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it.

END QUOTE

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The statement of Latham CJ would make no sense at all if His Honour had intended that the "victim" of the unlawful conduct first were to obtain a court order in its favour. As His Honour made clear, as so have numerous other Authorities, the law pretended law is no law at all!

Hence, the ATO has no legislation to apply as it has no powers to place itself above the constitution! It cannot administer a non-existing law which is a purported law only!

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Therefore, where the legislation is ***ab initio*** from onset then the ATO having in some form or another allowed individuals/businesses to administer the pretended GST legislation then must be deemed accountable to refund all and any GST I was charged. It is not relevant to me if the ATO did or didn't keep records as that is an internal matter that is beyond my control. The onus is upon the ATO to prove what amount of GST it directly/indirectly had caused me to pay over the years and failing it having any records in that regard, it has admitted not to have records, then the onus is upon the ATO to provide me with such offer of settlement that I may deem acceptable.

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It is neither relevant to me if any GST I was charged by any individual/business was or was not passed on to the ATO as after all it was the ATO who allowed this kind of absurd system to operate and as such must be held accountable for its own total mismanagement in that regard.

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Where legislation is invalid "***ab initio***" then it does not and never can somehow still allow for an organ of the Administration to nevertheless persist in enforcement of this purported legislation! Indeed to persist in doing so may make those persisting in this conduct liable to various criminal offences!

In my view, neither the ATO (Australian Taxation Office) and/or any other organ of the Administration should have to litigate in extensive manner about the validity or otherwise of legislation, rather that there should be a special office, such as the **OFFICE OF THE GUARDIAN**, a constitutional council, that advises the Government, the People, the parliament and the Courts, as to what is constitutionally permissible and what it not. Only then the ATO and for this any other organ of Administration could resort to advice irrespective of what political party is in power, and I have no hesitation to state unlikely would the purported GST ever then have come into legislation!

On the one hand, the ATO pursues individuals/businesses to keep records and to make declarations as to taxation paid, etc, while on the other hand the ATO itself has no proper records to verify this at all. One would have taken that the ATO at the very least has reliable records it can delve into to check if certain taxes or purported taxes were received by it, however, it is clear that the ATO despite receiving billions in dollars of purported GST (taxes) has absolutely no proper records as to ultimately who paid them. Yet, when I go to some businesses I am provided with a statement stating how much GST was paid by me while other businesses do not disclose

this at all. Meaning that the failure of appropriate recording by the ATO and having this also enforced by individuals/businesses, many millions of dollars individuals/businesses are collecting as to purported GST never makes it way to the ATO itself and so neither to Consolidated Revenue. Clearly the onus rest with the ATO to have ensured that there is a proper record keeping, and where the Senate Committee specifically request for details as to cost of administration of the (purported) GST legislation then the cost factor should have included all cost. As such the ATO may have deceived the Senate Committee if it didn't include all relevant direct and/or indirect cost! It also means that the ATO cannot now complain about the additional cost that may eventuate from keeping appropriate records as after all that is a problem the ATO ought to have addressed when requested for answers during the Senate Committee inquiry.
More over, the ATO unlikely also will have precise records of any other taxes it may raise, such as debit taxes of bank account. Meaning that the administration of the ATO is perhaps anything but administration but some gobblygook kind of conduct of "I am alright" conduct.

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QUOTE

> Furthermore, as have previously told you, we are not able to refund to you any of the GST that has been included in the price of products and services paid for by you.

END QUOTE

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The wording "we are not able to refund" may perhaps be better stated as to "we are not **willing** to refund", this as the ATO is bound to refund any moneys it unconstitutionally collected. The Framers of the Constitution made this clear.

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Now lets see, there was this newspaper article on 7-4-2008 that the ATO is pursuing criminals for a 75 million dollar tax bill as a way to combat crime, at least that was the gist of the article.

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As my past correspondence indicated the Framers of the Constitution made clear that legislation may be valid for one purpose but not for another purpose. If therefore the ATO is using taxation provisions to stop criminal gangs operating and/or to conduct business then its purposes is beyond its powers as it is to administrate taxation laws (that are constitutionally valid) and not to go after alleged gangsters to get them being prevented from operating. The ATO principle concern is to collect taxes from whatever source, regardless if they are from legal or illegal business practices. It is for this also that the aim is to keep taxation records confidential so that those persons who commit crimes still make appropriate taxation payments and not hide this for fear that they be reported then about their crimes to the police.
For argument sake if I were to be a crime boss I would need the making of a financial return to be lodged with the ATO like a hole in the head, as the ATO rather then being concerned with collecting taxes would be using it for ulterior purposes. It doesn't matter if the parliament did authorise it or not, what is relevant is that the ATO must make up its mind and if its conduct is to pursue crime rather then to collect taxes then it must face the consequences that individuals/businesses who otherwise would declare their income may be prevented from doing so appropriately because the ATO is abusing/misusing the information for non taxation purposes.
Considering also that the ATO has already admitted it has no proper records as to GST monies collected as to by whom it was actually paid, the ATO may undermine its own enforcement capacity as to collecting taxes. Its refusal to refund unconstitutionally collected GST underlines that the ATO has therefore placed itself above the law.

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If I were a lawyer acting for criminals I would have, so to say, a field day with this in court!
Admittedly the Courts tend to make orders against most individuals/businesses when ever the ATO litigate but that is perhaps more likely due to a habit then proper administration of justice. The John Murray Abbott case was a clear example where the High Court of Australia ruled against Mr Abbott, only then for Mr. Abbott to be provided with a refund because after all it was

found he never owned any debts to the Commonwealth. So much for the credibility of the High Court of Australia where it make a ruling of a debt existing where none actually ever existed and so admitted by the Crown afterwards!

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The ATO ought to revise its mentality that it can do as it like and get away with it because ultimately there is going to be trouble. After all, as with my decision to refuse to vote in federal elections, despite being a candidate, resulted that after a 5-year legal battle I succeeded on all constitutional and other legal grounds UNCHALLENGED because while the High Court of Australia in the past may have made certain rulings it never did consider the details I presented in my successful cases! Sure, the Australian Electoral Commission still persist in fining people for "FAILING TO VOTE" regardless that it was totally defeated by me on 19 July 2006 but that is the habit of organs of the Administration that when a judgment is against them they tend far to often to circumvent or ignore this ruling whereas if it is in their favour you bet your bottom dollar they will, so to say, haunt anyone into their grave.

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In view of the refusal of the ATO to refuse to refund all unconstitutionally collected GST to me I hold I am entitled to have the applicable interest rates applied for any monies refused to be refunded, as to compensate for the loss of value of the monies in view of inflation, etc and you can take notice of this also.

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The ATO by having administrated the purported GST legislation in the manner it did by this has trespassed upon my rights to allocate my monies as I desired because it allowed individuals/businesses to charge me whatever GST comp0onent they desired without any due and proper record keeping how much I was charged and how much of this monies was actually paid to the ATO to end up in Consolidated Revenue. There is no system where the ATO can collect purported taxes but cannot refund any invalidly/unlawful collected taxes. The power to collect must include the powers to refund! Hence, I do not accept that the ATO cannot refund any unconstitutionally collected GST to me!

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QUOTE

> However I should point out to you that if you were to embark on legal action on the basis that the GST legislation is not constitutionally valid, you should expect that your claims would be vigorously resisted.

END QUOTE

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I do not need to institute legal proceedings as the onus is upon the ATO to refund monies to me and for as long as it fails to do so appropriate interest and other charges are applicable.

The ATO cannot expect me to provide tax returns where it is unable to provide itself information that are relevant to it. Taxes paid, being it (unconstitutional) GST, bank fees, etc, all are taxes and I am entitled to take it that in due administration of taxation the ATO of anyone would keep appropriate taxation records. Unconstitutional GST monies are not "taxes" per se because they were not collected as valid taxation and therefore makes it even more complicated to me to differentiate between taxes and purported taxes where the ATO insist it being taxes regardless it being well aware and having acknowledged as to that I hold the GST legislation is ULTRA VIRES ***ab initio***.

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Over the decades many a barrister made clear I would be the losing party but then for them to discover that the courts time and again ruled in my favour. Like on 19 July 2006. The problem with lawyers is, so to say, that often they are unable to think outside the square. It is their fall down in litigation when they are confronted with a person who like myself, so to say, has done his homework. For example I read today a 2003 "**Crime and Candidacy**" statement of a Dr. Ian Holland of the Federal Governments information service, Politics and Public Administration Group, about Section 44 of the Constitution, and while the statement "appeared" to be well

researched and set out, in reality I would give it a 2 out of 10, as the entire argument was in my view constitutionally floored, in various ways.
My (48-year old) step-daughter made known in the past that when she obtained her various law degrees she was limited to how to approach legal issues as certain concepts were dictated (at the law faculty) and one simply could not act outside of it. She made known that when I provided her with certain set out about certain litigation, it resulted precisely in litigation as I had set out.
Perhaps you may seek to consider matter from my point of view and then seek to understand what I am pursuing and you may perhaps then realise that as like the AEC matters can escalate and what will be ultimately the harm flowing from it when a court yet again were to make a ruling in my favour? **All I seek is a refund of monies unconstitutionally directly/indirectly claimed from me and surely this ought to be deemed a reasonable request that should be responded upon positively?**

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Awaiting your response, **G. H. SCHOREL-HLAVKA**
END QUOTE

QUOTE

From: "G. H. SCHOREL-HLAVKA" <schorel-hlavka@schorel-hlavka.com>
To: "csgroup" <csgroup@iprimus.com.au>
CC: inspector_rikati@yahoo.com.au, aleequeensland@hotmail.com
Date: Wed, 11 Jul 2007 15:23:14 +0000 Subject: Re: Is the GST cast in stone?

As a "CONSTITUTIONALIST" I for one do not accept the validity of the GST.
Anyone who can check the Constitution may discover Section 123 requires a State referendum to approve a State to handover legislative powers to the Commonwealth by reference of powers. the states giving up certain taxing powers in return of the GST was unconstitutional.
Why not check out my blog http://au.360.yahoo.com/profile-ijpxwMQ4dbXm0BMADq1lv8AYHknTV_QH and my website http://www.schorel-hlavka.com for further information?
such as the unconstitutional SHOCK & AWE against the Aboriginals?
Gerrit (Gary)
END QUOTE

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Hansard *14-4-1897* Constitution Convention Debates
QUOTE

Sub-section 2.

Mr. GLYNN: I would again draw the attention of the Committee to what, I submit, is a difference between "**laws**" and "**Acts**." This word "law" is more abstract and may be applicable to a single section in an Act, and if that is so it is very material whether we leave the word "law," because the single section may deal only with the imposition of taxation, but the restriction on the power of amendment may be applicable to other sections in the same Act which do not deal with taxation only. I merely mention the point because I should like it cleared up by hon. members.

Mr. BARTON: Do I understand the hon. member to refer to the use of the words "**proposed laws**"? If so, "proposed laws," I may say, is an expression used in other parts in regard to "Bills," while "**laws**" covers the expression "**Acts**." If the hon. member will refer to the Bill he will find that the words "**proposed laws**" relate to **Bills**. With regard to "**Bills**," the provisions of the sections will be left to be carried out by the House, that is, by the President or Speaker. **So far as the expression "laws" or "Acts" is concerned, that deals with the law when it is passed, and such an expression to my mind clearly means that even after that which is a Bill has become law. if it deals with anything more than**

the imposition of taxation, it will be unconstitutional, and the Federal High Court can decide that it is unconstitutional and void; so when an Act affecting to deal with more than taxation, and yet is a Tax Bill, happens to be carried through both Houses and assented to in contravention of this provision, that would be an unconstitutional and therefore a void Act. I think that that is the point upon which my hon. friend wished for information.

Mr. GLYNN: What I was pointing out was that it may be suggested that the word "law" might mean a section or a whole Act. If it be contended that it means a section it might be quite competent under this clause 53 to point to other sections in one Bill, others not dealing with taxation only, but dealing with other and general matters. I raise the point because it seems to my mind that the sub-section opens the way to a difficulty in the way of limiting the power of the Senate through sending up mixed Bills such as one dealing with appropriations and general matters.

Mr. BARTON: Of course in one sense every clause in an Act is a law, because it is a distinct enactment; and if the hon. member will refer to the Statute Book in reference to old Acts he will find each clause beginning with "and be it further enacted," and every clause is therefore an enactment, and in that case it is a law. In this case, however, the meaning is clear. It is this: that the Bill, afterwards becoming a law imposing [start page 576] taxation, shall deal with the imposition of taxation only; that means, of course, shall contain such provisions as are necessary for carrying the taxation into effect. You cannot pass a taxation law by simply enacting that there shall be laid on certain property, or on certain subjects of importation, a duty. You will have to pass into law other enactments to carry that into effect. These are clauses dealing with taxation only, because they are the necessary machinery clauses for carrying the object of the Bill into effect. To that extent a law having been a Bill which dealt with taxation only, so long as it has clauses dealing with that subject only, would all be constitutional under this section. That is to say, where there were clauses in the Bill which did not themselves impose the tax, but provided for what was necessary or incidental to the carrying into effect of the tax law, they would be proper parts of the Bill, and therefore could not be ruled to be unconstitutional as being outside its scope.

Mr. KINGSTON: I do not know whether I quite understand the effect of these sections. Do I understand Mr. Barton rightly as saying that the effect of it will be, if we pass the clause in this shape, that if the law should be assented to by the two Houses, and receive also the Queen's assent. and if it deals with the imposition of taxation and some other matters, that that law would be unconstitutional, and liable to be set aside by the High Court? If that is so I think we are going a great deal too far. I think these provisions are chiefly intended for the regulation of business between the two Houses, and the maintenance of the rights of each. If an infringement of these provisions, however concurred in, takes place, and notwithstanding the infringement in question, both Houses assent to the proposed measure, yet it is in afterwards to be held invalid. I am inclined to think it is too serious a consequence, and I ask Mr. Barton to say precisely what is the intention of the Drafting Committee on the subject. I ask him also to consider the point whether it would not be sufficient to leave it as a matter between the two Houses without going to the extent of passing the Bill in such a shape that any relaxation of any of these provisions, however unimportant, and concurred in by both Chambers, would invalidate an Act of Parliament.

Mr. BARTON: My own opinion is distinctly that in the form in which this and the preceding sub-section, and probably the fourth sub-section, stand, they involve that protection which must be given under a Federal Commonwealth by leaving to the supreme

arbiter of the Commonwealth-that is to say, to the High Court-the determination whether substantial infractions of constitutional law have taken place. To put it in another way: If the hon. member will compare this with the 52nd clause, that the hon. member will see deals with "**proposed laws**," and not with "**enacted laws**." **"Laws" means "enacted laws." "Proposed" laws are to originate in the House of Representatives.** It is not intended, as of course he sees from the form of the section, that the High Court of the Commonwealth should have under review such a question as whether a Bill originated in one House or another if passed into law. That is a question for the Houses to settle between themselves. **But the question whether a law on the face of it exceeds the constitutional power as dealing with more than the imposition of taxation, dealing with more than the laying on of a tax and the machinery necessary for it, or whether it deals with two subjects of taxation at once, unless it is a Customs law, that question, and also the question whether the annual Appropriation Act deals with more than the ordinary annual services of the year, seem to me to be deeply rooted in the Constitution, and depend not merely upon the questions of relations of the Houses *inter se*, but on much larger considerations.** For that reason, the word used has been "laws," so that the Federal High Court may deal with them, and if they [start page 577] infringe those principles, declare them unconstitutional. But where the words "Proposed laws" have been used, those sections deal with the position which would arise where, as between the two Houses, a House as a matter of procedure originated, or otherwise dealt with, or amended a bill which by this Constitution it is desired that that House should not originate or amend. These are questions that must be settled between the Houses, because no court in the world has ever yet dealt with the question whether, as between the two Houses in their own relations, one or other House has exceeded its powers in originating or amending Bills. But it is a safeguard-an integral part of a Federal Constitution-that, if we once say that a law shall not deal with more than one subject of taxation-unless it is a Customs law-or that it shall in no way deal with anything more than the imposition of taxation and the necessary machinery, then that is a question which relates to the whole basic principle of Federation whether that law shall be deemed to be constitutional, even if passed.

Mr. ISAACS: Would you consider the repeal of an Act to be imposing taxation?

Mr. BARTON: The repeal of a Taxation Act could not be for the imposition of taxation.

Mr. ISAACS: I should think it would not be.

Mr. BARTON: Unless it was accompanied with alternative provisions for taxation.

Sir GEORGE TURNER: Hear, hear.

Mr. ISAACS: Suppose you repeal one land tax and put on another, are you clear that that is not dealing with the imposition of taxation?

Mr. BARTON: If you place in any subsequent Act of Parliament provisions which are irreconcilably at variance with the provisions of a prior Taxation Act, there will be an implied repeal. If this be so, then it is no violation of the provisions of the Constitution if you turn an implied repeal into an express repeal. If there is a replacement of prior taxation by a later taxation Act, the mere addition of a repealing clause would certainly not be an infringement of constitutional provisions. What can be done by implication can always be done by express statement. This set of sections has for its object the same object as had those of 1891. A law is unconstitutional if it deals, as a Tax Bill, with more than one subject of taxation unless it is a Customs Bill, or with any question except the imposition of taxation and the necessary machinery therefor. In either of these two cases, at any rate, the Supreme Court could declare that law to be unconstitutional. That is the protection

which a federal system gives, and, although it may be said to be placing the Supreme Court above the Parliament, it is nothing of the kind. It results necessarily from the appointment of an arbiter, who should decide what the Constitution is.

Mr. REID: The remarks of my hon. friend Mr. Barton raise very serious considerations. Let us suppose that a policy of taxation-we will say a Customs tariff-is passed by both Houses. Let us suppose that both Houses are emphatically in favor of it, and there is some provision in that long Bill-one short clause-which may raise a point of law; then any person affected by that taxation in some insignificant way might upset the whole tariff and throw an entire community into the greatest state of uncertainty. We do not wish anything of that kind. I look upon these provisions, not as inserted for the protection of the taxpayers, but as provisions inserted to define the relations between the two Houses, and it is a matter entirely between the two Houses. If, for instance, the Senate by an oversight or by agreement chooses to pass a Bill which is not in strict accordance with these provisions that ought to be a matter entirely between the two Houses. It is not likely that the Senate would allow anything of the kind to happen, and I [start page 578] have a very strong opinion that if a Bill contained say a land tax and also the machinery necessary for collecting that tax it would be a clear violation of this provision.

Mr. BARTON: Oh, no.

Mr. REID: I venture to say so, because I remember the way in which these taxes are imposed in the mother-country and in most of the colonies. The tax is put in one short Bill and the machinery clauses in another Bill.

Mr. BARTON: Not because of provisions of this sort.

Mr. REID: No, because they do not exist, of course, but for another good reason, namely, that whilst under our Constitutions the Upper House is not allowed freedom in modifying taxes it should be allowed the most perfect freedom in dealing with the machinery necessary for collecting those taxes. If the two were put together the Upper House would be very much embarrassed in exercising a discretion upon the machinery clauses. I think this is so serious a matter in the light put on it by Mr. Barton that we ought to copy the term in the margin of the clause. I propose therefore:

That in sub-section 2 the words "laws imposing taxation" shall be omitted with a view of inserting the words "Tax Bills."

I think that would be infinitely better. It would be far better that any Acts of the Federation should not be open to review in the law courts upon a mere matter of procedure, because the essence of authority to impose a tax on a subject is the concurrence of the Legislature, and if that concurrence is affixed to the tax it would be an absurdity that on some technical point the whole law should be upset. We do not wish to appeal to our higher court on matters of this sort. The more Parliament is self-contained the better, and the more it is the master of its own powers the better. Viewing these clauses as provisions to safeguard the other branch of Legislature, and with no reference to the ultimate effect of the laws themselves, I propose the amendment I have submitted. I will follow this amendment up by proposing a similar amendment in sub-section 3.

The CHAIRMAN then put the amendment.

Mr. REID: In deference to the suggestion, which I think is a proper one, of Mr. Barton-that we should follow as much as possible the structure of the Bill-I with the leave of the Committee, will alter my amendment by

Putting the word proposed "before "laws"

Leave granted to Mr. Reid to alter his amendment.

Mr. SYMON: There cannot be any doubt that this involves very serious consequences, and the underlying principle to which we have to get seems to me to be only indicated by my hon. friend Mr. Reid, rather than agreed upon by him. This amendment is not quite logical, and will not really accomplish his purpose. Undoubtedly it seems to me that clause 53 is intended to regulate the proceedings between the two Houses, to prescribe the basis upon which the relative power of the Houses in regard to Money Bills is fixed, and the exercise of their limitation and condition. If that is the governing sense of clause 53 and its various sub-sections, then we do not want an amendment at all. I am not saying that absolutely or dogmatically, but as indicating the opinion I hold on what Mr. Reid has said, that the whole purview of clause 53 is to deal with the relations of the two Houses regarding Money Bills. It was not intended by that section to create conditions which before a higher court might possibly lead to some Act being declared invalid, whereby endless confusion would arise throughout the Federal States. If that is the construction of the clause, and its object is ascertained by reading sub-section 1, does that interpretation govern the whole of the sub-sections, and would that be simply limiting their effect to the relation between the two Houses? At the same time, if there is the shadow of a doubt [start page 579] upon that point, I am sure that the Convention will feel that it ought to be set at rest. It would never do to have the whole of the finances of the Federal States as well as their constituent States disturbed by an interpretation which might, if the law had been passed and brought into operation, be declared invalid after the lapse of time by some suitor who objected to pay a two-penny tax. I would point out that by introducing the words "proposed law," if you do not exactly limit the scope of the whole section you will not prevent that result, because if the High Court will have jurisdiction under secton 2 to declare an Act invalid which did not comply with that provision it would equally have the power to declare an Act invalid if a Bill upon which an Act was founded did not comply with that condition. It occurs to me that if you condemn a tree because the branches and fruit are bad, the tree is equally bad if the root fails in its strength. So if your law is bad as being in conflict with the Constitution, it must be equally bad if the Bill upon which it is founded violates the Constitution. If we attach a condition to the introduction of a Bill that is questionable, and open to debate, we would lay the foundation upon something which might also be bad. What I suggest, in order to overcome the difficulty, which is obvious to all, is that we should introduce a general clause providing that non-compliance with any of the conditions imposed in this section with regard to the introduction of Money Bills should not invalidate them or lead to their being called into question after they have been assented to by the Governor. It would be comprehensive and safe, and no doubt would reach a constitutional point that would satisfy everybody.

Mr. HIGGINS: I may say with regard to the point the Premier of New South Wales has referred to, that it is the very point to which I referred yesterday in discussing the matter. I think it is right that "Bills" should be used so long as we are speaking of that which is not an Act. It is the proper expression to use when the measure has not been passed by both Houses. I am not going to go back upon our decision. I understand that the Committee has resolved that the phrase unheard of hitherto, "proposed laws," is to be adopted. If the phrase is to be adopted, I think there is a danger of private suitors being able to show in the court on twopenny-halfpenny litigation that the whole of the Act is void. Yesterday it was suggested by the President that the best course under the circumstances, to avoid all doubt, was to have a special clause stating that, notwithstanding these provisions, if the Federal Parliament has once assented to a Bill it is to be regarded as law, even though the exact

terms of the section have not been complied with. During the debate I have put down these words, which will answer the purpose if put in after sub-section 4.

Notwithstanding anything contained in the foregoing provisions, any proposed law to which the Federal Parliament has assented shall be deemed to be valid as a law.

When I say - the Federal Parliament I am using it strictly with regard to the definition in clause 1, chapter 1. The Federal Parliament is defined as Her Majesty and the two Houses, and I think this will answer the purpose. Of course I have drafted this in the haste of debate, but it seems to answer the purpose to which the President called attention yesterday, and I will put it as an amendment to clause 4.

Mr. ISAACS: There are two classes of matters in this relation that I think we must have regard to. The first is this: Wherever the Constitution sets forth a condition of the validity of a law, and that condition is intended to protect the people as against the Acts of the Parliament, there I think the court should be the ultimate tribunal to decide the constitutionality or otherwise of the enactment; but wherever it is introduced for the purpose of merely regulating the procedure between the branches of the Legislature, there I think, after the two Houses agree to any [start page 580] enactment, that no court should afterwards question it. This section is intended to protect the Senate as against the House of Representatives, and I think that we should be careful, while affording the fullest protection to the Senate, that if the Senate saw it was a case in which public interest or public urgency demanded that they should not stick too closely to their privileges, that no individual should be able by litigation to challenge their conjoint and voluntary act. I do think there is the strongest danger, and I ventured to draw attention to it yesterday, that the Federal Treasurer might, after having a Tax Bill passed or an Appropriation Bill, passed by both Houses willingly and with their eyes open, find himself in this position: that some individual might challenge the Act through a court of law, which would be compelled to declare it invalid. The Treasurer might have expended the money, or might be desirous of obtaining money under the authority of the Act, and the position I have indicated is one we should not drift into. I think that the general modes of expression used by my friends Mr. Symon and Mr. Higgins are very good, but I think that the form of the proviso, or rather another sub-section, should be:

No law shall be deemed to be invalid by reason only of any non-compliance with or contravention of this sub-section.

Mr. BARTON: That is what has been suggested to me in conversation with Mr. Reid.

Mr. REID: Any remarks made on this point may be made in better form if I withdraw my amendment and move it in the following form:-

Money Bills shall not be liable to be called in question in respect to any breach of the provisions of this section after the same have become law.

Mr. WISE: I am glad that the Hon. Premier of New South Wales has moved his amendment in the form he has now suggested, because it brings us face to face with what, I venture to think, is an important matter, the importance of which hardly appears to have been recognised, and which it is rather difficult to deal with at this stage. I regard the clause as drawn, and particularly having regard to the deliberate choice of the word "laws" in distinction to the words "proposed laws," as a most important constitutional safeguard, and I doubt very much whether the representatives from the smaller States realise what an important protection is going to be taken from them by the adoption of this amendment. Stated in two sentences, it comes to this: The Bill as framed provides that although the

ultimate power, whether because it has public opinion behind it or on account of the adoption of any machinery for meeting deadlocks, shall rest with the House of Representatives and the people of Australia as a whole, so that the numerical majority of the people shall ultimately in some way prevail, yet, in order to prevent that numerical majority overriding the views of any particular State, certain methods of coercion with which we have become familiar in our local Houses-methods of coercion of one House by the other-shall no longer be employed. One of the methods of coercion would be to include an obnoxious measure of taxation-obnoxious to the Senate-in a measure extremely popular and desired by the Senate.

Sir GEORGE TURNER: Is not that provided for?

Mr. WISE: No; tacking on to the Appropriation Bill is provided for, but not tacking on to ordinary Bills. Sub-clause 2 is necessary to give full effect to subclauses 3 and 4.

Mr. BARTON: Two and 3 give as far as possible the right to the Senate in detail, and sub-clause 4 gives the right for the prevention of tacking.

Mr. WISE: I am speaking more to get instruction from the Committee. As I understand clause 2, it is designed to prevent the tacking on of a tax on any other measure than the Appropriation Bill. Subclause 4 deals with tacking a tax on to the Appropriation Bill. Sub-clause 3 says, [start page 581] each tax must be in a separate Bill; subclause 2 shuts up another method of coercion.

Sir JOHN DOWNER: And away goes the Constitution.

Mr. WISE: As Sir John Downer says, away goes the Constitution. These are measures deliberately designed for the protection of every individual **citizen**, and every **citizen** who votes for the Constitution is entitled to know what are the terms on which he will be liable to pay taxes. **If the tax is imposed illegally there is no reason why the illegality should not be exposed by the Supreme Court of the Commonwealth just like any other illegal measure. No Government has a right to raise money illegally**.

Sir GEORGE TURNER: It might be raised in the belief that the Act was invalid.

Mr. WISE: I admit the risk, but it only becomes great if you attribute gross stupidity or ignorance to the Government of the colony. I cordially assent to the distinction drawn by the Attorney-General of Victoria between Acts of a political character which the Supreme Court would never investigate, but this is something more. **This is one of the fundamental conditions which must be observed before any taxation can be legally imposed.** It is no less fundamental than that in the Constitution of the United States, under which the Supreme Court recently declared a certain tax illegal. It may be inconvenient, but are not the inconveniences greater of having the whole power of taxation placed in one House, putting it in the power of their members to override the other in any way they please, without having their action investigated or controlled by any judicial body? Is that not a greater risk than that of having a little inconvenience by some accidental omission through not observing the provisions of this clause? If it is really desired there should be no limit whatever upon the power of the House-and no one is a stronger advocate than I of keeping the control in the House of Representatives-

Mr. REID: Both Houses must concur.

Mr. WISE: No; that would not follow. We have yet to deal with clauses to prevent deadlocks.

Sir GEORGE TURNER: There are none.

Mr. BARTON: These are clauses to prevent deadlocks, and the best there could be.

Mr. WISE: Certain clauses have been circulated in draft which make certain suggestions for overcoming deadlocks. But supposing the two Houses have had a difficulty, and that the numerical majority must prevail. Now assume that, in order to overcome this provision, if the amendment of Mr. Reid is carried, a Taxation Bill has been tacked on, say, to a Factory Act or some other Act. I am taking an extreme case, and it is only in extreme cases that this would operate. Supposing it were tacked on to an Act of imperative necessity, like a Defence Acts it could not be thrown out by any Chamber without menace to the public safety. **If a case of that sort were attempted, and the Senate should choose to throw that measure out, the two Houses could meet, and the House of Representatives, by its more numerous majority, would carry the day, although there would not be the shadow of a doubt that the Tax Bill which had been carried in defiance of Constitution would be illegal. And yet no power on earth would be sufficient to aid the reluctant taxpayer, who would be robbed as surely as if the money were taken out of his pocket.**

Mr. REID: You are assuming a case in which the Government, having ultimately the appeal to the people, would begin by a breach of the Constitution. That is a big handicap.

Mr. MCMILLAN: If you do not wish to break the Constitution, you will recognise the right of appeal to the High Court.

Mr. REID: We do not want our taxes bandied about in courts of law.

[start page 582]

Mr. WISE: All this is designed to prevent the use of a weapon with which we are now familiar, the use of the weapon of coercion in times of excitement, where there may be a large, active, and passionate majority, a majority which, under these circumstances, we say shall not be allowed to act at once, because we provide that there shall be certain checks put upon it by the action of the Senate. But in order to prevent that position being rudely, ruthlessly, and recklessly overborne, it is said that the measure shall go up by itself as a single measure, and not tacked on to anything else. If we agree, we can go further. Mr. Reid is willing to put that in the Constitution. If we want to do that, let us do it with our eyes open, and not treat it as a matter of small importance. It is a matter of very great importance, and the distinction ought to be observed.

Sir JOHN DOWNER: What we are discussing now, and are endeavouring to fritter away, is what has been called the compromise of 1891, and this represents the whole bone and sinew of the compromise. The whole effect was this, when it came into the House, whether the Senate should have the right only to reject a Bill absolutely *in globo*, or whether they should veto in detail. We, who fought that, were in turn defeated, but in substance were successful, a majority of them refusing to put in words giving the right of veto in detail; and this provision, which was carefully drawn and considered, was put into the Bill for the purpose of giving the Senate the right substantially in another form. Now it is suggested that this right would in course of time be of little use, that these relative rights of the two Houses would in course of time be of little authority, unless at the back of it all there is a vindicatory authority, some authority that is to be the guardian of the Constitution and which will take care that the Constitution is observed, and that is to be the Supreme

Court, therefore the draftsmen used different words-"proposed law" and "laws,"-the one to mark the stages of a Bill as between the Houses. and the other to mark what it has to be When in the condition of completion.

Mr. REID: I will say at once that I have no desire to raise an interminable debate on this question of States' rights. I would rather not say another word-it is not worth the discussion. We might have the debate going on for another two days at this rate. I will not move my amendment at all.

Amendment withdrawn.

Mr. DEAKIN: I desire to congratulate the hon. member upon the step be has taken, but would now repeat, in a sentence or two, a suggestion which has been discussed favorably by Bryce and Bourinot, and which appears to me to offer a way out of this difficulty. It might be acceptable. It is not an amendment to move now, but one which, if thought over and approved, might be submitted at a later stage. I realise the force of the case put by the Premier of New South Wales as to the possible dislocation of machinery, the difficulty and loss liable to be occasioned by the discovery that a measure of the kind to which he referred-a Tax Bill-had been informally passed, and consequently that all that had been done required afterwards to be undone. That would be a serious catastrophe, and if we could prevent it, while conserving and protecting State privileges such as the hon. member Mr. Wise has very properly called attention to, we should be glad to provide against. I would ask, then, is it not possible to provide against this by enabling the representatives of any State in the Senate, after such a Bill has passed both Houses, to challenge it, and suspend its operation until the opinion of the Supreme Court can be taken on the matter?

An HON. MEMBER: That would never do.

An HON. MEMBER: It is very simple.

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Mr. DEAKIN: The Premier of New South Wales has called attention to an evident risk, though not a great risk, but certainly a serious one when it occurs, and if it is possible to provide against it, why not do so. If there were a power in the Constitution by which the representatives of any State could challenge the coming into force of a measure before it was given effect to, and before a tax was imposed, and the Supreme Court were required to take into consideration the question of its constitutionality, that would secure the safe-guard which the less populous States require, while you would not involve any suffering on the individuals intended to be affected by the legislation.

Sir WILLIAM ZEAL: That would place us in a humiliating position.

Mr. KINGSTON: I understand that the position put by Mr. Reid is that-

Mr. REID: If this discussion is going on, I shall not withdraw my amendment. I withdrew it to stop the debate. But I shall insist on moving the amendment if the talk is to go on.

Mr. KINGSTON: I hope the hon. member will not withdraw it.

Mr. BARTON: The discussion I would point out, Sir, can only be upon the clause.

The CHAIRMAN: There is no amendment before the chair. The Hon. Mr. Reid intimated that he was going to move an amendment.

Mr. KINGSTON: I hope that the Premier of New South Wales will adhere to the course that he indicated earlier in the debate that he would pursue. I understood the position put by the hon. member, Mr. Barton, was that if the clause is passed as at present, under clause 52 non-compliance will not be fatal to the validity of any law, and non-compliance with section 53 will be fatal, and that any law passed under that section will be invalidated by the High Court of Australia.

Mr. BARTON: I might put it this way. The matter appearing on the face of the Bill-in respect of these matters which I submit are charters to the States-can be dealt with by the Court, but matters which are matters of procedure between the two Houses are not to be dealt with by the. Court.

Mr. KINGSTON: I understand my hon. friend puts it this way: Non-compliance with the section guarding the rights of the House of Representatives will not be fatal, but non-compliance with section 53, providing for the recognition of the privileges of the Senate, will be. I object to that most strongly; and as to what has been said about words being used here to emphasise the distinction, I remind hon. members of this-that these words were not used in the Commonwealth Bill as it left the Sydney Convention in 1891, but the same words were employed as to the infringement of the rights of the House of Representatives as were used with regard to the infringement of the rights of the Senate. The words we find here, "proposed laws," on which the whole distinction is based, are introduced for the first time before this Convention. There was a proposition to strike them out, which I then supported, and I trust something of the sort will be moved again in order that we may decide whether or not we are going to draw this distinction-that neither Sir Samuel Griffith, nor any other member of the Sydney Convention suggested-that, as regards the House of Representatives, if they infringe the law, so good, but, on the other hand, as regards the senatorial rights, if they are once touched, the aid of the High Court of Australia can be invoked, and the law declared invalid. I ask members to consider which of the two is the more important. Look at section 52, declaring in which House laws appropriating revenue, or imposing burdens on the people should originate. Surely there is no more important principle in constitutional Government, than a principle of that sort. Yet we are told, or the distinction is now attempted to be drawn, that it can be infringed-that a [start page 584] law can originate in the Senate in direct defiance of that, and, so long as the House of Representatives concurs, it passes to the Statute book as a valid measure. Compare a provision of that sort with the matters in clause 53, matters of pure convenience in regard to which we are to give powers to the Senate to enable them to veto in detail, by requiring that the laws should deal with one subject only. Sub-section 3 of clause 53 says:-

> Laws imposing taxation, except laws imposing duties of Customs on imports, shall deal with one subject of taxation only.

Compare these two things as matters of importance. Can any hon. member doubt for a moment which should be placed first in point of importance, clause 53 or 54? Yet hereby the introduction of words which were unknown to the Sydney Convention-"proposed laws"-in the first part of section 52, as opposed to the word "laws" in clause 54 of the 1891 Bill, it is proposed as regards the rights of the people to say to the House of Representatives as regards the initiation of Bills for the appropriation of the public revenue, "You can do what you like with them and no court shall stop you." As regards these other matters, priority of importance is to be given to them, and though the Senate may well wish to waive them, if they are infringed in the minutest particular the High Court of Australia may interfere and say, "Your work shall be held as nought, and the Act shall be declared void." It seems to me such a thing is utterly indefensible, and I trust Mr. Reid will adhere to the course he originally indicated his intention to take.

Mr. BARTON: As the hon. member who has just sat down has referred so fully to what I have said, I should like to put myself in the right position. I lay down two principles. The one is that a question of mere procedure, where rights are given by our Constitutional law, is to be settled between the Houses themselves, and that there never was a Constitution in the world which gave any judiciary the power to inquire into the manner in which the Houses settled their procedure in those matters; but where it is a question of the presentation of a law, when passed, in such a shape, on the face of it, that one House is deprived of its fundamental rights as a component part of the Constitution, that should be settled by the arbiter of the Constitution. Was it ever attempted in this world, on a question whether a Bill originated in this House or that, or whether that House amended it or not, which is a question of fact, to allow a Supreme Court to be the arbiter of its validity? That has never occurred, and never can. No Court should be allowed to inquire into the manner in which two Houses adjust relations between themselves. If we give these two Houses the privileges which, according to the decision of the Committees in 1891, according to the decision of the Convention of 1891, and according to the decision of the Committee now, it is intended to give-the powers, privileges, and immunities of the House of Commons-they will stand, as the House of Commons has ever stood, against any encroachment or infringement by any Court whatever inquiring into its method of regulating its procedure.

Sir EDWARD BRADDON: Hear, hear.

Mr. SYMON: It is not within the power of the judiciary to do so.

Mr. BARTON: It is not in the judiciary's power, as given in this Bill. But the question whether, what appears on the face of a law is within the provisions of the Constitution or not, is a totally different one, and that question alone the arbiter of the Constitution has a right to decide. I desire to adhere to the compromise of 1891. I have been endeavoring to do so against some delegates, who, however, will now find me faithful in adhering to it on their behalf. Where there are matters not matters of procedure-where the effective rights of a [start page 585] component part of the Constitution are involved-the Constitutional principle is that the arbiter of the Constitution-must be allowed to protect those rights. You have not it so in England because the Parliament there is Sovereign, but you have it in the Federal Constitution, because you have a Parliament that is only a part of the Constitution, and that Constitution must protect those provisions of the Constitution which are threatened with infringement. I shall resist all amendments in these respects because I consider the principles, which are altogether principles of justice, ought to protect Parliament in the exercise of its internal powers, and protect the people as to what is on the face of a law a breach of the Constitution

Mr. ISAACS: Would the hon. member mind looking at clause 54 with regard to that?

Mr. CARRUTHERS: My hon. friend, Mr. Barton, forgets that he has already consented to a departure from the principle of the 1891 Bill. If he looks at clause 52 he will find we have amended that clause in the very direction that he objects to amend clause 53. The Bill of 1891 uses the words:

Laws appropriating any part of the public revenue

An amendment has been carried which effects the very purpose which Mr. Barton is contending against now. So that if there is any strength in the contention of the wisdom of the 1891 proviso, the hon. member has given his case away. For the sake of consistency, he should either support the proposal now made or else go back and have clause 52 brought into harmony with clause 53. Mr. Barton speaks of the English Constitution. That is an unwritten Constitution, and no court of law has, therefore, any statute to guide it in its

interpretation of that Constitution. But here we have a written Constitution. In clause 71 I see that-

The judicial power shall extend to all matters arising under this Constitution or involving its interpretation.

My hon. friend, Sir John Downer, smiles, but if these words had not this meaning: that the Federal Judiciary should have the power of construing, I am at a loss to understand what they mean. It says so, and I take the words in cold type rather than listen to arguments based on a Constitution which is unwritten. Mr. Wise says that we may nave the case of a minority overriding a majority, coercing the Senate, and passing laws despite of this regulation. Does not the hon. member know this, and I appeal to this Constitution to support my argument, that any solitary member, either in the Senate or in the House of Representatives, can immediately wreck a Bill infringing these provisions by drawing the attention of the presiding officer to it. It is in the hands of any one representative in either Chamber at any stage up to the final stage of that Bill to call attention to the infringement of the Constitution, and to have the Bill ruled out of order. **I may be told that you may have a corrupt Speaker or a corrupt President, who will not rule it out of order, but you are just as likely to have a corrupt Judge.** So far as regards this matter, any one solitary member of a minority-and it would be a very small minority that could not number one-can, by drawing attention to the infringement of the Constitution, have the Bill ruled out of order. Where can there be the coercion of a minority then, when it will be in the hands of the minority to protect themselves by this simple appeal to the Chair? In such a case, I say the Bill will have to pass unanimously, and where it passes unanimously why leave it to the judiciary to wreck that which is the opinion of both Houses of the Legislature?

Mr. WISE: Why have a judiciary at all?

Mr. CARRUTHERS: If it is the sole argument for a Judiciary that we should have such a tribunal to wreck laws made with the approval of both Houses of Legislature, then let us have no judiciary [start page 586] at all. If my hon. friend Mr. Wise wants a judiciary to wreck the work of the Legislature, I do not think the people of Australia will support him in that contention. This clause was never intended, as far as the people have read it, to give effect to the arguments of either Mr. Wise or Mr. Barton. I hope that Mr. Reid will stand to his amendment, and that if he does not move it others will do it. We shall have this point decided by a test division.

Mr. WISE: I would suggest to Mr. Carruthers that the amendment should be rather in this form: instead of saying that no law passed under this section should be inquired into by the Supreme Court say:

No law passed by the Federal Parliament shall ever be inquired into by the Supreme Court.

Mr. REID: The question just put by Mr. Wise shows the very strange position he occupies. He does not seem to draw any distinction between the case he referred to in America, where the Supreme Court of the United States ruled a Bill out of order on the grounds that it was a violation of the principle of the Constitution as to a principle on which taxation should be imposed, and not a mere case of procedure between the two Houses. It seems to me that too much has been made of this point, which is represented as an attempt to take away from the smaller States their protection. That is a very good catch cry for, an argument, especially from New South Wales, when a speaker is hard up for one. There is absolutely nothing whatever in it, as the Hon. Mr.

Carruthers has pointed out, and any member in either House can surely put a simple question to the Speaker to decide the fate of a Bill that is contrary to the provisions of the Constitution. My hon. friend Mr. Barton put a view just now which would wreck any Taxation Bill in the world. He said that by the words "Laws imposing taxation shall deal with the imposition of taxation only" in a Bill you can put any number of clauses in there which would have nothing to do with the actual imposition of taxation. If that were so it would mean a rich harvest for the lawyers of the Federation, and I hold the view with others that our finances might be brought into serious confusion thereby. Lately some taxation was imposed in a colony and it was done in two ways-by a Machinery Bill and by a Taxation Bill. Under provisions of that kind you would have the courts of the Federation flooded with applicants for litigation. We do not want the legislation of the Commonwealth to be degraded to that level. If we put in the Constitution a safeguard for the Senate that the Bill shall not be more than is specified here, is the Senate going to be such a decrepit, helpless creature, that, having a constitutional safeguard for its protection, it will be absolutely too blind to see it? Not only that, but they say that every senator from all the States will be so absolutely incapable as to give away one of the safeguards of the rights of the Senate. Unless this Senate that we are about to create is going to be such a despicable object such arguments as those used by Mr. Wise would have no weight. While Parliament is legislating for the people, and when the two Houses have come to an agreement that a certain thing should be law we do not want the High Courts to come into the Parliaments of the country and shipwreck that which both Houses have deliberately passed. With reference to the bogey raised about the referendum, there are provisions in this amendment, which dispose of that argument, because in the amendment I proposed to submit Money Bills should be liable to be questioned until they become law, so that at any time when the referendum is going on, a Bill could be easily questioned on a point of law in the courts. The absurdity of the contention of some is shown in the fact that in America in neither of the two Houses would a glaring violation of the Constitution be called attention to. I say further, if there is so much importance attached to this we must go back and put the clause which [start page 587] safeguards the other House in absolutely the same position. I have no feeling in this matter except a desire that Acts of Parliament, when they become law, should have the force of law and should not merely become food for lawyers. That is my only desire. Anyone who has occupied the position of Treasurer can tell of the loss that might be brought about if, after a policy had been brought into force, perhaps four or five years afterwards, a point is taken on some innocent formal words of the Bill, and the judges are compelled to declare that all of the money collected under the Act during those years had been improperly collected.

Mr. BARTON: Would that justify a sweeping amendment?

Mr. REID: My object was such a simple one that I did not apprehend so much importance would be attached to it. At first blush I thought everyone would be as anxious as I was to prevent the possibility of such difficulties, but I see now that there is a great deal more importance attached to it than I thought. The importance, I think, disappears when we remember that any member of the House of Representatives, upon calling the attention of the chair to the breach of the provisions, would kill the Bill there, and any one senator, upon drawing attention to the same clause in the Upper House, could kill the Bill there too.

Mr. WISE: Have you considered the position in America with regard to the Speaker, who happens to bear the same name as yourself?

Mr. REID: The Speaker of the House of Representatives in America is really the leader of a political party sitting in the chair, and surely we are going to draw a distinction between the Speaker of our House and the partisan officer sitting in the chair there and pulling the wires for the benefit of his party.

Mr. BARTON: Would you let the Constitution rest upon this matter?

Mr. REID: Clearly no Ministry would bring in a Taxation Bill and allow it to be so amended. In America they move under a different set of circumstances altogether. As I pointed out, there is a great difference between the procedure as to whether a Bill contains clauses too many or not, and taxation itself in clear violation of the principle of taxation put in the Constitution. I was pointing out that I look upon this merely as a matter of procedure.

Mr. WISE: It is not a matter of procedure.

Mr. MCMILLAN: Is not the amendment to be limited to procedure?

Mr. REID: Entirely as between the two Houses, and that is my only desire.

Mr. WISE: Would not the defect, if there was a defect, under this sub-section appear on the face of the Bill?

Mr. REID: **If it appeared on the face of the Bill, we have to assume first that the Government would bring in a Bill which on the face of it was illegal, and that there would not be one pure soul in the House to call attention to it, and that even the immaculate Senate would not contain an angelic mind that would do its duty to the Constitution. Heaven help the Constitution if it is to be run on these lines! The Upper House will not allow its rights to be violated if they are put in the Constitution, and the object of the amendment is simply to prevent an unfortunate accident, which would happen over and over again in Acts of Parliament, from rendering an Act after it has received the Royal assent, and which might be, perhaps, the deliberate policy of the country, accepted by vast majorities in both Houses, invalid. I would not have proposed this amendment in face of the serious debate it has provoked. I proposed, if no member of the Convention has a previous amendment:**

To insert at the end of sub-section 4: "Money Bills shall not be liable to be called in question in respect to any breach of the provisions of this section after the same have become law."

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That would allow any exception to be taken to a Money Bill till it has received the Royal assent, after which no such question shall be raised.

Sir GEORGE TURNER: We have devoted considerably over an hour to this discussion.

Mr. REID: Perhaps Sir George Turner will allow me, and in order to get this matter tested, I will apply the very same test which was applied to clause 52. I propose:

Before the word "laws," in sub-section 2, to insert the word "proposed."

I shall thus challenge the sense of the Convention in exactly the same manner as in the previous instance.

Sir GEORGE TURNER: **We have been discussing this matter for considerably over an hour, and if we take as long over all questions we shall be here for some weeks, and it seems the more we discuss it the more confused members will undoubtedly become in connection with it. I do not propose to add to that confusion to any great extent. I think there is some misapprehension with regard to the defects which might arise under this subsection. It may be that if the Parliament did not follow out the course here laid down the Federal Court would have the right to declare the whole law to be void. Well, that would never do. It would never do after a law had been passed voluntarily, without any compulsion such as Mr. Wise speaks of, the Parliament fully believing that they were doing everything right, and the Treasurer had acted on it, and collected a large amount of revenue, for him to find, because some small slip had been made, that the law was absolutely void. At the same time we do not want it to appear that in making any alteration we desire to, take away from the smaller States any protection which they may think they have under this. No one desires to give any ground for it, and I do not think any alteration we could make would take away the protection, because the protection is undoubtedly with the Senate. The only difficulty which might arise would be that the point in question might be overlooked. Therefore if we would lay on somebody the duty of certifying before the law passes that it was in compliance with this section we could give all the protection required.**

Mr. O'CONNOR: **Then you would leave it to the person who certifies to interpret the law.**

Sir GEORGE TURNER: **No; when the law has once passed the court should not have the liberty to interfere, and say on some small question of procedure that the law should be upset I would leave it to the Senate.**

Mr. REID: They will take care of themselves.

Sir GEORGE TURNER: Let it be the duty of the President for the time being to certify that the proposed law was in compliance with this section. It will then be his duty before putting in such law-

Mr. REID: The Senate could make a Standing Order to meet that.

Sir GEORGE TURNER: No; in order to prevent any doubt arising among the representatives of the smaller colonies that they might be injured, I would suggest to Mr. Barton to adopt that mode, and make it appear that, **while the Court had no right to interfere with the Act when it was once law, yet before it became law every opportunity should be taken to see that that section is not infringed.** I would leave it to the President of the Senate to certify, either by himself or on a resolution of the Senate, that the proposed law was in accordance with this section, so that there would be a statutory duty on him to consider before the law was passed that there was no infringement of it.

Mr. GORDON: It might be passed in one, sitting.

Mr. BARTON: Would you prevent the Governor giving his consent without the certificate?

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Sir GEORGE TURNER: Something like that. I quite agree with the smaller States that there should be some provision by which they could not be injured, but I feel very loth to go the full length of giving the court power to interfere with the Bill when it is passed.

Mr. MCMILLAN: Perhaps a bewildered layman might mention what I understand to be the exact position. I understand if we add the word "proposed" before "laws" it would then be really a matter of procedure, and that the introduction of the word "proposed" before "laws" would make it practically a Bill, and that otherwise the question of whether the measure is constitutional could not be dealt with.

Mr. BARTON: It will prevent the High Court from inquiring into it.

Mr. MCMILLAN: According to the amendment proposed, it would prevent any mere slip of procedure from making invalid an Act which may affect the whole country and its financial operations, **but nothing which we may enact with regard to procedure will prevent any suitor from going to the High Court if the Act is essentially unconstitutional.** That is the way I look at it, and it seems to me that either putting in "proposed" before "laws," or adding an amendment somewhere or other making it clear that no mere slip of procedure can invalidate the law, would meet all the difficulties.

Mr. BARTON: This is not proposed to cover mere slips, but everything.

Mr. MCMILLAN: I do not think that could be the intention. We are attempting to legislate for a very limited possibility. **You will get disputes so long as there are lawyers in the world. I do not know whether Federation will do away with lawyers.**

Mr. BARTON: Not until merchants will cease to quarrel.

Mr. MCMILLAN: If so it would simplify our arrangements very much. At the same time it does seem that there ought to be something introduced to prevent the law being put into operation for a mere breach of procedure, if there is such a chance.

Mr. SYMON: There is no chance.

Mr. MCMILLAN: I do not suppose that any ordinary moral layman would do it, unless he were instructed by a less moral lawyer.

Mr. HIGGINS: There seems to have been infused in this debate an amount of spirit, and I am going to incur the risk of the ordinary peacemaker. There has been no reference to the common-sense provisions which are put into all articles of association with regard to digressions from the prescribed routine. On the one hand, there is no doubt that there is no covert design to injure the smaller States and their representatives, by attempting to impose upon them laws which are not in the ordinary course as prescribed. I think the members for the minor States will accept that assurance. But, on the other band, there is no desire on the part of the minor States advocates to give the lawyers more work than they can possibly help. But there is no doubt that these sub-sections 2 and 3 of section 53 are calculated to lead to questions in the courts which ought to be avoided if possible. Take sub-section 3:

Laws imposing taxation, except laws imposing duties Customs on imports, shall deal with one subject of taxation only.

What is meant by one subject of taxation? Suppose a land tax is imposed, you tax posts and rails. That may be argued not to be a law dealing with one subject. There are questions which will certainly arise which will be fruitful in litigation unless we take great care. Therefore, I am in thorough accord with the desire of the Premier of New South Wales to have some clause which will obviate the bringing of these trivial matters into the court, and under which a great wrong will be done on the ground of some trifling breach of the Act. What is done in the case of articles of association? There are in articles of association pro- [start page 590] visions for meetings to be held, for the holding of meetings in a certain

manner, and for a number of directors, and so forth. But there is always a clause for any accidental omissions; to comply with the articles is not to invalidate the resolutions of the meeting. I would suggest this should be done here. All we want to provide against is accident, mere accidental omissions. I would suggest the following:

Any accidental failure to comply with the foregoing provisions of this section shall not invalidate any proposed law to which the Federal Parliament has assented.

Mr. REID: That would make it worse.

Mr. HIGGINS: But I would provide that the failure shall be treated as accidental, in this way. I would go on to add:

The failure shall be treated as accidental if it has not been brought to the attention of the President of the Senate or of the Speaker of the House of Representatives.

Mr. BARTON: This procedure is to be brought before the court by way of affidavit, then.

Mr. HIGGINS: It is a simple matter. The mere fact that you define the accident in this form-that is to say, when no one has brought it before the Speaker or President-is quite sufficient. Even if the word "accidental" were not defined, it is a regular expression used in articles of companies, and there has never been any question of difficulty raised with regard to it. It would be very easy to say that it should be treated as accidental unless some member of either House brings it before the Speaker of the House of Representatives or the President of the Senate. I feel-sure that the experience of companies for many years past is the best experience we can have for dealing with any irregularity of this sort. I do not want to move this as an amendment, but if the honorable the Premier of New South Wales would accept it I would be very glad. It might be better for us to leave it to the Drafting Committee, with instructions that some form of words to carry out this idea should be adopted. I am not prepared to move anything on the spur of the moment, but I feel sure something of the kind I have suggested would be the correct way of getting over the difficulty.

Mr. O'CONNOR: I think it is a misapprehension on this question to say that it is a matter for lawyers, and not of sufficient importance to be considered worthy of a full discussion. But I think it is a matter of the utmost importance, because it is one of the guarantees in this Constitution to the people represented in the Senate. I wish to put it as shortly as possible from that point of view. **The Senate, by section 53, have certain limitations upon their powers. They are not allowed to deal with an Appropriation Bill appropriating the necessary supplies for the ordinary annual services of the year; they are not allowed to amend a Tax Bill; and they are not allowed to amend any Appropriation Bill so as to increase any charges upon the people. That is the limitation which is put upon the power, not only of the members of the Senate, <u>but it indirectly affects the rights of the people of the different States they represent</u>, inasmuch as you have your States represented in the Senate.** That is a limitation on the power of the States, and therefore in that limitation not only the members who represent the States at a particular time, but every member of the States interested has a direct interest in that portion of the Constitution. Now, in order that that right shall be exercised only in the strictest possible way you must surround it with some safeguards, and these safeguards become necessary for this reason, that it is well known where legislation is carried on by two Houses it is a common practice to evade laws of this kind, which are merely laws of procedure, and it is very easy to evade them. For instance, it is very easy to evade a law imposing taxation by inserting some provision in the Bill which it will be very

difficult for the [start page 591] Senate to reject, and which would put the Senate in a very awkward position in the public eye if it did reject it, but which at the same time make it necessary if they pass it to pass an obnoxious system of taxation. A proposal of that kind is not unknown. Take the next sub-section-

Laws imposing taxation, except laws imposing duties customs on imports, shall deal with one subject of taxation only.

It is not an uncommon thing to introduce a Tax Bill containing a tax on land which might or might not be objectionable, or a tax on income which might or might not be objectionable.

Mr. REID: Where is there a law against it?

Mr. O'CONNOR: I will deal with that by-and-by. I point out that in the absence of a law, and the very absence of a sanction which will enforce the law, provisions for getting over the procedure of the House are very common. The next provision is:

The expenditure for services other than the ordinary annual services of the Government shall not be authorised by the same law as that which appropriates the supplies for the ordinary annual services, but shall be authorised by a separate law or laws.

That is meant to be directed to the provision of tacking which is very often met with in the process between the two Houses. **Tacking to the Appropriation Bill is not a device that is unknown in these colonies.**

Mr. REID: Is it forbidden in this section?

Mr. GLYNN: It is not prevented by this section.

Mr. O'CONNOR: It is not excepted in the way which I will point out now, by making an infringement of this Act a penalty, that is to say, a penalty that the Act which infringes shall be of no validity. It is only in that way that you can ensure compliance with these provisions, **or if you make it so obligatory that if they are not complied with the Act shall be void.** I point out, in regard to these three different matters, that these are ways in which proposals of this kind between the two Houses are affected. It is said that is only between the two Houses. In any question between two Houses you will always be brought face to face with the condition of things which exists between the two Houses now. A law which may be introduced in violation of one of these sub-sections maybe believed to be a violation by the Senate, and thrown out on that ground, and be sent back. It may be sent up again by the House of Representatives, and so by that way you have a question which, instead of being settled, becomes a matter of contest between the two Houses. Another matter of difference between the two Houses we know. It is where one House happens to take an unpopular view of a question-a view which for the time being is not the view of the majority of the people. We know it is easy to bring the pressure of the majority of public opinion on one House for the purpose of obtaining a violation of the law. This is not intended to be a protection to the House or the Representatives of the House, but to the States represented in the House; that no matters of tactics between the Houses, or no playing off of public opinion by one House against another, shall ever take away the protection embedded in the Constitution for the States. I have heard of the argument of the inconvenience of laws being upset on account of some invalidity being discovered-some trifling invalidity, perhaps. I say you must submit to that inconvenience if you wish to enter a Federal Constitution. **The very principle of the Federal Constitution is this: that the Constitution is above both Houses of Parliament.** That is the difference between it and

our Houses of Parliament now. **The Federal Parliament must be above both Houses of Parliament, and they must conform to it, because it is in the charter under which union takes place, and the guarantee of rights under which union takes place; and, unless you have some authority for them to interpret [start page 592] that, what guarantee have you for preserving their rights at all.** It is very necessary to insert this provision in the Constitution, because if you do not do that then these questions are questions of procedure between the two Houses in which undue pressure may be brought to bear at any time on one House or other for the purpose of vetoing a law and doing injustice to the States represented in that House in the different ways in which the States are represented. As to the inconvenience, there are thirty-two different subjects of legislation here which may be dealt with by the federal authority, and in regard to any one of these if an error is made which takes the law outside the authority which is given to the federal power it is invalid-absolutely void-no matter what inconvenience may follow.

Mr. ISAACS: That is not a rule of procedure; that is jurisdiction.

Mr. O'CONNOR: With every respect, that is begging the question to put that as an argument.

Mr. ISAACS: That touches on State rights.

Mr. O'CONNOR: I admit that. In fact the whole thing is founded on State rights because if your amendment, using the word "proposed," is carried it is a matter of procedure; but if the word "laws" remains it is not a matter of procedure.

Mr. ISAACS: That is what you have done on clause 62.

Mr. REID: Why did the Drafting Committee alter that from the Bill of 1891?

Mr. O'CONNOR: With all respect to that hon. member, the Drafting Committee did not alter that. It was altered by the Constitutional Committee, and I think very properly, because the initiation of a Bill is a different thing altogether from any of these questions. The initiation of a Bill is a matter which does not limit the powers which are given under section 53 to the States.

Mr ISAACS: Surely the initiation of Money Bills gives much more to the liberties and rights of the people.

Mr. O'CONNOR: That goes really into a legal question. The difficulty of dealing with a matter of that kind is the manner in which it has to be raised before a court.

Mr. ISAACS: Same principle.

Mr. O'CONNOR: So long as you have a principle that if a law, on the face of it, is invalid, it is a matter which the Court can decide, the matter of initiation is not a matter of that kind. The principle involved here is exactly the same principle involved in the question decided in America as to the uniformity of taxation laws. The populations of the States had a right to insist that no tax which was not uniform should be imposed. And no matter what the rights of the Senate, for the time being, that was the protection in the Constitution against any action which might be taken, whether with the consent of the Senate or without. I ask the Committee to adhere to the proposal in its present form, not because it is a matter of protection to the Senate or the other House, but because it is a matter of protection to the States that have entered into this union that that limitation which is placed upon their power of amending a certain class of Bills cannot be infringed or enlarged by

the adoption of any ordinary tactics which may be used under our present Constitution between the two Houses.

Mr. SYMON: I do not wish to detain the Committee more than a moment or two, but I feel I ought to set myself right in regard to this proposed amendment. In doing so I wish, as I have already done personally, to express my regret that perhaps it was owing to a suggestion of mine that Mr. Reid's amendment assumed the shape it did. I accept any responsibility on that score, but I hope he will forgive me if I am unable to follow it up by voting for the amendment. I am, in this instance, an illustration of the value of discussions of this sort, and I desire to express my in- [start page 593] debtedness to Mr. Wise and Mr. Reid for their arguments, which have satisfied me it would be exceedingly unwise and dangerous for us to introduce this amendment in this clause. I rather come back to my original view that, substantially at least, the provisions of this section are intended as provisions of procedure. So far as they are provisions of procedure, Mr. Reid has shown conclusively that we have absolutely nothing to fear, because the House of Representatives may be relied upon, and the Senate may be relied upon to see that the ordinary preliminaries and the ordinary technical provisions are observed before the Bills are finally dealt with. I was led away by a consideration of the inconveniences that might flow from a taxation or some other Bill being declared invalid by the High Court some time after it became law. But exactly the same inconveniences may possibly arise from any single Bill passed under the thirty-five heads of legislation with which the Federal Parliament will have to deal. Therefore it seems to me that, whilst undoubtedly inconveniences may arise, still these inconveniences do not militate against a very salutary power which as a Federation we propose to vest in the High Court of the Commonwealth. I will only add this-without going into the details applied in so masterly a way by my hon. friend Mr. O'Connor, when he pointed out the real safeguard in relation to these sections which the High Court might be at the instance of a suitor-that we must remember if we seek to derogate from the power we vest in the High Court of dealing with all laws which any **citizen** of the Federation may claim to be unconstitutional, we are not invading State rights, because it is not a question of small States or large States, but it is a question of the liberty and rights of every subject throughout Australia. It is the subject that is concerned in this; it is not the body politic, but every taxpayer-every individual who may be assailed either in his liberty-

Mr. REID: But if both Houses are favorable to the taxes, is there anything in that?

Mr. SYMON: That does not matter. The moment you override or coerce the Senate-

Mr. REID: Coerce! Why, one man has only to get up and point out that it is contrary to the Constitution.

Mr. SYMON: Suppose you have a majority in the Senate willing to override the law, how is the minority to be protected, how is the State represented by that minority to be protected, and every dissentient **citizen** in any of the other States, large or small? But the point I wish to call the particular attention of the Committee to is that if we seek to prevent redress being obtained in the High Court with regard to the constitutional position of any law, we are invading one of the first principles underlying any system of Federation. My hon. friend Mr. Carruthers seems to forget that we are dealing with Federation when he talks about a High Court to wreck the work of legislation. First of all, that is an inappropriate expression. If he means we are constituting a High Court to decide whether the laws are constitutional or not, undoubtedly we are. If not we had better sweep this Federation away at once-we are here on a wild goose chase. Were we to adopt the amendment, I do not see that it would have the effect which Mr. Carruthers urged, if it

were hedged round with such limitations as Mr. Higgins alluded to; but if we pass this amendment in its present form we run the risk of making Parliament, in regard to Money Bills, the judge of whether it is acting within the Constitution or not. If we do that we are striking at the root of a just Federation, and it is from that point of view, which was brought very clearly before the committee by my hon. friend Mr. Wise, that I feel it impossible to vote for an amendment which at the first blush seemed to get over some [start page 594] practical difficulty. I think we had better omit it altogether. If we omit it we shall be acting consistently in this: that we shall be making no exception to the power of the High Court to interpret the law of the Constitution, and declaring whether an Act of Parliament is contrary to that or not. Parliament is not supreme, and the very essence of the Federation is that it should not be so. Parliament, as far as constitutional questions are concerned, is under the law, and it must obey the law. If we make an exception in regard to Money Bills we had better make an exception in the case of all other Bills which may arise under the provisions of clause 51, and thus sweep away the High Court. I thought that we were all, agreed that the reason for the establishment of the High Court was a salutary one, and that it would determine constitutional law and practice. We must all remember that at one portion of the history of England a question of liberty was raised by a humble individual named John Hampden, who put forward a point on the subject of taxation. We do not know but that we may have John Hampdens in Australia raising questions of liberty; it would be well to leave the High Court of Australia to deal with such matters as that.

Mr. Reid's amendment, by leave, withdrawn.

Sub-section 2 as read, agreed to.

Sub-section 3.

Sir GEORGE TURNER: I desire to draw Mr. Barton's attention to these words in the subsection:

Laws imposing taxation, except laws imposing duties of Customs on imports, shall deal with one subject only.

That would require that every time you desire to deal with the duty of excise it should be done by a separate measure. That cannot be the intention. It would very often happen that the question of duty of Customs and the duty of excise would have to be discussed together, and that it would be impossible to decide what ought to be done with regard to the one unless you know what you will do with reference to the other. If we are to deal with the large number of items included in a Customs Bill, I fail to see why we should not be able to include in the same measure all duties of excise. I would ask the hon. member to consider the matter, and either make an amendment or give us a reason for the retention of the words as they stand.

Mr. BARTON: The reason why it has not been done so far is this: Sub-sections 2 and 3, in consideration of the fact that laws imposing taxation are not subject to amendment by the Senate, have been put in the form of protecting the Senate from the coercion which might be involved in a taxation measure having added to it something which was not a taxation measure, or a taxation measure having two distinct subjects of taxation brought into the measure together. That protection is of course a counterpoise to preventing the Senate from amending such measures. If what I might call the other side, in a genial way, had their way this morning, it would be a question whether protection of this kind remains in the compromise of 1891. The hon. member raises an important point, and that is whether there is to be permission in the Customs Bill to have a corresponding excise. That is a matter I must leave in the hands of the Convention entirely. For myself, I have no strong

feeling about it, except that we ought to keep as strong and inviolate as possible those protections which are afforded not only to the Senate, but to the people themselves to consider what under the Federal Government is involved in so separating the subjects of taxation, and, as the next sub-section shows, the subject of appropriation, as to enable the Senate to deal with them separately. The object of this, of course, is that inasmuch as amendment is prevented the subjects should be so divided that no two subjects could come before [start page 595] the Parliament together as matters of taxation, so that where the Senate cannot amend they have the right of veto, and veto as far as possible in detail. Of course they cannot have Customs or excise law in respect of so many items so that there could be veto in regard to each, because veto in detail with all of these would mean interference with the financial policy of the whole Government. But it has been unanimously agreed in respect of taxation that the Senate should have a veto, and the object of this clause is to divide into their proper categories all laws imposing taxation, so that that veto may be exercised without interference and as a protection to the smaller States and a protection of those rights which every Second Chamber ought to have, whether it is the Senate of a Federation or a House made under the ordinary Constitution. That is my object, and I am sure that the object would be infringed if the provision were to allow the question to be considered in the same Bill. My position is this: that until I see very strong reasons for doing otherwise it is my intention to adhere to the terms-I do not want to bind anyone else-but I desire to adhere individually to the conclusions of 1891, because I think they are the best basis upon which Federation can be secured. I think very strong reasons should be adduced to allow the two subjects of taxation to be introduced into the one Bill, and we should adhere as nearly possible to the Bill of 1891. Most of us contend that the compromise or the conclusions of 1891 should be adhered to, and as we have succeeded in our argument in showing that they should be adhered to in respect of one portion of the clauses I think we should stick to them in regard to the other.

Sir EDWARD BRADDON: Although I entirely agree with the object of the clause in one respect, I think it fails in the object intended to be given to it, and that is in the exception as to laws for imposing duties of Customs. I question whether that exception is sufficiently and carefully safeguarded. There is no doubt as an ordinary layman reads it that under the laws imposing duties of Customs or on imports they can go on and impose taxation in any other form. There is nothing to prevent the imposition of excise duties, and there is nothing to prevent the law seeking to impose land or income taxes or anything else, and therefore I hope, when the clause comes to be finally accepted, as I trust it will be, that some limitation will be placed upon the exception in regard to duties. I think we all understand what is meant, that a Bill imposing duties may necessarily have to deal with any number of subjects liable to such duties, but as the subsection is worded it will go much further.

Mr. ISAACS: An instant before Sir Edward Braddon called attention to this matter I was directing Sir George Turner's attention to the same point. The intention is perfectly plain to us at all events, but what may be done and what in future times may be contended is not quite so clear. The sub-section reads:

Laws imposing taxation shall deal with one subject of taxation only.

Bills which impose duties of Customs on imports are entirely excepted from that provision.

Mr. GLYNN: We can amend it.

Mr. ISAACS: Yes; and I think it should be made to read:

Laws imposing taxation shall deal with one subject of taxation only, provided laws imposing duties of Customs on imports and of excise may deal with more than one item.

Sir WILLIAM ZEAL: I suggest that the best plan would be to postpone the clause afterwards, and recommit it in order that the draughtsmen may re-cast it. We have now been discussing the clause for a couple of hours, and have made little progress.

Mr. REID: I assure my friend Sir William Zeal that the matter raised by Sir George Turner is very important.

[start page 596]

Sir WILLIAM ZEAL: Refer it to the draughtsmen.

Sir GEORGE TURNER: It is not a question of drafting.

Mr. REID: I would point out to Sir William Zeal that recommitting the clause might mean fighting the matter all over again, and we want to get rid of it altogether. The point raised by Sir George Turner is an important one. There may be a Customs Bill introduced, and it may involve duties of excise on a large number of goods, and at present each excise duty would have to be included in a separate Bill, and then a most unfair thing might be done. Ten duties might be proposed, and eight, because they were popular, might be agreed to, and the remaining two thrown out because they were less popular. If you have the Customs as a whole you must have the excise as a whole.

Mr. FRASER: Surely duties of Customs on imports should be dealt with at the same time as excise. That is only common sense, and might be agreed to at once, as we have been wasting a tremendous lot of time

Sir GEORGE TURNER: I hope Mr. Barton will not mind me proposing to alter the sub-section, as I know the difficulty of interfering with drafting, and I do not like to have my own drafting interfered with. I will move:

That after the words "Customs on imports" there shall be added the words "and excise."

Mr. MCMILLAN: Do you mean that they should be in one Bill or two Bills?

Sir GEORGE TURNER: I think that they should be in one Bill.

Mr. MCMILLAN: Then you are making it necessary that there should be one Bill of Customs and excise combined.

Sir GEORGE TURNER: I would not go that length.

Mr. WISE: I think the sub-section might be made to read:

Laws imposing taxation shall deal with one subject of taxation, and laws imposing duties on imports shall deal only with duties of Customs and excise.

The difficulty my friend Sir George Turner suggests is that if you add laws imposing duties on exports and laws imposing duties on excise you leave it this way: that you would have to have as one Bill a Bill imposing duties on exports, and you would have to have another separate Bill imposing duties on excise. I understand my friend may do this where a Customs tariff is introduced and there are a number of balances in the same tariff at the same time-Customs duties with excise duties.

Sir GEORGE TURNER: If necessary.

Mr. BARTON: Do we do that in our ordinary legislation? We bring in a separate Bill.

Sir GEORGE TURNER: We do not.

Mr. BARTON: I do not think it is the practice in New South Wales to go into Committee of Ways and Means, both for Customs and excise, at the one, time; I think that is the Flame in South Australia. It may mean a very important question to both Houses whether the Customs duties should be in one Bill, and the duties on excise in another, or whether they should both be in one Bill, and it is a question after all whether we should depart from the arrangement here. I will put this case. It is easy to balance the duties on Customs and duties on excise in one Bill if you do not regard certain contingencies which may arise, but if you have another House to deal with and you have regard to the policy of taxation, then, in a House to which you have conceded the right of veto, it is a different matter. If you include several subjects in one Bill you will find the Senate ready to grant an excise on beer, but not on tobacco, and it will not have the power to provide for that excise on beer, without assenting to that on tobacco, inasmuch as the power of amendment is taken from it. It would not have an opportunity of declaring itself on this, inasmuch as these were placed in a sort of balance. So it remains a question whether these [start page 597] duties of excise should not be in one Bill and Customs in another, and also whether-

Mr. REID: Why Customs in this way?

Mr. MCMILLAN: I would suggest as an amendment the insertion of the words:

Except laws imposing duties of Customs and excise, whether in one or separate Bills.

Mr. BARTON: If you did that you would have both Customs and excise in one measure.

Mr. MCMILLAN: Why not?

Mr. BARTON: Mr. McMillan says, "Why not?" I think that is a question to be debated by the Convention. I have not considered the matter much myself. If you are to accept Bills proposing duties of Customs and duties of excise, whether in one or separate Bills, you still leave it open to have forced upon the Senate a Bill which contains duties on imports, and also widely different duties on excise, and the question is whether that is within the intention of the compromise of 1891, which was, as far as it was possible, to separate the subjects in detail. Whether that power should be preserved, I think is a very important question. It is, however, very easily overcome in the way of drafting. The suggestion of Mr. Wise or a modification, of it might be put in. But inasmuch as I regard it as a question of substance I will not say anything about it till the Convention has had an opportunity of fully expressing itself. I would like to defer my opinion, only saying that it is my intention, as far as possible, to adhere to the compromise of 1891.

Sit GEORGE TURNER: I would like to omit the words:

Except laws imposing duties of customs on imports,

and add at the end of the clause:

Providing that laws imposing duties of customs on imports, and also imposing duties of excise, and may deal with any number of articles.

I do not desire to take away an item of the compromise, but I do desire to prevent deadlocks occurring hereafter. From my experience I say that if you leave it in this position

you may have serious difficulties hereafter. You perhaps would have a duty of so much on spirits, and an excise of so much on tobacco, and unless you deal with it in this way you will get into a state of confusion.

Mr. BARTON: You might provide that no excise shall be imposed on any item which is not also subject to taxation.

Sir GEORGE TURNER: I do not know. We have an excise duty on colonial beer. I am perfectly prepared in this way, as suggested to me by Mr. Deakin, that where you have items of Customs on imposts, and you desire to have an excise on similar articles they could go in one Bill. But if the question applies to something on which you have no Customs duty it might be put in a separate Bill. If you are going to impose a Customs and you desire a duty of excise, these two questions ought to be considered and passed at one time, for if you impose a duty of excise on a certain article and reject the duty of excise you might destroy a large industry.

Mr. FRASER: I think that the amendment would be perfect provided that the duties in the shape of excise would only deal with the subjects on which are imposed import duties, but it does not say so. If duties are proposed on spirits or wines, and these articles have an increase of duties proposed, then undoubtedly the Treasurer of the day should have the liberty to propose duties of excise on similar articles but not to ring changes upon any number of outside articles. If that is attended to the amendment will be in perfect order.

Mr. MCMILLAN: I think it is absolutely necessary in making a comprehensive financial policy that a Bill introduced with Customs should also, as a rule, contain details of the excise; but, at the same time, I think it would be a mistake to make it compulsory in the Constitution that there should be one Bill. We ought to make it so that the excise and Customs [start page 598] could be dealt with together, but that they could be introduced as separate Bills if necessary.

Sir GEORGE TURNER: There is nothing to prevent that.

Mr. MCMILLAN: I am only pointing out now as a financier that I agree with Sir George Turner that if you have a broad financial policy such as that which would usher in the arrangements of a new Federation it would be better that the financial proposals should hang together. There is no greater injustice to the Upper House in dealing with the Excise Bill *in globo* than there is in the Upper House dealing with a Customs Bill *in globo.*

Mr. SYMON: We might adopt what Sir George Turner proposed if we struck out the last few words, and inserted:

Upon any article upon which it is proposed to impose duties of Customs.

That would enable a financial proposal to be submitted, and would not be open to the objections pointed out by the hon. member Mr. Barton, that it would be dealing separately and independently with excise duties which in the interests of the States might be dealt with separately, because in one State it might be to its interest to do so, though it might not be in another State. It might be to the interest of South Australia to have excise duties on tobacco, but it may not be on other articles.

Mr. REID: They should be taken together because we want to do away with these local combinations causing strifes over one impost as against another, and deal with the question in a broad national spirit.

Mr. SYMON: We want to prevent unpatriotic combinations.

Sir JOHN DOWNER: In this matter we are fighting over again the question as to whether the Senate shall have power to deal with Money Bills or not. Here is the first attempt to fritter away the right of the Senate in this matter. There will be cases in which the subjects of import and excise must be very largely mixed up, and it may be highly proper to consider the two things together. Where is the difficulty in having two Bills before the Senate, where is the difficulty in their internal arrangements which prevents them from dealing with them?

Mr. MCMILLAN: They might reject one and accept the other.

Sir JOHN DOWNER: If we are to force the Government to bring up its financial resolutions piecemeal instead of in one Bill it would be it highly inconvenient thing to the Government. I can understand every gentleman present who is a Minister in office now, and who has these things brought more immediately before his mind at the moment, taking this view. We ought not, however, to sacrifice a great constitutional principle on questions like this. A great struggle took place over the power of amendment. That was reduced to the power of veto, and that was again brought down to the question of whether veto, instead of being general, should be in detail; and I understand that we have settled that it should be in detail. Are we going to depart from that? So fax as practical difficulty is concerned, there can be none in a Customs Bill and an Excise Bill going up at the game time for consideration by the Senate.

Mr. MCMILLAN: It is not worth while fighting about.

Sir JOHN DOWNER: I do not know whether it is worth while fighting about it. We want to find that out. We want to provide for this question of tacking, and for one Bill being put on to another, and so compelling the Senate to pass Bills some parts of which they like and with some of which they disagree. It is, I think, better to leave the clause as it is.

Mr. BARTON: I understand it is proposed to strike out:

Except laws imposing duties of Customs on imports

And to insert at the end of the clause:

Providing that laws imposing duties of Customs on imports and also imposing duties of excise, may deal with any number of articles.

[start page 599]

Sir GEORGE TURNER: I am not particular as to the wording so long as I got the principle.

Mr. GLYNN: Leave out "excise."

Mr. BARTON: I think still the game difficulty arises, as the intention of the principle in the conclusions of 1891 was, wherever it was reasonably possible, to separate matters so that they remained separate matters of principle to be dealt with by the Senate separately. This would be a departure from that principle, and would curtail those rights of the Senate which are given to it in consideration of the fact that it may not amend Money Bills. It is clear by the decision of to-day that the Senate may not amend Tax Bills, and I want to stand to that principle of justice which, in lieu of the right to amend Money Bills, gives it the right to deal in detail with and veto separate subjects of taxation. I think the course which is adopted in some other colonies, as in this one and New South Wales, might well

be adopted by the Commonwealth, to pass a separate law for every such subject of excise duty, to pass a separate resolution in ways and means for every such subject, and having carried those resolutions to embody them in a Bill. There have been departures in all the colonies, but that has been the prevailing rule, and I think it is the beat plan. If that view is adopted I do not think we should leave out these words, but should leave the clause as it stands and insert some words to meet Sir Edward Braddon's objections. His objection is an important one. It is that the words:

Except laws imposing duties Customs on imports

may impliedly give leave when passing a Customs Bill to add other subjects of duties other than Customs duties; so that a Customs Bill might include a Land and Income Tax Bill.

Mr. SYMON: Hear, hear.

Mr. BARTON: That clearly was never the intention of the clause. While I wish to stick to the substance of the compromise of 1891, I am perfectly ready that any amendment should be made which can carry out and effectuate the intention of that compromise. I think it might, be better if we retain the clause as it stands, and then add to the sub-section the words:

And laws imposing duties of Customs shall deal with duties of Customs only.

I will move that as an amendment.

Sir EDWARD BRADDON: I only seek Mr. Barton's advice as to whether the words he has just indicated will cover the ground we wish to cover as completely as a draft of an amendment which I have shown him, and which proposes to add at the end of the sub-section the following:

Provided that laws imposing duties or Customs on imports may deal with several duties or Customs, but shall not deal with any other subject than such duties or Customs.

Mr. BARTON: I have already proposed an amendment to that effect.

Sir EDWARD BRADDON: Then I am satisfied.

Question-That the words, "Except laws imposing duties on Customs on imports," proposed to be struck out, stand part of the sub-section-put. The Committee divided.

Ayes, 23; Noes, 14. Majority, 9.

END QUOTE

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QUOTE

Costello to shame premiers

David Uren and Steve Lewis
February 28, 2005

LABOR state governments that fall behind in spending on health, education and infrastructure would be "named and shamed" under a Howard Government offensive to increase accountability for $35 billion in GST revenues.

Peter Costello yesterday confirmed the Government's latest plan to increase its control over national economic development, amid concerns that the states are squandering too much on public sector salaries.

"If they're going to take $35 billion of GST revenue, they need to be held accountable," the Treasurer told the Nine Network's Sunday program.

John Howard is expected to take a formal plan to the next premiers conference, after cabinet discussion last week on ways to increase transparency of annual GST payments to the states.

But the Labor premiers, reinvigorated by West Australian Premier Geoff Gallop's emphatic election win, will strongly contest any moves to increase Canberra's control over how they spend GST funds.

Dr Gallop warned yesterday of a concerted federal attack on states' rights, saying his Government's ability to deliver improved services was under threat.

END QUOTE

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HOUSE OF REPRESENTATIVES
WEDNESDAY, 14 SEPTEMBER 2005

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QUOTE **dr140905-GST.pdf**

Mr TRUSS—They could accept some kind of a freeze on GST, if they chose to do so—I am not expecting that they will.It is also true to say that business users get their GST refunded for the fuel they use for business purposes. The change in taxation policy makes a huge difference to the price of fuel, and I think it is part of the reason why the public have been a little more understanding about the current price than they have been in the past.

64 HOUSE OF REPRESENTATIVES Wednesday, 14 September 2005 CHAMBER

To put this into some kind of context, a family who uses 50 litres of petrol a week is now saving $174 a year in excise as a result of the changes that we have made. If Labor had still been in office and there had been no change to the tax system, the fuel excise now would be 52.8c a litre, or 38 per cent higher than it is. So Labor comes into this debate with a fair bit of history, with a fair bit of dirty linen.

END QUOTE dr140905-GST.pdf

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QUOTE Form69-78B-v13-PROVISIONAL-part-2.doc

1. That the Application of GST in various ways is unconstitutional as it seeks to apply taxation on Court services as if it is some "**service**" to the community as a profit making entity, rather that the Courts are beyond constitutional powers of the Commonwealth of Australia. For example, if the imposition of a service charge upon the Courts were deemed to be constitutional valid then it would not stop the Federal Government to apply a certain taxation structure that effectively could be seen as to control the Courts, being State and or Federal.

A part of a 9-3-2006 correspondence to the Commissioner of Taxation is reproduced below, which in itself ought to indicate that DIRECT and/or INDIRECT TAXATION was not particularly considered to be applied to Courts, rather to private companies and ordinary workers and their productions.

It cannot be held that somehow the administration of justice could be deemed to fall within the category of "service" as a business matter.

The GST in that regard must be deemed unconstitutional where tit comes to "**services**" provided by a Court. The moment "**any form of taxation**" can be deemed permissible upon the **ADMINISTRATION OF JUSTICE** then it gives by way of backdoor the Commonwealth of Australia powers to manipulate the State Courts. For example, it could provide that any judgment made against it (the Commonwealth of Australia) would incur a high taxation rate. For example, the Commonwealth could then legislate for taxation as to JUDGMENTS pending to be GUILTY or NOT GUILTY findings, and then introduce a special taxation levy against jurors that if they find a person "NOT GUILT" then they have to pay themselves a certain penalty tax.

The British Parliament itself made clear that the moment you would connect the Court system with an **ABN** number to a Department of Justice then it would in effect give that Department or can be seen to be given powers to manipulate the Courts and by this influence the Courts in its decisions, etc.

The Courts processes must **not** be deemed to fall within "service" provided for profits and must be deemed to be outside the realm of taxation that can be levied against the Court and so the services it provide where they are stricltly in the oridinary course of ADMINISTRATING JUSTICE.

Fancy the Commonwealth of Australia to legislate that any judicial officer who pronounces a judgment against the Federal Government and/or any of its Departments is to pay $5,000.000.000.- in special taxation! The moment it is accepted that the Federal Parliament can tax the **ADMINISTRATION OF JUSTICE**, and any services provided within this process, then it is to give the Commonwealth of Australia the free hand to manipulate Courts dicisions, both State and Federal.

It could for example levy a special tax of exhuberant cost, against any person wishing to be a judge, and allow tax free entrée to those it decides can be granted such tax free entrée.

After all, the Commonwealth of Australia already does this unconstitutional kind of taxation system with excluding Federal Members of Parliament superannuation from taxation, Peter Reith (former Minister) unconstitutional tax exempt income of about two hundred and fifty thousand dollars, etc.

Albeit the Commonwealth of Australia may appear to have unlimited taxation powers, the truth is "that it is bound within the structure of the ***Constitution***" and as such cannot apply taxation where it would interfere with the judiciary or other matters not provided for within its powers. For example a special taxation or tax examption on donations on religion would be in breach of Section 116 and as such be unconstitutional!

A taxation on the services provided by the **ADMINISTRATION OF JUSTICE** therefore must be deemed likewise **UNCONSTITUTIONAL**!

The 22 September 2006 hearing (at the time of the drafting of this document) as to taxation therefore neither could be legitimately proceed where this would entail the Defendant to be ordered likely to pay GST charges on services provided by the Court!

QUOTE 18-5-2004 CORRESPONDENCE from Mr. G. H. Schorel-Hlavka;

WITHOUT PREJUDICE

Mr John Howard 18-5-2004
Parliament House Canberra,
Fax 02 6273 4100 Ph; 02 6277 7700 Re; "**a multiple of 150 or 150%"**
GST and other taxation abuses

Cc; Mr Mark Latham, Leader of Her Majesty Opposition

Mr Bob Brown, Senator Mr Andrew Bartlett, Senator,

AND TO WHOM IT MAY CONCERN

END QUOTE 18-5-2004 CORRESPONDENCE from Mr. G. H. Schorel-Hlavka

QUOTE **18-5-2004 CORRESPONDENCE from Mr. G. H. Schorel-Hlavka**

Hansard *8-3-1898* Constitution Convention Debates

Mr. HIGGINS.-Clause 55 says that such a law would be invalid. I am speaking from some little experience in our local Parliament. A Charities Bill was introduced, and it was proposed to raise the money for the charities by means of a sports tax, and additional rates upon ordinary lands and buildings. Supposing that money was required, and the House of Representatives said that it should be raised by a tax upon lands, the Senate might then say-"Oh, no, we can raise the same amount of money by means of a tax on sports and lands." That suggestion could not be made, because if it were adopted there would be two subjects of taxation in the Bill and the law would be invalid. I will take another instance: It is provided that laws imposing taxation shall deal only with the [start page 2024] imposition of taxes. Under that provision the Senate can make no condition to a law imposing taxation, and it will have to accept the taxation as it stands, or not at all. The law will otherwise be treated as invalid, and the taxpayers could then re-fuse to pay anything. Then sub-section (3) says-"A law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation."

END QUOTE **18-5-2004 CORRESPONDENCE from Mr. G. H. Schorel-Hlavka**

Again;

The law will otherwise be treated as invalid, and the taxpayers could then re-fuse to pay anything.

Clearly, Mr G. H. Schorel-Hlavka, the Grandmaster "constitutionalist", did advise the Commonwealth of Australia about GST in its format being unconstitutional, but as generally is applicable the government ignores this all together. This is precisely also the response **UPMART** was getting when seeking the understanding/cooperation of the Victorian Government.

The **GST** (Goods and Service Tax) being on not just sport and land but on everything else as such clearly appears to be unconstitutional. It is not only of "**Goods**" and "**Services**" but also it is a taxation on different "**Goods**" and different "**Services**".

Hansard *21-1-1898* Constitution Convention Debates

QUOTE **Mr. REID.-**

But do not let us forget that under the State arrangement of such matters there are scores of systems which can be carried out, but under the federal jurisdiction the source of the revenue for these old-age pensions **will be strictly limited to Customs or direct taxation.**

There is no power in the Federal Parliament to carry out ideas which have been suggested with great force in the different colonies that these pensions should be derived by a certain system of licences on places of popular entertainment-taxes on admissions to theatres and race-courses.

END QUOTE

Again;

QUOTE

There is no power in the Federal Parliament to carry out ideas which have been suggested with great force in the different colonies that these pensions should be derived by a certain system of licences on places of popular entertainment-taxes on admissions to theatres and race-courses.

END QUOTE

.

The GST is doing precisely that!
We now find GST on about everything and as the Framers of the ***Constitution*** stated;

QUOTE 9-3-2006 from Mr. G. H. Schorel-Hlavka

WITHOUT PREJUDICE

Australian Taxation Office 9-3-2006
Commissioner Michael Carmody (Executive Office)
Fax **1800 060 063**
C/o department@treasury.gov.au.

AND TO WHOM IT MAY CONCERN

Re; **GST, tax deductions & various other issues**

Sir,
I am soon to publish;

INSPECTOR-RIKATI® & What is the -Australian way of life- really?
A book on CD on Australians political, religious & other rights

This book deals with the abnormalities where what is constitutionally proper is side stepped and we are subjected to unconstitutional conduct and legislation that is in fact **ULTRA VIRES**.
In it also will be published my past 2004 correspondence to you and the lack of appropriate response upon matters raised.
This correspondence also set out, in a limited manner, below that while Section 51 of the ***Constitution*** in general was intended that once the Commonwealth of Australia by way of the Federal parliament had exercise legislative powers then the States would no longer possess such legislative powers, however Section 51(ii) in regard of **TAXATION** never was intended to apply as such, just that the High Court of Australia may never have understood this to be so.
Anyone who has studied the **HANSARD** records, such as the 22-4-1897 **CONSTITUTION CONVENTION DEBATES**, would be aware that the Federal Government in its enforcement of customs and duties (including taxation) throughout the Commonwealth. Yet, we have that, as I understand it, the Federal Government unconstitutionally is providing tax free incomes to people such as the High Commissioner Peter Reith, the former AWB chairman about 1 million dollars, etc. I view that as a commissioner of Taxation is obligated to ensure that taxation is paid by all Australian throughout the commonwealth in the same manner and there must be a challenge against this unconstitutional conduct to payout tax free incomes as it is beyond constitutional powers regardless if the Federal Parliament did provide legislation for this.
Further, the same is with religious funding and so tax deductions regarding donations to religious entities, which is and remains unconstitutional.

Hansard *17-3-1898* Constitutional Convention Debates (Australasian Federal Convention)
QUOTE **Mr. DEAKIN**.-

In this Constitution, although much is written much remains unwritten

END QUOTE

.

Some of the quotations following are taken from more extensive quotations reproduced below, as to allow the reader to check in which context certain quotations were stated and to elicit their true intent.

.Hansard *16-2-1898* Constitution Convention Debates

QUOTE

Mr. ISAACS.-

An income tax or a property tax raised under any federal law must be uniform "throughout the Commonwealth."

END QUOTE

And

QUOTE

Mr. REID.-So long as he agrees with me, I do not care what his reasons are. It is vital to the industrial interests of Australia that this matter should be settled as soon as possible. **Every man engaged in manufacture, in production, and in commerce will be thrown upon his beam ends until he knows what the fiscal policy of the Commonwealth is to be.** Upon that ground alone, in mercy to the people, we should do what we can to compel the Federal Government and the Federal Parliament to make the work of framing a uniform Tariff their first great work.

END QUOTE

.

Hansard *16-2-1898* Constitutional Convention Debates (Australasian Federal Convention)

QUOTE **Mr. ISAACS** (Victoria).-

If honorable members will turn to clause 52, which deals with the powers of the Parliament, they will find that in sub-section (2) the Federal Parliament is empowered to legislate in regard to customs, excise, and bounties, which shall be uniform "throughout the Commonwealth." That is, within every state and every part of a state. "Throughout the Commonwealth" is the largest expression that can be used. In the next sub-section it is provided that all taxation shall be uniform throughout the Commonwealth. An income tax or a property tax raised under any federal law must be uniform "throughout the Commonwealth." That is, in every part of the Commonwealth.

END QUOTE

And

QUOTE

Sir JOHN DOWNER.-I cannot foresee. I cannot pretend to have the gift of prescience which would enable me to know how ultimately a coach and four may be driven through this Constitution. But I say let those who want limitations propose their insertion in the Bill. I would prefer to leave the main enactment in this clause exactly as it stands. It may be that the words of Sir Samuel Griffith represent all he can think of. Perhaps they may represent all that can be wanted at any time; but it is just possible that something may be omitted from them something which might derogate from this freedom of trade which we intend to have throughout the Commonwealth, Then, I ask honorable members to consider this: **Although the clause says that trade and intercourse throughout the Commonwealth shall be absolutely free, you have to look through this Constitution at the other provisions, which show clearly what is the intention. This is a broad central declaration; the rest you gather from a perusal of other provisions of the Bill.** I think the fears of Mr. Isaacs in the particulars he mentioned are not well founded.

END QUOTE

And

Why use a vague expression which may possibly seriously interfere with state administration in some minor departments, which have been up to now, and always will be, expressly left to the states?

*

The main principle laid down here is that after the expenses of the government of the commonwealth have been deducted from the revenue, the balance shall be returned to the states as nearly as possible in proportion to the amounts contributed by them.

*

I have observed that the members of the Drafting Committee have from time to time contended that the Constitution is a matter of great principles. It is the contract between all the parties to the union

*

Customs and excise, and bounties, but so that duties of customs and excise, and bounties shall be uniform throughout the Commonwealth

*

It is quite easy to realise circumstances under which a tax, say upon land, might be imposed by the state, and made a first charge upon property, and a similar impost might be levied by the commonwealth; but the state law would have to come second, and the, commonwealth would, therefore, have the first helping out of the fund for providing that particular tax.

*

With regard to direct taxation, which we are more particularly discussing, the colonies will possess in future every power which they now possess. Consequently, no power is taken away except the power of imposing duties of customs or excise.

*

I believe an excise would also include a stamp duty.

*

There is nothing in this clause which will give the federal tax-gatherer any priority over the state tax-gatherer.

*

The main principle laid down here is that after the expenses of the government of the commonwealth have been deducted from the revenue, the balance shall be returned to the states as nearly as possible in proportion to the amounts contributed by them.

*

Consequently the direct taxation will be in existence in the colonies before it can be imposed by the commonwealth.

*

Excise would include licenses!

*

In no part of this clause is priority given to the federal government in the matter of the right of levy.

The following clearly indicates that being it direct payments, tax deductions or other kind of funding cannot be constitutionally valid in regard of any religion

Hansard *2-3-1898* Constitution Convention Debates (Australasian Federal Convention)

QUOTE

Mr. REID.-I suppose that money could not be paid to any church under this Constitution?

Mr. BARTON.-No; you have only two powers of spending money, **and a church could not receive the funds of the Commonwealth under either of them.**

END QUOTE

Clearly, tax deductions to religious organizations would be unconstitutional as it is the same way as paying by allowing to pay less tax, being as a bounty or payment back from otherwise applicable taxable income.

Hansard *16-3-1898* Constitution Convention Debates (Australasian Federal Convention)

QUOTE

Mr. ISAACS (Victoria).-**I quite agree with the view Mr. Barton has presented. It seems to me, following that view, that now we have gone through the Bill and dealt with the amendments, the Enabling Act provides what is really a statutory adoption**

of the Constitution. It does not seem to me more than a formal motion, because it distinctly provides that when the Constitution, as framed prior to the adjournment, has been reconsidered, together with any suggested amendments by the Legislatures, then the Constitution, so framed, shall be finally adopted with any amendments agreed to. In fact, the whole trend of the Federal Enabling Act is that we must frame a Constitution. It is not a matter of option with us whether we shall adopt the Constitution or not, but having gone through the Bill as now presented, and the various clauses having been agreed to by majorities, it seems to me, following the view brought forward by the leader, that it is now our statutory duty to finally adopt this Constitution.

The motion was agreed to.

END QUOTE

It is clear that the **Constitution Convention** (Australasian Federal Convention) was required to provide a ***Constitution*** and that the following High Court of Australia ruling indicates;

QUOTE

it requires that "the whole of our law, written or unwritten, is accessible to the public - in the sense, of course,

END QUOTE

WATSON v LEE (1979) 144 CLR 374***;(*** JUDGE3 STEPHEN J.)

QUOTE

As Scott L.J. said in Blackpool Corporation v. Locker (1948) 1 KB 349, at p

361 , speaking there of sub-delegated legislation, "there is one quite general question . . . of supreme importance to the continuance of the rule of law under the British constitution, namely, the right of the public affected to know what that law is". The maxim that ignorance of the law is no excuse forms the "working hypothesis on which the rule of law rests in British democracy" but to operate it requires that "the whole of our law, written or unwritten, is accessible to the public - in the sense, of course, that at any rate its legal advisers have access to it at any moment, as of right".

END QUOTE

Meaning, that any taxation laws should be that people are aware of what is applicable. If then the Federal government takes it upon itself to give tax free incomes to certain people then clearly this is not a known taxation matter and must be deemed for this also illegal.

To understand some of the reasoning behind how customs and duties (taxes) are applicable we must consider it also in the context of what was debated;

Consider the following;

QUOTE

The very principle of the Federal Constitution is this: that the Constitution is above both Houses of Parliament.

END QUOTE

As such, parliament cannot override constitutional provisions and limitations, and for so far any legislation that is beyond constitutional powers it will be ULTRA VIRES and as such not legally enforceable.

QUOTE

What is really wanted is to prevent a discrimination between citizens of the Commonwealth in the same circumstances.

END QUOTE

While the Commonwealth of Australia, so to say, has a free reign on imposing direct taxation, it is however limited by the fact that all laws enacted by the Federal Parliament (actually they are passed as Bills by the Federal Parliament and do not become law until Royal Assent is has been given and they are published, as to be available to the general community) that all laws enacted must be "**UNIFORM**" throughout the Commonwealth of Australia. Tax deductions can be deemed to be bounties and as such must be deemed to operate in the same manner.

QUOTE

Mr. MCMILLAN: I think the reading of the sub-section is clear.

The reductions may be on a sliding scale, <u>but they must always be uniform.</u>

END QUOTE

And

QUOTE

Sir GEORGE TURNER: No. In imposing uniform duties of Customs it should not be necessary for the Federal Parliament to make them commence at a certain amount at once. We have pretty heavy duties in Victoria, and if the uniform tariff largely reduces them at once it may do serious injury to the colony. **<u>The Federal Parliament will have power to fix the uniform tariff, and if any reductions made are on a sliding scale great injury will be avoided.</u>**

END QUOTE

<u>Hansard *17-3-1898* Constitution Convention Debates</u>

QUOTE **Mr. BARTON**.-

But it is a fair corollary to the provision for dealing with the revenue for the first five years after **<u>the imposition of uniform duties of customs</u>**, and further reflection has led me to the conclusion that, on the whole, it will be a useful and beneficial provision.

END QUOTE

And

QUOTE

On the other hand, the power of the Commonwealth to impose duties of customs and of excise such as it may determine, which insures that these duties of customs and excise would represent something like the average opinion of the Commonwealth-that power, and the provision that bounties **<u>are to be uniform throughout the Commonwealth</u>**, might, I am willing to concede, be found to work with some hardship upon the states for some years, unless their own rights to give bounties were to some extent preserved.

END QUOTE

The first indication that the Framers of the ***Constitution*** intended for the States to keep full taxation powers, regardless if the Commonwealth of Australia were to implement taxation can be shown by the quotation below;

<u>Hansard *12-3-1898* Constitution Convention Debates (</u>Australasian Federal Convention)

QUOTE

Sir GEORGE TURNER (Victoria).-

<u>If the money were taken out of Customs revenue, and the clause were not in the Bill, there would be so much less surplus to return to the states, and the states would have to make up the deficiency themselves by direct taxation.</u>

END QUOTE

<u>Hansard *31-3-1891* Constitution Convention Debates</u>

QUOTE

2. Customs and excise and bounties, but so that duties of customs and excise and bounties shall be uniform throughout the commonwealth, and that no tax or duty shall be imposed on any goods exported from one state to another;

END QUOTE

Hansard *11-3-1898* Constitution Convention Debates

QUOTE

Taxation; but so that all taxation shall he uniform throughout the Commonwealth, and that no tax or duty shall be imposed on any goods passing from one state to another.

END QUOTE

And

QUOTE

That all the words after the word "taxation" where it is first used be struck out, and that the following words be substituted:-"but not so as to discriminate between states or parts of states, or between goods passing from one state to another."

END QUOTE

And

QUOTE

That all the words after the first word "taxation" in the second sub-section be omitted, with a view to inserting the following words-"but not so as to discriminate between states or parts of states, or between persons or things passing from one state to another."

The amendment was agreed to.

The clause, as amended, was agreed to.

END QUOTE

Then, on 16-3-1898 is appears to have been amended, without further discussion but approved off by voting, from;

QUOTE

Taxation; but not so as to discriminate between states or parts of states, or between persons or things passing from one state to another.

END QUOTE

To

QUOTE

Taxation; but not so as to discriminate between states or parts of states

END QUOTE

It was claimed that in substance there was no change. Hence, both versions ought to be taken as having the same meaning.

This is a critical issue as the wording;

QUOTE

"**or between persons or things from one state or another**"

END QUOTE

then clearly entails that there can be no difference in taxation between persons, and as such neither one person having a tax free income, partly or wholly while another having the same income is required to pay more tax.

What must be noticed is that while the wording in subsection 51(ii) regarding taxation did alter, the principle that the State retained its rights to raise taxation was maintained throughout as statement from the 1891 (see 31-3-1891) and 1898 (11-3-1898) **Constitution Conventions** clearly underlines, and that the change from 11-3-1898 to the version of 16-3-1898 was not an amendment per se but rather held to be to improve the clause without a

change in substance, unless it was specifically stated otherwise, as was applicable with clauses 9 and 10 relating to time and places.
Further, in regard of tariffs, customs, duties, taxation, etc it was made clear that in regard of the Commonwealth of Australia it was bound to have charges uniform throughout the Commonwealth, albeit uniformity did not mean that a sliding scale could be used. As such a sliding scale that was apply throughout the Commonwealth, such as the sliding scale of percentage payable on income tax is within constitutional powers and limits. However, having people exempt from taxation by special deals is beyond constitutional powers if such exemption is not applied on a uniform bases throughout the Commonwealth.

Therefore any person, say, earning $100,000.00 a year must be charged the same income tax rate as any other person anywhere in the Commonwealth of Australia earning the same. It means that soldiers getting paid so called tax free special payments is unconstitutional as like tax free income payments for a High Commissioner or other persons such as the alleged about $1 million paid to the former Chairman of the AWB
For example, I see no issue with tax exemption to all and any person who are to have an income below a certain threshold but I would have an issue if a person has an income, say, just below the threshold and then was to be paid so called tax free income as this would be unconstitutional.
The Commonwealth of Australia, like any other employer would be bound to pay its servants under the same taxation legislative provisions as that is applicable if those people were working for another employer.

With the child support, this clearly cannot be a debt to the Commonwealth as if it were it would be required to be paid into Consolidated Revenue. Whatever the High Court of Australia in the past may have ruled otherwise the issue is what is constitutionally appropriate.

While it was held
http://www.aph.gov.au/Library/pubs/cib/1997-98/98cib01.htm
QUOTE

> This 'power of the purse' has enabled the Commonwealth to engage in policy making in areas over which it has no direct constitutional powers and has also given it influence over State borrowing.

END QUOTE

This is in fact not at all as such, as I have set out extensively in my already published books.
Hansard *1-3-1898* Constitution Convention Debates
QUOTE

> **Mr. WISE**.-If the Federal Parliament chose to legislate upon, say, **the education question**-and the Constitution gives it no power to legislate in regard to that question-the Ministers for the time being in each state might say-"We are favorable to this law, because we shall get £100,000 a year, or so much a year, from the Federal Government as a subsidy for our schools," **and thus they might wink at a violation of the Constitution**, while no one could complain. **If this is to be allowed, why should we have these elaborate provisions for the amendment of the Constitution? Why should we not say that the Constitution may be amended in any way that the Ministries of the several colonies may unanimously agree? Why have this provision for a referendum? Why consult the people at all? Why not leave this matter to the Ministers of the day? But the proposal has a more serious aspect, and for that reason only I will ask permission to occupy a few minutes in discussing it.**

END QUOTE

http://www.aph.gov.au/Library/pubs/cib/1997-98/98cib01.htm

QUOTE

The Committee presented its report and recommended that, for the duration of the War and one year afterwards, the Commonwealth government should be the sole authority to impose taxes on income and that the States should be duly compensated. In May 1942, legislation was introduced in the Federal Parliament to give effect to this recommendation and a uniform income tax scheme came into operation on 1 July 1942.

END QUOTE

Constitutionally, the Commonwealth of Australia, regardless if the States had agreed with it, could not exclude the states from raising their own taxes, as it would required a Section 128 referendum to deny the States to raise their own taxes. What is embedded in the constitution that the States have constitutionally their own taxation powers cannot be denied without an amendment of the ***Constitution*** for this.

http://www.aph.gov.au/Library/pubs/cib/1997-98/98cib01.htm

QUOTE

However, the States' ability to devise new taxes was constrained by High Court interpretation of section 90 of the Constitution. Section 90 states:

'On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive...'

There appears to be a significant difference between an economist's view of what constitutes an excise and the view taken by the High Court. To an economist, an excise is a tax which is imposed upon goods which have been produced domestically (as against customs duties which are imposed on imported goods). An excise is usually applied at the point of production, for example, being paid by the oil refiner or by the cigarette manufacturer. In this respect, an excise is different from a sales tax, which is usually imposed at the wholesale or retail level and which generally does not discriminate between domestically produced and imported goods. This distinction is even more important in a federal system of government.

END QUOTE 9-3-2006 from Mr. G. H. Schorel-Hlavka

QUOTE Form69-78B-v13-PROVISIONAL-part-2.doc

Comments; as the *small selection* of the highlighted sections of the notes below indicate:

POLITICIANS ARE NOT ABOVE THE LAW! The G.S.T. act clearly violates the **CONSTITUTION** and thus it is **ILLEGAL** and **NULL AND VOID**!

Note: This document should be attached to my file for future reference since from now on, the G.S.T. portion will be withheld from every Invoice.

678 COMMENTARIES ON THE CONSTITUTION [Sec. 55]

House of Representatives behind them, might be entirely subverted. That is a difficulty which, I think, none of us wish to create. Therefore, I am prepared to take the responsibility of adhering to the amendment. Holding the position I have always held, that the Senate should be a real body and not a mockery o f State interests while it should be a Second Chamber holding definite powers and rights as expressing the will of the people within the States which it represents -I have also held that we should only carry responsible Government into effect by making it real and effective, and a power of amending a machinery Bill to the extent of making a tax not worth collecting would be equal to the power of amending a Bill imposing taxation."

{31r. E. Barton, Conv. Deb,, 1Ielb., p. 2060.)

"All I am endeavoring to do is to attribute a meaning to words in this Constitution, which I believed in Adelaide and I explained my belief as I have read -that they did convey, which I am inclined to believe now they do convey, without a special explanation; but as to which I am in serious doubt, because of the very strong express nature of the words ' shall deal with the imposition of taxation only.' It is in order to remove that doubt, and for that purpose only, that I wish these words to be inserted, and I really do believe that the insertion of the words will carry out the real spirit of the understanding of 1891." (Id. p. 2u67.)

Mr. Barton's amendment to add the words " and collection" was rejected by 26 votes to 16. But see Note, § 248, *supra*

§ 255. " Shall be of No Effect."

The next important point discussed was whether a law violating the rule forbidding the combination of taxation with any other matter, or the rule forbidding a tax Act to contain more than one subject of taxation, should be void *in toto,* or should be void only to the extent of the irrelevancy, or to the extent of the additional subjects. Mr. G. H. Reid moved that the prohibition should not invalidate any part of law which did not infringe the provisions of the Constitution, and that if any law imposing taxation contained more than one subject of taxation, the tax first in order of enactment should be taken to be properly passed.
(Conv. Deb., Melb., p. 2O89.)
This amendment was negatived by 27 to 15 votes feeling, however, prevailed in the Convention that some provision should be made in the Constitution, to effect that only the parts of the Act in which the forbidden matter existed should be invalid. At a later stage MR. Reid moved the insertion of the words "and any provision therein dealing with any other matter shall be of no effect." This amendment was accepted without a division.
Conv. Deb., Melb., 2415.)

§ 256, "One Subject of Taxation Only."

By the first paragraph of the section, laws imposing taxation must deal only with the imposition of taxation. If the section contained no other limitation regulating and restricting the exercising of the taxing power there would be nothing to prevent the House of Representatives from sending to the Senate a bill containing a number of separate and independent taxes. The section, however, goes on to enact that laws imposing taxation shall, with the exception of those relating to customs and excise, deal with one subject of taxation only. It is necessary to explain the object of this limitation. By the second paragraph of sec. 53, the Senate is deprived of the power to amend tax bills, but it may, constitutionally reject them. In order to maintain its right to veto, in detail, each specific tax to which it objects, without thereby involving the rejection of other taxes of which it approves, the Constitution prohibits the combination of taxation proposals; it requires each proposed tax to be submitted by the House of Representatives to the Senate, in a separate bill. This procedure being followed the Senate can exercise its discretion with respect to each tax, without being coerced to pass a tax to which it objects, in order to carry a tax which it desires. In this respect the Senate will have greater control over taxation than the House of Lords enjoys.
The Papers Duties Precedent may be here referred to in illustration of the manner in which sec. 55 will operate in strengthening the Senate. In 1860, the Commons

determined to balance the year's ways and means by an increase of the property tax and stamp duties, and the repeal of the duties on paper. The increased taxation had already received the assent of Parliament, when the Lords rejected the Paper Duties Repeal Bill; and thus overruled the financial arrangements voted by the Commons. That House was naturally sensitive to this encroachment upon its privileges; but the Lords had exercised a legal right, and their vote was irrevocable during that session. The Commons, therefore, to maintain their privileges, recorded upon their journal, 6th July, resolutions affirming that the right of granting aids and supplies to the Crown is in the Commons alone; that the power of the Lords to reject bills relating to taxation "is justly regarded by this House with peculiar jealousy, as affecting the right of the Commons to grant the Supplies, and to provide the ways and means for the service of the year; and that to guard, for the future, against an undue exercise of that power by the Lords, and to secure to the Commons their rightful control over taxation and supply, this House has in its own hands the power so to impose and remit taxes, and to frame bills of supply, that the right of the Commons as to the matter, manner, measure, and time may be maintained inviolate." In accordance with these resolutions, during the next session, the financial scheme of the year was presented to the Lords for acceptance or rejection as a whole. The Commons again resolved that the paper duties should be repealed: but, instead of seeking the concurrence of the Lords to a separate bill for that purpose, they included in one bill the repeal of those duties with the property tax, the tea and sugar duties, and other ways and means for service of the year; and this bill the Lords were constrained to accent. The budget of each year has since that occasion been comprised in a general and composite Act- a proceeding supported by precedent. In 1787, Mr. Pitt's entire budget was comprised in a single bill; and during many subsequent years great varieties of taxes were imposed and continued in the same Acts.{May's Parl. Prac. 10th ed. pp. 550 1.)

From this precedent it appears that the Commons have the right to send to the Lords a single scheme of taxation embodying the repeal of old taxes and the imposition of new taxes; the function of the Lords being, in such a case, limited to a simple assent to the whole scheme or a simple negative of the whole scheme. Such a composite or general tax bill could not be submitted by the House of Representatives to the Senate; it would be unconstitutional, the maxim being "one tax one bill", except in the case of bills dealing with customs and excise.

We have now to consider what will be the consequence if Parliament should, whether by accident or design pass a law imposing taxation, yet dealing with more than one subject of taxation--a law, say, imposing an income tax and a stamp duty. A proposal that the tax standing first in order in the enactment should be valid, whilst the other, or others, next in

order should be null and void, was rejected by the Convention. No provision is made in the Constitution, therefore, for segregating the taxes and providing for the validity of one and the nullity of others. Where the Constitution intends that one portion of an Act only shall be of no effect and the rest operative it is so expressed. The only conclusion is that an Act embodying a plurality of taxes would be absolutely and completely ultra vires.

Recommendation of money votes.

56. A vote, resolution, or proposed law '257' for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated. 258.

HISTORICAL NOTE.-- The provision in the Commonwealth Bill of 1891 was:

§ 249. "Increase Any Charge or Burden on the People."

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people. This provision may be described as a limitation on the reserved power of the Senate to amend money bills, other than tax bills and annual appropriation bills. Seeing that the Senate cannot amend a bill imposing taxation, it may be naturally asked how can the Senate possibly amend a proposed law so as to increase any proposed charge or burden on the people? The answer is that the Senate is only forbidden to amend tax bills and the annual appropriation bill; it may amend two kinds of expenditure bills, viz.: those for permanent and extraordinary appropriations. If the Senate could propose an increase in the amount of money to be spent in public work bill say from one million sterling to two millions sterling that amendment would necessitate increased taxation in order to give effect to it, and consequently an addition to the burdens and charges on the people. The Senate may amend such money bills so as to reduce the total amount of expenditure or to change the method, object, and destination of the expenditure, but not to increase the total expenditure originated in the House of Representatives.

§ 250." The Senate may •• Return to the House."

SUGGESTION OF AMENDMENTS. The money bills which the Senate cannot amend are bills imposing taxation and bills appropriating money for ordinary annual services. Bills of this description cannot be amended by the Senate, but it may, at any stage, return them to the House of Representatives with a message requesting the omission or amendment of any item or provision. Under this law the Senate could suggest amendments in the ordinary annual appropriation bills, and in tax bills, such as a bill to impose duties of customs and excise. If the suggestions thus made where not entertained by the House, the Senate would have to pass or reject those bills, as sent from the House, so that the responsibility of final acceptance or rejection would remain with the Senate as if no suggestion had been made. A fierce controversy has taken place with reference to the power conferred on the Senate to suggest modifications in bills which it cannot amend. The argument has been thus summed up by Sir Samuel Griffith: "Whether the mode in which the Senate should express its desire for an alteration in Money Bills is by an amendment, in which they request the concurrence of the House of Representatives, as in other cases, or by a suggestion that the desired amendment should be made by the latter House, as of its own motion, seems to be a matter of minor importance. A strong Senate will compel

attention to its suggestions; a weak one would not insist on its amendments." (Notes on the Draft Federal Constitution, 1897, p. 9.)

There does, however, seem to be a substantial constitutional difference between the power of suggestion and the power of amendment, as regards the responsibility of the two Houses. A short analysis will make this clear. In the case of a bill, which the Senate may amend, the Senate equally with the House of Representatives is responsible for the detail. It incorporates its amendment in the bill, passes the bill as *amended,* and return it to the House of Representatives. If that House does not agree to the amendment, the Senate can "insist on its amendments," and thus force the House of Representatives to take the responsibility of accepting the amendments or of sacrificing the bill; whilst the House of Representatives cannot force the Senate to take a vote on the bill in its original form.

On the other hand, in the case of a bill which the Senate may not amend, the House of Representatives alone is responsible for the form of the measure; the Senate cannot strike out or alter a word of it, but can only suggest that the House of Representatives should do so. If that House declines to make the suggested amendment, the Senate is face to face with the responsibility of either passing the bill as it stands or rejecting it as it stands. It cannot shelve that responsibility by insisting on its suggestion, because

'...However, the judiciary has no power to amend or modernize the Constitution to give effect to what Judges think is in the best public interest. The function of the judiciary, including the function of this Court, is to give effect to the intention of the makers of the Constitution as evinced by the terms in which they expressed that intention. That necessarily means that decisions, taken almost a century ago by people long dead, bind the people of Australia today even in cases where most people agree that those decisions are out of touch with the present needs of Australian society.'

":.. The starting point for a principled interpretation of the Constitution is the search for the intention of its makers"

Gaudron J (Wakim, HCA27\99)

"...But-in the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they could have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes. "

Windeyer J (Ex parte Professional Engineers' Association)

... *"A Federal constitution must be rigid. The government it establishes must be one of defined power; within those powers it must be paramount but it must be incompetent to go beyond then."*

Gummow and Hayne JJ (Wakim, HCA2 7\99)

§ 33 "And all Laws"

No difficulty is suggested by the words; "and all the laws made by the Parliament of the Commonwealth under the Constitution." **The words "under the Constitution" are words or limitation and qualification.** They are equivalent to the words in the corresponding sanction of the Constitution or the United States "in pursuance thereof," Supra. Not all enactments purporting to be laws made by the Parliament are binding; but law made under, in pursuance of, and within the authority conferred by the Constitution, and those only, are binding on the courts, judges, and people. A law in excess of the authority conferred by the Constitution is no law; it is wholly void and inoperative; it confers no right, it imposes no duties; it affords no protection. (Norton *v.*, Shelby County, 1 IS U.S. 425; see note § 447

"Power of :11C Parliament of a Colony.'') .

The Act itself is binding without limitation or qualification because it is passed by the sovereign Parliament, but laws passed by the Parliament of the Commonwealth, a subordinate Parliament, must be within the limits of the delegation of powers or they will be null and void. To be valid and binding they must be within the domain of jurisdiction mapped out and delimited in express term, or by necessary implication, in the Constitution itself. What is not so granted to the Parliament of the Commonwealth is denied to it. What is not so granted is either reserved to the States, as expressed in their respective Constitutions, or remains vested but dormant in the people of the Commonwealth, The possible area, of enlargement of Commonwealth power by, an amendment of the Constitution will he considered under Chapter VIII.

Every legislative assembly existing under a federal constitution is merely a sub-ordinate law-making body, whose laws are of the nature of by-laws, valid whilst within the authority conferred upon it by the constitution, but invalid or unconstitutional if they go beyond the limits of such authority. There is an apparent absurdity in comparing the legislature of the United States to an English railway, company or school board, but the comparison is just. .a law passed by Congress which is in excess of its legal powers as contravening the Constitution is invalid;... a law passed by Congress is called an Act of Congress; and if *ultra vires* is described as `unconstitutional'; a law passed by the Great Eastern Railway Company is called a 'by-law', and if ultra vires is called, not `unconstitutional' but `invalid'. .

QUOTE 060309

WITHOUT PREJUDICE

Peter Beattie MP, Premier 9-3-2006

General Office premiers.master@premiers.qld.gov.au
Phone: 07 3224 4500, Facsimile: 07 3221 3631 **Ref; Terrorism, Constitutional issues, etc**
PO Box 185 Brisbane Albert Street Qld 4002

Cc; **Terry O'Gorman** Australian Council for Civil Liberties robogor@ozemail.com.au
Mr Peter Webb, secretary-general The Law Council of Australia mail@lawcouncil.asn.au
Mr Richard Faulks, President, Australian Lawyers Alliance enquiries@lawyersalliance.com.au
James McConvill, Lecturer at Deakin University law School, Melbourne james.mcconvill@deakin.edu.au
Mr Lex Lasry QC, Chairman of Victoria Criminal Bar Association Lex.lasry@vicbar.com.au
Prof Andrew Fraser, andrew.fraser@mq.edu.au
Andrew Byrnes Prof int law UNSW ahrc@unsw.edu.au
Hilary charlesworth & **Gabrielle McKinnon** ANU C/o hilary.charlesworth@anu.edu.au
Mr Kim Beezley, Leader of Her Majesty (Federal) Opposition, Kim.Beazley.MP@aph.gov.au
Mr Michael Jefferey, Governor-General@gg.gov.au
Luke Howie info@homelandsecurity.org.au
Mr John Stanhope **leah.deforest@act.gov.au**
Mr John Howard & Peter Costello David.Hawker.MP@aph.gov.au
Christoph Pyne C.Pyne.MP@aph.gov.au
John Cobb John.Cobb.MP@aph.gov.au
Mr Bob Brown, Senator (Greens) senator.brown@aph.gov.au
Senator Lyn Allison (AD) senator.allison@aph.gov.au
Mark Vaile (Nationals) mark.vaile.mp@aph.gov.au
The Honourable Clare Martin MLA chiefminister.nt@nt.gov.au
Premier Mr Steve Bracks info@parliament.vic.gov.au
Premier The Hon. Morris IEMMA, MP thepremier@www.nsw.gov.au
THE HON DR GEOFF I GALLOP BEc MA MPhil DPhil MLA wa-government@dpc.wa.gov.au
Premier Mr Paul Lennon judy.jackson@justice.tas.gov.au
Hon MIKE RANN MP ramsay@parliament.sa.gov.au
Steven Ciobo Steven.Ciobo.MP@aph.gov.au
marise@marisepayne.com, P.Georgiou.MP@aph.gov.au, J.Moylan.MP@aph.gov.au
Senator George Brandis, senator.brandis@aph.gov.au
Senator Barnaby Joyce senator.joyce@aph.gov.au

AND TO WHOM IT MAY CONCERN

Sir,

Hansard *8-2-1898* Constitution Convention Debates

QUOTE

Mr. DOUGLAS (Tasmania).-As I understand, the clause now before us is as. follows:-

A state shall not make or enforce any law abridging any privilege or immunity of **citizens** of other states of the Commonwealth. [start page 679] That is the first portion. Now, I ask, if you impose on the **citizens** of one Estate a law not applicable to the **citizens** of another state, is not that interfering with the privileges of the **citizens** of that part of the Commonwealth? The second part of this clause provides-

nor shall a state deny to any person within its jurisdiction the equal protection of the laws.

If Victoria imposes on me a special tax because I happen to reside in Tasmania, owning property in this colony, am I properly protected under this clause? Surely the meaning of the clause as it now stands is that the protection of the Commonwealth shall extend to all **citizens** of the Commonwealth, in whatever province they may own property, and in whatever province they may reside. I submit that the word **citizens** "here ought to be properly defined. I am at a loss to understand whether it means **citizens** of a particular state or **citizens** of the Commonwealth.

Mr. SYMON.-**Citizens** of the Commonwealth.

Mr. DOUGLAS.-Then, how can a state impose a special tax on a **citizen** of the Commonwealth because he happens to reside in another portion of the Commonwealth? The thing is absurd on the face of it. If we are to federate, let us federate in a proper spirit. What is the use of talking about the Federation if a **citizen** in one part of the Commonwealth may be treated differently from a **citizen** in another part of the Commonwealth? Unless the true spirit of federation is infused into this Constitution, we had better have no federation at all, and the sooner we depart to our respective homes the better.

Mr. REID.-Hear, hear.

Mr. DOUGLAS.-Yes, and then New South Wales will have all she wants. Let us have something straightforward. If we are to have a federal community, do not restrict us in this sort of way. I beg to move, as an amendment, that this clause be omitted, with a view to the insertion, in lieu thereof, of the following clause, suggested by the Legislative Assembly of Tasmania:-

The **citizens** of each state, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be **citizens** of the Commonwealth, and shall be entitled to all the privileges and immunities of **citizens** of the Commonwealth in the several states, and a state shall not make or enforce any law abridging any privilege or immunity of **citizens** of the Commonwealth, nor shall a state deprive any person of life, liberty, or property without **due process of law**, or deny to any person within its jurisdiction the equal protection of its laws.

END QUOTE

And

QUOTE

Mr. REID.-Probably; one could rely upon a South Australian to discover anything of that sort. The result of these decisions was that persons drawing wealth from this mine, from which the New South Wales Government receive, I think, 5s. per acre per annum, found themselves out of the reach of taxation, and their estates after their death were

absolutely beyond probate duties. Now, under a system of direct taxation, the New South Wales Government gets something like £15,000 a year from the Broken Hill mines. This, no doubt, is a very fine federal enterprise, to create distinctions and to abridge our jurisdiction in dealing with the wealth produced in our own colony. Personally, I am not at all in favour of an absentee tax. It cannot be said that the New South Wales income tax is such a tax. I wish, however, to direct the attention of honorable members to the very dangerous track we are going upon in not being satisfied to leave to the states that which we profess to leave to them. **We profess to leave to the states their powers of local management in certain respects**, but we are constantly trying to meddle with concerns which do not belong to us, and which will not belong to the Federal Commonwealth. I am afraid that this action will create a very unhappy impression in the various colonies. We are all in favour of giving equal **citizenship** and the equal protection of the laws to all the members of the Commonwealth. It is quite novel in Australia to hear any talk upon this point, because I think this has been universally conceded here. I am prepared to vote upon the lines laid down by the honorable and learned member (Mr. O'Connor) in guaranteeing equality to all the **citizens** of the Commonwealth; but do not let us, by side devices, interfere with matters that we should leave to the management of the states.

Mr. SYMON (South Australia).-The honorable member (Mr. Howe) is under a very grave misapprehension, not only as to my views, but also as to the real issue before the committee. The issue before the committee is not whether we should impose a tax upon absentees.

Mr. HOWE.-I understand that.

Mr. SYMON.-Nor is it whether we should repeal the inefficient absentee tax. existing in South Australia. The issue is whether we are to destroy the autonomy of the states in certain respects. I am, and always have been, utterly opposed to absentee taxation, and the views which I expressed were brought out by an illustration which was used to show the effect of the clause. The honorable and learned member (Mr. Wise) made use of two illustrations, in dealing with which I merely pointed out that there was no earthly reason why the states should not have power to deal with these matters. I never suggested any divergence from the views of my honorable friend (Mr. Howe), and I am glad that he is with me in thinking that this useless absentee tax should be swept away.

Mr. OCONNOR (New South Wales).-I rise for the purpose of pointing out the position in which we stand, and to express the hope that, having discussed this matter so fully, we may soon come to a division. The honorable and learned member (Mr. Wise) has proposed an amendment which, if carried, will involve the declaration that the **citizens** of each state are **citizens** of the Commonwealth.

END QUOTE

as this right is "***EMBEDDED***" in the unwritten part of the ***Constitution***!

Awaiting your response, **G. H. SCHOREL-HLAVKA**
END QUOTE 060309

.

QUOTE 060311

WITHOUT PREJUDICE

Mr Michael Kirby 11-3-2006
High Court of Australia
Sydney, NSW 2000 Re; **Constitutional issues, etc.**
Emailed to; JSaleh@hcourt.gov.au, sdca58fd.039@cbr-nw6-fp.hcourt.gov.au

Sir,

When I read the judgment of HIGH COURT OF AUSTRALIA - GENERAL DIVISION, **ALLDERS INTERNATIONAL PTY LTD v COMMISSIONER OF STATE REVENUE**, Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ, 14 November 1996 – Canberra somehow it seemed to me that the judgment by yourself and two other judges failed to address certain relevant issues. After some search on the Internet I then came across the judgment of SUPREME COURT OF VICTORIA, **ALLDERS INTERNATIONAL PTY LTD v COMMISSIONER OF STATE REVENUE (VIC)**, Harper J, 26 April 1995 – Melbourne, and noted that His Honour in fact had canvassed the very issues I detected had not been addressed by yourself.

Over recent times, mainly for the past 2 years or so, I seem to be locked out of the High Court of Australia website, as to research past judgments, and so have to find other ways to get the same information or have others getting it of the High Court of Australia website and then forward it to me. I have previously already filed a formal complaint via the Victorian Government webmaster, and while it did immediately relief the block out for about 2 weeks, soon thereafter I was again denied access. I consider this a very serious issue, that seemingly because I am exposing High Court of Australia handing down ill conceived judgments somehow this appears to me to have resulted that I am blocked out of accessing High Court of Australia website to download judgments. As such, while it makes it more troublesome for me to expose what is wrong with judgments handed down, I for one do not believe that any judge ought to have some pride in this kind of tactic. After all, judges should accept that fair and proper criticism is not only permissible but indeed required to keep the judiciary on their toes.

It is clear that the **Constitution Convention** (Australasian Federal Convention) was required to provide a ***Constitution*** and that the following High Court of Australia ruling indicates;

WATSON v LEE (1979) 144 CLR 374***;(*** JUDGE3 STEPHEN J.)

QUOTE

> **As Scott L.J. said in Blackpool Corporation v. Locker (1948) 1 KB 349, at p**
> **361 , speaking there of sub-delegated legislation, "there is one quite general question . . . of supreme importance to the continuance of the rule of law under the British constitution, namely, the right of the public affected to know what that law is". The maxim that ignorance of the law is no excuse forms the "working hypothesis on which the rule of law rests in British democracy" but to operate it requires that "the whole of our law, written or unwritten, is accessible to the public - in the sense, of course**, that at any rate its legal advisers have access to it at any moment, as of right".

END QUOTE

Again;

QUOTE

> **it requires that "the whole of our law, written or unwritten, is accessible to the public - in the sense, of course,**

END QUOTE

As such, I view, the High Court of Australia ought to , so to say, put its money where its mouth is and ensure that I have unlimited access to what is available on its website to the general public. But, as I experienced in litigation before this Court, it has one rule in criticising courts below (on appeal) but it has another rule when it comes to enforce the same principles in its own court. Then it is utterly disorganised and lacks any transparency and fair and proper procedures. In my view it conduct is deplorable and worse at times then the very courts it dares to criticise about their conduct.

Ambard v Att Gen for Trinidad and Tabaco (1939) AC 322 at 335
QUOTE

"The basic of the right to fair comment is the Right of Freedom of speech and the inalienable right of everyone to comment fairly upon matters of public importance."

END QUOTE

(1) No wrong committed in criticism of administration of justice:
LORD ATKIN in **AMBARD v ATTORNEY-GENERAL for TRINIDAD and TABAGO** (1936) A.C. 332, at 335
QUOTE
"But whether the authority and position or an individual judge, or the due administration of justice, is concerned, **no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice.** The path of criticism is a public way, the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary man"
END QUOTE

(2) The right for the public to be informed about the judicial process being properly applied or acts:
THE COMMENTS OF SIR JAMES MARTIN C.J., IN THE MATTER "**THE EVENING NEWS**" (1880) N.S.W. LR 211 AT 239.:
QUOTE
"**The right of the public to canvass fairly and honestly what takes place here cannot be disputed. Our practice of sitting here with open doors and transacting our judicial functions as we do, always in the broad light of day, would be shown of some of its value if the public opinion respecting our proceedings were at all times to be rigidly suppressed. We claim no immunity from fair, even though it be mistaken criticism.**"
QUOTE
.

(3) As to value of criticism, keeping judge subject to rules and principles of honour and justice;
(a) **R v FOSTER** (1937) St. E Qd 368
(b) **Re WASEMAN** (1969) N.Z.L.R. 55, 58-59
(c) **Re BOROVSKI** (1971) 19 D.L.R. (34) 537
(d) **SOLICITOR-GENERAL v RADIO AVON LTD** (1978) 1 N.Z.L.R. 225, at 230-31

Ambard v Att Gen for Trinidad and Tabaco (1939) AC 322 at 335
QUOTE
"The basic of the right to fair comment is the Right of Freedom of speech and the inalienable right of everyone to comment fairly upon matters of public importance."
END QUOTE

The term "**subject to the provisions**" was used ample of times by the Delegates (the Framers of the ***Constitution***) at least on 31 different days and as such a term that can be easily understood what they intended as to the meaning of "**subject to the provisions**".

With the application of Section 52(1) the wording "**subject to the constitution**" precisely was meaning that, and not that somehow the Commonwealth can create some tax heaven for itself to be excluded from taxation. The meaning of "**subject to the constitution**" must be taken as having the same /simular meaning as used in Section 10 of the ***Constitution***.

Hansard *31-3-1891* Constitution Convention Debates

QUOTE **Sir SAMUEL GRIFFITH:**

> Of course it is necessary for the purposes of the commonwealth that it should have the control over all means of communication. Another provision to which I desire to call special attention is No. 30, which reads thus:
>
> The exercise within the commonwealth, at the request or with the concurrence of the parliaments of all the states concerned, of any legislative powers with respect to the affairs of the territory of the commonwealth, or any part of it, which can at the date of the establishment of this constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia, **but always subject to the provisions of this constitution.**

END QUOTE

The usage of "**but always subject to the provisions of this constitution.**" or "**subject to this constitution**" is to be deemed interchangeable without a different meaning.

I have no doubt that the usage of "**subject to this constitution**" included provisions which were relevant in Section 51, including subsection (i) and (ii) for example, it would indeed be a total absurdity if subsection 116 was not applicable to the Commonwealth in its territories, and it could dictate religion in an airport terminal that was still part of a State.

Actually, while the states retained their powers to legislate as to religion, Section 116 specifically excludes this to the Commonwealth. If Section 52 were to apply differently, that the "exclusion" of section 52 means it can ignore Section 116 then the whole meaning of Section 116 in regard of "**and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.**"

Section 122 gives the Commonwealth powers to make laws "**for the government of any territories**" but Section 52(i) clearly reduces this powers to be (subject to this constitution", and this means subject to Section 116 also.

To hold that Section 116 is not applicable to Section 52 would make the part "**and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.**" Of Section 116 nonsensical, in that it was obvious to the Framers that about all or most public servants of the Commonwealth would have their living quarters within Commonwealth territories. Indeed, the Framers discussed the fact that other then the seat of the Parliament lend would be leased out to people living there.

To argue that the Commonwealth is not bound by other parts of the ***Constitution*** would mean that effectively the Commonwealth could ignore Section 116 and dictate in Commonwealth offices held in proprietary of a State that anyone entering a post office had to follow certain religious practices. This kind of a nonsense situation would serve any fanatical religious sect that may come to power in time to come and then use the very High Court of Australia judgments to its advantage in such manner.

It could effectively turn this country into some fanatic religious nation, circumventing Section 116 by arguing that it is entitled to dictate that no person t can sit in Parliament unless being a

member of their religion. Considering the absurd decision in ***Sykes v Cleary***, where the High Court of Australia took out of context what was stated, and the case of ***Sue v Hill***, where again the High court of Australia ignored to appropriately interpret the **INTENTIONS** of the Framers, as much as with the 1982 **Wilson J** judgment about funding of religious school, then if I were of some extreme religious sect then if I had power I could use all those High Court of Australia judgments to not only kick out Members of Parliament for not being members but have them all imprisoned and turn this nation into a religious zealot dictating who shall or shall not on religious grounds enter Commonwealth territory. Meaning, anyone elected but not being of the religion will be denied to enter Commonwealth territory and by this his/her seat be declared vacant for failing to attend.

One must not ignore the horrific consequences that could follow if "**subject to this constitution**" was ignored to be applied to what else is stated in the ***Constitution***.

It would also be absurd to argue that the Commonwealth somehow could ignore Section 99 by giving Victoria, say, a tax free area where businesses could operate from leasing commonwealth held land as proprietor, and by not having to pay taxes otherwise applicable in Victoria could have an improper advantage to commence from that would wipe out also the "trade and commerce" to be equal through the nation. It could also then ignore Section 117 as if this does not apply to the Commonwealth held territories. Clearly, this is an utmost stupidity of argument to be stated as the Commonwealth is derived from the States, and as such where any constitutional provision relates to a State then it must also be held to apply to commonwealth held territory for so far this is applicable, such as with telecommunication, postal services, taxation, etc.

My view is that the MABO decision appears to show judicial bias, which I view is that as a alleged homosexual you seek to make a case for minority groups. Subsection 51(xxvi) was never intended to operate for minority groups and the con-job 1967 referendum neither presented this to the general community (the electors) to vote for a transformation of the application of the entire Section. Hence, the amendment must be interpreted in that Aboriginals now as like other coloured races would loose their citizenship (not being nationality) and so their franchise the moment any special legislation was passed within that amended subsection 51(xxvi).

I perceived comments about the Framers of the ***Constitution*** having been discriminatory against Aboriginals to be a fiction of the imagination of the judges claiming so, as any **FAIR MINDED PERSON** who had taken the time to research the Debates as I did, so extensively, would have been aware that their general consensus was that Aboriginals were equal to any other natural born Australian in the Federal provisions, and it was upon the States to provide them with State franchise. Once a State had provided an Aboriginal with franchise then constitutionally nothing was there to prevent the Aboriginal to exercise his/her franchise also in the federal arena.

The quotations below also include what unlike the MABO judgment, Section 127 was not intended to discriminate against Aboriginals but rather was in regard of the quota to avoid States with large Aboriginal populations being considerably financially burdened in the first years of Federation.
As stated below;
QUOTE

> The last comments clearly underlines that any race subject to special laws within Subsection 51(xxvi) loses their rights of franchise.
>
> Now, any proposal to have homosexuals being dealt with under this "**race**" provision would in fact not only be an absurdity, as Subsection 51(xxvi) was intended to relate to coloured races, **but more over, would remove the right of homosexuals to have franchise** and by this neither could be in Parliament or serve as a judicial officer in a court!

END QUOTE

And

QUOTE

> It ought to be clear that there was never any intentions that somehow a person trading on Commonwealth controlled property could by this avoid paying taxes and duties.
>
> Indeed, it would be a breach of Subsection 51(ii) if it were to apply different regime versus that in a State.
>
> The real issue is that the Commonwealth properties are owned by the States, and that when there is a reference to States, then it includes any territory or property held by them in conjunction by all States. The usage of "**subject to this constitution**" in Section 52 cannot be used in a different context then what is used in Section 10 and must be interpreted to its meanings as expressed by the Framers of the ***Constitution***.

END QUOTE

Likewise the "embroyo state" (quisi State) being a Territory it cannot have voting rights in a Senate where it is a House of the States.

As the Framers of the **Constitution** made clear, laws by the Commonwealth must be for the whole of the Commonwealth.

Hansard *16-2-1898* Constitution Convention Debates

QUOTE **Mr. ISAACS**.-

> **An income tax or a property tax raised under any federal law must be uniform "throughout the Commonwealth."**

END QUOTE

If Section 52(1) was to exclude commonwealth properties from the normal taxes otherwise applied to others then no longer it is "**throughout the commonwealth**".
Section 52(1) was never intended to operate as such.
Indeed, land that was acquired by the Commonwealth but not as sovereign but as proprietor, such as with Melbourne (Tullemarine) airports it was clear that from onset it was intended that State laws regarding taxation (being it licences, etc) would apply. the operation of Melbourne (Tullemarine) Airport as an Airport itself is not hampered by airport facilities.

I still like to know where is the constitutional powers in the first place for the Commonwealth of Australia to run airports?

The recent expansion of Melbourne (Tullemarine) Airport opened by Mr Brumby, a Minister of the Victorian government was in my view appropriate, as after all, it is and remains Victorian soil. The Framers of the constitution never even contemplated. For so far I can detect, to have airports, let alone could have provided for this. The fact that the Commonwealth of Australia has constitutional powers in Subsection 51(i) in regard of trade and commerce does not mean it then can start up whatever business it likes, including running an airport. Simply, it can purchase land as a proprietor and for the purpose of exercising constitutional powers have customs operating, but anything not strictly within constitutional powers do not come within the exclusion zone. After all, if people working in the Duty Free stores are in fact employed by some business in the State of Victoria, it would be absurd if then nevertheless they can be excused of paying State payroll tax because they are actually working on the Airport.
As I understood it, there was once an issue with Australian Post delivery not having to follow State laws. This is sheer and utter nonsense. In my view it only underlines how ill trained the judges were who handed down such a judgment. Any Commonwealth officer must abide to relevant State laws even if performing a Commonwealth function. After all, as the Framers of the ***Constitution*** made clear even Commonwealth law enforcement could be done only through the State Courts and State police!

If Post delivery personnel can disregard State laws then they can exceed speed limits as much as they like and drive their delivery vehicles on footpaths and be free from prosecution. In my view the judges who decided that case in such manner to place Australian Post above State laws only were complete idiots.

For years I have made known that what we need is an **OFFICE OF THE GUARDIAN**, a constitutional council, that advised the Government, the people, the Parliament and the Courts about constitutional powers and limitations. Then judges at least can fall back on getting some sound and sensible advice of people who have their job to research matters.

As for the argument that overseas certain airports provide duty-free or other store facilities for travellers hardly could have any impact to what our constitution stands for. Our ***Constitution*** is designed by Australians for Australians.

The same with where in the past the Commonwealth used to have its own shipping line which I view was unconstitutional also.
Likewise, for the Commonwealth now to lease out land to be used, WOOMERA, to be used by foreign nations to do testing and this by a lease to BEA.

The Framers made clear that property could only be acquired for the sole purpose of what is allowed by constitutional provisions. Duty free shops never existed at the time of the creation of the constitution and should be no part of the business of the Commonwealth. To allow this would in effect mean that the High Court of Australia is going beyond its own constitutional powers where it is bound to determine the **INTENTIONS** of the Framers of the ***Constitution*** as to the application of constitutional provisions and limitations.
Hansard *17-3-1898* Constitutional Convention Debates (Australasian Federal Convention)
QUOTE **Mr. DEAKIN**.-

> **In this Constitution, although much is written much remains unwritten**

END QUOTE

In my view, Commonwealth functions, even if airports were to be held within constitutional powers, it cannot expand it into duty-free stores, perhaps in the future casino's, hotel accommodations, etc.

Within the A.C.T. the difference is that the Commonwealth holds that as sovereign and as such has legislative powers, but it cannot do so with land it holds as proprietor and the state never intended to hand over State taxation rights.

Previously, after I wrote to Mr John Howard that the Commonwealth could not sell land held at **POINT NEPEAN** to private investors without continue its own law enforcement, building regulations, etc, the commonwealth aborted to sell it. As I made clear then, it could only sell the land back to the State of Victoria as to reinstate all State legislative powers. The Commonwealth subsequently, instead of wanting to sell the land for 500 million dollars ended up paying the State of Victoria 5 million dollars for a clean up.
As I had explained, all State legislative powers had been extinguished in **POINT NEPEAN** when it was transferred into Commonwealth ownership at federation and therefore, unless the land was sold back or given back to the State of Victorian to reinstate its legislative powers
Lets have a further look at taxation;

* **Customs and excise, and bounties, but so that duties of customs and excise, and bounties shall be uniform throughout the Commonwealth**
* **There is nothing in this clause which will give the federal tax-gatherer any priority over the state tax-gatherer.**
*

In no part of this clause is priority given to the federal government in the matter of the right of levy.

Consider the following;

QUOTE

The very principle of the Federal Constitution is this: that the Constitution is above both Houses of Parliament.

END QUOTE

As such, Parliament cannot override constitutional provisions and limitations, and for so far any legislation that is beyond constitutional powers it will be **ULTRA VIRES** and as such not legally enforceable.

QUOTE

What is really wanted is to prevent a discrimination between citizens of the Commonwealth in the same circumstances.

END QUOTE

While the Commonwealth of Australia, so to say, has a free reign on imposing direct taxation, it is however limited by the fact that all laws enacted by the Federal Parliament (actually they are passed as Bills by the Federal Parliament and do not become law until Royal Assent is has been given and they are published, as to be available to the general community) that all laws enacted must be "**UNIFORM**" throughout the Commonwealth of Australia.

Tax deductions can be deemed to be bounties and as such must be deemed to operate in the same manner.

QUOTE

Mr. MCMILLAN: I think the reading of the sub-section is clear.

The reductions may be on a sliding scale, but they must always be uniform.

END QUOTE

And

QUOTE

Sir GEORGE TURNER: No. In imposing uniform duties of Customs it should not be necessary for the Federal Parliament to make them commence at a certain amount at once. We have pretty heavy duties in Victoria, and if the uniform tariff largely reduces them at once it may do serious injury to the colony. **The Federal Parliament will have power to fix the uniform tariff, and if any reductions made are on a sliding scale great injury will be avoided.**

END QUOTE

Hansard *17-3-1898* Constitution Convention Debates

QUOTE **Mr. BARTON**.-

But it is a fair corollary to the provision for dealing with the revenue for the first five years after **the imposition of uniform duties of customs**, and further reflection has led me to the conclusion that, on the whole, it will be a useful and beneficial provision.

END QUOTE

And

QUOTE

On the other hand, the power of the Commonwealth to impose duties of customs and of excise such as it may determine, which insures that these duties of customs and excise would represent something like the average opinion of the Commonwealth-that power, and the provision that bounties **are to be uniform throughout the Commonwealth**, might, I

am willing to concede, be found to work with some hardship upon the states for some years, unless their own rights to give bounties were to some extent preserved.

QUOTE

.

Hansard *31-3-1891* Constitution Convention Debates

QUOTE

2. Customs and excise and bounties, but so that duties of customs and excise and bounties shall be uniform throughout the commonwealth, and that no tax or duty shall be imposed on any goods exported from one state to another;

END QUOTE

Hansard *11-3-1898* Constitution Convention Debates

QUOTE

Taxation; but so that all taxation shall he uniform throughout the Commonwealth, and that no tax or duty shall be imposed on any goods passing from one state to another.

END QUOTE

And

QUOTE

That all the words after the word "taxation" where it is first used be struck out, and that the following words be substituted:-"but not so as to discriminate between states or parts of states, or between goods passing from one state to another."

END QUOTE

And

QUOTE

That all the words after the first word "taxation" in the second sub-section be omitted, with a view to inserting the following words-"but not so as to discriminate between states or parts of states, or between persons or things passing from one state to another."

The amendment was agreed to.

The clause, as amended, was agreed to.

END QUOTE

Then, on 16-3-1898 is appears to have been amended, without further discussion but approved off by voting, from;

Taxation; but not so as to discriminate between states or parts of states, or between persons or things passing from one state to another.

To

Taxation; but not so as to discriminate between states or parts of states

It was claimed that in substance there was no change. Hence, both versions ought to be taken as having the same meaning.

This is a critical issue as the wording;

"**or between persons or things from one state or another**"

then clearly entails that there can be no difference in taxation between persons, and as such neither one person having a tax free income, partly or wholly while another having the same income is required to pay more tax.

What must be noticed is that while the wording in subsection 51(ii) regarding taxation did alter, the principle that the State retained its rights to raise taxation was maintained throughout as statement from the 1891 (see 31-3-1891) and 1898 (11-3-1898) **Constitution Conventions** clearly underlines, and that the change from 11-3-1898 to the version of 16-3-1898 was not an amendment per se but rather held to be to improve the clause without a change in substance,

unless it was specifically stated otherwise, as was applicable with clauses 9 and 10 relating to time and places.

Further, in regard of tariffs, customs, duties, taxation, etc it was made clear that in regard of the Commonwealth of Australia it was bound to have charges uniform throughout the Commonwealth, albeit uniformity did not mean that a sliding scale could be used. As such a sliding scale that was apply throughout the Commonwealth, such as the sliding scale of percentage payable on income tax is within constitutional powers and limits. However, having people exempt from taxation by special deals is beyond constitutional powers if such exemption is not applied on a uniform bases throughout the Commonwealth.

If the argument of the High Court of Australia were to be accepted that the Commonwealth could have its own kind of charges, because it has within Section 52(i) EXCLUSIVE legislative powers then it could simply turn commonwealth property in tax heavens. Clearly, taxation stipulated in Section 51(ii) remains applicable and for this the provision in Section 52 "**subject to this constitution**" which means every relevant Section that can be applied.

Hansard *9-4-1891* Constitution Convention Debates

QUOTE

> **53.** The Parliament shall, also, **subject to the provisions of this Constitution**, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to the following matters:-

END QUOTE

Hansard *3-3-1898* Constitution Convention Debates

QUOTE **Mr. OCONNOR** (New South Wales).-

> Until the Parliament otherwise provides, **but subject to this Constitution**, the laws in force in each state for the time being relating to elections for the more numerous House of the Parliament of the state shall, as nearly As practicable, apply to elections in the state of senators and of members of the House of Representatives.

END QUOTE

And

QUOTE

> **Mr. BARTON** (New South Wales).-I move-
>
> That the following new clause follow clause 44A:-
>
> Until the Parliament otherwise provides, but **subject to this Constitution**, the laws in force in each state for the time being relating to elections for the more numerous House of the Parliament of the state shall, as nearly as practicable, apply to elections in the state of senators and of members of the House of Representatives.
>
> This proposed new clause is to be substituted for the last portion of clause 10, and for the corresponding clause dealing with the House of Representatives. These are clauses which prescribe that until the Parliament makes laws on the subject the laws in force in each state relating to certain electoral matters shall as nearly as practicable apply to elections in that state of senators and of members of the House of Representatives. This is a substituted provision which deals with both the elections to the Senate and the elections to the House

of Representatives, and practically puts into one clause the work of two. It shortens up the provisions by speaking of the laws relating to elections instead of enumerating certain laws which are parts of the electoral law, **and it guards the change by inserting the words** "**subject to the Constitution**," **and saying the application shall be as nearly as practicable.** It seems to me to be a beneficial shortening of the matter, and I propose that it should take the place of the two clauses which have been struck out.

The new clause was agreed to.

END QUOTE

Hansard *1-4-1891* Constitution Convention Debates

QUOTE

Mr. BAKER: I move as an amendment:

That after the word "functions," line 7, the following words be inserted:-"as are contained in schedule B hereto, and such other powers and functions not inconsistent there-with."

It will be seen that we are deliberately making the instructions given to her Majesty's representative part of our Constitution.

Mr. CLARK: No; subject to the Constitution!

Mr. BAKER: **I admit that no instructions can be given which are inconsistent with the constitution**, but instructions can be given which are additional to the constitution, and which cover grounds not mentioned in the constitution.

Sir SAMUEL GRIFFITH: How?

Mr. BAKER: Why, under the provisions of an act a despatch was sent from the Government of Queensland, I think it was, to England, in which it was stated that the royal instructions to the governor are part of the constitutional law of the colony. I believe that is undoubted, and we are affirming that in this particular clause. Why should we go to Downing street for any part of our constitution which we can put into this act?

Mr. DEAKIN: What do you propose to put in, then?

Mr. BAKER: Well, I am not prepared to put in the whole of the powers and functions which are to be expressly set forth as having to be performed by the Governor; but I want to affirm the proposition that they shall be, as far as possible, contained in our constitution. Here is one matter to which I will allude. In 1878, after the Dominion of Canada had been formed, they objected to the instructions given to the Governor-General of Canada. They said that they did not consider that he was sufficiently amenable to his advisers, that a good many of the matters upon which he had instructions from the home government were matters upon which he ought to have followed the advice of his constitutional advisers, and Mr. Blake, who was the Minister of Justice, wrote several able despatches on the matter, and proceeded to England, I believe, twice. He certainly proceeded to England once, and after a great deal of trouble, and a great deal of friction the home Government gave way, and they erased from the former instructions an immense number of instructions which had formerly been contained in them. Among other things I will mention one matter which, I think, certainly ought to be inserted in the schedule of this bill, and that is as to the manner in which the governor-general is to exercise the prerogative of pardon. **We know very well that, according to the instructions now extant, which have never been altered, our colonial governors have the right of exercising their own discretion; and we also know that whenever Downing-street has been appealed to to uphold a governor in carrying out the powers which they say be ought to possess, they have shuffled in the matter.** In Canada it has been provided that the power of the prerogative of pardon is to be exercised by the governor-general:

1st. As to capital cases, with the advice of the Privy Council.

2nd. As to other cases, with the advice of at least one of his ministers.

3rd. As to cases in which pardon or reprieve might directly affect the interests of the empire, or any country or place beyond the jurisdiction of the Government of the Dominion, the Governor-General is, before deciding, to "take those interests specially into his own personal consideration, in conjunction with such advice as aforesaid."

[start page 575]

That is clearly laid down, I think. The last portion-the third subdivision-is quite proper, because he acts in matters relating to the interests of the empire as an officer of the Imperial Government; but in all other cases it is expressly laid down that be is to act on the advice of his responsible ministers. That is only one point. I should like to see in the schedule to this bill all the powers and functions of the governor-general which it is possible to define and to reduce to writing, so defined. I do not wish that we should have to go to Downing-street from time to time to find out what the powers of our constitution are.

Mr. DEAKIN: The first question that arises might be as to whether this is the best means of accomplishing, the end which the hon. member has in his mind. If the hon. member proposes to define the powers of the governor-general so far as they can be defined, I am cordially with him. The matter, indeed, received some attention at the hands of the committee, though the question as to the method of definition to be adopted was felt to be surrounded with difficulty. The solution which I wish to suggest to the hon. member who has now moved his amendment is that it would be better to embody in the bill itself anything that we have to say on this subject; and for my own part, I cannot conceive that it will be necessary to do anything more-if I may repeat what I was urging a few minutes ago in connection with another subject-than to insert in this bill, and to state on the very face of the constitution, that the governor shall invariably act on the advice of his responsible ministers, that every act of his shall be countersigned by a responsible minister who shall make himself responsible by his signature for that particular act. That will apply even to circumstances under which a governor-general changes his ministers.

Sir SAMUEL GRIFFITH: He has got to turn out the first lot on nobody's advice!

Mr. DEAKIN: Exactly; but, as the hon. member is perfectly well aware, having gone through the process so often himself, the incoming ministry invariably take that responsibility upon their shoulders.

Sir SAMUEL GRIFFITH: That is not acting on advice, though!

Mr. PLAYFORD: It is acting on his own responsibility!

Mr. DEAKIN: Not at all. However, the question is one of phraseology. If we are agreed on the principle, we can easily embody it in language; and I would suggest to the hon. member, Mr. Baker, that it would meet all the purposes of the schedule which he proposes, and do away with what seems to be an indirect method of dealing with the matter, to say directly that the governor's powers shall be limited by the necessity on his part of obtaining the signature of a responsible minister to every one of his acts.

END QUOTE

Hansard *20-4-1897* Constitution Convention Debates

QUOTE

CHAPTER VI.-NEW STATES.

Clause 113-Any of the existing colonies o [*name the existing colonies which have not adopted the Constitution*] may upon adopting this Constitution be admitted to the Commonwealth, and shall thereupon become and be a State of the Commonwealth.

Sir GEORGE TURNER: This clause provides that any of the existing colonies may, upon adopting this Constitution, be admitted to the Commonwealth, and shall thereupon become and be a State of the Commonwealth. The next section provides for the admission of new States, with power to impose certain conditions on their admission. Is it wise that we should allow any of the existing colonies to stand aside as long as they like, for any number of years, and to ultimately come in, whether the colonies which have joined like it or not, on exactly the same conditions? Surely it is not unreasonable to say to the existing colonies: "You have a perfect right to join with us, to throw in your lot with us, participate in the advantages, share the risks, make the losses we have to make jointly, make the enterprises we have to make jointly; but if you do not wish to do that, if you desire to stand aloof and allow us to make this Federation, we must have some say

in it when you wish to join." I think that is fair and reasonable, and I should be glad if Mr. Barton will explain why this unlimited right should be given to the existing colonies, and why the Federal Parliament should not have the power to admit any existing colony on conditions which may be laid down.

Mr. DEAKIN: Something similar to clause 114?

Sir GEORGE TURNER: According to clause 114 new States may be admitted on terms which the judgment of the Federal Parliament might fairly decide. Certain conditions ought to be imposed by the Federal Parliament as representing the States which initiated the Federation, and which certainly ought to have some say in it. I do not desire at the present moment to move an amendment because my hon. friend may be able to give some good reason why this distinction should be drawn. If so I will be willing to fall in with it.

Mr. BARTON: The reason of this provision is partly due to what is included in the United States Constitution as follows:

No new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress.

That section is practically the same as we have placed in this Bill-sections 133 and 114 read together. Section 113 provides a sort of *locus poenitentiae* that every existing colony may be allowed to come in when it likes.

Sir GEORGE TURNER: At any time.

Mr. BARTON: Clause 114 allows the Commonwealth to make and impose conditions, as to the extent of representation in either House of Parliament or otherwise, as it thinks fit. However we might read the parallel provisions as they appear in the American Costitutions, as they appear here it does seem as if the existing colonies not joining the Federation at first are entitled to come in under these provisions at any time, and that only new States are made subject to conditions. I think that is the meaning of the clause.

Sir GEORGE TURNER: That is the intention.

Mr. BARTON: That is the intention. The motive of the clause is that we may offer a fair inducement to those colonies which we want to join us to come in at the earliest moment. It is for this reason that every State that does not join under this Constitution at first, as the rest of the Bill shows, is a colony. It is a State when it joins. After this Commonwealth is formed any existing colony that joins will in a sense be a new State, because the States will be the colonies which join at-first. That is why [start page 1008] this provision is placed in this chapter, and I think it is as convenient a place for it as any other. We are offering, not a time, but an opportunity to the other colonies which do not join with us at first, being existing colonies, to come in and join, and we offer them an absence of the conditions that we would have to impose on new States if new States had to be created. There may be difficulties existing as to the joining of other existing colonies which will be smoothed over by a provision of this Sort. If you place them all on the same footing, and make existing colonies, as well as those which are to be created hereafter, all liable to conditions, then, it seems to me, that there may be a very great discouragement to any State., such as Queensland or Western Australia, which might not decide at first, to join in the Commonwealth. But if you give them an opportunity, even for an indefinite period, to join, you are really offering them the terms of this Constitution, which, if varied from, would make it harder for them to come in.

Mr. HIGGINS: Is not this an inducement not to join now?

Mr. BARTON: I think not. The greatest advantage is to be gained by joining when the others join.

Mr. SYMON: Would you limit the time?

Mr. BARTON: No; and for this reason: This clause is not to be read with the Federal Enabling Act which will be a spent Act within a short time. Then it might be argued that this clause did limit a certain time, but that is not so. So it does not impose a definite period of time. But the Committee may think it is better to leave the provision in its present state, leaving it to the Commonwealth, if the existing colonies do not come in within a reasonable period, to fix a limit.

Mr. DEAKIN: That would mean an amendment of the Constitution. The clause as it stands is entirely one-sided. It binds the outstanding colonies to nothing, but it does bind the colonies who federate to the

unconditional acceptance of a colony which has stood out as long as it has been to its interest to Stand out, and enabling it to come in at its own will without the consent of the other States. I take it that at least the consent of the Commonwealth should be necessary before any State should be able to join in this union.

Mr. WISE: If we begin that clause with the words " Until Parliament otherwise determines," would that meet the difficulty?

Mr. DEAKIN: That would meet the difficulty I have just mentioned, and would certainly be a very great improvement. It would be unreasonable, as Mr. Barton indicated, to expect that all the colonies about to join can federate within the same month, or perhaps year. In the case of the United States more than twelve months elapsed before all the colonies were brought into line. A certain time limit might perhaps be fixed, but I do not know if, after all, the proposal that has been made is not better. It makes this, then, a less one - sided arrangement, which now binds the Commonwealth and does not bind the States.

Mr. O'CONNOR: Is not this one of those things which would be better dealt with after the adjournment?

Mr. DEAKIN: I feel strongly that it is absolutely necessary to insert the words, "Until Parliament otherwise determines." I think this is absolutely essential, for the present clause is obviously unfair on the face of it. Supposing there was a great emergency and some of the colonies came together for a common purpose-say for defence-and at great expense provided against risks. It might happen that some colony which stood out at first would step in subsequently, not to share in the risk, but only in the profits.

Sir JOHN DOWNER: Why not strike out clause 113?

Mr. DOUGLAS: Would the hon. member allow me to suggest to add to the clause these words:

As may from time to time be declared.

[start page 1009]

Supposing one colony comes in this year and another colony comes in three years afterwards, you would then have to make a calculation of the revenue, and the colony that was late in entering the Federation would have to pay a sort of penalty fixed on a comparative financial basis.

Mr. DEAKIN: That would be best. The hon. member has put his finger upon a further difficulty. I understand that a financial scheme has been drafted which is to be determined by calculations made for a particular period; but these calculations will be null and void as far as the particular province coming in is concerned. Having stood out it seeks to enter the Federation, so as to dislocate the whole financial system.

Mr. BARTON: Perhaps we had better see what the financial scheme is first, and postpone these clauses.

Mr. DOUGLAS: I would like to ask the Leader of the House how is a colony to be admitted, and what is the proceeding to be gone through?

Mr. BARTON: It can only be done by Act of Parliament.

Mr. ISAACS: Whatever the financial scheme may be, I think we should deal with this clause in the way suggested, and not postpone it, and I think the view taken by my hon. friend Mr. Wise is the correct one. We may be able to incorporate the principle to which he alluded at a later period, by inserting, the words "upon such conditions as Parliament may think fit," in a subsequent portion of the clause. Whatever may be the financial scheme arranged, I think this should be done; for as the provision now stands it is offering a premium to stand out from the Commonwealth-something like a mining speculator who holds aloof until he sees which way things are going. We should all throw in our lot at once and take our chance, and not stand out till there is an opportunity of coming in afterwards, when difficulties are over, and sharing in the profits. I think we ought to deal with this question irrespective of what the financial scheme is.

Sir EDWARD BRADDON: I hope we shall safeguard the Commonwealth. I think some provision is necessary to be taken against those colonies that are languid in the movement. We do not want to allow any colony to lounge into the Federation on its own terms after the other colonies have borne the heat and burden of the day and made things easy for it. I hope, amongst other stipulations-it is necessary to make some stipulations-that one shall be that all of the colonies shall enter upon the same terms as those upon which we enter, and that is by a referendum to the States. I understand Mr. Barton is going to postpone the clause, and I think it is one that needs postponement until we know what the Financial Committee has been doing. If we

agree to some basis in connection with the Financial Committee's work, we may be able to make some provision here to guard those in the van of the movement against those who are the laggers.

Mr. BARTON: I do not think it will be well to leave out clause 113 until we have made some alterations to clause 114. I am a little exercised in my mind as to the meaning of certain words in the clause, and if the legal members will give me their assistance I shall be glad. **In clause 114 you will find these words:**

The Parliament of the Commonwealth may make and impose such conditions as to the extent of representation in either House of Parliament, or otherwise.

Mr. WISE: Strike them out.

Mr. BARTON: No, do not strike them out yet; I am a little exercised as to the meaning of the words:

As to the extent of the representation in either House of the Parliament, or otherwise.

Would they not exclude the Commonwealth from making provision, except as to representation?

Mr. WISE: You bad better strike out all the words after "conditions."

[start page 1010]

Mr. SYMON: Put in after "conditions" the word "including," and strike out "as to."

Mr. BARTON: I think I shall move:

That clause 113 be struck out,

I shall, if that is done, move amendments to the next clause, and make the one deal with the whole matter.

Clause 113 struck out.

Clause 114-The Parliament may from time to time establish and admit to the Commonwealth new States, and may upon such establishment and admission make and impose such conditions, as to the extent of representation in either House of the Parliament or otherwise, as it thinks fit.

Mr. BARTON: In the first line I move:

To insert after "from time to time" the words "admit to the Commonwealth any of the existing colonies and may," and strike out "and admit to Commonwealth."

Then I shall adopt Mr. Symon's suggestion, and move to insert "include" and leave out the words "or otherwise."

Mr. KINGSTON: I think you will want to make the words read:

And may upon such admission or establishment.

Sir JOHN DOWNER: You do not want the word "establishment."

Mr. BARTON: I would explain this for the consideration of the Convention, that you do want the word "establishment" with regard to new States.

Mr. KINGSTON: You want both.

Mr. BARTON: Yes; I was explaining to Sir John Downer that we do. We are only dealing with the continent and Tasmania, as far as we know at present. **There may be such a thing as the division of Western Australia and. Queensland, but apart from that any new State would have to be carved out of the limits of the Commonwealth. That would consequently be matter for absolute establishment, as new States could not be created any other way.**

Mr. ISAACS: I do not know whether I caught the answer correctly, but I think Mr. Kingston wants the word "admission" repeated.

Mr. BARTON: I move:

To insert after the word "time," where it occurs the second time, the words "admit, to the Commonwealth any of the existing colonies of *(name the existing colonies which have not adopted the Constitution)* and may from time to time.

Amendment agreed to.

Mr. BARTON: I move:

To strike out the words "establishment and admission," with the view of inserting the words "admission or establishment. "

Amendment agreed to.

Mr. BARTON: I propose

In line 4 to insert before "conditions" the words "terms and."

Amendment agreed to.

Mr. BARTON: I propose:

To leave out the words "as to," just following "conditions," with a view to putting in their place the word "including."

Amendment agreed to.

Mr. BARTON: I propose:

In the next line to strike out "or otherwise."

Amendment agreed to.

The CHAIRMAN: I will read the clause as amended:

The Parliament way from time to time admit to the Commonwealth any of the existing colonies [*here name the colonies which have not adopted the Constitution*], and may from time to time establish now States, and may upon such admission or establishment make and impose such terms and conditions, including the extent of representation in either House of Parliament, as it thinks fit.

Sir EDWARD BRADDON: I think your grasp of this clause in its present condition shows your perfect knowledge of the art of amendment in every possible way. It has been done in such a way that we have not the scantiest idea of what it now provides.

Mr. DEAKIN: **It is a mosaic.**

Sir EDWARD BRADDON: **Distinctly mosaic; but I think the majority of this Convention do not know what it is. We have embodied everything and struck out everything.**

Mr. DEAKIN **Give up everything, and take back all."**

Sir EDWARD BRADDON: **I would [start page 1011] suggest that those who have not grasped this volcanic amendment in the way in which our chairman has, should have this clause placed before them in print, so that they may see what it is.**

Mr. DEAKIN: **Have it set to slow music. (Laughter.)**

The CHAIRMAN: Perhaps Sir Edward Braddon will take my assurance that it is all right. (Laughter.)

Mr. DOBSON: **I confess I was very much disappointed with Sir Edward Braddon's last utterance. I thought he would be the fool to rush in where the angels fear to tread.**

Mr. DEAKIN: **Disappointed that he was not the fool?**

Mr. DOBSON: I thought he would say that here is a departure from equal representation in the Senate. I can see why the clause should stand as it is to the extent of equal representation in the House of Representatives, but not as to equal representation in this Senate. **It can hardly arise that Norfolk Island**

would come in as a separate State, and few of us would like to give Norfolk Island six senators. Here we are making a departure as regards new States, inasmuch as we are giving the Federal Parliament power to alter that which is supposed to be the very foundation of the federal edifice we are rearing.

Mr. DOUGLAS: Before we pass this I think, with Sir Edward Braddon, we should see this clause in print.

Mr. DEAKIN: You can have it recommitted if necessary.

Mr. DOUGLAS: It seems to me that the wording is entirely incorrect.

Sir GRAHAM BERRY: I would ask Mr. Barton's attention to clause 23, which we have already passed. We have provided there:

Each of the existing colonies of Now South Wales, **Now Zealand**, Queensland, Tasmania, Victoria, and Western Australia, and the province of South Australia shall be entitled to five representatives at the least.

That seems to conflict with the clause we are now considering.

Mr. BARTON: No. That clause is part of the Constitution dealing with the existing colonies which become States, and the Commonwealth would not under the clause we have just dealt with be deprived of making terms and conditions which give more than five representatives if the States were entitled to more. Clause 23 deals only with the minimum number of representatives.

Mr. GLYNN: This clause will be part of the Constitution, and will give the power to change the representation. I am afraid we made a mistake in leaving out clause 113. There Should have been a distinction between existing colonies and new States. If Queensland does not come in at once and wants to come in later on she will have to make application without stating the terms on which she wishes to be admitted. **The Parliament can state the terms**, and it will be out of Queensland's power to revise them, and it may then be difficult for Queensland to come in.

Sir EDWARD BRADDON: I should like Mr. Barton to tell us what this really means.

Mr. BARTON: If the hon. member will look at section 113 he will see within brackets:

[name the existing colonies which have not adopted the Constitution.]

Sir GRAHAM BERRY: How can that possibly be done? None of the colonies have adopted the Constitution.

Mr. BARTON: That of course can only be done when the colonies which have adopted the Constitution are known, then their names could be filled in when application is made to the Imperial Parliament. Bearing that in mind when the imperial Parliament has legislated, clause 114 reads:

The Parliament may from time to time admit to the Commonwealth any of the existing States, and may from time to time establish new States, and may upon such admission or establishment make and impose such terms and conditions, includ- [start page 1012] ing **the extent of representation in either House** of of Parliament as it thinks fit.

Sir EDWARD BRADDON: How can the representation of either House of Parliament be stated? We have agreed to the representation of every State being in the ratio of two to one, and how is the Federal Parliament to arrange **a representation** which may be, according to this clause as now amended, the representation of one House only, and that possibly the House of Representatives? That is the point Mr. Dobson referred to, and which concerns us of the smaller States as it affects representation of the smaller States when there may be additions to the Commonwealth by new States.

Mr. DEAKIN: The answer is that no such bargain can be made without the consent of the smaller States, through the House in which they have the majority.

Mr. WISE: And **subject to the Constitution**.

Mr. O'CONNOR: And they could not come in unless these States like.

Sir EDWARD BRADDON. The smaller States cannot ensure a majority.

Mr. DEAKIN: They have a majority in the Senate from the commencement.

Clause, as amended, agreed to.

Clause 115-The Parliament may make such laws as it thinks fit for the provisional administration and government of any territory surrendered by any State to and accepted by the Commonwealth, or any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, **and may allow the representation of such territory** in either House of the Parliament to the extent and on the terms which it thinks fit.

Mr. WISE: I move:

That the following words be added at the end of the clause:

No federal territory shall be leased for a longer period than fifty years, or alienated in fee simple, except upon payment of a perpetual rent, which shall be subject to periodic appraisement, upon the unimproved value of the land so alienated at intervals of not more than ten years.

Mr. DEAKIN: Is "territory" the best word to use there? Territory here is given a peculiar significance in the American sense-a great area under a Government which is not a State.

Mr. WISE: "Lands," then, I shall make it:

No lands, the property of the Commonwealth.

I do not know what reception this amendment will meet with in this Convention, but I am satisfied that there is no resolution that has been submitted to it which will touch the interests of the people outside more nearly than this.

Mr. GLYNN: Hear, hear.

Mr. WISE: It is desirable, if we wish to commend this Constitution to the approbation of the democratic multitude, whose votes it must receive, that we should indicate in the clearest possible manner that those principles which they have most at heart are conserved by this Constitution. No one need imagine that I am going now to enter upon any discussion of the question of land values taxation. It would be out of place altogether in an assembly of this kind to assume that there is any representative here who has not fully considered that question from every point of view. All I desire is in a definite form to bring up for acceptance or rejection by this Convention a proposal as to the future treatment of the lands which may ultimately belong to the Commonwealth. And in the amendment I have proposed I endeavor to avoid for all time to come-**as we hope we are framing a Constitution now that will last for many generations-all the evils which have attended the reckless alienation of territory since the foundation of these colonies**-

Mr. GLYNN: Hear, hear.

Mr. WISE: And to secure for the Commonwealth the growing and permanent source of revenue from that State-earned increment in the value of land which comes silently from the mere accretion of population, and from the exercise of the powers of Government. With these ends in view I have drawn an amendment which comprises two [start page 1013] matters**; the first limits the tenure of leasehold to a period of not more than fifty years, and the second provides that if alienation is allowed at all, it shall only be allowed upon such terms as will secure that a fair portion of the unearned increment of the land shall go back to the people who make that value by popular exertion.** And so I propose my amendment. I think the Convention will admit I have faithfully fulfilled my promise not to enter into a large and discursive discussion. I hope, therefore, that those opposed to this will follow my example in this respect, and not enter into a discussion, which in this assemblage, at all events, would be largely academic. If this Convention rejects the amendment, I may say that those who support it will try and persuade the local Parliaments to insist on its insertion in the Bill, and if I may prophesy-though I know it is dangerous to prophesy, and in nothing more so than in politics-shall prophecy that if this amendment is rejected now every Parliament in Australia will insist on its being adopted, and that we shall have to pass it in the Convention next time.

Mr. FRASER: You do not know the Parliaments.

Mr. BARTON: I would only suggest with regard to my hon. friend's amendment that it-

Mr. FRASER: **He does not mean it. He is only joking.**

Mr. WISE: You will find it is no joke.

Mr. BARTON: I have only to say this. If after the establishment of the Commonwealth the people are land nationalisers they will do what my hon. friend suggests. If they are not land nationalisers we have no business to make them so against their will.

Sir EDWARD BRADDON: I think there is a necessity for amending line 6, It states that the Commonwealth **may allow the representation** of such territory in either House of the Parliament to the extent and on the terms which it thinks fit. I would ask why it should be left to the Federal Parliament to decide? **The representation in this instance** is to be in both Houses, not in one House or in the other. Why should we not preserve in this question the ratio of representation which has been fixed already in regard to our representation generally?

Mr. BARTON: We have passed that clause long ago.

Sir EDWARD BRADDON: I am discussing clause 115.

Mr. BARTON: My hon. friend is speaking on clause 114.

Sir EDWARD BRADDON: My hon. friend does not know his own Bill.

Mr. BARTON: I thought you were harking back.

Sir EDWARD BRADDON: No. I am harking forward. I would suggest to my hon. friend that it is not intended that there shall be any departure from the principle that we have bound ourselves to, and that the difficulty here may be got over:

By striking out all words after "Parliament" in the twenty-second line and inserting "in accordance with the ratio of representation provided in the Constitution."

I am not going to manifest that mistrust in the Federal Parliament which has been shown here occasionally; still I think it is desirable that we should as far as possible safeguard ourselves against the breach of that engagement which has been entered into in a previous part of this Bill. I will move to test the matter the amendment which I have suggested.

The CHAIRMAN: Will Mr. Wise withdraw his amendment to allow this to be put?

Mr. WISE: Yes.

Leave given.

Mr. MCMILLAN: I think this is a very important matter, because I look forward with some hope that in future under federal administration a large portion of this continent will have to be dealt with under peculiar conditions. I do not think that [start page 1014] in regard to the administration of these territories, which are very peculiar in themselves, we ought to bind the Federal Parliament. I would suggest to my hon. friend that the matter might be dealt with in this way: instead of bringing in either Houses of Parliament **allow of the representation of such territory** to the extent and on the terms it thinks fit, leaving it entirely open as to the course to be adopted.

Mr. O'CONNOR: That is what the section provides.

Mr. MCMILLAN: So far as I can understand my hon. friend he wants to bring the territories practically into line with the States, which, of course, would be a great mistake. There would be many experiments in administration owing to the peculiar conditions of these territories, and we ought not to tie the Federal Parliament under these circumstances.

Mr DEAKIN: I think my hon. friend Sir Edward Braddon somewhat mistakes the position. If the United States plan is followed territorial delegates would simply be entitled to enter the House of Representatives and speak there, but would not be permitted to vote. They are only agents. The territories here would consist of parts of Australia in which there was merely a nominal population. From them persons might be privileged to enter the House of Representatives in order to state their wishes, but these persons could not take any other part in the proceedings.

Mr. BARTON: They are provisionally governed by the Commonwealth.

Sir EDWARD BRADDON: **Representation should carry with it the right to vote.**

Mr. DEAKIN: Under territorial representation if it follows the plan of the United States, as it probably would, territorial representatives would be entitled to speak in the House of Representatives, but not to vote. I think Sir Edward Braddon will see that his alarm is not well-grounded, and that whatever determination is come to in regard to the representation of territories must be settled by both Houses. The Senate will have an equal voice with the House of Representatives in determining what representation is to be given, when it is to be given, and how.

Mr. BROWN: I hope that Sir Edward Braddon will not insist on this amendment. It appears to me that we are again doing as we have been doing very frequently during the discussion of this Bill, namely, trying to put into the Constitution things which ought to be dealt with hereafter by the Commonwealth. **It is perfectly plain that as regards any territory which may require to have representation in the Commonwealth,** Some special arrangement will have to be made such as that indicated by my hon. friend Mr. Deakin. **To put into this clause a condition that such territory can only be represented under the terms and conditions to which the complete States are admitted will, I apprehend, be contrary to what the Convention has in view.**

Mr. BARTON: And prevent the Commonwealth from taking over any at all.

Mr. BROWN: In addition to that, it is showing a large amount of distrust of the wisdom of Parliament. We shall all, **through our representatives**, have the opportunity of influencing decisions in the future Parliament just as we have done here. Some hon. members occasionally regard this Commonwealth Parliament as a sort of foreign and hostile body which will have to be watched, and concerning which all sorts of precautions will have to be taken to prevent it from doing mischief. Having faith in the wisdom and capacity of the Federal Parliament, we should not load the Constitution with these unnecessary details.

Mr. BARTON: I ask the hon. member not to insist upon his amendment, which refers to territories and not to new States**. It would be impossible for the Commonwealth ever to consent to the admission of territories which might be sparsely populated, and which would, [start page 1015] according to the hon. member's proposal, be entitled to six members in the Senate. Territories or districts which are only in a primitive state of development are intended to be dealt with by a clause of this sort. They are in a transition state, and they are governed by the Commonwealth until such time as the States have reached a condition which would entitle them to representation in the Senate.** Bryce says:

Besides these full members there are also eight territorial delegates, one from each of the territories, regions in the West enjoying a species of self-government, but not yet formed into States. These delegates sit and speak, but have no right to vote, being unrecognised by the Constitution. They are, in fact, merely persons whom the House under a Statute admits to its floor and permits to address it

This Constitution is on a little more liberal basis than that in this respect: the Commonwealth in the case of the secession of a territory which is cumbersome, gives power to allow the representation of it in either House of Parliament under the terms which the Parliament thinks fit. Instead of the territories being governed in a way that only entitles them to be represented as delegates there is power to give them a certain degree of representation. It is quite as much as they can have the right to expect, and this is a more liberal provision than is to be found in the American Constitution. I trust we shall not have to divide on this.

Mr. DOUGLAS: Why should the words "either House of the Parliament" be there? What is required is to strike out:

In either House of the Parliament to the extent and to insert:

And it shall be on such terms and conditions as the Parliament shall think fit.

Sir EDWARD BRADDON: I should not object to the clause so strenuously as I have done if it were clearly shown **that representation in this instance did not carry with it the voting power which we generally understand accompanies representation. A representative is as well as being a speaking machine, a voting one,** and if Mr. Barton will say in the Bill that this representative or these representatives are not to have votes, then my alarm will be dispelled. **This is the fact as regards the representation of colonies under the American Constitution, but we have nothing in the clause to show that it is to be the fact here also.**

Amendment negatived.

Mr. Wise's amendment was then put

Mr. HIGGINS: My feeling is in sympathy with Mr. Wise's general intention, but I am embarrassed with the proposal at this stage. **There is no doubt our duty is to frame a Constitution for Australasia, and in framing a Constitution we are giving the Federal Parliament power to acquire territory for the purposes of the Federation.** It must acquire territory belonging to private persons or to the Crown, and all the resolution can apply to is as to what belongs to the Crown. It must deal with the lands under the Constitution, and I submit to my hon. friend, that his proposal is not constitution-making at all. However advisable it is to have no alienation in fee simple of these federal lands, and although we know there will be an effort to boom the land when the federal capital is fixed, we are departing from the ambit of our instructions in the Federal Enabling Acts if we adopt the proposal now. Our duty is to frame a Constitution, and for us to put in the Constitution something as to what is to be done with the property under the Constitution, is something which I cannot understand. I ask the hon. member to withdraw it. Rightly or wrongly, a great proportion of the people look with apprehension upon these views, and we do not want to frighten the people from coming into the Federation.

Mr. WISE: It will have the opposite effect.

Mr. HIGGINS: I feel as strongly as Mr. Wise as to the expediency of the policy indicated in his resolution, but I want to get Federation, and I do not want to deter a large portion of the people from [start page 1016] voting "Yes" if we get a working Constitution. Mr. Wise can tell his friends that we shall try to induce the Federal Parliament to accept this system. I think Mr. Barton has struck the nail on the head when he said it was not a matter to be considered in framing a Constitution. In framing the Constitution power is given to acquire Crown or private lands by the Federal Government, but at the same time, what is to be done by the Commonwealth is not a matter of Constitution framing.

Mr. TRENWITH: I differ from my hon. friend on this question, as I think it is desirable that we should, if we can, put a provision in the Constitution that the lands of the Commonwealth shall always remain the lands of the Commonwealth. We have bad ample evidence of the unwisdom of selling lands in fee simple in all of the States. We have had several very remarkable instances in the colony of Victoria-quite recently, where from time to time land was required for public purposes. All the land has belonged to the people of the State, and when it is sought to be acquired for public purposes, it is always found that the people have to pay very high prices for that which should never have departed from them, and we are continually embarrassed with the difficulty. The railways are notoriously non-paving from a book-keeping point of view, and it is altogether because of the fact that in the early days we alienated a large amount of the public lands, and when we required them for public purposes we had to pay private persons inordinate prices. I feel I should not be doing right in discussing this question at the length it deserves, but I feel bound to urge one or two reasons why it would be right to put it in this Constitution at any rate at this stage, even if it were struck out subsequently. **Mr. Higgins points out that in the Constitution Act we have there are provisions for the sale, letting, or otherwise dealing with Crown lands, and therefore it is unwise to to put in this Constitution that they should not be sold.** Now clearly there is no departure from the Constitution to which he refers. Supposing we only made a provision for letting the lands we have only done the same thing in a different degree as has been done in the Constitution to which he referred. It has been said that if the people cannot acquire the fee simple of the land they will not develop it to the same degree as they would if they could acquire it. We have been able in Victoria to furnish an object lesson in this connection. We recently passed an Alienation Act to which we attached clauses providing for the perpetual leasing of land subject to a re-valuation every ten years. We find that that land known as the mallee country in Victoria is being taken up very largely indeed under that system. affording to the agriculturist an opportunity of using the land for agricultural purposes, and leaving to the State perpetually such unearned increment as may from time to time accrue. We all know that unexpected developments take place and land is inordinately increased in value, not through any effort of the person using it, but through some extraneous circumstances over which he has no control, such as the discovery of a goldfield, or the development in the locality of some form of production which was not thought to be likely at the time it was alienated. The mallee land of Victoria was thought a few years ago to be absolutely worthless, and the difficulty was not to get people to buy it, but to stop on it at all, in order to destroy the rabbits and keep them from overrunning the adjoining lands. But quite recently, through two inventions, the land has become amongst the most valuable, the most easily worked, and the most remunerative in the colony, and if it had been alienated at the price that could be got for it a little while ago it would have been giving away the land to a few lucky people. If this clause is put in the Constitution now it will give us an opportunity of ascertaining what is the feeling of [start page 1017] the Parliaments that will have to deal with the Bill. It will give us an opportunity of learning the opinions of the people through the press.

Mr. O'CONNOR: This is not a proper use to make of this Convention.

Mr. TRENWITH: It is a proper use.

Mr. O'CONNOR: To test the feeling on a fanciful doctrine.

Mr. TRENWITH: It is for us to learn between now and four months hence what is the desire of the people, and by inserting it now we should have discussion on it in a way.

Mr. BARTON: Do you not think we would have discussion on it if we do not put it in.

Mr. TRENWITH: No. Because if we pass it it will be made a clause in this draft which we are preparing with a view of inviting criticism. Our work just now is to deal as nearly as possible with what we think is wise with the knowledge that it will receive serious and extensive public and Parliamentary criticism in order that we might, in the light of that criticism, do what seems most in accord with the public will. It was thought desirable in previous constitutions to put provisions in for what was then the prevailing custom in regard to the sale as well as the letting of public lands. But there has grown up, and is growing up, a very emphatic and widespread feeling that a great injustice was done to the people at the inception of the colony by disposing of their right to the public lands. **We are making a Constitution for lands to be dealt with by another body, and if that feeling is as general as I, Mr. Wise, and others think it is, we have a right to put in the Constitution a provision that will guard the public property in land from being dissipated as it has been in the past.** I feel this subject is so interesting and so important that it is very difficult indeed-it requires a great deal of self-abnegation-to refrain from discussing it as I should like to discuss it. But it is not proper that I should; and, having in view the shortness of the time, I will not do so. But I would urge hon. members to vote for the clause Mr. Wise has proposed; and if, as they think, it will frighten a large number of persons from coming into Federation, we can eliminate it when the second consideration of this Constitution comes on; or if, as some others think, there is such a widespread feeling in favor of it that this will popularise and even frighten away many that have that guidance from public discussion in the press, upon the platform, and in Parliament.

Mr. WALKER: I hope that our hon. friend Mr. Wise will allow this to go to a division at once.

Mr. WISE: I am quite agreeable.

Mr. WALKER: Or else withdraw it. Those who have been in Australia for many years know that the fact of acquiring land on easy terms is one of the main reasons Australia has such a much larger population now than it had forty years ago. At the present time we have enormous areas in Australia practically uninhabited, and yet these lands have been offered on remarkably easy terms. It is preposterous to make this Convention a debating society for the discussion of this land question, after all the delays we have had.

Sir JOHN DOWNER: Hear, hear.

Mr. WALKER: If Victoria wants more land, why not let her annex the Northern Territory from South Australia? I believe she could get it for the asking.

Mr. TRENWITH: There is only one reason, and that is that South Australia will not consent.

Mr. WALKER: Perhaps the best thing is to give away the land so as to get the people to reside on it and occupy it, and thereby contribute to the revenue through the Customs-house. I hope that without further discussion this proposal of the hon. member will be negatived.

Dr. COCKBURN: I do not think that this is the lace for a dissertation on the [start page 1018] various forms of land tenure. Still this is a special case, and not a general one. We are dealing with practically the site of the federal capital.

Mr. TRENWITH: That, and possibly more.

Dr. COCKBURN: Therefore the circumstances attending the consideration of this clause are altogether exceptionable. Wherever that capital is fixed there is bound to be a large influx of population, and a rise in land values to a fabulous extent.

Mr. WISE: Hear, hear.

Dr. COCKBURN: And we should consider how we can make the best practical arrangement, so that Federation may as far as possible pay its way.

Mr. WISE: If you leave it to the Federal Parliament the people will rush in and get the land beforehand.

Dr. COCKBURN: If a scheme can be proposed by which it is shown that the Federal Parliament will retain to itself as the landlord an enormous rise of prices in land, then it will be able to dispense with revenues from other directions. This is an aspect which might guide the people in considering what the cost of Federation will be.

Mr. HIGGINS: The people cannot rush and get Crown lands when it is a federal capital.

Dr. COCKBURN: **We have to consider this matter simply as an ordinary landlord. The federal authority will be the landlord of the site of the federal capital, and it is for us to consider what is the best possible use to which the landlord can put the land. This does not necessarily touch the question of land nationalisation or of methods of land tenure.** Therefore I feel compelled to vote with Mr. Wise, and in doing that I do not admit that I agree with the hon. member in all his views. I vote for the amendment because it establishes the general methods of a sound principle, which is applicable in the present instance, and will go a long way towards settling the question I have just alluded to.

Mr. HOWE: This land question is really the basis of all public good. **So fax as the land laws of each individual State are concerned, I think they should be left entirely to the Parliament of that State.** Ever since I took an interest, directly, in the politics of the State to which I belong I have advocated the leasing of our Crown lands, and, I am happy to say, Mr. Glynn, myself, and others, working shoulder to shoulder, have introduced into this country a system of leasing for a term, of leasing in perpetuity, for a fixed rent, or of giving a leasehold with right of purchase, which, instead of giving the principal part of the money to the Government, reserves it to the lessees, so that they may improve their properties, which is as good to them as if they held it in fee. The State which is to be created under this Bill is to have a Parliament which will outnumber any of the Parliaments of the other colonies, and which is to be elected by the people of all the colonies. What right has one State to say to the Parliament representing the whole people that you shall do so and so with your land? The Parliament should be allowed to deal with the land in which the federated government will sit as they like, just as we claim that we should be allowed to deal with the land in our own States. I should resent the Federal Government having the power vested in them of directing any individual State, however small, how it should dispose of its Crown land. We should never give them that right, and at the same time we should not attempt to dictate to the Federal Parliament how they should dispose of their land. You say, "Trust the people"; Mr. Deakin is always telling us to do that. I say, let the Federal Parliament deal with their lands at their sweet will and pleasure. They are appointed by the people, and will have to account to the whole of the people for the way in which they dispose of their lands.

[start page 1019]

Sir EDWARD BRADDON: This discussion is purely academical, and it was intended to be so by Mr. Wise. He is a believer in one capital for the Commonwealth. There is but one possible capital.

Mr. TRENWITH: There is only one Hobart.

Sir EDWARD BRADDON: And inasmuch as it is not at all likely that that capital will have a very considerable quantity of land to dispose of-

Mr. BARTON: Not even if you have the whole island.

Sir EDWARD BRADDON: If we had the whole island we should make it difficult for some impecunious, if largely populated, States to acquire property there. But as a matter of fact there will not be a very large amount of unalienated land to deal with in the capital, and that amount may very well be dealt with in accordance with the ordinary laws prevailing in the Commonwealth from end to end.

Question-That the words proposed to be added be so added-put. The Committee divided.

Ayes, 13; Noes, 21. Majority, 8.

END QUOTE

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QUOTE

Clause 118-The seat of Government of the Commonwealth shall be determined by the Parliament.

Until such determination the Parliament shall be summoned to meet at such place within the Commonwealth as a majority of the Governors of the States, or, in the event of an equal division of opinion amongst the Governors, as the Governor-General shall direct.

Mr. WALKER: I am only going to add a few lines to the first sentence. I propose:

That the following words be added after the word "Parliament," "and shall be within an area which shall be federal territory."

That is giving effect to the intention of the Constitution Bill as in clause 104. I may say that my desire is that the federal capital shall be in some place which is not at present a capital city, thereby removing a bone of contention, and giving us an opportunity of forming another centre of population. If the Federal Parliament thinks proper to test the principles which my hon. friend Mr. Wise advocates they can do so. But that, in my opinion, is comparatively a small matter at this stage.

Mr. HIGGINS: Is it a small matter?

Mr. BARTON: I trust that the Convention will not find it necessary to add this amendment. It is far better to let that matter be settled in the future. We have a provision in clause 51, sub-section 2-that is the only one which deals with the site of the federal capital-which says that the Parliament shall, subject to the Constitution, have exclusive powers to make laws for the peace, order, and good government of the Commonwealth with respect to the following matters, including the site of the seat of government. But that does not say that the Federal Parliament is bound to take any piece of territory heretofore not inhabited, or not thickly inhabited, and turn it into a federal capital. At present it will be better to leave the hands of the Federal Parliament free, and I trust [start page 1020] most of the hon. members will be of that opinion. We ought to leave the Federal Parliament free to determine the site of the Federal capital. My hon. friend's amendment would make it compulsory upon the Commonwealth to take some area and turn it into a federal capital. It would also practically impose this limitation, that some territory would have to be selected which is not at present a great centre of population. I am inclined to the opinion myself that it would be a good thing, in order to avoid intercolonial jealousies, that the site of the capital should not be in one of the present centres. But subject to that limitation of opinion we shall do well to allow the Commonwealth to deal with the matter itself. We should not tie its hands. It is fair to leave it in the hands of those who will be the citizens of Australia, and who ought to determine it for themselves. In the meantime we can allow the clause to stand as it is. I therefore suggest that this amendment be not carried.

Amendment negatived; clause, as read, agreed to.

END QUOTE

And

QUOTE

Clause 120-In reckoning the numbers of the people of a State or other part of the Commonwealth aboriginal natives shall not be counted.

Dr. COCKBURN: As a general principle I think this is quite right. But in this colony, and I suppose in some of the other colonies, there are a number of natives who are on the rolls, and they ought not to be debarred from voting.

Mr. DEAKIN: This only determines the number of your representatives, and the aboriginal population is too small to affect that in the least degree.

Mr. BARTON: It is only for the purpose of determining the quota.

Dr. COCKBURN: Is that perfectly clear? Even then, as a matter of principle, they ought not to be deducted.

Mr. O'CONNOR: The amendment you have carried already preserves their votes.

Dr. COCKBURN: I think these natives ought to be preserved as component parts in reckoning up the people. I can point out one place where 100 or 200 of these aboriginals vote.

Mr. DEAKIN: Well, it will take 26,000 to affect one vote.

Mr. WALKER: I would point out to Dr. Cockburn that one point in connection with this matter is, that when we come to divide the expenses of the Federal Government *per capita*, if he leaves out these aboriginals South Australia will have so much the less to pay, whilst if they are counted South Australia will have so much the more to pay.

Clause, as read, agreed to.

END QUOTE

Hansard *20-4-1898* Constitution Convention Debates

QUOTE

Mr. BARTON: There can be no difficulty about this matter unless it is necessary to restore the word "proportionate." Then the words "minimum number of representatives" might be left where they are. The question is made difficult by clauses 23 and 27. In clause 23 there is a provision that there shall be two members in one House to one of the other. Then we go on to arrive at a quota which, until [start page 1030]Parliament otherwise provides, is to be the number for each member. Then we provide in clause 27:

Subject to the provisions of this Constitution, the number of members of the House of Representatives may be from time to time increased or diminished by the Parliament.

If the Parliament, that is by the concurrence of the House of Representatives and Senate, wishes to decrease the number of the House of Representatives then the question arises whether the whole of this clause 121 is not necessary in order that that the proportionate representation of any State in either House may be preserved. Taking the proportion of one House and the proportion of the other, and then taking the liberty given to the Parliament to increase or diminish the number of the House of Representatives, although the proportion may be maintained, the one result may be to diminish the representation in both Houses. On reconsideration, therefore, I am a little inclined to think that by adopting the suggestion to leave out the word "proportionate" I made a mistake. If we keep in that word it will also be necessary to keep in minimum representation. As it has been suggested that we should re-commit the clause, perhaps it will be better to pass it now and re-commit it, as I shall probably have other amendments to suggest. I shall probably move- although I am not certain yet-to restore the word "proportionate." I ask leave to withdraw the proposed amendment.

Amendment withdrawn.

END QUOTE

And

QUOTE

Clause 101-**Subject to the provisions of this Constitution**, the constitutions of the several States of the Commonwealth shall continue as at the establishment of the Commonwealth, until altered by or under the authority of the Parliaments thereof in accordance with the provisions of their respective Constitutions.

Dr. COCKBURN: I move:

To strike oat the words "in accordance with the provisions of their respective constitutions."

I take it that it is an inalienable principle in a Federation that the States within the Federation should be at liberty to decide themselves as to what form of Constitution they will live under. They should not require to go to any outside authority.

Sir JOHN DOWNER: Only to their own Parliament.

Dr. COCKBURN: They require under this clause to have the Royal assent to any alteration of their Constitution. The Parliaments of the States will have no longer the power to deal with questions outside the Commonwealth. They will be confined to matters within the States, They will have no power whatever to, legislate in reference to navigation, immigration, or any of those matters regarding which- formerly Bills

passed by the Parliaments have had to be reserved for the Royal assent. Therefore, seeing that it is regarded by all authorities, as a characteristic of Federation, and as a means of increasing the powers of self-government of the people, that the Constitutions under which the peoples of the [start page 992] States choose to live may be changed by them at their own will, without reference to outside authority, I propose to strike out these words.

Mr. ISAACS: They preserve the right you speak of.

Dr. COCKBURN: No; the States will not have the right to amend their Constitutions without appealing to some authority outside. They do not have to do that in Canada, nor in America.

Mr. DEAKIN: Do you want our States to take the place of Canadian provinces

Sir JOHN DOWNER: They only communicate with the Queen through the Governor-General.

Dr. COCKBURN: I have raised this point at every opportunity. I do not wish to take up the time of the Convention, but I certainly shall move-an amendment, because the clause is not in accordance with the general provisions of Federation. **The States composing the Federation should have full power to deal with local affairs.** Essentially, all external relations are taken out of their jurisdiction. I do think they ought to have the power themselves to say what the Constitution under which they live shall be.

Amendment negatived.

END QUOTE

Hansard *3-3-1898* Constitution Convention Debates

QUOTE

Mr. SYMON.-A person coming from another colony to my right honorable friend's colony would be entitled to the privileges and immunities enjoyed by the **citizens** of that colony, no more and no less. What we have to guard against is this: I apprehend that we do not wish that any state should disqualify, or lessen the privileges and immunities of, **citizens** of other states should such **citizens** enter within its borders. As the Bill now stands, it might be within the power of one state to say that no **citizen** of another state should hold land within its boundaries, or that they should hold it only under certain conditions. It should not, however, be possible for such an enactment to have force. Every **citizen** of the Commonwealth should be entitled to hold land in any state under the same terms as were imposed upon **citizens** of that state. If a **citizen** of Western Australia went to Victoria he should be able to hold land in Victoria upon the same terms, and subject to the same qualifications and limitations, as a **citizen** of Victoria.

Sir JOHN FORREST.-Could he be prevented from doing so? Would the Bill, the object of which was to prevent him from holding land, get the Royal assent?

Mr. SYMON.-**Of course, the absolute control by a state of everything within its own borders is retained by this Constitution, except in respect to such matters as are expressly handed over to the Commonwealth.**

Sir JOHN FORREST.-But subject to the Imperial control.

Mr. SYMON.-The Imperial authorities might not interfere. Of course, these are mere possibilities that I am discussing. This is the principle involved: Is it not desirable that a **citizen** of Western Australia should have the same privileges and immunities as are enjoyed by a **citizen** of Victoria, and *vice versa*? If we do not insert such a provision as this in the Constitution, I do not think we shall have a Commonwealth **citizenship** at all.

Sir JOHN FORREST.-I do not think that could happen.

Mr. SYMON.-I do not know about that. A state might do a great many things which would come uncommonly near to taking away advantages from **citizens** of other states, and this possibility is so grave that it ought to be very seriously considered. The arguments which I used in opposition to clause 110 will give me serious pause, unless some provision of this kind is introduced into the Constitution.

Mr. KINGSTON.-How would you define the word "citizen"?

Mr. SYMON.-**I do not think that it is necessary to frame a definition of "citizen." A citizen is one who is entitled to the immunities of citizenship. In short, a citizen is a citizen. I do not think you require a definition, of "citizen" any more than you require a definition of "man" or "subject."**

Mr. ISAACS.-Would you include a corporation in the term "citizen"?

Mr. SYMON.-Why not?

Mr. ISAACS.-Well, in America they do not.

Mr. SYMON.-I do not see why a corporation existing in one colony should not have the rights of a corporation in another colony. Otherwise you defeat the objects of this Constitution.

[start page 1783]

Mr. ISAACS.-I agree that that ought to be so, **but the word "citizen" will not include a corporation**.

Mr. SYMON.-Well, in my opinion it should. I think, however, though I am not prepared to say definitely, that other provisions in the Constitution would deal with that case. Clause 52 provides that we are to have uniformity, and I think would prevent any difficulty in regard to corporations, quite apart from the question of the meaning of the word "citizen." But if you ask me whether a corporation might not come within the definition of "citizen" to a certain extent-not, of course, in regard to the right of the voting and so on-I should say that it would. The difficulty is one that requires to be met. Although I admit that the amended American Constitution goes further than anything we require, and is directed to a particular and special condition of things, this provision seems to me absolutely essential, and, in my opinion, the Constitution would be incomplete without it.

Mr. ISAACS (Victoria).-There is one word in the proposed clause which, when the honorable member was speaking, did not strike my attention as it does now. I read the clause as if it provided that the **citizens** of each state should be entitled to all the privileges and immunities of all the **citizens** of the several states; but I find now that it is not so. The words in the clause are "in the several states," so that possibly it would not have the disadvantages which I thought at first it would have. I am afraid, however, that it will not do what the honorable and learned member wishes. In Dr. Burgess's work, vol. 1., pages 255-256, it is pointed out that Germany adopted a provision of this kind with the fall intention that is actuating us now. This is what the writer says about it:-

This is simply the old provision of Article 4, secure 2. of the Constitution of the United States. that "The **citizens** of each state" (Commonwealth) "shall be entitled to all privileges and immunities of **citizens** in the several states" (Commonwealths). It was fashioned from this provision. It was discovered and demonstrated in the Constitutional Assembly of 1867 that this provision would not secure the civil liberty throughout the German State which that body intended to establish, The difficulty was solved, not by fixing the immunities and privileges of **citizenship** in the Constitution, but by vesting the Legislature of the General Government with the power to deal with all these subjects by statutory provisions.

That is precisely what the honorable and learned member (Dr. Quick) tried to do yesterday. The provision which the Convention threw out yesterday is that which has been proved by experience to be the only one which in Germany could carry out the object wished for. The provision which they moulded upon the provision in the American Constitution failed to carry out that object, and I am afraid that the provision of the honorable and learned member (Mr. Symon) will also fail to do so.

Mr. KINGSTON (South Australia).-I agree with what has fallen from the honorable and learned member (Mr. Isaacs). I think that we made a mistake yesterday when we rejected the amendment of the honorable and learned member(Dr. Quick), and I trust that before we finally separate, we shall be able to include that amendment in the Constitution, or, if not, to adopt a provision similar to that which was suggested by the honorable and learned member (Mr. Glynn), which would have made the clause read as follows:-

A state shall not deny to the **citizens** of other states the privileges and immunities of its own citizens.

That, I understand, would mean that a Victorian citizen, whether a Chinaman or any one ease, going, say, into the great province of Western Australia, would be entitled to all the privileges and immunities of a citizen of Western Australia. If Western Australia had legislated to restrict the rights of Chinese within her borders, a Chinaman going there would be subject to that restriction, but if no restrictions had been imposed upon Chinese [start page 1784] residing within Western Australia, it would be impossible for Western Australia, simply because a Chinaman came from another colony, to treat him

differently from the way in which Chinese residents there were treated. It seems to me an anomaly to use the word "citizen" in this Constitution, if you neither define it nor make provision for its definition. I asked the honorable and learned member(Mr. Symon), what was his definition of "citizen," and I understood him to say that a citizen was a man who had the rights of citizenship. That reminded me of the definition once given of an archdeacon, who was described as a reverend gentleman who performed archidiaconal functions. Such a definition may be all very well in humorous conversation, but we have already been warned about the impropriety of inserting anything of this character in the Constitution. I trust that we shall make this Constitution perfectly intelligible within its four corners, and I do not think we can do that without adopting some provision of the kind suggested by the honorable and learned member (Dr. Quick).

Mr. DOUGLAS (Tasmania).-**I take it that what is required is that the position of citizens of the Commonwealth should remain practically what it is now, and that each citizen, when he went out of his own state into another, should be liable to the laws of that state, but to no special laws.** On the other hand, he should not be able to carry with him any particular privileges. It seems to me that we should take care to prevent the states from passing any law which would restrict the rights and liberties of **citizens** of other states who happened to come within its borders.

Mr. SYMON (South Australia).-The criticism of my honorable and learned friend (Mr. Isaacs) is, of course, perfectly sound. This provision does not provide all that we should like to provide. His citation from Burgess shows that probably something further will be required, but so far as the clause goes, honorable members will see that it is essential that such a provision should be introduced into the Constitution. Otherwise, we fall short of giving to the **citizens** of each state the privileges which it is intended that this Union shall confer upon them. The only real objection to the provision is that it does not go so far as may be necessary to give complete **citizenship**. But to the extent to which it does go, and following upon the lines of the American provision, which has worked so advantageously for over a hundred years, it seems to me essential that we should introduce it into the Constitution.

Dr. QUICK (Victoria)-I do not propose to be as severe in my criticism of the provision of the honorable and learned member (Mr. Symon) to-day as he was in his determined opposition to my proposed clause yesterday. I would point out, however, two difficulties in the way of adopting his provision. The first is that there is no definition of the status of "citizen." **The clause does not say whether a citizen is a ratepayer of a state, an adult male, or any member of the population of a state-men, women, children, Chinamen, Japanese, Hindoos, and other barbarians. Who are the citizens of a state?**

Mr. SYMON.-**That depends upon the law of the state upon the subject.**

Dr. QUICK.-**So far as I am aware, there is no law in any colony defining colonial citizenship or state citizenship. I am merely adopting the line of argument which my honorable and learned friend adopted yesterday, in taking advantage of technical points.**

Mr. SYMON.-That was not my line of argument.

Dr. QUICK.-The honorable and learned member gives no definition of state **citizenship**, but he proposes to place in the Constitution a provision relating to state citizens. At the present time there is no such entity as a state citizen. The status of elector, or ratepayers or member of the population of a state may exist, but the [start page 1785] status of **citizen** does not exist. I am surprised that my honorable friend, with all his learning and acumen, has proposed to place in the Constitution a provision containing a term of which there is no definition, even in Professor Morrison's Dictionary. Another objection is this: The clause proposes to impose the obligation upon all the states to treat the people or citizens, as the honorable and learned member has described them, of other states upon the same terms as apply to their own citizens. Does not that provision interfere with state rights?

Mr. SYMON.-Not a bit.

Dr. QUICK.-Why should the honorable and learned member endeavour to interfere with state rights, when he has been one of the most determined advocates of and sticklers for the independence of the states?

Mr. SYMON.-Are you not going to give **citizenship** throughout the Commonwealth?

Dr. QUICK.-This is a Bill to establish a Federal Commonwealth, and while there may be strong arguments in favour of defining federal **citizenship**, I contend that there is no occasion for us to go further and to attempt to define state **citizenship**. On these two grounds I think that the proposed clause should be rejected.

The CHAIRMAN.-It will be advisable if Dr. Quick desires to move his new clause that be should move it as an amendment on this one, so as to save two discussions on the subject.

Mr. WISE (New South Wales).-I am sorry it is impossible to obtain the last edition of Cooley's *Constitutional Limitations*. There is a most valuable note in it upon the importance of similar words in the American Constitution, which were introduced by an amendment as ancillary to the clauses relating to the freedom of trade. Judge Cooley points out that since that amendment has been introduced these words have been found of the utmost importance in preventing interference by the several states with the trade of their neighbours, under various pretexts. He points out that under there words such a tax as that on commercial travellers in New Zealand would have been declared illegal, although it could not have been touched under the freedom of trade clause. Devices really aimed at limiting trade between the states, although ostensibly taking another form, were dealt with under this amendment, and without it they could never have been prevented. I trust the amendment will be carried in this form, or perhaps Mr. Symon can see his way to alter the word "states" to "Commonwealth," which, I think, would meet Dr. Quick's view.

Mr. SYMON.-If you move that, I will accept it.

Sir JOHN FORREST.-What is a citizen? A **British subject**?

Mr. WISE.-I presume so.

Sir JOHN FORREST.-They could not take away the rights of **British subjects**.

Mr. WISE.-I do not think so. I beg to move-

That the words "each state" be omitted, with the view of inserting the words "the Commonwealth."

I apprehend the Commonwealth must have complete power to grant or refuse **citizenship** to any **citizen** within its borders. I think my answer to Sir John Forrest was given a little too hastily when I said that every **citizen** of the British Empire must be a **citizen** of the Commonwealth. **The Commonwealth will have power to determine who is a citizen.** I do not think Dr. Quick's amendment is necessary. If we do not put in a definition of citizenship **every state will have inherent power to decide who is a citizen**. That was the decision of the Privy Council in **Ah Toy's** case.

Sir JOHN FORREST.-He was an alien.

Mr. WISE.-**The Privy Council decided that the Executive of any colony had an inherent right to determine who should have the rights of citizenship within its borders.**

Mr. KINGSTON.-**That it had the right of keeping him out.**

[start page 1786]

Mr. WISE.-In our case he was within our limits, but he was not allowed to sue in our courts.

Mr. BARTON (New South Wales).-If it is a fact that citizens, as they are called, of each state are also **citizens** of the Commonwealth, there may be some little doubt as to whether this is not providing for practically the same thing.

Mr. WISE.-No, there may be territories that is what I want to provide for.

Mr. BARTON.-**In other portions of the Bill we use the words "parts of the Commonwealth" as including territories, so that the object of Mr. Wise would be met by using the words "citizens of every part of the Commonwealth" or "each part of the Commonwealth."** Mr. Wise will see that that follows the ordinary phraseology of the Bill, and I do not think it alters the meaning of what he intends to propose. I leave it to his consideration, because it would make the clause more consistent with the rest of the Bill. I still take objection to the use of the word "citizen" here without a definition, and I understand the definition is to be proposed by Dr. Quick. As this will be the only part of the Bill where the expression "citizen" occurs, I would like to support the suggestion of the Chairman that Dr. Quick should move his clause as an amendment on that of, Mr. Symon. Then the definition will be in the only clause which deals with the subject. As to ordinary matters, the part of the Bill called the Act has made some provision. Clause 7 of the covering clauses, as redrafted, provides that-

This Act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, and all **treaties** made by the Commonwealth, shall be binding on the courts, Judges, and

people of every state and of every part of the Commonwealth, anything in the laws of any state to the contrary notwithstanding.

So anything conferred by the Constitution or by any law under the Constitution upon any subject or citizen, as he has been called, will be retained by him, inasmuch as the liability to obey the laws involves the protection of the laws, so that a good deal of what is sought by this clause is already conferred by clause 7. As to the general object of Mr. Symon's proposal, I confess I am strongly in favour of it. My only doubt is whether we should not rather cumber the Constitution by using the word "citizens," and requiring a definition of **citizens** when we use it here, and when the ordinary term to express a **citizen** of the empire might be used. We are subjects in our constitutional relation to the empire, not citizens. "Citizens" is an undefined term, and is not known to the Constitution. The word "subjects" expresses the relation between **citizens** of the empire and the Crown.

Sir GEORGE TURNER.-**Is a naturalized alien a subject?**

Mr. BARTON.-**He would be a citizen under the meaning of this clause**.

Sir GEORGE TURNER.-**Suppose you say "subject" without definition, would that include naturalized aliens?**

Mr. BARTON.-Yes. Dr. Quick's definition is: Persons resident in the Commonwealth, either natural-born or naturalized subjects of the Queen, and if they are subject to no disabilities imposed by the Parliament they shall be **citizens** of the Commonwealth. Why not use the word "subject," and avoid the necessity of this definition?

Dr. QUICK.-This definition does not interfere with the term "subject" in its wider relation as a member of the empire or **subject of the Queen**.

Mr. BARTON.-No, but the definition of "citizen" as a natural-born or naturalized **subject of the Queen** is co-extensive with the ordinary definition of a subject or **citizen** in America. **The moment be is under any disability imposed by the Parliament be loses his rights.**

Dr. QUICK.-**That refers to special races**.

END QUOTE

The last comments clearly underlines that any race subject to special laws within Subsection 51(xxvi) loses their rights of franchise.

Now, any proposal to have homosexuals being dealt with under this "**race**" provision would in fact not only be an absurdity, as Subsection 51(xxvi) was intended to relate to coloured races, but more over would remove the right of homosexuals to have franchise and by this neither could be in Parliament or serve as a judicial officer in a court!

And

QUOTE

Mr. BARTON.-But if he is under any disability under any regulation of the [start page 1787] Commonwealth he would cease to be a citizen, however slight that disability might be. I doubt whether the honorable member intends that. There is power by law to regulate the people of any race requiring special laws. There may be some purely regulative law passed, not imposing any special restriction on any person of that kind who may be a **subject of the Queen**. That regulation, if it were of the mildest character, under this definition, would deprive him of his rights.

Dr. QUICK.-**The regulation would have to specify the ground of disability.**

Mr. BARTON.-Yes; but my honorable friend says not under any disability imposed by the Parliament. Would not the difficulty be that if he were under any slight disability for regulative purposes, all his rights of **citizenship** under the Commonwealth would be lost?

Mr. KINGSTON.-**There might be a special disability on minors.**

Mr. BARTON.-**That might be one of the disabilities. Of course here the disabilities as to minors would not matter much**, but I would like to put this consideration to Dr. Quick, that if we use the term "subject," or a person subject to the laws, which is a wider term, we shall avoid the necessity for a definition of "citizen." **You might say a subject or resident being the subject of the Queen.**

Sir GEORGE TURNER.-Subject to the laws will be too wide.

Mr. BARTON.-Yes, it might be. The expression "resident subjects of the Queen" would avoid the necessity of having a definition of a term which only occurs in one place in the Constitution. I do not know how Mr Symon would take the suggestion, but it is far better not to import the word "citizen" **here if we can deal with it by a term well known in the constitutional relations of the empire between the Queen and her subjects.**

Mr. SYMON (South Australia).-I have expressed the opinion, whether rightly or wrongly. that the word "citizen" does not require a definition at all in the Constitution. We are not dealing with rigid terms or with a Constitution which is not to be perfectly elastic, and under the construction and interpretation of the Constitution the word "citizen" seems to me to be capable of very easy determination. It is one of those expressions which in the Constitution is just as easy of determination as the word "person." I really do not see where the difficulty is.

Mr. ISAACS.-It has been found very difficult to define it by decisions in the United States.

Mr. SYMON.-There is no man in Australia who is more profoundly versed in constitutional law than Mr. Isaacs, and he knows that every point and every question has been the subject of more or less debate and discussion, and will be until the end of time.

The words "subject," "person," and "citizen" can be made subjects of controversy at all times if occasion requires it. At the same time, it does not affect the principle that there should be a definition of "citizen," either in the form suggested by Dr. Quick or by Mr. Barton. I will be quite content. The principle is what I am contending for: The principle that our labours will be incomplete unless we make the rights of **citizens** or subjects in one state to extend to the **citizens** of another state who may go from one state to another. There ought to be no possibility of any state imposing a disqualification on a person in the holding of property, or in the enjoyment of any **civil right**, simply because be happens to belong to another state. That would not give us the uniformity of **citizenship** we all desire, and therefore I am willing that the word "**citizenship**" should be defined as Dr. Quick suggests, with perhaps some modification. I also support the suggestion from the Chair that the two propositions might be considered together. The clause would do something to meet the difficulty, not perhaps finally or conclusively, as Mr. Isaacs, said, but at any rate to a large extent and almost completely.

[start page 1788]

END QUOTE

No question about it that the 1967 con-job referendum actually now has resulted that legislation passed within the amended subsection 51(xxvi) in regard of Aboriginals constitutionally stripped all Aboriginals of their State citizenship and so Commonwealth citizenship (also being Australian citizenship) and so their franchise!

And

QUOTE

Mr. SYMON.-I should be quite satisfied with that.

Dr. QUICK (Victoria).-There can be no doubt that this subject is surrounded with considerable difficulty, and probably any decision arrived at will be reviewed either by the Drafting Committee or the Convention at a subsequent stage. The Hon. Mr. Wise's suggestion to amend the Hon. Mr. Symon's clause so as to make it read-

The **citizens** of the Commonwealth shall be entitled to all the privileges and immunities of the **citizens** of the several states,

offers a method by which the difficulty might be solved, but a definition ought to precede any legislation on the subject, and I shall therefore propose that the new clause of which I have given notice defining **citizenship** be placed in front of the words proposed by Mr. Symon. It is as follows:-

All persons resident within the Commonwealth, being natural-born or naturalized subjects of the Queen, and not under any disability imposed by the Parliament, shall be **citizens** of the Commonwealth.

Mr. Symon's words would then follow:-

And the **citizens** of the Commonwealth shall be entitled to all the privileges and immunities of **citizens** in the several states.

Mr. SYMON.-Is it necessary to leave in the words "natural-born or naturalized"?

Dr. QUICK.-That is a detail that is open to discussion. I feel that there is a considerable difficulty in connexion with this definition, but, as it has been suggested, I will propose it, and leave the committee to amend it if they think proper. The words proposed to-day may not give exact expression to the views of the Convention, but it would be a very serious mistake if some provision of this kind were not inserted in the Constitution.

The CHAIRMAN.-The amendment proposed by the Hon. Mr. Wise is now before the Chair.

Mr. WISE (New South Wales).-I will withdraw my amendment for the time being, to enable Dr. Quick to submit his amendment.

The amendment was, by leave, withdrawn.

END QUOTE

It ought to be clear that there was never any intentions that somehow a person trading on Commonwealth controlled property could by this avoid paying taxes and duties. Indeed, it would be a breach of Subsection 51(ii) if it were to apply different regime versus that in a State.

The real issue is that the Commonwealth properties are owned by the States, and that when there is a reference to States, then it includes any territory or property held by them in conjunction by all States. The usage of "**subject to this constitution**" in Section 52 cannot be used in a different context then what is used in Section 10, and must be interpreted to its meanings as expressed by the Framers of the ***Constitution*** during the Debates to create the ***Constitution***.

My view is, that judges ought to spend more time perusing the Hansard records of the **Constitutional Convention Debates** so that in regard of certain constitutional provisions at least they make sense and do not give this garbage as too often is handed down. It is not the Courts function to try to bring within the legislation or constitutional powers something that the Framers of the ***Constitution*** never intended.

When it comes to Subsection 51(v) "**postal, telegraphic, and other like services**" the Delegates (Framers) specifically discussed that the latter was because of likely new discoveries that would occur and so to be included. As such, this section was intended to include future inventions in this filed using telegraphic (electronic) communication. Hence, in that regard, I view that the invention of television was within the expectations of the Delegates, regardless that at the time of framing the ***Constitution*** did not exist. The importance of interpreting any section and subsection of the constitution is what where the intentions of the Framers at the time they created the ***Constitution***. It is clear that from reading their debates they never intended to exclude a State for sovereign powers it had over any property the Commonwealth held as proprietor unless specifically stated to be beyond the States powers. It would be absurd to hold that somehow the Commonwealth could purchase land without restrain and then lease it to anyone and while the Commonwealth would not be required to pay land tax as any other land proprietor it could still charge it against someone subleasing the land. The issue is that the Commonwealth holding land

for Commonwealth purposes, not that of for investment, etc, does not have to pay any kind of land tax however any land occupied as proprietor not being used strictly for the public use for which the Commonwealth has constitutional powers, then it is bound to pay land tax as any other landholder. At no time did the Framers contemplate that the Commonwealth would go beyond its constitutional powers. Therefore, it cannot be held that somehow they intended for the Commonwealth to buy land up and then lease or sublease whole or part of it. Managing airports, in my view has nothing to do with Commonwealth purposes. In fact neither so the running of a television station. The powers to legislate, such as "**companies**" does not mean that the Commonwealth then can use this to create company after company in whatever area. There never was any constitutional powers to separate Australian Post from the then Telecom (now Telstra) and indeed, postal workers not directly employed by Australian Post neither can rely upon any Commonwealth constitutional provisions. Also, land that was purchased at the time for Telecom/Telstra communications if it was deemed to be as is applied to Melbourne (Tullamarine) Airport that the State Government cannot change land tax, then the moment Telstra was privatised the State Government and so the local councils under it was entitled to charge land tax. It would be an absurdity to hold that some private company could avoid paying land tax. More over, if the land was held by the Commonwealth as a "**sovereign**", then the sale of the land by Telstra to others would not extinguish the sovereign powers of the Commonwealth, and it would then remain commonwealth territory. Meaning, that in effect land rezoned by a local council and allowed for building of houses, then the rezoning and any land tax upon the buildings would remain unconstitutional as the property being held as sovereign by the Commonwealth of Australia cannot revert back to the State unless the land is sold back or given back to the relevant State government.

Despite the numerous trips to Melbourne (Tullemarine) Airport I am not aware any signage indicating that one is entering or leaving Commonwealth territory. Neither that one is entering or leaving Commonwealth legal jurisdiction. This is in particular also a major problem with people entering a building, such as Centrelink, Department of immigration, etc.

Centrelink, as I understand it, is a private company that is hired by the Commonwealth of Australia to manage certain social security matters. It would be absurd to argue that somehow State laws were extinguished , say, on a Centrelink used property. It would fall within ordinary State powers. For example, a private printing company that happens to print material for the commonwealth government Printer, hardly could be deemed to be reclassified as being on commonwealth property while printing, say, a Gazette, while at the same time having other printers printing business cards for a private person then this part of the Printers building is not Commonwealth property. The Framers of the ***Constitution*** did accept that for example the Commonwealth could engage lawyers to act for the Commonwealth, but it also took the position that those working in customs, Australian Post and telecommunication, etc would al be Commonwealth Public Servants. As such, where a person is not a Commonwealth Public Servant then any constitutional powers otherwise applicable may or may not be so.

A Commonwealth health inspector entering a private farm to investigate a health matter hardly could then claim that the farm now is Commonwealth property because of working there for an inspection. Neither could the Commonwealth health inspector claim not to be bound by State laws merely because of exercising Commonwealth constitutional powers in regard of quarantine, etc, as is argued with Australian Post deliveries.

Commonwealth Public Servants are as much bound by State laws as any other private citizen within State legal jurisdiction. Commonwealth vehicles cannot, for example, ignore State road rules and would be obliged to pay parking and other infringement notices as any private citizen.

The Framers never intended that the Commonwealth could terrorise in that regard any State!

The Framers inserted Subsection 51(xxvi) to keep out "**coloured races**" to protect Australian jobs, yet the legislation is abused and misused for purposes never intended by the Framers, and coloured races are allowed into the country unchecked to take Australian jobs, or jobs are transferred to other countries. That is not the intent of the constitution, and either we have a

constitution and act within the restrictions as intended by the Framers or simply we all together create one that is more suitable. But, having this nonsense going of, such as an unconstitutional Queen of Australia must be stopped. A major failure with Commonwealth legislation is that they do not reveal in the preamble under which specific legislative power the enactment is made, by this they are playing "**Russian Roulette**", so to say, with unconstitutional legislation. Hence, legislation must show the source of legislative powers. **And, lawyers not competent in constitutional issues should not be appointed to the bench of the High Court of Australia!**

QUOTE 3-11-2002 CORRESPONDENCE

WITHOUT PREJUDICE

Mr Michael Kirby 3-11-2002
High Court of Australia
Sydney
NSW 2000
Faxed to: 02-6273 3025

AND TO WHOM IT MAY CONCERN

Re: **Would it be possible to have gay matters dealt with in the Family Court of Australia?**

Sir,

In regard of your e-mail, I am now able to provide you details as to the true intentions of the framers of the Constitution.

Thu, 31 Oct 2002

QUOTE

Dear Mr Schorel-Hlavka

Thank you for your letter.

There is no bias, any more than there would be for a woman judge sitting in a case involving women or a male judge in a rape case.

Your views on the Constitution appear to have overlooked s 51(xxxvii) of the Constitution. If that power were not enough, and none of the other heads of power sufficed, it is true that an amendment of the Constitution might be required. Alternatively, there are cooperative schemes for parallel legislation. Ours is a cooperative federation, as the Constitution itself envisaged.

Sincerely, Michael Kirby
END QUOTE

It ought to be clear, that contrary to the assertion of the high Court of Australia, Section 51(xxxvii) is not a section which permitted the **PURPORTED** reference of legislative powers, in regard of the Australian Act. Indeed, if this were to be so then the very sovereignty of each State would no longer exist!
Neither so would it to refer legislative powers in regard of gay and lesbian people unless accepted by way of refendum (s128), to approve of the reference of powers.

I quote below part of the Hansard ***THURSDAY, 27TH JANUARY, 1898*** which ought no doubt show that the only issue any state can "refer' to the Commonwealth is a matter that is within its State legislative powers.

Clearly, the Australian Act was not something that was within the legislative powers of any State.

Further, Section 51(xxxvii) can only be used to refer legislative powers of one or more (but not all) States to the Commonwealth!

Further, any reference of such powers is still subject to Section 128 referendum!

QUOTE

> **Mr. BARTON** (New South Wales).-
>
> Consequently, if it were proposed to add a legislative power of the kind suggested by Mr. Holder, **I take it that as Chapter VIII. provides first for the passage of the proposed law by an absolute majority, and then for a referendum, the law would have no effect unless the majorities of the several states agreed to it.**

END QUOTE

It must be very obvious, that while a State may refer legislative powers to the Commonwealth, it can't be deemed effective unless it has been accepted by way of "referendum" within Section 128 of the ***Commonwealth Constitution***.

END QUOTE 3-11-2002 CORRESPONDENCE

QUOTE 8-11-2002 CORRESPONDENCE

Subj:Fwd: MAIL FROM JUSTICE MICHAEL KIRBY'S CHAMBERS
Date:8/11/02 1:09:11 AM AUS Eastern Daylight Time
From:schorel-hlavka@schorel-hlavka.com
To:ghschorelhlavka@aol.com
Sent from the Internet (Details)

Return-Path: <JSaleh@hcourt.gov.au>
Received: from vmmr2.verisignmail.com (vmmr2.verisignmail.com [10.166.0.139])
by vmms2.verisignmail.com (Mirapoint Messaging Server MOS 2.9.3.2)
with ESMTP id PXI85202;
Wed, 6 Nov 2002 20:16:07 -0500 (EST)
Received: from hcagateway.hcourt.gov.au (mail.hcourt.gov.au [203.102.38.106])
by vmmr2.verisignmail.com (Mirapoint Messaging Server MOS 2.9.3.2)
with ESMTP id PMY20649;
Wed, 6 Nov 2002 20:16:02 -0500 (EST)
Received: by hcagateway.hcourt.gov.au; id LAA24518; Thu, 7 Nov 2002 11:51:46 +1100 (EST)
Received: from hca1.hcourt.gov.au(192.168.1.3) by hcagateway.hcourt.gov.au via smap (V5.0)
id xma024500; Thu, 7 Nov 02 11:50:52 +1100
Received: from HCA-CANBERRA-MTA by cbr-nw6-fp.hcourt.gov.au
with Novell_GroupWise; Thu, 07 Nov 2002 12:13:49 +1100
Message-Id: <sdca58fd.039@cbr-nw6-fp.hcourt.gov.au>
X-Mailer: Novell GroupWise Internet Agent 6.0.2 Beta
Date: Thu, 07 Nov 2002 12:13:22 +1100
From: "Janet Saleh" <JSaleh@hcourt.gov.au>
To: <mayjusticealwaysprevail@schorel-hlavka.com>
Subject: MAIL FROM JUSTICE MICHAEL KIRBY'S CHAMBERS
Mime-Version: 1.0
Content-Type: multipart/alternative; boundary="=_7F23865D.F091FD2E"

Dear Mr Schorel-Hlavka

Thank you for your further letter of 3 November 2002.

I have noted your points of view and the quotations you have given from the Convention Debates. They are certainly very interesting.

I do not feel that I can continue this interchange, mostly because of the pressure of work. However, I am grateful to you for expressing your opinions, as is your right as a citizen of this country.

Sincerely, Michael Kirby

This is an email from the Sydney Chambers of Justice Michael Kirby.
Janet Saleh is the judge's Personal Assistant.
Telephone: +61 2 9230 8203

Fax: +61 2 9230 8626
email: JSaleh@hcourt.gov.au
END QUOTE **8-11-2002 CORRESPONDENCE**

Awaiting your response, **G. H. SCHOREL-HLAVKA**
END QUOTE 060311
.
QUOTE 070220 correspondence

WITHOUT PREJUDICE

Mr John Howard Parliament House, Canberra, 20-2-2007
Fax 02 6273 4100 Ph; 02 6277 7700 C/o David.Hawker.MP@aph.gov.au

Cc; All Federal Members of Parliament
Premier Mr Steve Bracks info@parliament.vic.gov.au
Premier Carpenter wa-government@dpc.wa.gov.au
Premier The Hon. Morris IEMMA, MP thepremier@www.nsw.gov.au
Peter Beattie MP, Premier premiers.master@premiers.qld.gov.au
Premier Mr Paul Lennon "Ackerley, Beth" <Beth.Ackerley@dpac.tas.gov.au>
Hon MIKE RANN MP ramsay@parliament.sa.gov.au
Peter Cullen National Water Commission, Wentworth Group
Professor Mike Young mike.young@csiro.au, information@wentworthgroup.org
Dr Arlene Buchan a.buchan@**acfonline.org.au**
George Warne - irrigator farmer GM and CEO of Murray Irrigation Limited
Sam Leone sam.leone@mdbc.gov.au
Wendy Craik Chief Executive wendy.craik@mdbc.gov.au
Some others; greg.holland@mdbc.gov.au, TheLivingMurray@mdbc.gov.au, icm@mdbc.gov.au, lakevic.project@mdbc.gov.au, watertrade.project@mdbc.gov.au, floodplain.project@mdbc.gov.au, sraudit.project@mdbc.gov.au, sharon.davis@mdbc.gov.au, david.dreverman@mdbc.gov.au, catherinen@murrayirrigation.com.au, aciar@aciar.gov.au

AND TO WHOM IT MAY CONCERN

Ref; 10 Billion dollars but who pays, etc

Sir,

You have offered **10 billion dollars** regarding the issue of **WATER** issues, but only provided the States involved are referring legislative powers over to the Commonwealth of Australia, **but this has constitutional problems** to it which appears to be ignored by all.

Hansard *27-1-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**)

Mr. DEAKIN.-

> **As I read clause 52, the Federal Parliament will have no power, until the law has thus become absolutely federal, to impose taxation to provide the necessary revenue for carrying out that law.**

Please note that clause 52 is now Section 51 of the *Constitution*.
Absolute Federal is that Consolidated Revenue can only be used if the Commonwealth of Australia has sole legislative powers to the exclusion of all States and Territories! This, as the Territories in that regard are a **quasi State**!

Hansard *2-3-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**)

Mr. OCONNOR (New South Wales).-

Of course, when I speak of a state, I include also any territory occupying the position of quasi-state, which, of course, stands in exactly the same position.

Hansard *12-3-1898* Constitution Convention Debates (Official Record of the Debates of the National Australasian Convention)

Sir GEORGE TURNER (Victoria).-It seems to me that the question of direct taxation is again being drawn across the trail to catch votes. Under ordinary circumstances, a million or two million pounds could not be taken from the Customs revenue; but, suppose that an expenditure were undertaken, the Commonwealth would have to raise the money by direct-taxation. If the money were taken out of Customs revenue, and the clause were not in the Bill, there would be so much less surplus to return to the states, **and the states would have to make up the deficiency themselves by direct taxation.** These little words, "direct taxation," were used in the Finance Committee, and have been used since to try and frighten honorable members. If money cannot be raised by customs duties, it must be raised by direct taxation.

The amendment was negatived.

Again;

and the states would have to make up the deficiency themselves by direct taxation.

You see, the Commonwealth of Australia is permitted to make grands within its constitutional powers to a State but if the Commonwealth of Australia obtains legislative powers then there is no constitutional powers make any grand to a State in regard of it, as it no longer has the legislative powers, and this is where the legal trickery kicks in, as perhaps unbeknown to the premiers then the Commonwealth of Australia is to levy a special tax against the States who referred legislative powers to the Commonwealth of Australia where as the State who did not refer the legislative powers, say, Western Australia and Tasmania would not have this special levy.

Below I have set out to some extend how this applies, using the statements of the Framers of the ***Constitution*** themselves. As such, it is not something that I, so to say, dreamed up, just that I as a Grandmaster "**constitutionalist**" research these matters.

Basically, if Queensland, NSW, Victoria and South Australia were to refer legislative powers to the Commonwealth of Australia then the Commonwealth of Australia has to recoup the billions of dollars by charging those four States a special levy. Now, I view that the electors of those States should be made aware of this!

It is because of the reference of legislative powers that this come about, whereas if the States retain their legislative powers and the Commonwealth of Australia, say, within Section 96 of the ***Constitution***, then the Commonwealth of Australia could set conditions, albeit they must not go beyond any other powers set out in the ***Constitution*** (as the Framers of the ***Constitution*** made clear) and as such the Commonwealth of Australia could insist, for example, that the **10 BILLION DOLLARS** are provided progressively pending completion of certain targets, such as exist in Victoria when one has to pay a builder only progressively as a house is being build.

By this also, the Commonwealth of Australia could, for example, have a condition that a body of experts are to be appointed as commissioners to manage **WATER** issues, in regard of those States who are receiving moneys of the 10 billion dollars, and such committee is to report back to the Federal Government also as to justify further progressive payments. Hence, the idea of Premier M. Rann is the best option and the recent suggestion of Premier Peter Beatty to pump surplus **WATER** from Queensland into the Murray River further would enhance the plan.

I for one do not believe that Queensland should be on its own severely out of pocket for having a **WATER** pipeline laid into the ground to provide the Murray River with **WATER**. Indeed, Northern Queensland may be able to create **WATER** storage facilities (reservoirs), where also surplus **WATER** can be pumped into and then later to be released to the Murray River. The potential is huge, and avoid wasting the **WATER** into the seas.
Because coal production for export does involve huge amounts of **WATER** resources I view that companies that are using large amount of **WATER** should pay for this as to offset cost of **WATER**. They simply should not be allowed to use drink**WATER** for industrial purposes on such a grand scale. Likewise, as I previously recommended to premier Steve Bracks, the Fire Brigade should be using only recycled **WATER** as it is absurd to have good drinking **WATER** flowing down the drains whenever the fire hydrants are turned on as it needs to clear itself and so precious **WATER** is in the process wasted with every fire hydrant used for that purpose. Also, it really does not matter to use recycled **WATER** for extinguishing fires.

The Commonwealth of Australia, since federation, by way of Section 100 of the ***Constitution*** and has had indirect legislative powers to set what is "**reasonable use**" of **WATER** where it affects navigation of rivers.

QUOTE 16-3-2005 correspondence to Malcolm Turnbull

Hansard 1-2-1898

> **Mr. HOLDER**.-We do not want to deprive New South Wales of any such power. We wish to leave that colony as free as ourselves to use her rightful share of the water for any purpose she pleases. **Who is to determine what is the rightful share? The Federal Parliament.**

END QUOTE 16-3-2005 correspondence to Malcolm Turnbull

One may ask did Malcolm Turnbull ignore this information conveniently?

See also http://au.blog.360.yahoo.com/blog-ijpxwMQ4dbXm0BMADq1lv8AYHknTV_QH and www.schorel-hlavk.com

Hansard *17-3-1898* Constitution Convention Debates (Official Record of the Debates of the National Australasian Convention)

Mr. DEAKIN.-

In this Constitution, although much is written much remains unwritten

Hansard *16-2-1898* Constitution Convention Debates (Official Record of the Debates of the National Australasian Convention)

Mr. ISAACS (Victoria).-

> In the next sub-section it is provided that all taxation shall be uniform throughout the Commonwealth. An income tax or a property tax raised under any federal law must be uniform "throughout the Commonwealth." That is, in every part of the Commonwealth.

Hansard *22-2-1898* Constitution Convention Debates (Official Record of the Debates of the National Australasian Convention)

> **Mr. BARTON**.-I am saying now that I do not think there is any necessity for clause 95 in its present form. What I am saying however, is that it should be made certain that in **the same way as you provide that the Tariff or any taxation imposed shall be uniform throughout the Commonwealth**, so it should be provided with reference to trade and commerce that it shall be uniform and equal**, so that the Commonwealth shall not give preference to any state or part of a state. Inasmuch as we provide that all taxation,**

whether it be customs or excise duties, or direct taxation, must be uniform, and inasmuch as we follow the United States Constitution in that particular-in the very same way I argue that we should protect the trade and commerce sub-section by not doing anything which will limit its effect. That is the real logical position.

Hansard *11-3-1898* Constitution Convention Debates (Official Record of the Debates of the National Australasian Convention)

Clause 52, sub-section (2).-Taxation; but so that all taxation shall he uniform throughout the Commonwealth, and that no tax or duty shall be imposed on any goods passing from one state to another.

Mr. BARTON (New South Wales).-I have prepared an amendment with regard to this sub-section, which puts the matter into a form which would express the intention of the Convention, whilst avoiding a difficulty. Honorable members will recollect the difficulty that arose over the construction of words equivalent to "uniform throughout the Commonwealth" in the United States of America. Although no actual decision has been given, a doubt has been raised as to the meaning of the word "uniform." The celebrated income tax case went off as to the direct apportionment of taxation amongst the people according to numbers, and this point was not decided, but a great deal of doubt has been thrown on the meaning of the word in the judgment of **Mr. Justice Field.** I think that although the word "uniform" has the meaning it was intended to have-"one in form" throughout the Commonwealth-still there might be a difficulty, and litigation might arise about it, and prolonged trouble might be occasioned with regard to the provision in case, for instance, an income tax or a land tax was imposed. **What is really wanted is to prevent a discrimination between citizens of the Commonwealth in the same circumstances.** I beg to move-

That all the words after the word "taxation" where it is first used be struck out, and that the following words be substituted:-"but not so as to discriminate between states or parts of states, or between goods passing from one state to another."

I conceive it to be quite unnecessary to retain these words in view of clause 89, prescribing free-trade among the several states, under which any duty or tax on goods passing from one state to another would be clearly invalid, and could not possibly be allowed by the operation of the preference clauses. I propose not to say anything about goods in this connexion passing from one state to another, as that is sufficiently provided for, **and I put in this provision, which prevents discrimination or any form of tax which would make a difference between the citizen of one state and the citizen of another state, and to prevent anything which would place a tax upon a person going from one state to another.** I beg to move-

That all the words after the first word "taxation" in the second sub-section be omitted, with a view to inserting the following words-"**but not so as to discriminate between states or parts of states, or between persons or things passing from one state to another.**"

The amendment was agreed to.

Hansard *11-3-1897* Constitution Convention Debates (Official Record of the Debates of the National Australasian Convention)

Dr. QUICK.-Certainly, with regard to constitutional questions. I am prepared, if necessary, to give up the subject's right of appeal; but I emphatically assert that there should be a right of appeal from the decision of the High Court in regard to this

Constitution, a Constitution embodying novel provisions and giving important powers, including the power of the Federal Court to review the procedure of Parliament. **The Federal High Court is empowered to-declare a law passed by both Houses and assented to by the Crown *ultra vires*, not because the Legislature has exceeded its jurisdiction, but because of some fault of procedure.** Appeals would be made only when there was a reasonable doubt in the minds of the responsible advisers of the Commonwealth that the decisions of the High Court were open to question. The knowledge of this right of appeal would be an incentive to the High Court to be most careful in its decisions, and especially in its early decisions. I need not enumerate the cases in which, if the amendment is carried, there will be no right of appeal. There will be no right of appeal in regard to the letter of the Constitution itself. There will be no opportunity to review a decision, for instance, in regard to legislation under clause 52, sub-section (1)-"The regulation of trade and commerce." **Then, again, it is provided that all taxation is to be uniform**, and all legislation under this provision will be taken out of the purview of the Privy Council.

But, when it comes to the Commonwealth of Australia not exercising federal powers as such for the whole of the Commonwealth of Australia but merely using referred powers for some of the States such as with the **WATER** issue then a special tax is not only permitted but is required as to cover the cost in regard of those States who had their powers referred to the Commonwealth of Australia. In that case, it is a special legislative power, not being for the whole of the Commonwealth of Australia and hence no funds from Consolidated Revenue can be used for this.

Mr. DEAKIN (Victoria).-

As I read clause 52, the Federal Parliament will have no power, until the law has thus become absolutely federal, to impose taxation to provide the necessary revenue for carrying out that law.

(Clause 52 is now Section 51 of the ***Constitution***)

Hansard *27-1-1898* Constitution Convention Debates (Official Record of the Debates of the National Australasian Convention)

Sub-section (35).-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 the state or states by whose Parliament or Parliaments the matters was referred, and to such other states as may afterwards adopt the law.

Mr. DEAKIN (Victoria).-I wish to call attention to this sub-section, which, like several others in this portion of clause 52, represents a power first conferred upon the Federal Council, but which, as it appears to me, if allowed to remain in its present restricted form-suitable enough as that may have been to the Federal Council-is altogether unsuitable to the differing conditions of the Federal Parliament. In the original draft of the Federal Council Bill the proposal was framed in clause 16 as follows:-

The Governors of any two or more of the colonies may, upon an address of the Legislatures of such colonies, refer for the consideration and determination of the Council any questions relating to those colonies or their relations with one another, and the Council shall thereupon have authority to consider and determine by Act of Council the matter so referred to it.

The draftsman who advised the Imperial Government altered that including it in section 15 of the Imperial Act constituting a Federal Council, where it forms the last part of subsection (*i*). The first part of the sub-section gives the Federal Council legislative

authority in respect to the several matters following, and the clause before us, freely translated, follows:-

Any other matter of general Australasian interest with respect to which the Legislatures of the several colonies can legislate within their own limits, and as to which it is deemed desirable that there should be a law of general application.

Now, that appears to be ample for all the legislation which the Federal Council could have dealt with. That body has no Executive, has no Budget, and undertakes no expenditure. That body is [start page 216] the mere creature of the colonies, is dependent upon them, except within a very limited area, and, in fact, altogether for any expenditure it may be necessary to incur. Now, during the discussion of the question of old-age pensions, when I referred to the possibility of that matter being dealt with under this sub-section, I evoked a comment from Sir John Downer, which called my attention in a particularly pointed way to a present weakness of the sub-section in this respect. It may well be that some matters referred by the several state Parliaments to the Federal Parliament, in order that common legislation may be passed for one or more colonies, may require legislation involving some expenditure-expenditure which must be undertaken in order to give effect to that legislation. It might be for the ordinary machinery administration-the payment of salaries of certain officers-or it might be the power to levy certain fees and collect certain charges; or it might involve direct taxation; but in all such cases it appears to me that the present sub-section may be inadequate. For instance, if reference be made to sub-section (3) of this clause 52 it will be found that the Federal Parliament has only the power to raise money by systems of taxation which shall be uniform throughout the Commonwealth. Consequently, if any legislation referring to any less number of the colonies than the whole of the colonies, and which involved any expenditure, was passed by the Federal Parliament, although those colonies were willing to vote that expenditure, the Federal Parliament might have no power to raise that money. The only possible means of the Federal Parliament obtaining that power would be if it were conferred in the provisions of the referring statutes passed by the referring colonies, but unless those provisions exactly agreed-and agreement would be extremely difficult to arrive at-the probability is that the law would be inharmonious and fail in its effect. I would suggest to the leader of the Convention that he should consider whether there should not be such a modification of sub-section (3), which provides for the raising of money by the Commonwealth, as would allow of a reference by two or three colonies desiring to intrust the Federal Parliament with the task of framing legislation for them, and enabling the Federal Parliament, if so called upon, to provide for the raising of the necessary revenue in those colonies. That would be one means of meeting the difficulty. Another means might be that when two or more colonies had determined, under sub-section (35), to refer to the Commonwealth Parliament any matter which required the raising of money from their **citizens**, it should be possible, for the Commonwealth, in regard to those particular matters, to provide for the necessary taxation to be levied in those colonies by the central authority, instead of leaving them to the very difficult task of coming to an independent agreement among themselves as to all the details of the method by which the money should be provided.

Mr. GLYNN.-Strike the sub-section out.

Mr. SYMON.-That is the best solution of the difficulty.

Mr. DEAKIN.-That may be so.

Mr. GLYNN.-We may have a conflict of laws under the sub-section.

Mr. BARTON.-Such laws can only apply to the referring states themselves.

Mr. DEAKIN.-They would not be, in the strict sense of the term, federal laws.

Mr. BARTON.-No, they would only apply to the states which referred the matters to the Federal Parliament.

Mr. DEAKIN.-**Exactly; but those laws can be adopted by the other states. If two or three colonies join in requesting the Federal Parliament to pass a statute on a particular matter applying only to those two or three colonies, and that law has been enacted and proved to work well, the remaining colonies of the group may adopt it, and finally [start page 217] you may have the Commonwealth in this position, that every colony in the group has adopted, as far as it can adopt, that particular law, which then ought to be a federal law.** This contingency is perhaps provided for. That being so, it becomes necessary for us to consider whether we should not also provide for the other contingency. If all the states of the group except one, or if three of the larger colonies, or any three of the colonies, required a common statute in regard to a particular subject, and the administration of that statute involved the raising of money, the Federal Government ought to be able to provide for the levying of that money under the same law if so requested by those concerned.

Sir GEORGE TURNER.-Will you briefly restate the point?

Mr. DEAKIN.-My point is that by the requests of different colonies at different times you may arrive at a position in which all the colonies have adopted a particular law, and it is necessary for the working of that law that certain fees, charges, or taxation should be imposed. **That law now relates to the whole of the Union**, because every state has come under it. As I read clause 52, the Federal Parliament will have no power, until the law has thus become absolutely federal, to impose taxation to provide the necessary revenue for carrying out that law. **Another difficulty of the sub-section is the question whether, even when a state has referred a matter to the federal authority, and federal legislation takes place on it, it has any-and if any, what-power of amending or repealing the law by which it referred the question? I should be inclined to think it had no such power, but the question has been raised, and should be settled. I should say that, having appealed to Caesar, it must be bound by the judgment of Caesar, and that it would not be possible for it afterwards to revoke its reference.** It appears to me that this sub-section, which is certainly one of the very valuable sub-sections of this clause, affording, as it does, means by which the colonies may by common agreement bring about federal action, without amending the Constitution, needs to be rendered more explicit. One point more especially which needs to be rendered clear is whether, when we have this federal action, there shall not be a federal means of providing for the necessary revenue that may be required or for imposing the necessary charges under such legislation.

Sir JOHN DOWNER.-Is that not implied?

Mr. DEAKIN.-If it is implied, would it not be best to make it explicit? The parentage of this clause, as I have shown-originating as it does in a body with practically no financial power-casts a certain suspicion on that reading of it, although, of course, the provision when embodied in this Act would have a different effect. Still, why not make it clear whether we mean that, when the Federal Parliament has passed federal legislation for some of the colonies, we shall allow that same legislation to deal with any necessary raising of revenue from those colonies which may be required to give effect to the legislation?

Dr. QUICK (Victoria).-I think the point taken by my honorable friend (Mr. Deakin) is one well worthy of the consideration of the Drafting Committee, and probably the difficulty to which he has drawn attention could be obviated by some such provision as that which he

suggested. **But this matter has struck me also from another point of view, and it seems to me that the provision affords an easy method of amending the Federal Constitution, without referring such amendments to the people of the various states for their assent.** Now, either when the state Parliaments have referred these matters to the Federal Parliament, and the Federal Parliament has dealt with such matters, that becomes a federal law, and cannot afterwards be repealed or revoked by the State Parliaments-that is one position, and in that case, of course, the reference once made [start page 218] **is a reference for all time, and cannot be revoked, so that to that extent it becomes an amendment of the states' Constitution**, incorporated in and engrafted on the Federal Constitution **without the consent of the people of the various states. On the other hand, if that be not so, and the states can, after making such reference, repeal such reference, what is the result?** You have a constant state of change-no guarantee for continuity or permanence-in this class of laws, and this might lead to a great deal of confusion and a most unsatisfactory state of things. My principal objection to the provision is that it affords a free and easy method of amending the Federal Constitution without such amendments being carried into effect in the manner provided by this Constitution.

Mr. BARTON.-**I cannot understand how it gives an opportunity of amending the Federal Constitution.**

Hansard *3-3-1897* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**)

Mr. ISAACS (Victoria).-What I am going to say may be a little out of order, but I would like to draw the Drafting Committee's attention to the fact that in clause 52, sub-section (2), there has been [start page 1856] a considerable change. Two matters in that sub-section seem to me to deserve attention. **First, it is provided that all taxation shall be uniform throughout the Commonwealth. That means direct as well as indirect taxation, and the object I apprehend is that there shall be no discrimination between the states; that an income tax or land tax shall not be made higher in one state than in another.** I should like the Drafting Committee to consider whether saying the tax shall be uniform would not prevent a graduated tax of any kind? A tax is said to be uniform that falls with the same weight on the same class of property, wherever it is found. It affects all kinds of direct taxation. I am extremely afraid, that if we are not very careful, we shall get into a difficulty. **It might not touch the question of exemption; but any direct tax sought to be imposed might be held to be unconstitutional, or, in other words, illegal, if it were not absolutely uniform.**

Mr. BARTON.-**We were inclined to the opinion that "uniform" would not apply so as to prevent the graduating of a tax. I am glad to have the suggestion from the honorable member, because the committee will be going into the matter again.**

I understand that the Commonwealth of Australia has given certain, so to say, political mates tax free salaries, I understood to be such as with **Peter Reith**, the former Minister of Defence. In my view, this is unconstitutional, as it means that the taxation legislation is not use equally throughout the Commonwealth!
Again;

It might not touch the question of exemption; but any direct tax sought to be imposed might be held to be unconstitutional, or, in other words, illegal, if it were not absolutely uniform.

While the Commonwealth may allow graduating tax pending the level of income, I do not accept that exclusion of paying tax for political mates placed in high positions is constitutionally valid!

As such, any tax exemption can only be applied if applicable throughout the whole of the Commonwealth, and not specific exemption for certain people only!

Hansard *7-3-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**)

> **Mr. BARTON** (New South Wales).-A rather important point has been raised with regard to sub-section (2), in regard to the question of uniformity of taxation. While there has been no express decision by the American courts as to the meaning of the words "uniform throughout the Commonwealth," there are expressions in one of the cases which render it necessary for us to use caution. I therefore ask for a little more time in which to consider this matter.
>
> **Mr. HIGGINS**.-To allow graduations and exemptions, is it?
>
> **Mr. BARTON**.-My own desire is that the Federal Parliament should be unfettered in the exercise of its taxing power, if it has to use any direct taxation at all. Whatever my own opinions may be as to the way in which that power should be exercised, it is necessary that the authority to which it is confided should have the power in full force. That being so, I wish to see that this authority is properly conserved. For that reason, I think it advisable to postpone the matter, and I therefore move that it should be postponed until after clause 80 has been considered. It would then come on immediately before the provision relating to finance and trade, to which it is so nearly related.
>
> The motion was agreed to, and the clause postponed.

What ought to be clear is that Section 96 grands can be facilitated only regarding issues where the States have legislative powers. After all, if the Commonwealth of Australia has legislative powers it does not need to make grands. And, if the Commonwealth of Australia were to obtain legislative powers it might well be that the entire **WATER** issue could get worse, rather then better.

We have seen in regard of the detention of refugees, as my website extensively sets out, what an utter mess is made of it where innocent Australians are detained/deported without due regard of **DUE PROCESS OF LAW**. There are numerous other issues that are left unnoticed to many where there is a lack of proper action. For example, the use of Australian Post facilities (Commonwealth legislative powers) for sending scams to people. The use of telecommunication (commonwealth legislative powers) to send people scam emails.

Despite hundreds of millions of dollars being defrauded through those schemes the Federal government simply fails to appropriately deal with it. By this, people end up loosing their entire life savings, and remarkably prior to federation people then lost their entire life savings on dodgy companies investments, and after more then 100 years of federation the Commonwealth of Australia has not, so to say, been able to turn the tide, despite that it has all legislative powers to deal with companies.

Much is argued about the use of corporations laws for Industrial Relations changes, but lets check what really did bring about Section 51(xx) and its intent as to constitutional powers!

It indicates it was to deal with unifying registration of corporations, nothing to do with people employment with a corporation!

Hansard *3-4-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**)

> Sub-clause 19. The status in the commonwealth of foreign corporations, and of corporations formed in any state or part of the commonwealth.

Mr. MUNRO: We have agreed to sub-clause 13, dealing with the incorporation of banks, and I do not see why a similar provision should not be made in regard to the incorporation of companies. Why should they not be under the control of federal officers? At the present time the law as to incorporation is different in the different colonies, and the result is [start page 686] extremely unsatisfactory in many cases. **I do not see why we should not make the same provision in regard to the incorporation of companies as we have made in regard to the incorporation of banks.** We might introduce at the commencement of the sub-clause words to this effect: "The registration or incorporation of companies."

Sir SAMUEL GRIFFITH: I do not think we should. There are a great number of different corporations. For instance, there are municipal, trading, and charitable corporations, and these are all incorporated in different ways according to the law obtaining in the different states.

Mr. MUNRO: But as to trading corporations!

Sir SAMUEL GRIFFITH: It is sometimes difficult to say what is a trading corporation. What is important, however, is that there should be a uniform law for the recognition of corporations. Some states might require an elaborate form, the payment of heavy fees, and certain guarantees as to the stability of members, while another state might not think it worth its while to take so much trouble, having regard to its different circumstances. I think the states may be trusted to stipulate how they will incorporate companies, although we ought to have some general law in regard to their recognition.

Sir JOHN BRAY: I think the point raised by the hon. member, Mr. Munro, is worth a little more consideration than hon. members seem disposed to bestow upon it. We know what some of these corporations are; and I think joint-stock companies might be incorporated upon some uniform method. In South Australia, a banking company is not allowed to be incorporated under the Companies Act; still, there is nothing in Victoria of which I am aware to prevent a banking company from being registered there as a limited company and opening a branch in South Australia a few days afterwards. I think it is necessary, therefore, to have some uniform law. There is nothing in which the public should have more confidence than in banks which are in any way recognised by the state; and I think we should have some uniform system of incorporating banks. Many companies, although doing business under different names, are, in reality, banks.

Mr. MUNRO: The banks are incorporated under the Companies Act in Victoria!

Sir JOHN BRAY: You can establish financial companies, which you do not call banks, but which answer all the purposes of banks. We have provided that the federal parliament shall legislate as to the incorporation of banks; but there is nothing to prevent the incorporation by the states themselves, quite apart from the federal parliament, of trading companies which will do all the ordinary business of banks. If it is desirable to intrust legislation as to the incorporation of banks to the federal government, there is no reason why we should not say that the registration of financial companies doing all the business of banks should be dealt with in the same manner.

Sub-clause agreed to.

Hansard *12-4-1897* Constitution Convention Debates (Official Record of the Debates of the National Australasian Convention)

Mr. BARTON:

The status in the Commonwealth of foreign corporations and of corporations formed in any State or part of the Commonwealth.

It has so far been altered as to read:

Foreign corporations and trading corporations formed in any State or part of the Commonwealth.

So that the Commonwealth may have the power to legislate, not merely with regard to the legal status of corporations acting within the Commonwealth, but it may have power as far as it can legislate upon the general subject of these corporations, over the general subject of foreign corporations, formed in any part of a State of the Commonwealth, for the purpose of uniform legislation.

Mr. HIGGINS: Does that give power to exclude them from trading in the Commonwealth?

Mr. BARTON: **Not, I think, to exclude them**, **but to regulate the mode in which they conduct their operations.** It is for the purpose of uniformity. After the old subsection, which gave the Commonwealth power to deal with the subjects of marriage and divorce, have been added these words:

Hansard *17-4-1897* Constitution Convention Debates (Official Record of the Debates of the National Australasian Convention)

Sub-section 22: Foreign corporation and trading corporations formed in any State or part of the Commonwealth.

Sir GEORGE TURNER: With regard to this clause, we have already given power to deal with the question of banking, and we are now giving power to deal with foreign corporations and trading corporations. I fail to see why we should limit the sub-section to trading corporations. There are financial institutions which are not banking institutions, and if we are going to give the Federal Parliament power to legislate with regard to banking, and with regard to trading corporations, we should go a step further and give it power also to legislate with regard to financial institutions.

Mr. BARTON: I do not know.

Sir GEORGE TURNER Building societies.

Mr. BARTON: I think the present wording of the sub-section covers as nearly as may be the intentions of the Constitutional Committee, and really for the amendment, which is a desirable amendment, in the sub-clause as it stood in the Bill of 1891, we are indebted to my hon. friend, Mr. Isaacs, who put it in its present form.

Mr. ISAACS: I suggested the word for temporary consideration.

Mr. BARTON: I Should like to be favored with any arguments in favor of the suggestion.

Mr. DEAKIN: We recently passed a law in our colony which placed a strict limitation on the meaning of the word "banks," excluding from it particular kinds of financial companies which had hitherto been called banks, or treated as banks.

Mr. BARTON: You mean that kind of financial company that went down so often.

Mr. DEAKIN: We distinguish them from banks on the one hand and trading corporations on the other. **We want to include all limited companies** because the class of companies I am speaking of deal with lands and with deposits, and they require to be carefully regulated.

Mr. MCMILLAN: **You want to include everything outside private companies.**

Mr. DEAKIN: **Especially land and finance companies which caused so much litigation in the past.**

Mr. Symon: In the original Act corporations simply are mentioned. Why this difference?

Mr. BARTON: The reason of making the difference was this: It having been seen that the word "corporations," as it existed, covered municipal corporations, [start page 794] the term was changed to "trade corporations."

Mr. SYMON: Why not simply use the term "company"? If you use that word it will be well enough understood.

Mr. BARTON: Why not adhere to "corporation"? That governs everything under the Companies Act.

Mr. SYMON: Why not leave out the word "trading"?

Mr. BARTON: Or add the word "financial"?

Sir JOSEPH ABBOTT: I move:

To insert the word "financial" before "corporation."

Mr. BARTON: Would it not be better to make it thus:

Any trading or financial Corporation.

So as to separate that branch from foreign corporations?

Sir JOSEPH ABBOTT: I will consent to that and move:

To insert after trading "the words or financial."

Amendment agreed to.

Hansard *27-1-1898* Constitution Convention Debates (Official Record of the Debates of the National Australasian Convention)

Mr. BARTON.-**We do not propose to hand over contracts and civil rights to the Federation, and they are intimately allied to this question.**

And

Sir JOHN DOWNER.-

The people of the various states make their own contracts amongst themselves, and if in course of their contractual relations disagreements arise, and the state chooses to legislate in respect of the subject-matter of them, it can do so.

While the High Court of Australia in its 14 November 2006 handed down a judgment, it obviously never considered all relevant matters.

http://www.abc.net.au/pm/content/2007/s1833935.htm

MIKE RANN: The Prime Minister on Melbourne Cup Day gave us assurances of collaboration and not acting independently. The Prime Minister looked the Premiers in the eye and gave us assurances.

But now we're being told by Malcolm Turnbull, that in fact this takeover has been planned for several months. So the answer is, when do we believe them?

http://www.abc.net.au/news/newsitems/200701/s1833861.htm

Mr Rann says a legal challenge to the plan would be a waste of money.

"And rather than collaboration or seeking agreement, the first thing that [new Environment Minister] Malcolm Turnbull talked about on radio this morning was a High Court challenge, and then boasted that he was no stranger to the Constitution.

"We want these bucket loads of cash to go into water, not into lawyers' pockets."

Again;

and then boasted that he was no stranger to the Constitution.

Now, as Malcolm Turnbull already stated as quoted below some parts;
http://www.abc.net.au/news/newsitems/200701/s1833524.htm

Mr Turnbull says the Government has the power to overrule the states if they do not agree to give up the system.

And

Mr Turnbull says he is prepared for a High Court challenge if the states resist.

"I'm not a stranger to the Constitution myself," he said.

Quite frankly it is to me sheer and utter nonsense that the Commonwealth of Australia can overrule the States if they do not give up the system, as the Commonwealth of Australia can legislate as to "**reasonable use**" as to protect navigation but no more! It is the Federal Court (High Court of Australia) that would have to adjudicate riparian rights if that became an issue, as I will explain later.

I personally wonder what constitutional experiences Malcolm Turnbull may have, as the fact that he might have done some litigation involving constitutional matters does not necessarily mean that he is an expert in this field or more over that he even understands what it is about. Also, a person might be an expert in certain constitutional issues but not in others, and as such not being a stranger to the ***Constitution*** does not mean the person is an expert in all constitutional issues. Indeed, if he was such an expert, which I doubt, I view he would never have gone down the path of the ill-conceived republican referendum.

http://orange.yourguide.com.au/detail.asp?class=national%20news&subclass=general&story_id=550532&category=General

He became chairman of the Australian Republican Movement and when in 1999 the proposal was put to a referendum and defeated, declared that "whatever else John Howard achieves, history will remember him for only one thing he was the prime minister who broke the nation's heart".

And this is where the danger lies, the views of Malcolm Turnbull may change with the wind. In time to come the ten billion dollars may turn out to be inadequate, but then the States would have no say into the matter.

They may find that the ever power hungry Federal Government would pursue to obtain other legislative powers but not fixing the real issues. It has proved to do so in numerous other matters where it has sole legislative powers.

The legislative powers are at times very murky if they are State or Commonwealth because we really lack properly trained constitutionalist. Those judges appointed to the High Court of Australia may know next to nothing about constitutional powers and their limitations yet are to adjudicate upon it and then disaster strikes far to often, with ill conceived judgments handed down. Even where judges are attacking each other credibility.

This is why we need an **OFFICE OF THE GUARDIAN**, a constitutional council, that advises the Government, the People, the Parliament and the Courts as to constitutional powers and limitations. Then this **OFFICE OF THE GUARDIAN** can expose what is embedded in the ***Constitution***!
Only when such an **OFFICE OF THE GUARDIAN** is created for every State and the Commonwealth of Australia will more sense be made out of constitutional issues.

http://www.murrayirrigation.com.au/content.aspx?p=3

> Murray Irrigation Limited was formed on March 3, 1995, when the government-owned NSW Murray Irrigation Area and Districts were privatised and ownership transferred to irrigators. Each irrigator landowner is a shareholder in the company. Shares are held in proportion to the water entitlements held by each member.

The issue is not and should not be as to refer legislative powers to the Commonwealth of Australia for the sake of getting 10 billion dollars, as then the States could simply combine their effort and privatise the lot with one company working for the four States using private investment. However, as no Government owns **WATER** that flows from one State to another, then it cannot be privatised either. However, Queensland could seel its surplus **WATER** to other States where this **WATER** isn't drawn from navigating rivers. But, in my view, the States ought to act sensible and combine their finances and political interference from Canberra and be subject to whatever political party might be in power how then the issue of **WATER** will be dealt with, it might just be better to leave legislative powers in the hands of the States.
It should also be kept in mind that there was for example this issue where the Federal Government bankrolled some program to clear out a **WATER**way at huge cost to the taxpayers, where by the time the works were done there was no real need for it at all, as the dredging of the creak/river no longer was required, but because it was a political decision in a marginal seat moneys were nevertheless spend on the program. This is the danger when the **WATER** issue is in Federal legislative power, where the Federal Government may allocate the monies to what might be most suited in its political interest in marginal seats and at cost of projects that are required to be done as a matter of urgency.

Regardless what anyone else may believe, constitutionally the States retained legislative powers over water and **environment**. Yet, we have already witnessed how the Federal Government purportedly using its "environment" legislative powers, for political purposes in a marginal seat blocked an about 200 million dollar windmill program because of that perhaps once in a thousand years a **Yellow Belly Parrot** might be killed. Perhaps next they will ground all planes for this? These issues are also canvassed in my forthcoming book;

> **INSPECTOR-RIKATI® on the battle *SCHOREL-HLAVKA v BLACKSHIRTS***
> **For the quest of JUSTICE, in different ways. Book on CD.**
> ISBN 978-0-9580569-4-6 was ISBN 0-9580569-4-3

Albeit some also were previously canvassed such as in my 30 September 2003 book;

INSPECTOR-RIKATI® on CITIZENSHIP
A book on CD about Australians unduly harmed.
ISBN 978-0-9580569-6-0 was ISBN 0-9580569-6-X

On 6 July 2006 I also published one of my other books;

INSPECTOR-RIKATI® & What is the -Australian way of life- really?
A book on CD on Australians political, religious & other rights
ISBN 978-0-9751760-2-3 was ISBN 0-9751760-2-1

This book was subsequently also filed as evidence in my appeals for "**FAILING TO VOTE**", and despite of my section 78B **NOTICE OF CONSTITUTIONAL MATTERS**, on numerous constitutional matters I succeeded in the appeal **UNCHALLENGED** on each and every constitutional ground I raised. This, including it is unconstitutional to force anyone to vote in federal elections! I proved to be correct, and therefore I proved, after a 5-year legal battle, that in that regard I knew what was and is constitutionally applicable then the lawyers for the Federal Government did, and despite the provisions of Section 245 of the ***Commonwealth Electoral Act 1918*** making it obligatory to vote, in the end I proved it was unconstitutional legislation.
While Malcolm Turnbull may be litigation hungry, at least where he already seemed to indicate willing to go to the High Court of Australia about it, I view, that Premier Michael Rann was rather right that it should not be about litigating in Court (using my own interpretation of his statement) but seeking to deal with the real **WATER** issue.

For this, I view, that it would be highly undesirable for the States to refer legislative powers to the Commonwealth, where if anything it is in fact a judicial power regarding riparian rights and other rights, as the Framers of the ***Constitution*** pointed out, also referring to International law provisions to be applied, and so it would not make one of iota difference if the Commonwealth of Australia in that regard were to take over legislative powers as it would unlikely resolve any current problems, such as "**over-allocation**" as Malcolm Turnbull already is on record to have stated that he isn't going to interfere with the "**over allocation**" of **WATER**, this underlining that the Commonwealth of Australia not only ignored to exercise its available legislative powers to deal with "**reasonable use**" of **WATER** but already has heralded it isn't going to change it. More then likely for political purposes as not to loose its political donations from big business.
The word "**over allocation**" means too much **WATER** being allocated! And, Malcolm Turnbull is on record to have stated that this went on for about 50 years. Now, if the Federal Government left it for some 50 years and still refuse to deal with the issue of "**over allocation**" then I view that the issue is not to be taken away from what political use it can be as I have no doubt it is already made a federal political football and Malcolm Turnbull has already started this with his assurances not to stop "**over allocation**" of **WATER**. So, what is he intending to do if he had the legislative power over **WATER** if he isn't going to cut back on "**over allocation**" one may ask? If large mining companies give million of dollars in political donations then more then likely they too can continue their abuse of drink**WATER**.
As the Framers of the ***Constitution*** made clear that whomever holds power over **WATER** also hold the power over the price of land, industry, etc, as it all relies upon **WATER**.
Hence, I view it would be ill advised for any State to hand over legislative power regarding **WATER** to the Commonwealth of Australia.
Next, we might see that Minister of the Crown of the Federal Government will get **WATER** exemptions, as they get TAX exemption, and then they can legislate for themselves whatever **WATER** use they desire at cost of others. It might be unconstitutional but we see that when it

comes to what is constitutionally appropriate or not, the Federal Government really couldn't care less as we see with the tax free incomes for their political mates, and others.

Therefore anyone should be forewarned that where the Federal Government (of whatever political party) cannot even manage in a constitutional proper manner the legislative powers it already has, then one would be foolish to give it more power.

We have seen with cases such as **Vivian Alvarez Solon**, how this woman was denied any legal rights and yet there was no "**responsible minister**" held accountable for such gross power abuse. And yet hundreds of others likewise were denied their constitutional rights of **DUE PROCESS OF LAW**.

Hansard *2-03-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**)

> **Dr. QUICK.-**
>
> The Constitution empowers the Federal Parliament to deal with certain external affairs, among which would probably be the right to negotiate for commercial **treaties** with foreign countries, in the same way as Canada has negotiated for such **treaties**. **These treaties could only confer rights and privileges upon the citizens of the Commonwealth, because the Federal Government, in the exercise of its power,** [start page 1753] **could only act for and on behalf of its citizens.**

As such, if we are having a **FREE TRADE AGREEMENT** with the USA then surely we should already have in place a treaty that Australians are conferred the same legal rights if charged as any American has.

How on earth can you trade with any country that does not give equal rights to an Australian?

We have the **David Hicks** case that the Federal Government botched.

We have the unconstitutional/illegal invasion into the sovereign nation Iraq. We have the illegal towing away of unseaworthy refugee boats, and numerous other problems existing with the Commonwealth of Australia that it ought to be obvious that it should first gets its act together before seeking further legislative powers for other issues/matters.

For the above and other material I have published or I am about to publish, in my forthcoming book, I oppose any reference of legislative power to the Commonwealth of Australia.

Obviously with **WATER** having been privatised considerably, such as in NSW, even so the Framers of the ***Constitution*** made clear that no one had ownership of **WATER** that was in a river that flowed through different States, then being it the Murray Irrigation Limited or any other, we seems to have a considerable problem already. Would the Commonwealth apply constitutional limitations and declare that the **Murray Irrigation Limited** has no legal right to claim or trade in "over-allocation" of **WATER**? Any future Federal Government merely has to legislate as to "reasonable use" and it might wipe out, so to say, **Murray Irrigation Limited** **WATER** trading altogether, as after all Malcolm Turnbull may make any pledge he likes, but in the end it is the composition of the Federal Parliament that determines in future what will be applicable, and what, if any, legislation will be enacted as to "reasonable use" of **WATER** that might wipe out any **WATER** trading altogether.

What I have sought to show is that ignorance of how constitutional powers and limitations apply may have caused considerable problems already and only a foul would want to continue on this without first seeking to redress matters to ensure that at least it all has a constitutional valid basis.

In my view, as I have stated so often already, the Federal Government, and so also every State/Territory, ought to have an **OFFICE OF THE GUARDIAN**, so that finally constitutional powers and limitations are better known to all concerned. It makes it also fairer to companies that they at least will now their legal basis and not could be caught off guard and may support

reference of legislative powers from the states to the Commonwealth of Australia only to discover that by this they basically wiped themselves out of any further **WATER** dealings.
Awaiting your response, **G. H. SCHOREL-HLAVKA**
END QUOTE 070220 correspondence
.
QUOTE **Chapter 012 Reference of legislative powers**
Chapter 012 Reference of legislative powers
* Gary, what is this reference of legislative powers about?

**INSPECTOR-RIKATI**®, read what I have quoted from the Hansard recorded debates and then read what the Victorian Government (Jeff Kennett as Premier) did in regard of Industrial Relation in 1996 and how all the States likewise did so in 1986 regarding children of non-marriage and you may understand none of them understood what is constitutionally proper and neither that they sought the approval of their citizens before legislating for a referral of legislative powers.

* Do they need to?

Well, they needed to do so for the ***Constitution*** and as is set out below States have no legislative powers to give away their legislative powers without expressed consent by the electors of that State, by way of State referendum.

* But the system of referendum doesn't exist, does it?

It does, as it was used in the first place to approve the **Constitution Convention Bill** and as such became the precedent to establish that the parliament of a colony (now State) cannot hand over legislative powers without expressed consent by the electors.
And, as you will find set out below, the States inserted that they can withdraw this reference of legislative powers, and so clearly never understood how this reference of legislative powers applied. This, as once it is referred and the Commonwealth has legislated upon it then it is federal law and the States no longer then can legislate on that matter.
Therefore, the States never intended to give away, on a permanent basis that is, the children legislative powers or the Victorian Government neither the Industrial Relations legislative power and as such it was never constitutionally valid in that regard either.
As stated below
QUOTE

> In fact, the Framers referred that the purpose of subsection 51(xxxvii) was one to enable the Commonwealth to be the arbitrator in matters in dispute between the States, albeit not involving all States. Hence, the ***Commonwealth Powers (Family Law---Children) Act 1986*** is not such a "matter' that is in dispute between 2 or more but not all States.
> We then have the concoction of the ***Federal Courts (State Jurisdiction) Act 1999***, which purports to legally validate unconstitutional federal court Orders (Being it from the Family Court of Australia and/or Federal Court of Australia.) Again, we have a clear misconception about the function and positions of those Courts.
>
> Likewise, the ***Commonwealth Powers (Industrial Relations) Act 1996*** was beyond legislative powers for the State of Victoria to refer to the Commonwealth of Australia as it was not a "matter' in dispute between two or more but not all States.

END QUOTE

HANSARD *17-3-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

Mr. DEAKIN.-
In this Constitution, although much is written much remains unwritten,

This means you have to check back to the Hansard records of the **Constitution Convention Debates** as to find out what were the intentions of the framers of the ***Constitution*** and the "principles" embedded in this ***Constitution***.

HANSARD *2-3-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

Mr. HIGGINS.-**The particular danger is this: That we do not want to give to the Commonwealth powers which ought to be left to the states.**

HANSARD *27-3-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

Mr. MCMILLAN.-
I hold-and every year of my political life has made it a more sacred principle to me-that the less the Government do, except in acting as policemen in trade disputes, the better for the community. I do not want to insert in this Constitution a provision which by implication will show a trend of thought of a certain character, to which I need not further refer. **I do not want it to be presumed for one moment that we desire to give to the Federal Parliament the right to interfere in trade disputes and in the ordinary business and commerce of the country. The less the Government has to do with these things the better, and the more clearly it is understood that the Government is not to interfere excepting for the preservation of law and order the sooner these disputes will be likely to end.**

It also underlines the need for an **OFFICE OF THE GUARDIAN** so that everyone involved has an ability to obtain relevant details/information regarding each and every Section of the ***Constitution*** and its application.

Hansard *27-1-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

Sub-section (35).-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 the state or states by whose Parliament or Parliaments the matters was referred, and to such other states as may afterwards adopt the law.

Mr. DEAKIN (Victoria).-I wish to call attention to this sub-section, which, like several others in this portion of clause 52, represents a power first conferred upon the Federal Council, but which, as it appears to me, if allowed to remain in its present restricted form-suitable enough as that may have been to the Federal Council-is altogether unsuitable to the differing conditions of the Federal Parliament. In the original draft of the Federal Council Bill the proposal was framed in clause 16 as follows:-

The Governors of any two or more of the colonies may, upon an address of the Legislatures of such colonies, refer for the consideration and determination of the Council any questions relating to those colonies or their relations with one another, and the Council shall thereupon have authority to consider and determine by Act of Council the matter so referred to it.

The draftsman who advised the Imperial Government altered that including it in section 15 of the Imperial Act constituting a Federal Council, where it forms the last part of

subsection (*i*). The first part of the sub-section gives the Federal Council legislative authority in respect to the several matters following, and the clause before us, freely translated, follows:-

Any other matter of general Australasian interest with respect to which the Legislatures of the several colonies can legislate within their own limits, and as to which it is deemed desirable that there should be a law of general application.

Now, that appears to be ample for all the legislation which the Federal Council could have dealt with. That body has no Executive, has no Budget, and undertakes no expenditure. That body is [start page 216] the mere creature of the colonies, is dependent upon them, except within a very limited area, and, in fact, altogether for any expenditure it may be necessary to incur. Now, during the discussion of the question of old-age pensions, when I referred to the possibility of that matter being dealt with under this sub-section, I evoked a comment from Sir John Downer, which called my attention in a particularly pointed way to a present weakness of the sub-section in this respect. It may well be that some matters referred by the several state Parliaments to the Federal Parliament, in order that common legislation may be passed for one or more colonies, may require legislation involving some expenditure-expenditure which must be undertaken in order to give effect to that legislation. It might be for the ordinary machinery administration-the payment of salaries of certain officers-or it might be the power to levy certain fees and collect certain charges; or it might involve direct taxation; but in all such cases it appears to me that the present sub-section may be inadequate. For instance, if reference be made to sub-section (3) of this clause 52 it will be found that the Federal Parliament has only the power to raise money by systems of taxation which shall be uniform throughout the Commonwealth. Consequently, if any legislation referring to any less number of the colonies than the whole of the colonies, and which involved any expenditure, was passed by the Federal Parliament, although those colonies were willing to vote that expenditure, the Federal Parliament might have no power to raise that money. The only possible means of the Federal Parliament obtaining that power would be if it were conferred in the provisions of the referring statutes passed by the referring colonies, but unless those provisions exactly agreed-and agreement would be extremely difficult to arrive at-the probability is that the law would be inharmonious and fail in its effect. I would suggest to the leader of the Convention that he should consider whether there should not be such a modification of sub-section (3), which provides for the raising of money by the Commonwealth, as would allow of a reference by two or three colonies desiring to intrust the Federal Parliament with the task of framing legislation for them, and enabling the Federal Parliament, if so called upon, to provide for the raising of the necessary revenue in those colonies. That would be one means of meeting the difficulty. Another means might be that when two or more colonies had determined, under sub-section (35), to refer to the Commonwealth Parliament any matter which required the raising of money from their **citizens**, it should be possible, for the Commonwealth, in regard to those particular matters, to provide for the necessary taxation to be levied in those colonies by the central authority, instead of leaving them to the very difficult task of coming to an independent agreement among themselves as to all the details of the method by which the money should be provided.

Mr. GLYNN.-Strike the sub-section out.

Mr. SYMON.-That is the best solution of the difficulty.

Mr. DEAKIN.-That may be so.

Mr. GLYNN.-We may have a conflict of laws under the sub-section.

Mr. BARTON.-Such laws can only apply to the referring states themselves.

Mr. DEAKIN.-They would not be, in the strict sense of the term, federal laws.

Mr. BARTON.-No, they would only apply to the states which referred the matters to the Federal Parliament.

Mr. DEAKIN.-**Exactly; but those laws can be adopted by the other states. If two or three colonies join in requesting the Federal Parliament to pass a statute on a particular matter applying only to those two or three colonies, and that law has been enacted and proved to work well, the remaining colonies of the group may adopt it, and finally [start page 217] you may have the Commonwealth in this position, that every colony in the group has adopted, as far as it can adopt, that particular law, which then ought to be a federal law.** This contingency is perhaps provided for. That being so, it becomes necessary for us to consider whether we should not also provide for the other contingency. If all the states of the group except one, or if three of the larger colonies, or any three of the colonies, required a common statute in regard to a particular subject, and the administration of that statute involved the raising of money, the Federal Government ought to be able to provide for the levying of that money under the same law if so requested by those concerned.

Sir GEORGE TURNER.-Will you briefly restate the point?

Mr. DEAKIN.-My point is that by the requests of different colonies at different times you may arrive at a position in which all the colonies have adopted a particular law, and it is necessary for the working of that law that certain fees, charges, or taxation should be imposed. That law now relates to the whole of the Union, because every state has come under it. As I read clause 52, the Federal Parliament will have no power, until the law has thus become absolutely federal, to impose taxation to provide the necessary revenue for carrying out that law. **Another difficulty of the sub-section is the question whether, even when a state has referred a matter to the federal authority, and federal legislation takes place on it, it has any-and if any, what-power of amending or repealing the law by which it referred the question? I should be inclined to think it had no such power, but the question has been raised, and should be settled. I should say that, having appealed to Caesar, it must be bound by the judgment of Caesar, and that it would not be possible for it afterwards to revoke its reference.** It appears to me that this sub-section, which is certainly one of the very valuable sub-sections of this clause, affording, as it does, means by which the colonies may by common agreement bring about federal action, without amending the Constitution, needs to be rendered more explicit. One point more especially which needs to be rendered clear is whether, when we have this federal action, there shall not be a federal means of providing for the necessary revenue that may be required or for imposing the necessary charges under such legislation.

Sir JOHN DOWNER.-Is that not implied?

Mr. DEAKIN.-If it is implied, would it not be best to make it explicit? The parentage of this clause, as I have shown-originating as it does in a body with practically no financial power-casts a certain suspicion on that reading of it, although, of course, the provision when embodied in this Act would have a different effect. Still, why not make it clear whether we mean that, when the Federal Parliament has passed federal legislation for some of the colonies, we shall allow that same legislation to deal with any necessary raising of revenue from those colonies which may be required to give effect to the legislation?

Dr. QUICK (Victoria).-I think the point taken by my honorable friend (Mr. Deakin) is one well worthy of the consideration of the Drafting Committee, and probably the difficulty to which he has drawn attention could be obviated by some such provision as that which he suggested. **But this matter has struck me also from another point of view, and it seems to me that the provision affords an easy method of amending the Federal Constitution, without referring such amendments to the people of the various states for their assent.** Now, either when the state Parliaments have referred these matters to the Federal Parliament, and the Federal Parliament has dealt with such matters, that becomes a federal law, and cannot afterwards be repealed or revoked by the State Parliaments-that is one position, and in that case, of course, the reference once made [start page 218] **is a reference for all time, and cannot be revoked, so that to that extent it becomes an amendment of the states' Constitution**, incorporated in and engrafted on the Federal Constitution **without the consent of the people of the various states. On the other hand, if that be not so, and the states can, after making such reference, repeal such reference, what is the result?** You have a constant state of change-no guarantee for continuity or permanence-in this class of laws, and this might lead to a great deal of confusion and a most unsatisfactory state of things. My principal objection to the provision is that it affords a free and easy method of amending the Federal Constitution without such amendments being carried into effect in the manner provided by this Constitution.

Mr. BARTON.-**I cannot understand how it gives an opportunity of amending the Federal Constitution.**

Dr. QUICK.-In this way. At present clause 52, which we are now discussing, deals with the powers of the Federal Parliament. It defines those powers in specific terms, in specific paragraphs. Very well. Then, if under this sub-section power be given to the state Parliaments to refer other matters to the Federal Parliament, to that extent the powers of the Federal Parliament are enlarged, and therefore there is an enlargement of the Constitution. This enlarges the power of the Federal Parliament, and when a law is passed by the Federal Parliament, it becomes binding on the **citizens** of the states the Parliaments of which have made reference; and if these laws are binding, I say they become federal laws, and those federal laws may be administered by federal courts. Consequently, these referred powers become federal powers, and to that extent this becomes a means of amending the Federal Constitution.

An HONORABLE MEMBER.-The state Parliaments may refer some subjects to the Federal Parliament without the consent of the people.

Dr. QUICK.-True, the state Parliaments may refer some subjects to the Federal Parliament without the consent of the people of the states-that is my point-and to that extent the powers become grafted on the Federal Constitution in a manner directly different from the mode provided by this Constitution.

Mr. BARTON.-You can make amendments in your Constitution without referring to the people.

Dr. QUICK.-That is so, but there is a distinct provision here that there is to be no amendment of the Constitution without first such amendment being passed by the Federal Parliament, and then submitted to the people of the states, and there must be a majority of the people and a majority of the states before such amendment can become law. In this case also, I have to use an expression which has been frequently indulged in by Mr. Symon, that another mischievous result will follow from this power of reference. Supposing a state Parliament is troubled and bothered with an agitation upon a certain question-say, that of old-age pensions-and the state wants to get rid of a troublesome problem, it may simply,

out of its inclination to get rid of the difficulty, pass a Referring Bill shunting the question on to the Federal Parliament, and the matter may there be hung up on account of other difficulties. **Once a state has referred a matter to the Federal Parliament of course it cannot deal with it itself.**

Mr. BARTON.-**And it cannot repeal the law referring the matter.**

Dr. QUICK.-**There seems to be a difference of opinion on that point. I myself agree with the Premier of Victoria that there is power to repeal, and, consequently that the power of reference is not an ultimate power; it may be repealed, and what is the result?** It would lead to a most unsatisfactory state of affairs. My view is that the sub-section should be struck out altogether.

Mr. SYMON (South Australia).-I think we are greatly indebted to Mr. Deakin [start page 219] and Dr. Quick for raising this question. The only wonder is that it has not struck us at an earlier stage of our proceedings how very mischievous-to repeat a word which has just been attributed to me-this sub-section may possibly become. **I do not know, whether a state, after referring a particular subject of legislation to the Federal Parliament could not revoke the reference**. **My own personal view is that it could. It could revoke the reference, but if the Federal Parliament has acted upon that reference, and legislated upon it, then I think that legislation becomes federal legislation, and could not be revoked or interfered with in any way by the State.** If, as Mr. Deakin has said, they have appealed to Caesar, they must be bound by Caesar's decree, Caesar in this case being the Federal Parliament. **The law so passed by the Federal Parliament would become federal law for all time until the Federal Parliament repealed it.** Now, if the state happened to change its mind on this particular matter, what would be the result? The reference to the Federal Parliament may have been a mere political contrivance for the moment, as Dr. Quick has pointed out, to get rid of some troublesome question. **But if the state at some future period desired to legislate on its own account, and to deal with the matter, which perhaps was a matter of purely local concern, it would be faced with another portion of the Constitution, which says that no state law shall prevail if it is in conflict with the federal law.** A majority in Parliament, in order to get rid of a difficulty, might refer it to the federal authority, and then we might find subsequently the people of the state hampered by the impossibility of their retracing their steps, and carrying out legislation which they considered necessary and desirable. I think, myself, that the better way would be to strike out this provision altogether. It is inconsistent, it seems to me, with the foundation of our Federal Government. We declare here specific powers to be intrusted to the Federal Parliament, and by those we should abide, except so far as the matter is controlled by sub-section (36). It ought not to be competent for any state to get rid of a troublesome matter of legislation by saying-"We will refer this to the Federal Parliament." It is obvious that, as has been pointed out by Dr. Quick, this provision would extend powers to the Federal Parliament to a degree which would depend upon the hazard of the moment. Now we are doing all we can, by debating the matter day after day, to secure that those powers may be as precise as possible, and be brought within the limits of the necessities of the case. But here we are giving to any state the power of sending on to the Federal Parliament, for debate and legislation, some matter which it is purely for themselves to deal with, and I do not think we ought to put it in the power of states to relieve themselves from their own responsibilities in legislation or administration by any such easy contrivance as this might turn out to be. I think the provision is really in by mistake. **I was not aware until it was pointed out by Mr. Deakin, that it had its origin in connexion with the Federal Council Act, though I know it exists there. It might be applicable in that case, but it is not applicable to the Federal Government we are now seeking to establish.** I would also point out that sub-section (36) really gives a very wide

power in connexion with the exercise of legislative authority to the Federal Parliament, a power which I fancy would, if it were desired to extend power to the Federal Parliament, meet the case. Sub-section (36) enables the Federal Parliament to make laws with respect to-

The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the states concerned, of any legislative powers 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.

[start page 220]

Mr. DEAKIN.-That is a different thing altogether.

Mr. SYMON.-I am not quite sure whether that is a desirable provision to leave in.

Mr. ISAACS.-It is much too large; I intended to call attention to it.

Mr. SYMON.-I think this matter was brought up before, and it is a much more serious matter than honorable members might at the first glance be disposed to think. I believe it would enable states, in a matter of purely local legislation, to refer the matter to the Federal Parliament for it to deal with. I have not referred to the provisions of the Federal Council Act, but I think the concluding words of sub-section (36), if left in at all, should certainly be very carefully considered. I do not know what they mean or how extensive they may be.

Mr. DOBSON.-Could you give any illustration of a matter which would be referred to the Federal Parliament by one of the colonies?

Mr. SYMON.-Not of what would be referred, but of what might be referred. I will choose one which it might be very proper for us to refer to the Federal Parliament-the question of the disputed boundary between South Australia and Victoria. The reference would probably be quite ineffective, as the Federal Parliament would not deal with a subject of that kind at the invitation of one state.

Mr. BARTON.-If they did the settlement could only extend to that state.

Mr. SYMON.-But look at the invitation which this would give for the engendering of heat, passion, and discussion in the Federal Parliament. Look at the difficulties that would be raised on the part of the Federal Parliament in having a matter of that kind brought under its notice at all. There might be other matters of social concern, and one was mentioned by Mr. Deakin, that of old-age pensions.

Mr. DOBSON.-That would hardly come under this provision. The financial part of it would operate against its being referred.

Mr. SYMON.-As Mr. Deakin has put it, supposing such questions were referred, how is the Federal Parliament to deal with them without some enabling powers with regard to finance?

Mr. OCONNOR.-If a state referred question of state finance it might be dealt with.

Mr. SYMON.-Does the honorable member say that that would be a desirable thing to do?

Mr. BARTON.-**Is it not for the people of the state to determine whether it is desirable?**

Mr. SYMON.-Is it desirable to shunt on to the Federal Parliament a power that we have not settled in the Constitution? Would not this reduce the powers of the federal authority to a mere fluctuating quantity? My view is that we should strike this provision out altogether, and amend if necessary the succeeding subsection (36). We could then do whatever may be desirable within proper limits.

Sir JOHN DOWNER (South Australia).-I cannot see any of the difficulties which Mr. Deakin, Mr. Symon, and Dr. Quick anticipate in connexion with this sub-section. This, of course, is to be an inelastic Constitution, which can only be altered after great thought and with much trouble. **We define what are to be the boundaries of the Constitution of the Commonwealth. We leave everything else to the states. It may be that questions may afterwards arise which concern one, two, or three states, but which are not sufficiently great to require a complete revision of the whole Constitution, with all the troublesome proceedings that have to be taken to bring about a reform.** It would much facilitate matters if these questions could be referred to the Federal Parliament.

Mr. DEAKIN.-It would not be an easy process. You know how hard it is to get even two colonies to agree to anything.

[start page 221]

Sir JOHN DOWNER.-It would be easy compared with an alteration of the Constitution.

Mr. DEAKIN.-It would not be too easy.

Sir JOHN DOWNER.-Nothing should be too easy. **We have the power to alter the Constitution, but it is a power that can only be exercised with great difficulty.** We also have a power of quasi-arbitration, which the Commonwealth Parliament can exercise in an easier way, although not without some difficulty, at the request of one or more states. Now, is not that a good principle? I do not think many honorable members will say it is not. It is suggested that we are allowing the states to throw upon the Federal Parliament a responsibility they ought to take themselves. My answer is that every state wants to aggrandize itself, to increase its authority, and it will only be in very extreme cases that the states will resort to this means of getting rid of a difficulty. In an extreme case, is there any harm in having a comparatively easy method of reference, not to troublesome negotiations, nor to the Imperial Parliament, but to the Federal Parliament.

Mr. BARTON.-It might be impossible to dispose of the matter excepting in that particular way.

Sir JOHN DOWNER.-Yes.

Mr. OCONNOR.-Take a case of dispute regarding a boundary.

Sir JOHN DOWNER.-Yes, the cases might be infinite. Take a question of disputed territory, for instance. What could be more proper than that Victoria, if she became reasonable for once, should say-"Look here, we know we promised to do it; we know we have broken our promises; we acknowledge our transgressions, and will refer the matter at once to the Federal Parliament"? Who would blame her? Certainly not South Australia. Even in connexion with the question of rivers some point might arise that might concern two or three colonies, and that could not concern all the colonies. That, again, might be a proper matter for reference, **but it could not be a common matter of legislation in respect of every state.** I will now take the points Mr. Deakin makes. He doubts whether

this power of legislation will carry with it a power of raising the necessary money to give effect to the legislation.

Mr. ISAACS.-The states themselves will determine that.

Sir JOHN DOWNER.-Yes, the honorable member has given the answer.

Mr. DEAKIN.-Read it with sub-section (3).

Sir JOHN DOWNER.-I do not think that sub-section affects the matter in the slightest degree.

Mr. OCONNOR.-Sub-section (3) refers to the raising of money for the purposes of the Commonwealth itself.

Sir JOHN DOWNER.-Yes, and it can, in my opinion, have no relation to this question. When a matter is referred the Parliament of the Commonwealth will have unlimited powers of legislation.

Mr. DEAKIN.-To the extent of the reference.

Sir JOHN DOWNER.-**Exactly; but the parliament will be entitled to make a law about it which will be as good as any other law.** The only thing is that it will be limited in its area of application. Within the limits of the reference, it could deal with finances or any other question. I can see no difficulty at all in carrying out the sub-section in that respect, and I do not think that it wants any addition. We have practically to consider this from the point of view of a question of policy**. Is it worth while to leave to the states a power of referring disputed questions that may concern one or more, but may not concern all?** What possible difficulty can there be? It may be said that this should be left to the people, but the Parliament can decide. This Bill, before it can go home and can assume the form of an Imperial statute, will have to be submitted to a referendum of the people of each colony. It is only after that has been done that it can be made an Imperial [start page 222] statute, and why should we not give this power of reference to the states if it is a power that would work well? For my own part, I do not think the sub-section requires even verbal amendment. It will work quite well as it is so far as machinery is concerned. In regard to the principle, I think it is a very advisable power to confer, and I hope the sub-section will be agreed to.

Mr. ISAACS (Victoria).-My honorable friend (Sir John Downer) has put in better language than I could have employed many of the views I was going to present to the Convention. The object of the sub-section I take to be this. The foregoing sub-sections deal with matters upon which authority is to be given to the Federal Parliament to legislate with regard to all the colonies. They are admittedly matters of common concern. **Then it was thought that there might be other matters that might turn out to be matters of common concern, but that are not yet regarded as such or have not yet arisen in any way. In the course of the existence of the Commonwealth questions may arise that we do not foresee, and without any amendment of the Constitution the states may if they choose refer them to the federal power.** Or it may be that any two states, unable each of them separately to legislate beyond their own boundaries, may ask that this power to legislate may be given to them without the necessity to go to the federal authority. **It is perfectly plain that two separate states, even if they legislate in exactly the same terms, cannot carry the effect of their laws beyond their own boundaries.** There may be a difficulty, political or otherwise, as to leaving it in the power of any one state to refer to the Federal Parliament matters of purely local concern. If there be any objection on that

ground, I suggest that it can be got rid of by saying that this power shall be limited to matters which may be referred by two or more states to the Federal Parliament. That, I think, would obviate any of the difficulties which Mr. Symon has foreshadowed, and would carry out what we really want. No state, so far as I can imagine, requires to refer to the Federal Parliament the passing of any law that is to affect itself alone. But if it agrees with another state that some law; **not to be of universal application throughout the Commonwealth**, but to affect it and that other state alone, should be passed, power should be given in some such clause as this to ask the Federal Parliament to enact that what both states desire shall be of common application to them.

Mr. SYMON.-Could you put that in sub-section (36)?

Mr. ISAACS.-I do not wish to anticipate what I have to say upon sub-section (36). I think that that sub-section requires amendment, and that it is too large for more reasons than one. **But in my opinion the object of sub-section (35) would be better obtained by striking out the power of one state to refer its own purely local concerns to the Legislature of the Federation, and by limiting this power to cases where two or more states desire to be bound by the federal authority.**

Mr. BARTON.-Does the honorable and learned member say that sub-section (36) is too large? I would like to mention that we left out some restricting words because we thought that the provision was restricted by the whole scope of the clause.

Mr. ISAACS.-Well, I do not wish to confuse the two sub-sections. I think that Mr. Symon's objections will be met if we use the words matters referred to the Commonwealth by the Parliaments of any two or more states." A state Parliament may say-"We will not deal with this matter; we will refer it to the Federal Parliament." Some honorable members may think that a shirking of responsibility. I do not attach any weight to that contention, but I do not think anything is substantially gained by keeping in the provision.

Mr. BARTON.-**If a state Parliament wants to shirk its responsibility it can fall back upon the referendum.**

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Mr. ISAACS.-With regard to the other point that a state may repeal a law, I do not agree with that argument. **If a state refers a matter to the Federal Parliament, after the Federal Parliament has exercised its power to deal with that matter the state ceases to be able to interfere in regard to it. Moreover, when the Commonwealth has passed a law at the request of any Parliament or Parliaments, and the Parliament of a third state adopts it, it adopts a Commonwealth law, and it requires the consent of the Commonwealth to get rid of that law. In my opinion, there is no power of repeal with the states, and I feel no doubt that I have read among the decisions of the United States, one which is to the effect, although I cannot just now lay my hands upon it, that when a state has, with the consent of Congress, made certain enactments the power of Congress is required to repeal those enactments.**

Mr. REID.-Otherwise the provision would be perfectly idle. A state would refer a matter to the Commonwealth, and, not being pleased with the precise manner in which that matter was dealt with, it would immediately repeal the law.

Mr. ISAACS.-Yes; the state might just as well pass the law for itself.

Mr. OCONNOR.-**A law once passed under this provision becomes a federal law.**

Mr. ISAACS.-Yes, and nothing less than the federal authority can get rid of it.

Mr. BARTON (New South Wales). With regard to the particular sub-section which we have now in hand, I have not been brought to see that any dangerous power is given in it, or that there is any reason for an alteration. Let us take first the suggestion of the honorable and learned member (Mr. Deakin). The Federal Parliament can only deal with such matters as a state or states refer to it. A state may refer to the Federal Legislature a certain subject without referring, or expressly excepting from the reference, any financial dealing with that subject. In such a case the Commonwealth could only legislate upon the subject so far as its financial aspects were not concerned. If the whole subject were referred, not excepting finance, the Commonwealth could legislate to the whole extent of the reference. I think that the words used in the sub-section are ample for either case. The difference with regard to sub-section(3)is this: It is plain that that sub-section refers only to the raising of money by any mode of taxation for general Commonwealth purposes. Like all the rest of these sub-sections, with the exception of one or two which contains special provisions, it concerns matters relating to the peace, order, and good government of the Commonwealth," and the word Commonwealth" means *prima facie* the whole Commonwealth. In this sub-section, however, there are special words which prevent the law applying to the whole Commonwealth, and these are the words quoted by the honorable and learned member (Mr. Deakin):-

But so that the law shall extend only to the state or states by whose Parliament or Parliaments the matter was referred, and to such other states as may afterwards adopt the law.

It seems to me that if there is any raising of money intended by the states to be delegated to the Commonwealth-and they can only delegate their legislative authority to a certain extent, provided for by the Constitution-that will be expressed in the reference, or it can be excluded from any reference. In the one case or the other the Commonwealth can only proceed as far as the extent of the reference. **Then there was the objection of the honorable and learned member (Dr. Quick), that this provision affords an easy method of amending the state Constitution without the use of the referendum.** But at the present time the state Constitutions do not provide for the use of the referendum. The government of the states is by a majority of the representatives of the people, and it must [start page 224] be constitutionally assumed that when a majority of the two Houses of Parliament make a law the people speak through that law. If the people choose to speak through a law made in this way, there is no evasion of responsibility when an appeal was made to a superior authority for the settlement of a difficulty incapable of settlement by the relations of two bodies at issue. This is not a restriction but an enlargement of the legislative powers of the states, which I think is in the spirit of democracy, and one that we should grant.

Mr. HOLDER (South Australia).-I want to ask the leader of the Convention a question, his answer to which will influence my vote on the subject before us. The sub-section upon which we are dealing and the following sub-section are the only ones which provide for an extension of the powers of the Commonwealth. I have been looking up the clauses in Chapter VIII., and I do not see that under them any extension of the powers of the Commonwealth can be dealt with. I want to know whether I am right in supposing that under these clauses no extension of the powers or scope of the Commonwealth would be possible, because I think that under that chapter, if any alteration of the Constitution of the Commonwealth is desired, the states, to obtain it, must first-have a law passed by the Commonwealth Parliament? Now, suppose it is proposed to enlarge the power of the Commonwealth, by placing under its control the administration of Crown lands. First of all, the Federal Parliament would have to pass a law upon this subject, and that law might be held to be *ultra vires*. There would be no power to submit anything to the electors

without Parliament first of all passing a Bill, which, however, would be from the outset outside its power. I should like to know from the leader of the Convention whether my view of this matter is correct?

Mr. BARTON (New South Wales).-What I understand my honorable friend (Mr. Holder) to ask is this: Suppose it were desired that extra-legislative power than now exists should be granted to the Commonwealth-as, for instance, to take under its control questions relating to Crown lands, and so on-whether an alteration in the Constitution in that direction would be *ultra vires*? Now, the Bill provides, in Chapter VIII., that the provisions of the Constitution shall not be altered except in the following manner;" which, to my mind, means that if the processes specified are adopted the provisions can be altered in any way. I take the provision to mean that authority is given to the Commonwealth under the processes here specified to alter this Constitution in any manner, so far as it deals with the affairs of Federated Australia, and not with affairs outside the dominion of Australia. Consequently, if it were proposed to add a legislative power of the kind suggested by Mr. Holder, **I take it that as Chapter VIII. provides first for the passage of the proposed law by an absolute majority, and then for a referendum, the law would have no effect unless the majorities of the several states agreed to it.** So that not only the Commonwealth but the states would have to agree to the passage of the law. Then any objection to that law becoming a new part of the Constitution of the Commonwealth would vanish; because, I think, so much authority is conceded by Chapter VIII.

Mr. KINGSTON (South Australia).-I think that the difficulty is that Chapter VIII. does not give power for an amendment of the Constitution, except by implication, but simply opposes limitations in the mode of the exercise of the power of amendment. I would suggest to the leader of the Convention that we might add a clause permitting the alteration of this Constitution**, subject to the provisions of Chapter VIII.** That would include amongst the powers of the Parliament a power which is very necessary, and which it is no doubt intended to give by the Bill, but which is not at present provided for as clearly as might be.

[start page 225]

Mr. GLYNN (South Australia).-In connexion with the point raised by Dr. Quick that this provision might lead to an amendment of the Constitution otherwise than under clause 121, I would like to suggest that the reference would be as to a specific point. **It might be to settle a particular matter of legislation, but not a general power.** But we are still in this dilemma: **That the state might, by referring the matter to the state Parliament, deprive itself of the right of repeal, and thus take away the general power of legislation from the state Parliament. As I understand, a state Parliament cannot at present abrogate its own powers. It might pass a particular Act or it might repeal an Act, but here the Parliament of the state is giving away some power without the consent of the people of the state. We are giving power to the state Parliament to give away their sovereign powers without the consent of their people.**

Mr. DEAKIN.-To commit political suicide.

Mr. GLYNN.-That is really what it amounts to. It certainly requires serious consideration.

The subsection was agreed to.

Sub-section (36)-

The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the states concerned, of any legislative powers 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.

Mr. BARTON (New South Wales.)-I might mention as to this sub-section that there is a difference between its language and the language of the corresponding sub-section in the Bill of 1891. The difference is this:-In the Bill of 1891, after the words **legislative powers**" there came the words with respect to the affairs of the territory of the Commonwealth, or any part of it." It was considered unnecessary to retain those words, because the whole scope of the legislative authority is that the legislation should be for the peace and good government of the Commonwealth itself. **Inasmuch as the Commonwealth cannot make any laws except for the peace, order, or good government of the Commonwealth itself, we thought that it could not make laws except with respect to the affairs of the territory of the Commonwealth or any part of it.**

Mr. KINGSTON.-Will this give power to legislate with reference to a part only?

Mr. BARTON.-Only to the extent of the reference made. It must be a matter referred with the consent of the Parliament, so that it would only apply to the extent of the reference made.

Re; **No. 92, 1986** ***Commonwealth Powers (Family Law–Children) Act 1986***

It relates to "a state Parliament" and "referendum", as such a referendum is needed to accept a State to have accepted it reference of Power.
Also;

> **I take it that as Chapter VIII. provides first for the passage of the proposed law by an absolute majority, and then for a referendum, <u>the law would have no effect unless the majorities of the several states agreed to it.</u> <u>So that not only the Commonwealth but the states would have to agree to the passage of the law.</u>**

Albeit, a State can adapt a Commonwealth law that is validly enacted within the ***Commonwealth Constitution***, the reference of power however is limited, where it is to create legislative powers that doesn't exist previously "**<u>So that not only the Commonwealth but the states would have to agree to the passage of the law.</u>**". As such, it is not an issue for the Commonwealth to legislated on any matter referred to it unless by way of referendum this was accepted. The Victorian purported reference of powers ***Commonwealth Powers (Family Law- Children) Act 1993*** No.92 of 1986 the ***Mutual Recognition (Victoria) Act 1993*** were never approved by way of referendum and are NOT AT ALL part of the Constitutional powers of the Commonwealth albeit so claimed in prints of the ***Commonwealth Constitution***.

On 7 and subsequently on 21 October 1986 the Legislative Council passed the ***Commonwealth Powers (Family Law - Children) Act 1986 No 92*** which was Gazetted on 16 December 1986 and came into force on 28 October 1987. Version 010 being:

> **s. 4**
> The Governor in Council may, at any time, by proclamation published in the Government Gazette, fix a day as the day on which the <u>reference under this Act shall terminate</u>.

Mr. DEAKIN.-

Another difficulty of the sub-section is the question whether, even when a state has referred a matter to the federal authority, and federal legislation takes place on it, it has any-and if any, what-power of amending or repealing the law by which it referred the question? I should be inclined to think it had no such power, but the question has been raised, and should be settled. I should say that, having appealed to Caesar, it must be bound by the judgment of Caesar, and that it would not be possible for it afterwards to revoke its reference.

Version No. 010
Commonwealth Powers (Family Law--Children) Act 1986
Act No. 92/1986
Version incorporating amendments as at 14 July 1997
This Version incorporates amendments made to the **Commonwealth Powers (Family Law--Children) Act 1986** by Acts and subordinate instruments.

The Victorian Parliament has PURPORTEDLY amended this legislation of the ***Commonwealth Powers (Family Law - Children) Act 1986 No 92*** totally unaware what the true reference of legislated powers possibly could mean! It purports to refer legislative powers and withdraw it as it please! It was however never accepted by any referendum on the first place!

GLEESON J as a judge in the corium in of the Full Court of the HIGH COURT OF AUSTRALIA in **HCA 27 of 1999** under point 31 had this to say:

> "..***I held that State Parliaments had no power to vest State Judicial power in federal courts created by the Parliament of the commonwealth and that the parliament of the Commonwealth had no power to consent to State Parliaments vesting State Judicial power in the federal courts***."

I view, that likewise the States have no constitutional powers to vest the Commonwealth with legislative powers or the commonwealth to consent to accept legislative powers within Section 51(xxxvii) of the Commonwealth constitution unless the State constitution provides for such reference of legislative powers and also such reference of legislative powers has been approved in accordance of the provisions of **Section 128** of the ***Commonwealth Constitution*** by way of referendum, as well as that both the States (and so those voting in the referendum) and the Commonwealth have been aware that this reference of legislative powers is one of a permanent nature, after which the relevant State referring the legislative powers for ever has lost future legislative powers either to rescind, amend or otherwise alter any legislation the Commonwealth may provide upon a successful referendum.

The ***Victorian Constitution*** under ***s16*** provides that "***The Parliament shall have power to make laws in and for Victoria in all cases whatsoever.***" As such, this clearly exclude any "***reference***" of legislative powers from the State of Victoria to the Commonwealth! After all, to refer legislative powers means the State no longer has it, and that breaches the provisions of ***s16***!
That albeit the ***Victorian Constitution*** refers to the ***Australian Citizenship Act 1948***, no specific legislation appears to be in place as to formally adopt this Commonwealth legislation.

Hansard *1-3-1898* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

Mr. WISE.-If the Federal Parliament chose to legislate upon, say, **the education question-and the Constitution gives it no power to legislate in regard to that question**-the Ministers for the time being in each state might say-"We are favorable to this law, because we shall get £100,000 a year, or so much a year, from the Federal Government as a

subsidy for our schools," and thus they might wink at a violation of the Constitution, while no one could complain. **If this is to be allowed, why should we have these elaborate provisions for the amendment of the Constitution? Why should we not say that the Constitution may be amended in any way that the Ministries of the several colonies may unanimously agree? Why have this provision for a referendum? Why consult the people at all? Why not leave this matter to the Ministers of the day? But the proposal has a more serious aspect, and for that reason only I will ask permission to occupy a few minutes in discussing it.**

That on 7 and subsequently on 21 October 1986 the Legislative Council passed the ***Commonwealth Powers (Family Law - Children) Act 1986 No 92*** which was Gazetted on 16 December 1986 and came into force on 28 October 1987. Version 010 being:

Commonwealth Powers (Family Law---Children) Act 1986

Version No. 010

Commonwealth Powers (Family Law--Children) Act 1986

Act No. 92/1986

Version incorporating amendments as at 14 July 1997

TABLE OF PROVISIONS

Section Page

THIS PAGE IS TO BE MASKED

Version No. 010

Commonwealth Powers (Family Law--Children) Act 1986

Act No. 92/1986

Version incorporating amendments as at 14 July 1997

The Parliament of Victoria enacts as follows:

1. *Purpose*

The purpose of this Act is to refer to the Parliament of the Commonwealth certain powers relating to Family Law.

2. *Commencement*

This Act comes into operation on a day to be proclaimed.

3. *Reference of certain matters relating to children*

(1) The following matters, to the extent to which they are not otherwise included in the legislative powers of the Parliament of the Commonwealth, are referred to the Parliament of the Commonwealth for a period commencing on the day on which this Act comes into operation and ending on the day fixed, pursuant to section 4, as the day on which the reference under this section will terminate, but no longer namely--

(a) the maintenance of children and the payment of expenses in relation to children or child bearing;

(b) the custody and guardianship of, and access to, children.

(2) **The matters referred by sub-section (1) do not include the matter of the taking, or the making of provision for or in relation to authorizing the taking, of action that would prevent or interfere with--**

(a) a Minister of the Crown, an officer of the State, an officer of an adoption agency approved under a law of the State, or any other person or body having or acquiring the custody, guardianship, care or control of children under a provision of an Act specified in the Schedule; or

(b) the payment of maintenance in respect of children who are in such custody, guardianship, care or control; or

(c) **the jurisdiction of the Supreme Court to make orders in respect of children who are in such custody, guardianship, care or control**; or

(d) the jurisdiction of a court of the State, under a provision of an Act specified in the Schedule, to make orders, or take any other action, in respect of--

s. 3

(i) the custody, guardianship, care or control of children; or

(ii) access to children or the supervision of children.

(3) In the preceding provisions of this section--

(a) the references to children shall be construed as references to persons under the age of 18 years; and

(b) the references to the maintenance of, and the payment of expenses in relation to, children shall be construed as including references to the maintenance of, and the payment of expenses in relation to, persons who have attained that age and have special needs in respect of maintenance or expenses by reason of being engaged in a course of education or training or by reason of a physical or mental handicap; and

(c) the references to an Act specified in the Schedule shall be read as references to that Act as amended and in force from time to time, and as including a reference to any Act or Acts replacing that Act and as amended and in force from time to time.

4. *Termination of reference*

s. 4

The Governor in Council may, at any time, by proclamation published in the Government Gazette, fix a day as the day on which the reference under this Act shall terminate.

Sch.
amended by Nos 16/1987
s. 4(3)(Sch. 1 item 6), 56/1989
s. 286(Sch. 2 item 3).

SCHEDULE

Sch.

Section 3

Children and Young Persons Act 1989
Community Services Act 1970

NOTES

1. General Information

Notes

Minister's second reading speech--
Legislative Assembly: 17 September 1986
Legislative Council: 7 October 1986

The long title for the Bill for this Act was "A Bill to refer to the Parliament of the Commonwealth certain matters relating to Family Law.".

The **Commonwealth Powers (Family Law--Children) Act 1986** was assented to on 16 December 1986 and came into operation on 28 October 1987: Government Gazette 28 October 1987 p. 2925.

2. Table of Amendments

Notes

This Version incorporates amendments made to the **Commonwealth Powers (Family Law--Children) Act 1986** by Acts and subordinate instruments.

Community Services Act 1987, No. 16/1987

Assent Date: 12.5.87 *Commencement Date:* S. 4(3)(Sch. 1 item 6) on 22.2.89: Government Gazette 22.2.89 p. 386 *Current State:* This information relates only to the provision/s amending the **Commonwealth Powers (Family Law--Children) Act 1986** **Children and Young Persons Act 1989, No. 56/1989**

Assent Date: 14.6.89 *Commencement Date:* S. 286 on 31.1.91: Special Gazette (No. 9) 31.1.91 p. 2; Sch. 2 item 3 on 30.9.92: Government Gazette 26.8.92 p. 2470
Current State: This information relates only to the provision/s amending the **Commonwealth Powers (Family Law--Children) Act 1986** ----------

3. Explanatory Details

Notes

No entries at date of publication.

The State of Victoria (as did other States) legislated for the ***Commonwealth Powers (Family Law---Children) Act 1986***. This purportedly giving legislative powers within subsection 51(xxxvii) of the ***Commonwealth of Australia Constitution*** to the Commonwealth. My case before the High Court of Australia is one setting out that the framers of the **Commonwealth Constitution Bill 1898** made it very clear that not only could subsection 51(xxxvii) not be used for this, but also unless there is a referendum to approve of such reference of legislative powers it would remain **ULTRA VIRES**. Further, any matter validly referred to within the provisions of subsection (xxxvii) would become "**federal law**", and be beyond State legislation from then on, once the Commonwealth has legislated upon it. The ***Commonwealth Powers (Family Law---Children) Act 1986*** purports to be valid until the Governor is to make a proclamation otherwise, etc. Clearly, this underlines that the State of Victoria never had any concept what subsection 51(xxxvii) stood for. Once a reference of power has been referred to the Commonwealth in a valid manner, then once the Commonwealth legislate upon this, the State lost any legislative powers upon this matter. Further, the Commonwealth could not act upon any validly referred matters (within subsection 51(xxxvii)) where this required expenditure, as the Commonwealth is not permitted to fund such matters out of Consolidated Revenue. As such, any reference of powers that were to incur cost to be dealt with, would have to include an additional provisions for the Commonwealth to levy a special charge against the State for funding this. Again the Framers made clear that subsection 51(iii) as to taxation) could not be used for this. Subsection 51(iii) is to fund Commonwealth matters for the whole of the Commonwealth, and not for particular State related matters that were referred to by a particular State.

4. *Termination of reference* s. 4 The Governor in Council may, at any time, by proclamation published in the Government Gazette, fix a day as the day on which the reference under this Act shall terminate.

The Framers of the ***Constitution*** made clear, that once the Commonwealth had acted upon any legislation, then the state had no further legislative powers to deal with this. Hence, any purported termination of reference could not apply.

In fact, the Framers referred that the purpose of subsection 51(xxxvii) was one to enable the Commonwealth to be the arbitrator in matters in dispute between the States, albeit not involving all States. Hence, the ***Commonwealth Powers (Family Law---Children) Act 1986*** is not such a "matter' that is in dispute between 2 or more but not all States.

We then have the concoction of the ***Federal Courts (State Jurisdiction) Act 1999***, which purports to legally validate unconstitutional federal court Orders (Being it from the Family Court of Australia and/or Federal Court of Australia.) Again, we have a clear misconception about the function and positions of those Courts.

Likewise, the ***Commonwealth Powers (Industrial Relations) Act 1996*** was beyond legislative powers for the State of Victoria to refer to the Commonwealth of Australia as it was not a "matter' in dispute between two or more but not all States.

QUOTE 1-7-2003 CORRESPONDENCE

WITHOUT PREJUDICE

Mr Steve Bracks, Premier of Victoria 1-7-2003
Parliament House
Spring Street
Melbourne Ref; **STATE SOVEREIGNTY, etc**.
Fax 03 96515054

AND TO WHOM IT MAY CONCERN:

Sir,

Hereby I request you to clarify the position of the State of Victoria about the **purported *Australia Act 1986***.

This letter doesn't intend to go into reams of paper to set out all legal issues, as this already is done before the High Court of Australia in M114 of 2001, M32 of 2003, M40 of 2003, M40 of 2003 and M80 of 2003 extensively.
However, The Full Court of the High Court of Australia is due to hear in October 2003 the matter of M114 of 2001.

The matter is one where I contest the validity of the purported 10 November 2001 federal election. In the process of it, I contest the validity of the purported ***Australian Act 1986***. This, albeit I am aware of the High Court of Australia ruling in ***Sue v Hill*** as to hold that the Australia Act is a valid Act.

Albeit I am not a lawyer, never had any formal education in law, English is not my native language and neither did I have any formal education in the English language, I am making known that judges of the High Court of Australia simply don't know what they are talking about and that the States neither know what they are doing.
This may seem to be an absurdity to claim, but lets give an example.

The State of Victoria (as did other States) legislated for the ***Commonwealth Powers (Family Law---Children) Act 1986***. This purportedly giving legislative powers within subsection 51(xxxvii) of the ***Commonwealth of Australia Constitution*** to the Commonwealth. My case before the High Court of Australia is one setting out that the framers of the **Commonwealth Constitution Bill 1898** made it very clear that not only could subsection 51(xxxvii) not be used for this, but also unless there is a referendum to approve of such reference of legislative powers it would remain **ULTRA VIRES**. Further, any matter validly referred to within the provisions of subsection (xxxvii) would become "**federal law**", and be beyond State legislation from then on, once the Commonwealth has legislated upon it. The ***Commonwealth Powers (Family Law---Children) Act 1986*** purports to be valid until the governor is to make a proclamation otherwise, etc. Clearly, this underlines that the State of Victoria never had any concept what subsection 51(xxxvii) stood for. Once a reference of power has been referred to the Commonwealth in a valid manner, then once the Commonwealth legislate upon this, the State lost any legislative powers upon this matter.
Further, the Commonwealth could not act upon any validly referred matters (within subsection 51(xxxvii)) where this required expenditure, as the Commonwealth is not permitted to fund such matters out of consolidated Revenue. As such, any reference of powers that were to incur cost to be dealt with, would have to include an additional provisions for the Commonwealth to levy a special charge against the State for funding this. Again the framers made clear that subsection 51(iii) as to taxation) could not be used for this. Subsection 51(iii) is to fund Commonwealth matters for the whole of the Commonwealth, and not for particular State related matters that were referred to by a particular State.

4. ***Termination of reference*** **s. 4** The Governor in Council may, at any time, by proclamation published in the Government Gazette, fix a day as the day on which the reference under this Act shall terminate.

The framers of the Constitution made clear that once the Commonwealth had acted upon any legislation, then the state had no further legislative powers to deal with this. Hence, any purported Termination of reference could not apply.

In fact, the framers referred that the purpose of subsection 51(xxxvii) was one to enable the Commonwealth to be the arbitrator in matters in dispute between the States, albeit not involving all States. Hence, the ***Commonwealth Powers (Family Law---Children) Act 1986*** is not such a "matter' that is in dispute between 2 or more but not all States.

We then have the concoction of the ***Federal Courts (State Jurisdiction) Act 1999***, which purports to legally validate unconstitutional federal court Orders (Being it from the Family Court of Australia and/or Federal court of Australia.) Again, we have a clear misconception about the function and positions of those Courts.

I may make a notation that the Hansard discloses that the Minister for small business did indicate that there could be a legal challenge to the validity of this act and that it was designed to prevent this. I consider it an utter disgrace that those to represent the people of Victoria set to undermine the electors rights.
Further, the ***Act Interpretation Act 1980*** of Victoria does include the Magan Carta rights (such as judgement by once peers) and other provisions. Hence, any federal court order conducted under federal law cannot be valid in the State of Victoria. Indeed, unconstitutional federal court orders can never be made valid by a State! Anyone seeking to claim so is no less then a complete idiot!

The federal courts cannot operate unless they conduct litigation in a State according to State laws to enforce Commonwealth law. As such, the Family Court of Australia operating under federal litigation procedures and actually refusing to apply State laws for litigation are in breach of Section 118 of the ***Commonwealth of Australia Constitution***. The framers made clear, that the Commonwealth has no constitutional powers to enforce its own laws, as it was up to the State Courts to enforce them if they desired to do so or to use **JURY NULLIFICATION** if they held the Commonwealth law was oppressive or otherwise undesirable for that particular State.

When called for duty service, I noticed that the jury is **NOT** advised of their right to having the option of **JURY NULLIFICATION**, and as such, every conviction by a jury could be overturned upon the ground that the jury had not been appropriately instructed as to their rights. Albeit I did make a complaint , in person, to the County court at the time of my attendance for jury service, I was told that it was for the judge to do so. Yet, we were shown a video that purported to show what a jury was about, but it concealed the fact of the right of **JURY NULLIFICATION**.

The Australian Industrial Relations Commission unconstitutionally dealing with matters of apprentices, is another one of numerous unconstitutional conduct.

Back to the purported ***Australia Act 1986***. if one spend as much time reading Hansards of the creation of the **Commonwealth Constitution Bill 1898**, then one can, so to say, basically eat and breath what the framers where on about. It is for this, that when I read something, a warning light goes off within me that it is all constitutional wrong. All I then do it to trace back what I read and there it is the evidence that it is unconstitutional.

The framers made clear that the Commonwealth of Australia would remain a part of the empire, but it would be neither a republic or a monarchy. The framers made clear that the ***Constitution*** would not permit the Commonwealth to alter the prerogative unless there would be first a referendum to amend the ***Constitution*** to give such powers.

Further, the framers made clear that the Commonwealth could not use subsection 51(xxxvii) to give it self constitutional powers it didn't have. Barton (the second Prime Minister of Australia, albeit generally referred to as being the first Prime Minister of Australia) made clear that unless the reference of legislative powers was adopted not just by the Commonwealth but was approved by way of referendum by the majority of electors in the majority of States, the reference would be **ULTRA VIRES**.

As such, the purported ***Australian Act 1986*** remains **ULTRA VIRES**.

The framers also made clear that any referendum couldn't be backdated. As such unconstitutional legislation remained to be so.

For example, lets have a look at some of the content of the purported ***Australia Act 1986***.

The original part of the purported *Australia Act* 2(2) has as part;

> It is hereby declared and enacted that the legislative powers of the Parliament of each State include power to make laws for the peace, order and good government of that State that have extra-territorial operation.

Now, suppose the Commonwealth amend this to;

> It is hereby declared and enacted that the legislative powers of the Parliament of each State **are vested in the Commonwealth of Australia, and include for the Commonwealth of Australia to grant limited** power **to the Parliament of each State** to make laws for the peace, order and good government of that State that have extra-territorial operation.

So now you have it, that unless the Commonwealth provide for certain legislative powers the States have lost all legislative powers.

It must be clear that the Commonwealth by this purported ***Australia Act 1986*** would have all the powers to abolish the States. After all, the ***Australia Act 1986*** being a federal law, over which the States have no further powers.

If the commonwealth were to succeed to undermine the powers of the Senate, as to have joint sittings without first needing to go to the people for a double dissolution, then it could basically alter the purported ***Australia Act 1986*** willy nilly, and by this abolish the States. After all, the States have made themselves subject to federal law to be existing! They have given up their sovereign rights they had prior to and at the time of Federation.

The ***Victorian Constitution Act 1975*** being a Act of Parliament of the State of Victoria, therefore could be abolished by the Commonwealth without the State of Victoria having any legislative powers to do otherwise.

Just look at the con-job of the 1967 referendum that was arguable to give Aboriginals equal rights. If one were to consider ***Kartinyeri v The Commonwealth [1998] HCA 22 (1 April 1998)*** then the High Court of Australia portrays that the original version of the ***Commonwealth of Australia Constitution*** (prior 1967 referendum) was bias against Aboriginals.

If anything, this just shows the incompetence of the judges to understand what the ***Constitution*** really stands for!
Sure, the Commonwealth passed in 1909 a law for "white only" electors arguing that Section 30 of the ***Commonwealth of Australia Constitution*** gave that right, and the High Court of Australia approved this and also later argued that Section 41 of the Constitution no longer was a valid section as the people that were alive at the time of federation had died long ago and so the application of this section 41, the truth is that again the High Court of Australia was giving utter and sheer nonsense.
The framers made clear that section 30 of the Constitution would be subject to Section 41!
Further, lets see what Barton stated at the closure of the **Constitutional Convention**!

Hansard 17-3-1898

Mr. BARTON.-

This Bill also contains a provision in favour of electors, which is altogether absent from the Bill of 1891; that is, a provision for the protection of the voting right, when the right has been granted, **so that no adult person who, at the establishment of this Constitution, or [start page 2468] at any time afterwards, acquires the right to vote for the Legislative Assembly in his own colony or state can be deprived of that right by any law passed by the Federal Parliament.**

Did you notice the wording "**or at any time afterwards, acquires the right to vote**"
The framers made all along clear that the Commonwealth would have no constitutional powers to deny a elector of a State the political rights to vote in a federal election! As such, the right of Aboriginals qualified to vote in State elections were secured!

Now have a look at the application of subsection 51(xxvi) by any kind of legislation in regard of Aboriginals since the 1967 referendum;

Hansard 3-3-1898

Mr. BARTON.-No, but the definition of "citizen" as a natural-born or naturalized subject of the Queen is co-extensive with the ordinary definition of a subject or citizen in America. The moment be is under any disability imposed by the Parliament be loses his rights.

Dr. QUICK.-That refers to special races.

Mr. BARTON.-But if he is under any disability under any regulation of the [start page 1787] Commonwealth he would cease to be a citizen, however slight that disability might be. I doubt whether the honorable member intends that. There is power by law to regulate the people of any race requiring special laws. There may be some purely regulative law passed, not imposing any special restriction on any person of that kind who may be a subject of the Queen. That regulation, if it were of the mildest character, under this definition, would deprive him of his rights.

Dr. QUICK.-**The regulation would have to specify the ground of disability.**

Mr. BARTON.-Yes; but my honorable friend says not under any disability imposed by the Parliament. Would not the difficulty be that if he were under any slight disability for regulative purposes, all his rights of citizenship under the Commonwealth would be lost?

What is clear is that the Aboriginals and so neither the entire electorate of the Commonwealth were ever advised that any legislation in relation to Aboriginals would cause the loss of their citizenship! So their political rights to be an elector an to be a Member of Parliament!

It might be stated that subsection 51(xxvi) was intended to "alien" "coloured race", as to control their doings, such as chines gold mining in Victoria, the Afghans selling in Tasmania, etc but then the Commonwealth could only make laws applicable to the entire Commonwealth, not for a particular State.
What the framers did, was referring to nationalities and upon that basis inserted subsection 51(xxvi) of "race" and referring to nationalities as being a race! Afghans clearly is a nationality identification, not a race. To the framers, the identification of a nationality was refereed to as being a "race". Albeit, when dealing with Aboriginals, they sought to avoid this confusion by excluding them of subsection 51(xxvi) as well as to protect the Aboriginal rights to be considered equally as other Australians.

Extensive reading does indicate that the framers had misconceptions about what a "race" stood for. It referred to "Chinese", even those born in Australia and having Australian nationality, to be "Chinese". However, if it were to have related to a Chinese national that was "Caucasian" then the framers clearly didn't seem to apply this, as the body of their debates seem to indicate. They had this "white only" racist attitude in general and as such their references were to Afghans and Chines but to "**coloured race's**, which signify that they were basically against "**coloured races**" not a particular nationality, albeit they generally referred to this.

What was achieved with the 1967 referendum was that it removed the protection of Aboriginals, and caused more harm then good, as set out in my books.

Still, the problem existing is that "technically" Aboriginals lost the right of citizenship of the Commonwealth and so their federal political rights, albeit not their State citizenship or their State political rights.

The Commonwealth has no constitutional powers to grand State citizenship or to interfere with it, but could in effect deny Australian citizenship by invoking any legislation within subsection 51(xxvi) for any matter, as it then would cause **AUTOMATICALLY** the lost of Australian citizenship.

It ought to be clear that Australian citizenship has got nothing to do with Australian nationality or with naturalization. This to has been set out considerable before the High Court of Australia. The framers made clear that unlike the USA version, they didn't want to follow, the Commonwealth would have no constitutional powers to define/declare citizenship!

Back to the purported ***Australia Act 1986***, it ought to be clear that this Act was never validly enacted for commonwealth purposes and remains **ULTRA VIRES**. As is the ***Australian Citizenship Act 1948***.

The more I research constitutional matters the more I discover is wrong with the way it all is applied. Why on earth the State of Victoria squandered its sovereignty as to be subject to Commonwealth law, and in fact risk the Commonwealth using this power to abolish the States all together is beyond me.

However, I have received calls that the ***Constitution Act 1975*** of the State of Victoria is unconstitutional, and this might, so to say, be my next port of call.

In my view, a "***Constitution***" is not something that can willy nilly be altered by a Act of Parliament, as then it is hardly a ***Constitution***.

I may indicate that the above matters are canvassed extensively in the following books;

INSPECTOR-RIKATI® and the BANANA REPUBLIC AUSTRALIA
Dictatorship & deaths by stealth, Preliminary book edition on CD
ISBN 0-9580569-3-5

And

INSPECTOR-RIKATI® & There is no government to go to war.
A book on CD About Legal Issues Confronting Australia
ISBN 0-9580569-5-1

Those books relies extensively upon Hansard quotations to back up the arguments of the Author. Including that Victoria has basically no electors at all! That is another long story, set out in the books.

My request is, that the State of Victoria establish a **committee**, that will investigate the numerous complaints and other issues raised by me in my books and report back to the Parliament of Victoria. So that at least the State of Victoria will seek to redress matters as a matter of urgency, before it could be too far gone to rectify matters.

Again, this correspondence cannot set out all matters in details, and is merely intended to give some indication that there are real problems that need urgent attention.
Awaiting your response and cooperation,

G. H. SCHOREL-HLAVKA

END QUOTE 1-7-2003 CORRESPONDENCE

QUOTE 15-11-2005 CORRESPONDENCE

WITHOUT PREJUDICE

Committee Secretary, Senate Legal and Constitutional Committee 15-11-2005
Phone +61 2 6277 3560 Fax +61 2 6277 5794, legcon.sen@aph.gov.au

Ref; SUBMISSION Industrial Relations bill, etc **AND TO WHOM IT MAY CONCERN**

Sir/madam,

Due to legal proceedings, and so to say, not wishing to show my hands too early, I have first filed my documents in court (today), and now will disclose what I am on about.
It is my submission that the ***Commonwealth of Australia Constitution Act 1900*** (UK) is and remains a British legislation. It is my submission, that it was shown that British law are subject to the European Union legislative provisions, and for this the matters referred to in the ***Aggregate Industries UK Ltd., R (on the application of) v English Nature and & Anor*** [2002] EWHC 908 (Admin) (24th April, 2002) case in regard of compliance with **The European Convention for the protection of Human Rights and Fundamental Freedoms** ("the ECHR") also is and remains applicable to australian law. It is also my submission, that **Judgments - Mark (Respondent) v. Mark (Appellant) OPINIONS** OF THE LORDS OF APPEAL for judgment IN THE CAUSE, SESSION 2005-06 **[2005] UKHL 42** *on appeal from: [2003] EWCA Civ 168* relates to the birth rights of a person. (including who's parents are aliens).
Because we do not have the Henry XIII system in place, to allow a Government to amend legislation, and neither have the implied repeal system in place (where legislation subsequently enacted implied repeal of any earlier legislation that is contradictory to the new legislation), for

so far it is not a constitutional legislation, then the older legislation is deemed repealed, we have that any older legislation remains in force.
While the **The European Convention for the protection of Human Rights and Fundamental Freedoms** ("the ECHR") cannot repeal the ***Constitution***, it does however apply to any legislation (sub-legislation of the ***Constitution***) where not conflicting with the ***Constitution***.
Meaning, that any so called Australian Industrial Relations legislation will be subjected to the provisions of **The European Convention for the protection of Human Rights and Fundamental Freedoms,** this irrespective we may not be directly part of the European Union.
Awaiting your response, **G. H. SCHOREL-HLAVKA**
END QUOTE 15-11-2005 CORRESPONDENCE

QUOTE 31-12-2006 CORRESPONDENCE

WITHOUT PREJUDICE

Premier Mr Steve Bracks of the State of Victoria 31-12-2006
Parliament House, Fax 03 96515054
steve_bracks@parliament.vic.gov.au Ref; LAD06/9629 D06/12795 OFFICE OF THE GUARDIAN

Steve,
Thank you for the correspondence of GRAHAM MCLENNAN Manager, Parliament and Correspondence, Cabinet Secretariat forwarded on your behalf, as reproduced below;
QUOTE

From: DP&C <dp&c@dpc.vic.gov.au>

[add to contacts]

To: schorel-hlavka@schorel-hlavka.com
Cc:
Date: Thursday, December 28, 2006 01:50 pm
Subject: OFFICE OF THE GUARDIAN, WATER MANAGEMENT

LAD06/9629
D06/12795

Mr Gary Schorel-Hlavka
schorel-hlavka@schorel-hlavka.com

Dear Mr Schorel-Hlavka

OFFICE OF THE GUARDIAN, WATER MANAGEMENT

Thank you for your email of 27 November 2006 to the Premier.

The issues you have raised fall within the portfolio responsibility of several Ministers. Therefore, I have referred your email to several departments for consideration as follows:

§ Department of Justice
· Attorney-General regarding the Office of the Guardian, 8684 0000;
§ Department of Sustainability and Environment,
· Minister for Water, Environment and Climate Change regarding water management, 9655 6666.

Should you require further information regarding this correspondence, you may contact the Departments directly on the above telephone numbers.

We appreciate the time you have taken to express your views on these matters.

Yours sincerely

GRAHAM MCLENNAN
Manager, Parliament and Correspondence
Cabinet Secretariat

This Department, in accordance with the Public Records Act 1973, will collect and store the information you have provided. Should you have any queries regarding access to your personal information held by this Department please contact the Privacy Officer, Department of Premier & Cabinet, Level 2, 1 Treasury Place, East Melbourne 3002.

Text version of this message. (1KB)
END QUOTE

It ought to be understood that the proposed **OFFICE OF THE GUARDIAN** would not be a body that in any way could interfere with the legal processes, as this would not be its function. One of my chief concerns in seeking the creation of the **OFFICE OF THE GUARDIAN** is that it can fill up a position that would not in anyway interfere with existing rights and provisions of anyone, being they a judge, a member of parliament or any member of the general public.

In 1985, I then created the document **ADDRESS TO THE COURT**, and is now used in all levels of Courts, including the High Court of Australia, despite it is now shown as a formal document listed by any. See also my 1 December 2003 published book;

As I quoted in my 27-11-2006 correspondence;

HANSARD *10-3-1891* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

Dr. COCKBURN:

Parliament has been the supreme body. But when we embark on federation we throw parliamentary sovereignty overboard. Parliament is no longer supreme. Our parliaments at present are not only legislative, but constituent bodies. They have not only the power of legislation, but the power of amending their constitutions. That must disappear at once on the abolition of parliamentary sovereignty. No parliament under a federation can be a constituent body; it will cease to have the power of changing its constitution at its own will.

Again;

No parliament under a federation can be a constituent body; it will cease to have the power of changing its constitution at its own will.

If we then consider the matter regarding the purported reference of powers such as the ***Commonwealth Powers (Industrial Relations) Act 1996*** you may just find that this act as like its predecessor the ***Commonwealth Powers (Children) Act 1986*** is constitutionally floored, both State and Federal constitutional levels.

One does not have to be **Einstein** to understand from reading either of the previous mentioned legislations that the Victorian Parliament provided for the Governor to Gazette when such legislation of reference of powers shall be terminated, if at all.

What this does explain to me is that the Governments at the time, and so their legal advisors never really understood what Section 51(xxxvii) was about and that such kind of purported reference of legislative powers is a nullity. As the Framers of the ***Constitution*** made clear, that once a State was to refer legislative powers to the Commonwealth and the Commonwealth had acted upon this then it would be beyond the States legislative powers to withdraw or amend the reference of legislative powers! As the put it;

Hansard *27-1-1898* Constitution Convention Debates

Mr. BARTON.-**If a state Parliament wants to shirk its responsibility it can fall back upon the referendum.**

[start page 223]

Mr. ISAACS.-With regard to the other point that a state may repeal a law, I do not agree with that argument. **If a state refers a matter to the Federal Parliament, after the Federal Parliament has exercised its power to deal with that matter the state ceases to be able to interfere in regard to it. Moreover, when the Commonwealth has passed a law at the request of any Parliament or Parliaments, and the Parliament of a third state adopts it, it adopts a Commonwealth law, and it requires the consent of the Commonwealth to get rid of that law. In my opinion, there is no power of repeal with the states, and I feel no doubt that I have read among the decisions of the United States, one which is to the effect, although I cannot just now lay my hands upon it, that when a state has, with the consent of**

Congress, made certain enactments the power of Congress is required to repeal those enactments.

And

Mr. OCONNOR.-A law once passed under this provision becomes a federal law.

Mr. ISAACS.-Yes, and nothing less than the federal authority can get rid of it.

And

Mr. BARTON (New South Wales).-What I understand my honorable friend (Mr. Holder) to ask is this: Suppose it were desired that extra-legislative power than now exists should be granted to the Commonwealth-as, for instance, to take under its control questions relating to Crown lands, and so on-whether an alteration in the Constitution in that direction would be *ultra vires*? Now, the Bill provides, in Chapter VIII., that the provisions of the Constitution shall not be altered except in the following manner;" which, to my mind, means that if the processes specified are adopted the provisions can be altered in any way. I take the provision to mean that authority is given to the Commonwealth under the processes here specified to alter this Constitution in any manner, so far as it deals with the affairs of Federated Australia, and not with affairs outside the dominion of Australia. Consequently, if it were proposed to add a legislative power of the kind suggested by Mr. Holder, **I take it that as Chapter VIII. provides first for the passage of the proposed law by an absolute majority, and then for a referendum, the law would have no effect unless the majorities of the several states agreed to it. So that not only the Commonwealth but the states would have to agree to the passage of the law.** Then any objection to that law becoming a new part of the Constitution of the Commonwealth would vanish; because, I think, so much authority is conceded by Chapter VIII.

And;

Mr. DEAKIN.-My point is that by the requests of different colonies at different times you may arrive at a position in which all the colonies have adopted a particular law, and it is necessary for the working of that law that certain fees, charges, or taxation should be imposed. That law now relates to the whole of the Union, because every state has come under it. As I read clause 52, the Federal Parliament will have no power, until the law has thus become absolutely federal, to impose taxation to provide the necessary revenue for carrying out that law. **Another difficulty of the sub-section is the question whether, even when a state has referred a matter to the federal authority, and federal legislation takes place on it, it has any-and if any, what-power of amending or repealing the law by which it referred the question? I should be inclined to think it had no such power, but the question has been raised, and should be settled. I should say that, having appealed to Caesar, it must be bound by the judgment of Caesar, and that it would not be possible for it afterwards to revoke its reference.**

What is very important are the wording;

Mr. BARTON.-**If a state Parliament wants to shirk its responsibility it can fall back upon the referendum.**

It relates to "**a state Parliament**" and "**referendum**", as such a referendum is needed to accept a State to have accepted it reference of Power.
Also;

I take it that as Chapter VIII. provides first for the passage of the proposed law by an absolute majority, and then for a referendum, the law would have no

effect unless the majorities of the several states agreed to it. So that not only the Commonwealth but the states would have to agree to the passage of the law.

It must be understood that the States had to pass in the first place referendums to accept the **Constitution Convention Bill 1898** which later, with amendments, became the ***Commonwealth of Australia constitution Act 1900***(UK).

A point is that Section 51(xxxvii) first of all is not the right vehicle, so to say, to be used for the reference of powers regarding Children's custody and **Industrial Relations** matters. Further, once power is referred then the States can never again amend this legislation or rescind it. More over, it is without constitutional validity if the reference of powers was not approved by the electors of the relevant State concerned. Even the purported ***Victorian Constitution Act 1975*** professes that the State has all legislative powers, and as such it would be in conflict to this constitutional provision if some Act like the ***Commonwealth Powers (Industrial Relations) Act 1996*** were to refer powers from the parliament which constitutionally is provided. As such the purported ***Victorian Constitution Act 1975*** first would have to have been amended to allow for such exclusion. Because Governments in powers follow their political doctrine, irrespective that they were not elected on a particular doctrine, it means that as Former premier Jeff Kennett proved to do he by backdoor manner sought to amend the purported ***Victorian Constitution 1975*** by removing legislative jurisdiction from the parliament guaranteed by the purported ***Victorian Constitution Act 1975***! One cannot claim that because a government is elected into office it can then destroy the rights of electors willy nilly without it having been put to the electors. The electors alone can approve of any reference of legislative powers, and a State referendum for this is required as much as it was required at the time the States were Colonies and pursued to have a **LIMITED** Federation.

I have also been advised that the WA Parliament in 2003 has done away with references to the "Crown". I am neither a Royalist or a Republican, merely that in my view this is an utter and sheer nonsense as the States have no such powers to declare themselves a REPUBLIC by backdoor manner by removing the references to "Crown".

My various books previously published have set this out extensively and more over my successful appeals (unchallenged) also raised this issue!

The **OFFICE OF THE GUARDIAN**, State and/or Federal are to be constituted to seek to avoid misconceptions and ill-conceived views. It is not intended in any way to interfere with the legal processes applicable. For example, it would be an advisory body to the government, the people, the Parliament and the Courts. If therefore Mr and Mrs Citizen have a constitutional issue he then can approach the **OFFICE OF THE GUARDIAN** and seek from them all relevant information regarding the issue. The **OFFICE OF THE GUARDIAN** provides the information to this person in the same identical manner, as it would do if a judge of a Court were to ask for it or for that manner any politician, without bias.

The **OFFICE OF THE GUARDIAN**, where it detects or has the view that something is drastically wrong about a constitutional issue, then in its own right could make an application before the Courts as to seek the matter to be adjudicated upon. It doesn't matter if Mr and Mrs Citizen themselves pursue the matter before the Courts, the **OFFICE OF THE GUARDIAN** does not take sides, it simply is the **GUARDIAN** of the **GENERAL COMMUNITY** to ensure that constitutional provisions, the powers and limitations are appropriately provided for. Where a Court makes a decision upon a constitutional matter then the **OFFICE OF THE GUARDIAN** reflects any such decision with any material held on that subject. As such, ultimately the Courts decide what is constitutional appropriate. The **OFFICE OF THE GUARDIAN** as such can advise but cannot make final determinations! However, where currently many a person refrains from pursuing legal options to obtain a Courts decision being because of the risk of considerable legal cost involved, or otherwise, the **OFFICE OF THE GUARDIAN** would not be troubled by

this. Hence, it could pursue matters to obtain an appropriate ruling from a Court. This is a issue that requires to be attended too as what those attending to legal studies and practicing law generally never understood was that if any person makes a constitutional based objection against a legislative provision then from that moment the legislative provision in question is and remains **ULTRA VIRES** unless and until the appropriate Courts declares it to be **INTRA VIRES**. Indeed, this was an UNCHALLENGED issue I succeeded also upon in my appeals. Meaning, that one Mr and Mrs Citizen have raised a constitutional based objection, regardless that they may never take the matter before the Courts, it means that from then on the relevant legislative provision is and remains **ULTRA VIRES**! This has been so far grossly overlooked by judges and others alike and likely never have been understood to be applicable as such. My various books have set this out extensively; such as my 6 July 2006 publication;

INSPECTOR-RIKATI® & What is the -Australian way of life- really?
A book on CD on Australians political, religious & other rights
ISBN 978-0-9751760-2-3 was ISBN 0-9751760-2-1 (Prior to 1-1-2007)

We had previously a Newly (Victorian) judge to the High Court of Australia refusing to hand down a judgment in a appeal case because the judge made clear he did not know about the issue. I understand this judge, prior to appointment only was involved in one Court case involving a constitutional issue! Now this is the kind of lawyers we appoint to the High Court of Australia, who I view lack the basic understanding of what the constitution is about.
We also have word slanging matches (as set out in my books) between High Court of Australia judges, where one argued contemporary views must be used to explain how constitutional powers apply and the other judge argue that one cannot apply contemporary views as it must be interpreted as to what the Framers of the constitution intended.

Lets have a look at the ***Commonwealth of Australia Constitution Act 1900*** (UK)

44 Disqualification

Any person who:

(i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or

(ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or

(iii) is an undischarged bankrupt or insolvent; or

(iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or

Again;

(iii) is an undischarged bankrupt or insolvent;

Taking a **contemporary view** we could argue that "bankrupt" can mean a person "morally bankrupt" not just "financially bankrupt" and that would in my view then disqualify many politicians currently in the Federal parliament. You see, you cannot apply contemporary views to the wording of the framers as then you could turn it into any kind of nonsense never contemplated to be within the powers of the Commonwealth of Australia or otherwise being applicable. The same with "**OFFICE OF PROFIT**" the High Court of Australia in ***Sykes v Cleary*** in its ill-conceived judgment rules as including a State OFFICE OF PROFIT. My books have meticulously set out how Section 44 was created and how it is applicable to only Commonwealth OFFICE OF PROFIT and not at all was intended to apply to a State OFFICE OF PROFIT.

WHAT WE SIMPLY HAVE THAT WE HAVE JUDGES ADJUDICATING UPON MATTERS OF WHICH THEY HAVE AT TIMES LITTLE OR NO PROPER PERCEPTION OF WHAT IT IS ABOUT. THEY LACK THE TIME TO RESEARCH MATTERS SUCH AS I MAY HAVE DONE AND THEN ENDING UP GIVING JUDGMENTS THAT FLIES IN THE FACE OF NOT JUST COMMON SENSE BUT ALSO TO THE INTENTIONS OF THE FRAMERS OF THE CONSTITUTION.

It should be understood that legislation beyond legislative power is no legislation at all. Hence the ***Commonwealth Powers (Industrial Relations) Act 1996*** is and remains **ULTRA VIRES** and without an **OFFICE OF THE GUARDIAN** to pursue a declaration by a competent court of jurisdiction this nonsense drags on.

Just consider the consequences if after years of having such legislation on the books finally someone determine enough maintains it is **ULTRA VIRES** and has been since I made my constitutional objection at the very least and succeed in the Courts upon that basis and perhaps sue the Victorian Government for its neglect to appropriately deal with this.

What if some person is convicted in regard of a hideous crime and then use one of my books to show to the Court that the Court lacked legal jurisdiction and because of it the conviction is NULL AND VOID and he walks out as a free man?

As I indicated in past correspondences, any Commonwealth property obtained with the consent of the State the Commonwealth of Australia became "sovereign" in right of that property and all State legislative provisions were by this extinguished. Hence, if the Commonwealth of Australia (such as Point Nepean) desires to sell the property it cannot do so to anyone but to the relevant State as to recreate State legislative powers. If the Commonwealth sells the property to private interest then it nevertheless remains to be a commonwealth "sovereign" entity and State laws are not applicable. Being it the former Army camp at Broadmeadows, now turned into an Industrial site, or other Commonwealth entities, they all remain to be outside the legislative powers of the State of Victoria unless being returned to the fold of the Victorian legislative powers by being handed back to the State of Victoria which then can sell it off to private interest if this is so desired by it (the State of Victoria).

Just imagine that some company has on its premises people killed in an accident and then are beyond the reach of Victorian laws to be prosecuted and no Commonwealth law was applicable to them either? Just imagine if all businesses that have purportedly purchased properties from the Commonwealth of Australia now decide to refuse to pay local rates, as it is unconstitutional! I have no doubt that they could do so legitimately. Businesses could create hotels lacking any proper provisions knowing that it would be an exclusion zone of law where it is a Commonwealth entity and was not formally sold back to the State of Victoria.

The Commonwealth of Australia has the constitutional powers to acquire properties for Commonwealth purposes but not to sell it off to businesses other then where it (the property) is part of territories and intended to remain as such. One cannot have that the Commonwealth could obtain any property in a state and then on property market speculate to sell it off.

As with the Toxic waste issue the SA Government had lost in Court I then recommended to the premier to appeal it upon the constitutional ground that the Commonwealth of Australia had no constitutional powers to acquire property for toxic waste and they succeeded in the appeal.

We have children born in the State of Victoria deported as "Stateless" because of the ULTRA VIRES provisions of the ***Migration Act*** and the purported ***Australian Citizenship Act 1948*** defining/declaring "citizenship". Again I succeeded in my appeal using the unchallenged constitutional grounds that anyone born within the Commonwealth of Australia is a British national as embedded in the ***Constitution*** and there is no constitutional power for either the State and/or the Commonwealth of Australia to declare otherwise, irrespective if the child's parents are legally or illegally in the Commonwealth of Australia.

Also, that the States are not part of the Commonwealth of Australia but rather that the Commonwealth of Australia is a LIMITED federation of the colonies (now States) as like the European Union exists. And, also unchallenged was my constitutional based argument that the European Human Rights Act is applicable within the Commonwealth of Australia and so in all States, as my already published books also canvassed extensively.

Yes, we need an **OFFICE OF THE GUARDIAN** as to try to get some clarity in these aforementioned and numerous other matters, and not that in time the Courts find that for so long it was done wrong and any person in the **GENERAL COMMUNITY** may have lost their job and perhaps with it their home and everything else, because a Government ignored my warnings to fix up the rot.

Every Member of Parliament could consult the **OFFICE OF THE GUARDIAN** as to what it has on record regarding certain constitutional issues and by this be able to make a more informed decision in voting upon certain Bills presented to the Parliament.

During the 1999 State election, as a candidate, I proposed to create the Office of a **Minister for Decentralization** and faxed to the then Premier Jeff Kennett a document about this called "**WORK CONTRACT**", the principle of that document also were given to Russel Savage, who was also then on the campaign trial at various places I was then. Jeff Kennett then himself suddenly adopted this Minister for Decentralization issue and Russel Savage then pursued the "**CHARTER**" which was basically on the principles of the "WORK CONTRACT". The problem however with others are that they can adopt some idea but lacking the incentive I have may fail to successfully use it.

While Victoria, and other States seem to have a shortage of doctors in country areas somehow the decentralization has not taken off to deal with this. For example, why not offer Students in country area's scholarships to become doctors provided they undertake that in return for the free studies they commit to practice at least, so to say, 10 years in the area they come from or other nominated place. Sure, one may not instanter resolve shortage of doctors, but give people the opportunity to have a free education to become a doctor and likely they will grab it with both hands, so to say. If then they can practice in their own local towns, amidst the people they know so well then one also overcome the settling in issue, etc.

In my view, the Commonwealth of Australia has no constitutional powers to create its own Technical school's, as it remains to be within State legislative powers.

There are numerous other constitutional issues that require to be attended to, such as in finances, where the Commonwealth of Australia cannot create its own future holdings as if it is some "sovereign" entity as after all, all moneys it collects belongs to the States apart of using moneys for constitutional matters it has legislative power provided for and expenses to run the Commonwealth of Australia.

With an **OFFICE OF THE GUARDIAN** these and numerous other matters could finally be addressed and many current problematic issues either known or simmering within the community, can be perhaps altogether avoided to ever become major issue or resolved all together.

It is my view that the **OFFICE OF THE GUARDIAN** ought to be a Department **beyond political interference** and as such should be under the responsibilities of the Governor of the State.

And, the cost of running the **OFFICE OF THE GUARDIAN** would be nothing towards the saving considering avoiding possible litigation, etc. The mere fact that none of the Governments legal advisors woke up, so to say, that reference of powers cannot be done willy nilly because some government dominated parliament concedes to passing Bills, regardless how unconstitutional it might be, underlines the need of an **OFFICE OF THE GUARDIAN** also.

Awaiting your response, **G. H. SCHOREL-HLAVKA**

END QUOTE 31-12-2006 CORRESPONDENCE

END QUOTE **Chapter 012 Reference of legislative powers**

.

QUOTE 1-4-2008 correspondence to Federal Education Minister and Deputy PM Julia Gillard

WITHOUT PREJUDICE

Federal Education Minister and Deputy PM Julia Gillard 1-4-2008
E-mail: Julia.Gillard.MP@aph.gov.au

Cc; **Mr. Phillip Campbell** - Principal
MELTON SECONDARY COLLEGE Coburns Road , **Melton** VIC 3337
Tel: (03) 9743 3322 **Fax:** (03) 9743 0432

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DR TIM HAWKES
The King's School. Christian boys school, PO Box 1 Parramatta NSW 2124 Australia
Telephone: +61 2 9683 8555 • Facsimile: +61 2 9683 8488 E-mail: tks@kings.edu.au

.

GARRY DE DUFF
INDEPENDENT SCHOOLS COUNCIL
12 Thesiger Court, Deakin ACT 2600 or PO Box 324, Deakin West ACT 2600
Phone: 02 6282 3488 Fax: 02 6285 2926 Email: isca@isca.edu.au

.

DR ANDREW DOWLING
AUSTRALIAN COUNCIL FOR EDUCATIONAL RESEARCH
Australian Council for Educational Research ABN: 19 004 398 145
19 Prospect Hill Rd, Camberwell, VIC, Australia 3124
T: +61 3 9277 5555 F: +61 3 9277 5500
ACER Press Customer Service 1800 338 402 (Toll Free)

.

Ref; **EDUCATION FUNDING – WHO TO ADDRESS IT.**

.

Madam,

Enclosed in this correspondence is Chapter 456 which extensively deals with **EDUCATION FUNDING** and the issue of public versus private and religious funding, etc. Due to extensive usage of legislative provisions, Charters, transcripts, Authorities (judgments of courts) relevant to **EDUCATIONAL FUNDING** issues this correspondence is comprehensive and lengthy but may by this I anticipate give guidance how to address current **EDUCATION FUNDING** dilemma's. Only the ignorant would not consider the details set out below and I anticipate that therefore those involved in determining **EDUCATION FUNDING** will take appropriate consideration as to what is set out below.

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QUOTE Chapter 456

Chapter 456 Education FUNDING- Private schools- Religion

.

* Gerrit, I am really confused as to if a religious school is a private school and if it then can be funded or not! What is your opinion?

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**INSPECTOR-RIKATI**®, in this Chapter I am going to set out why funding of students regardless of attending to a public, religious or private school should be equal when it comes to certain items, such as those listed in Schedule 2 of the ***Education Act 1958*** (Victoria). The set out below attends to both State and Federal funding, but to get some understanding about matters I will be quoting legislative provisions of both State, commonwealth and other jurisdictions , etc.

.

As shown below;
QUOTE

The Court of Appeals concurred in this finding.

In addition, the District Court found that the statutory deduction for "textbooks" included not only "secular textbooks" but also:

1. Cost of tennis shoes and sweatsuits for physical education.
2. Camera rental fees paid to the school for photography classes.
3. Ice skates rental fee paid to the school.
4. Rental fee paid to the school for calculators for mathematics classes.
5. Costs of home economics materials needed to meet minimum requirements.
6. Costs of special metal or wood needed to meet minimum requirements of shop classes.
7. Costs of supplies needed to meet minimum requirements of art classes.
8. Rental fees paid to the school for musical instruments.
9. Cost of pencils and special notebooks required for class.

END QUOTE

.

Yet, often voluntary school fees as a way of extortion upon parents to pay monies, even so some schools then use monies extorted from parents as so-called "**voluntary school fees**" towards funding of purchase rental accommodation which are then in turn rented out for profit. In my view **Principal Phil Campbell** ought to have been well aware that as principal of a P12 that then students were charged for the cost of material used (Costs of special metal or wood needed to meet minimum requirements of shop classes) or the student was denied having the final product made as the P12 (public education facility) would try to sell it instead. By this students coming from a low income family would generally be robbed of the right to have the article produced at school because the parent(s) could not afford paying for the article. Such a P12 rather then promoting understanding and friendship promoted in fact division, hatred, etc as a student proud to have accomplished to make some item during classes not having the monies to pay for the material then find someone else able to purchase his/her product! Likewise so the P12 basically blackmailing a parent that unless the "voluntary school fees are paid" the principal will not provide for the student to be provided "free school uniforms" for which the principle needed to do no more but to authorise it where as the "free school uniform" was on account of the state. As such, for these and numerous other issues in relation to the so called "voluntary school fees" I am a total opponent of this scheme and it should be abolished. I discovered that ground keepers cost were charged in a "voluntary school fees" unlawfully. Also "swimming pool fees" were charged in the "voluntary school fees" despite of the relevant student already having a yearly pre-paid swimming pool membership, as such this was a rip off! For example an incident occurred where the then Premier of the State of Victoria Jeff Kennett had provided a show at cost of the State for all students to attend to free of charge when the show was shown at the school. I then discovered that various students had been denied to attend on the basis that their parents had not paid the "voluntary school fees". As such, even so it was a fee show paid for by the State the school used it to blackmail parents that as long as they didn't pay the "voluntary school fees" their children would be discriminated against unlawfully. When I attend to the school having discovered the exclusion of various students wrongfully from the show, and made known that this was unlawful, the students then were allowed to attend albeit they had missed already a lot of the show as well as the school had made those students the subject of ridicule both by the teachers and fellow students.

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Unlike the USA Constitution we do have the Hansard records of the Constitution Convention Debates as to the intentions of the Framers of the Constitution and as such while we can use the USA decisions as a guide we must however ensure to place it in the appropriate context applicable in the Commonwealth of Australia. Because federal legislation must at all times recognise the maximum rights and entitlements applicable in any State, when it commences to legislate, at least as what was applicable at the time of Federation by Colonial legislation, we may then first consider the Victorian Colonial position and what the Framers of the Constitution stated as quoted below. However, it should be made clear that I do not accept that social

economical system could be applied in funding as the Commonwealth is bound to fund for the "whole of the Commonwealth" as I have already extensively canvassed in various published books, and as such no need to repeat the same. Because High Court of Australia judgments are I view totally unreliable, as they are taking matters out of context I prefer to rely upon the USA Authorities albeit one must consider them in the context of existing constitutional provisions both of the State and the Commonwealth. The State of Victoria provides for funding of State Schools but not of religious or private schools and the Federal Government then funds Religious and Private schools more the State schools, this abnormality must stop. I have quoted below certain legislation and other provisions at to set out what I am on about.

.

In my view the State has no legal justification to discriminate between contributing for a student at a State school for Schedule 2 items of the ***Education Act 1958*** and that for students attending religious or private schools.

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In my view the Commonwealth neither can differentiate between students who are attending State schools, Religious schools or Private schools..

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Basically both the State and the Commonwealth are obligated to provide funding for a student, regardless if the students attends to a public (state) school, a religious school or a private school.

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The State is bound to remain within what is provided for in the schedule 2 of the Education Act where as the commonwealth can fund additional matters provided, again, it is in an equal manner throughout the whole of the commonwealth for any student regardless if this student attends to a public school, a religious school or a private school. I see absolutely no justification why parents of students who are attending to a private or religious school should have to fund education items that are for free provided at State schools. They all are taxpayers and should have equal benefits in rights. The difference is that if a parent has a child attending to a public school then it is aware that the student will be educated in the manner applicable for State schools. If the parent desires a more expensive education for the child and/or a religious education associated with the item s listed in schedule 2 then they can pay the difference of cost in education.

I see absolutely no justification why parents who care very much for the kind of education their child is provided with as to their standards then somehow are being punished to having to pay all education cost merely for having a child attending to a private school or a religious school.

Again, the difference of cost surely is justified for them to pay but not the basic cost of items of schedule 2 of the Education Act that is provided for free to public school students.

In my view, any Commonwealth funding therefore should be based upon the State in which jurisdiction the school is based is provided with the same funding for the items listed in schedule 2 of the Education Act (in this case relating to Victoria albeit other States may have simular provisions) as any other religious or private or public education facility. By this, all education facilities being public, private or religious would have the same funding provided by both the state and/or the Commonwealth in equal manner.

Because States may have different items that are for free education, there must be a minimum list of items that applies to all States and Territories for this purpose.

It should be understood that the Education Act of Victoria does not deny religious teaching at a public school, provided it is on a voluntary basis that a student attends and that only religious organisation appointed representatives teaches particular religious education. As such, I see no justification why a student at a public school could have religious education and yet have items listed in schedule 2 of the Education Act paid for out of consolidated Revenue where as if the same student were to receive the same education at a religious school then somehow the student is not entitled to any funding from Consolidated Revenue. This nonsense should be stopped.

.

Many a parent works two or three jobs to try to provide their child with religious or private school education and are so forced to do so because of the abnormality in funding. I see absolutely no legal, moral or other justification to allow this to continue.

Therefore the States are bound to fund all items listed in schedule 2 of the ***Education Act*** regardless if the student attends to a public, private or religious education facility and the commonwealth upon this then provide equal funding for other items that may be provided throughout the whole of the Commonwealth!

.

Lets now attend to various provisions, keeping in mind that the Commonwealth of Australia Constitution Act 1900 (UK) is a British Act and as such considering the decision of *Aggregate Industries UK Ltd., R (on the application of) v English Nature and & Anor* [2002] EWHC 908 (Admin) (24th April, 2002) and Judgments - Mark (Respondent) v. Mark (Appellant), OPINIONS, OF THE LORDS OF APPEAL for judgment IN THE CAUSE, SESSION 2005-06 [2005] UKHL 42 on appeal from: [2003] EWCA Civ 168

It appears that the **The European Convention for the protection of Human Rights and Fundamental Freedoms** ("the ECHR") albeit not overriding constitutional law, is **complimentary** to British (constitution) law, as the ***Commonwealth of Australia Constitution Act 1900*** (UK) is. As such that also ought to be kept in mind when considering the following;

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Version No. 093

Education Act 1958

Act No. 6240/1958

Version incorporating amendments as at 5 April 2005

QUOTE

22.Instruction in State schools

(1) In every State school, not being a night school or other special school, four hours at least shall be set apart during each school day for the instruction of the pupils, and of such four hours two shall be before noon and shall be consecutive and two shall be after noon and shall be consecutive.

(2) Instruction in the learning areas specified in the Second Schedule shall be free for all pupils (other than overseas students) attending a State school.

.

23.Religious instruction

(1) Subject to this section religious instruction may be given in any State school but otherwise secular instruction alone shall be given in State schools.

(2) When religious instruction is given in any State school during the hours set apart for the instruction of the pupils—

(a) such religious instruction shall be given by persons who are accredited representatives of religious bodies and who are approved by the Minister for the purpose;

(b) such religious instruction shall be given on the basis of the normal class organization of the school except in any school where the Minister, having regard to the particular circumstances of such schools, or having regard to the preparation or conduct of a pageant, special event or celebration of a festival in a school or schools, authorizes some other basis to be observed;

(c) attendance for such religious instruction shall not be compulsory for any pupil whose parents desire that he be excused from attending.

(2A) The Minister may give an authorisation under sub-section (2) in respect of the preparation or conduct of a particular class of pageant, special event or celebration of a festival generally to all schools, to a class or classes of school or to a specific school.

(3) No teacher within the meaning of this Act shall give any instruction other than secular instruction in any State school building.

(4) Nothing in this section shall prevent any State school building from being used for any purpose on days other than school days or at hours on school days other than the hours set apart for the instruction of the pupils.

END QUOTE

.

QUOTE

SECOND SCHEDULE

The Arts

English

Health and Physical Education (including Sport)

Languages other than English

Mathematics

Science

Studies of Society and Environment

Technology.

END QUOTE

.

DEPARTMENT OF FOREIGN AFFAIRS AND TRADE

CANBERRA

Charter of the United Nations, as amended

(including Statute of the International Court of Justice)

(San Francisco, 26 June 1945)
Entry into force generally: 24 October 1945

Entry into force for Australia: 1 November 1945

ATS-CD 1945 No.1

.

QUOTE UN Charter 1945

Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;

b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

QUOTE UN Charter 1945

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Version No. 003

Charter of Human Rights and Responsibilities Act 2006

No. 43 of 2006

Version as at 1 January 2008

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QUOTE

Preamble

On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.

This Charter is founded on the following principles—

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;

END QUOTE

.And

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QUOTE

PART 1—PRELIMINARY

1 Purpose and citation

(1) This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act.

(2) The main purpose of this Charter is to protect and promote human rights by—

(a) setting out the human rights that Parliament specifically seeks to protect and promote; and

(b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and

(c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and

(d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and

(e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.

END QUOTE

.

And

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QUOTE

5 Human rights in this Charter in addition to other rights and freedoms

A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

6 Application

(1) Only persons have human rights. All persons have the human rights set out in Part 2.

Note

Corporations do not have human rights.

(2) This Charter applies to—

(a) the Parliament, to the extent that the Parliament has functions under Divisions 1 and 2 of Part 3; and

(b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3; and

(c) public authorities, to the extent that they have functions under Division 4 of Part 3.

(3) Subsection (2) does not take away from or limit—

(a) any other function conferred by this Charter on an entity specified in subsection (2); or

(b) any function conferred on any other entity by this Charter.

(4) This Charter binds the Crown in right of Victoria and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

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PART 2—HUMAN RIGHTS

7 Human rights—what they are and when they may be limited

(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

8 Recognition and equality before the law

(1) Every person has the right to recognition as a person before the law.

(2) Every person has the right to enjoy his or her human rights without discrimination.

(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

(4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

END QUOTE

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Purpose and intent of the Charter;

QUOTE

http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Human+Rights/Human+Rights+Charter/JUSTICE+-+How+does+the+Charter+work+-+Human+Right+Charter

How Does the Charter Work?

A focus on prevention

The charter aims to improve service delivery and ensure transparent decision making by promoting a human rights culture in Victoria. The model of human rights protection aims to prevent human rights transgressions by requiring human rights to be at the fore of government decision making.

The charter requires all public authorities to act compatibly with human rights. The charter defines public authority and makes it clear that it includes a wide range of organisations providing services of a public nature. This could include private sector organisations carrying out public functions on behalf of government. The Victorian Public Sector Code of Conduct and the *Public Administration Act 2004* also require the public sector to respect human rights.

There is no additional right to legal action for a breach of the charter. The focus of the charter is about getting things right at a planning and policy stage - anticipating and preventing human rights infringements. However, a person may raise a human rights argument in the context of an existing matter before a court or tribunal and the Victorian Ombudsman may investigate whether administrative action is incompatible with a human right.

The charter supports the democratic process

The charter embraces a 'dialogue model'. The different parts of government – the courts, the Parliament and the executive – have specific roles and are in a dialogue to ensure human rights standards are met. The Victorian Parliament has the ultimate say in this dialogue as our democratically elected representatives.

Parliament considers human rights issues for all proposed new laws and regulations. A Statement of Compatibility is prepared for all proposed laws and a Human Rights Certificate is prepared for all proposed regulations. These state whether human rights are impacted and, if limited, explain whether and how a limitation is justified.

The charter requires that all statutory provisions (for example, laws and regulations) be interpreted, as far as possible, in a way that is compatible with human rights. If laws or regulations can be understood in a number of ways, the interpretation that considers human rights is preferred.

Where the court cannot interpret a law consistently with the charter, the Supreme Court may make a Declaration of Inconsistent Interpretation and Parliament will then decide whether to change the law. Unlike the United States' Bill of Rights, the charter does not allow courts to strike down laws as unconstitutional.

Roles of the arms of government

Executive

- Human rights standards are built into policy, legislation and practices
- Human rights impact assessments are provided to Cabinet
- Human rights Statements of Compatibility are provided to Parliament
- The responsible minister must respond in Parliament to declarations made by the Supreme Court.

Courts

- Where possible courts are required to interpret law to be compatible with the charter
- The Supreme Court can make declarations that are sent to Parliament if a law is not consistent with the charter.

Parliament

- Parliament passes laws after human rights scrutiny
- In exceptional circumstances Parliament can override the charter in passing legislation
- Parliament responds to declarations made by the Supreme Court
- Parliament has the final say on all laws.

Contacts

Human Rights Unit
Tel: 03 8684 0859
END QUOTE
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Therefore the Supreme Court of Victoria has the powers to declare that State education funding should be applied for all students regardless of attending a State school, a religious school or a private school provided the funding is used for the sole purpose of funding schedule 2 of the Education Act items.
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QUOTE Hansard Victorian Parliament

13 June 2006 ASSEMBLY

Title	**CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES BILL**
House	**ASSEMBLY**
Activity	**Second Reading**
Members	**McINTOSH**
Date	**13 June 2006**
Page	**1977**

Page 1977

CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES BILL
Second reading

Debate resumed from 4 May; motion of Mr HULLS (Attorney-General).

Government amendments circulated by Mr HULLS (Attorney-General) pursuant to standing orders.

Mr McINTOSH (Kew) -- The Charter of Human Rights and Responsibilities Bill has been in this place for some three weeks, and in that short time it is very interesting to note that, while we have heard from a number of advocates in relation to a charter or bill of rights in Victoria, a large number of people have also expressed to me, either personally or in writing, their profound concern about the introduction of a bill or charter of rights in Victoria.

Page 1977

I will start by giving a broad overview from the opposition's point of view of what we see as being the salient features of this bill.

The bill purports to specify those rights that the Parliament is seeking to protect. It is a matter of profound concern that already in the introduction to the there seems to be a notion of inconsistency arising in some of its passages. While we are seeking to protect some rights specifically nominated in the bill, there is a broad overview that says, 'That does not diminish your rights in relation to any other rights that you may have'.

Most importantly, given the fact that this charter will operate, in effect, as fundamental law, the outline of the specific rights we in the Parliament want to protect is a matter of concern. The bill purports to introduce what is very much a Labor abridged version of the **International Covenant on Civil and Political Rights**.

END QUOTE Hansard Victorian Parliament

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QUOTE

463 U.S. 388

Mueller v. Allen

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-195 Argued: April 18, 1983 --- Decided: June 29, 1983

A Minnesota statute (§ 290.09, subd. 22) allows state taxpayers, in computing their state income tax, to deduct expenses incurred in providing "tuition, textbooks and transportation" for their children attending an elementary or secondary school. Petitioner Minnesota taxpayers brought suit in Federal District Court against respondent Minnesota Commissioner of Revenue and respondent parents who had taken the tax deduction for expenses incurred in sending their children to parochial schools, claiming that § 290.09, subd. 22, violates the Establishment Clause of the **First Amendment** by providing financial assistance to sectarian institutions. The District Court granted summary judgment for respondents, holding that the statute is neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion. The Court of Appeals affirmed.

Held: Section 290.09, subd. 22, does not violate the Establishment Clause, but satisfies all elements of the "three-part" test laid down in *Lemon v. Kurtzman*, **403 U.S. 602**, that must be met for such a statute to be upheld under the Clause. Pp. 392-403.

(a) The tax deduction in question has the secular purpose of ensuring that the State's citizenry is well educated, as well as of assuring the continued financial health of private schools, both sectarian and nonsectarian. Pp. 394-395.

END QUOTE

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Hansard *2-3-1898* Constitution Convention Debates

QUOTE

Mr. BARTON.-But inasmuch as we have given to the Commonwealth the power of regulating the entry of that class of persons, and the power of regulating them when they have entered, is it not desirable that in that process there shall be left to the Commonwealth power of repressing any such practices in the name of religion as I have indicated? If it be necessary that there should be some regulative power left to the Commonwealth, then the argument that we should leave the matter to the states does not apply, because we give such a power to the Commonwealth.

Mr. HIGGINS.-Then all crimes should be left to the Commonwealth?

Mr. BARTON.-**No; because you do not give any power with regard to punishing crime to the Commonwealth**, but you do give power to the Commonwealth to make special laws as to alien races; and the moment you do that the power of making such laws does not remain in the hands of the states; and if you place in the hands of the Commonwealth the power to prevent such practices as I have described you should not defeat that regulative power of the Commonwealth**. I do not think that that applies at all, however, to any power of regulating the lives and proceedings of citizens, because we do not give any such power to the Commonwealth, whilst we do give the Commonwealth power with regard to alien races; and having given that power, we should take care not to take away an incident of it which it may be necessary for the Commonwealth to use by way of regulation.** I have had great hesitation about this matter, but I think I shall be prevented from voting for the first part; and as to establishing any religion, that is so absolutely out of the question, so entirely not to be expected-

Mr. SYMON.-It is part of the unwritten law of the Constitution that a religion shall not be established.

Mr. BARTON.-It is so foreign to the whole idea of the Constitution that we have no right to expect it; and, as my honorable and learned friend (Mr. Symon) suggests by his interruption, I do not think, whatever may be the result of any American case, that any such case can be stretched for a moment in such a way as to give Congress power of passing any law to establish any religion. I do not suppose that there is a man in Congress who would suggest it; and I have no doubt that the same court that decided that the community was a Christian community would say that the United States Congress had no power to establish any religion. The only part of the matter upon which I have had the least doubt (having become more confirmed in my opinion since I have considered the matter further) is the latter part of the proposal, which is that no religious test shall be required for any place of public trust in the Commonwealth. I do not think that any such test would be required, and the only question is whether it is possible. I have come to the conclusion that it is not possible. Therefore, my disposition is to vote against the whole clause.

Mr. REID.-**I suppose that money could not be paid to any church under this Constitution?**

Mr. BARTON.-**No; you have only two powers of spending money, and a church could not receive the funds of the Commonwealth under either of them.**

END QUOTE

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The question therefore is if the Commonwealth cannot provide funding for a Church "directly" can it so do "indirectly" by tax concessions, etc., this I view it cannot do.

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HANSARD *8-2-1898* **Constitution Convention Debates**

Mr. HIGGINS.-I did not say that it took place under this clause, and the honorable member is quite right in saying that it took place under the next clause; **but I am trying to point out that laws would be valid if they had one motive, while they would be invalid if they had another motive.**

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Quick & Garran's "***Annotated Constitution of the Commonwealth of Australia***" more accurately and more meaningfully says that;

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"A law in excess of the authority conferred by the Constitution is no law; it is wholly void and inoperative; it confers no rights, it imposes no duties; it affords no protection.".

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The following applies as much to Federal laws of the Commonwealth of Australia as it does to federal laws in the USA; http://familyguardian.tax-tactics.com/Subjects/LawAndGovt/ChallJurisdiction/AuthoritiesArticle/AuthOnJurisdiction.htm

> 37 Am Jur 2d at section 8 states, in part: "Fraud vitiates every transaction and all contracts. Indeed, the principle is often stated, in broad and sweeping language, that fraud destroys the validity of everything into which it enters, and that it vitiates the most solemn contracts, documents, **and even judgments**."

And

> The general misconception is that any statute passed by legislators bearing the appearance of law constitutes the law of the land. The U.S. Constitution is the supreme law of the land, and any statute, to be valid, must be in agreement. It is impossible for both the Constitution and a law violating it to be valid; one must prevail. This is succinctly stated as follows:
>
> > The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it. An unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.
> >
> > Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. . .
>
> A void act cannot be legally consistent with a valid one. An unconstitutional law cannot operate to supersede any existing valid law. Indeed, insofar as a statute runs counter to the fundamental law of the land, it is superseded thereby.
>
> **No one is bound to obey an unconstitutional law and no courts are bound to enforce it.**

Sixteenth American Jurisprudence
Second Edition, 1998 version, Section 203 (formerly Section 256)

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Hansard *1-3-1898* Constitution Convention Debates

Mr. GORDON.-

Once a law is passed anybody can say that it is being improperly administered, and it leaves open the whole judicial power once the question of *ultra vires* is raised.

.

Again;

and it leaves open the whole judicial power once the question of *ultra vires* is raised

.

Hansard *1-3-1898* Constitution Convention Debates

Mr. SYMON.-**It is not a law if it is *ultra vires.***

.

HANSARD *1-3-1898* Constitution Convention Debates

Mr. GORDON.-

The court may say-"**It is a good law, but as it technically infringes on the Constitution we will have to wipe it out.**"

And

Mr. BARTON.-

The position with regard to this Constitution is that it has no legislative power, except that which is actually given to it in express terms or which is necessary or incidental to a power given.

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HANSARD *17-3-1898* Constitution Convention Debates

Mr. DEAKIN.-

In this Constitution, although much is written much remains unwritten,

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As a “constitutionalist” I pursue what is constitutionally applicable.

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QUOTE

Last Updated: 21 September 2001

FEDERAL COURT OF AUSTRALIA

Ruddock v Vadarlis [2001] FCA 1329

THE HONOURABLE PHILIP RUDDOCK MP, MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS, THE COMMONWEALTH OF AUSTRALIA AND WILLIAM JOHN FARMER v ERIC VADARLIS, HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION AND AMNESTY INTERNATIONAL LIMITED

V 1007 OF 21001

In *Laker Airways Ltd* ***v*** *Department of Trade* [1977] 1 QB 643, the House of Lords held that there was no residual prerogative right to withdraw the designation of an airline, Skytrain, under an international airline treaty between England and the United States (the Bermuda Agreement), where the airline had been duly licensed under a domestic statute regulating civil aviation. On the question of construing the scope of the domestic statute, Roskill LJ said (at 722):

> *"I do not think that the Attorney-General's argument that the prerogative power and the power under municipal law can march side by side, each operating in its own field, is right. The two powers are inextricably interwoven. Where a right to fly is granted by the Authority under the statute by the grant of an air transport licence which has not been lawfully revoked and cannot be lawfully revoked in the manner thus far contemplated by the Secretary of State, I do not see why we should hold that Parliament in 1971 must be taken to have intended that a prerogative power to achieve what is in effect the same result as lawful revocation would achieve, should have survived the passing of the statute unfettered so as to enable the Crown to achieve by what I have called the back door that which cannot lawfully be achieve by entry through the front. I think Parliament must be taken to have intended to fetter the prerogative of the Crown in this relevant respect."*
>
> Lord Denning MR said (at 706-707):
>
> *"Seeing then that ... statutory means were available for stopping Skytrain if there was a proper case for it, the question is whether the Secretary of State can stop it by other means. Can he do it by withdrawing the designation? Can he do*

indirectly what he cannot do directly? Can he displace the statute by invoking a prerogative? If he could do this, it would mean that, by a side wind, Laker Airways Ltd would be deprived of the protection which the statute affords them ... [T]he Secretary of State was mistaken in thinking that he could do it."

See also Lawton LJ (at 728) and Mocatta J at first instance (at 678) to the same effect.

END QUOTE

.

Lets now consider what Wilson J stated in ***ATTORNEY-GENERAL (VICT.); EX REL. BLACK v. THE COMMONWEALTH [1981] HCA 2; (1981) 146 CLR 559 (2 February 1981)***;

.

QUOTE

While on present authority it is not permissible to seek the meaning of s. 116 in the convention debates.

END QUOTE

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The "**present authority**" was the unconstitutional decision in 1904 when the High Court of Australia held that the Hansard records of the Constitution Convention Debates could not be used to explain the true meaning of the Constitution and the principles embedded in it , this even so the framers of the Constitution had made clear that the Constitution was to be interpreted as to what they had been recorded in the Hansard having stated during the debates!
As such, Wilson J was in my view deceptive. This I did set out in greater details below in the part quoted of my 11-7-2004 correspondence.

.

The following was part of the **ADDRESS TO THE COURT** 19-7-2006 when the Court upheld the appeals without any reservation!

.

QUOTE Chapter 12 "**INSPECTOR-RIKATI® & How lawfully to avoid voting-CD**"
I take the position that Subsection 245(14) of the ***Constitution*** is not and cannot be regarded to limit the right of a objection to be only a (theistic belief) "religious objection" but includes also any secular belief objection.

.

If Subsection 245(14) was limited to being "theistic belief" then it would be **unconstitutional**.

.

QUOTE 4-6-2006 CORRESPONDENCE FAXED 10.36 pm 4-6-2006

WITHOUT PREJUDICE

Commonwealth Director of Public Prosecutions 4-6-2006
C/o **Judy McGillivray**, lawyer
Melbourne Office, 22nd Floor, 2000 Queen Street, Melbourne VIC 3000
GPO Box 21 A, Melbourne Vic 3001
Tel 03 9605 4333, Fax 03 9670 4295 ref; 02101199, etc
T01567737 & **Q01897630**

AND WHOM IT MAY CONCERN

Re; "**religious objection**" (Subsection 245(14) of the ***Commonwealth Electoral Act 1918***) offend Section 116 if the ***Constitution*** if it excludes **secular belief** based objections.

.

Madam,

As you are aware I continue to refer to my religious objection albeit do wish to indicate that while using the "**religious objection**" referred to in subsection 245(14) of the Commonwealth Electoral Act 1918 I do not consider that this subsection 14 limits an objection

only to an "theistic belief" based "**religious objection**" but in fact it also includes any secular belief based "**religious objection**", as it must be neutral to whatever a person uses as grounds for an "**objection**". This, as Section 116 of the ***Constitution*** prohibit the Commonwealth of Australia to limit the scope of subsection 245(14) to only "**theistic belief**" based "**religious objections**". Therefore, any person having a purely moral, ethical, or philosophical source of "**religious objection**" have a valid objection.

Neither do I accept that a person making an "**religious objection**" requires to state his/her religion, and neither which part of his/her religion provides for a "**religious objection**" as the mere claim itself is sufficient to constitute what is referred to in subsection 245(14) as being a "religious objection". Therefore, the wording "**religious objection**" is to be taken as "**objection**" without the word "**religion**" having any special meaning in that regard.

If you do not accept this as such, then there is clearly another constitutional issue on foot!

I request you to respond as soon as possible and set out your position in this regard.

.

Awaiting your response, **G. H. SCHOREL-HLAVKA**

END QUOTE 4-6-2006 CORRESPONDENCE FAXED 10.36 pm 4-6-2006

END QUOTE Chapter 12 "**INSPECTOR-RIKATI® & How lawfully to avoid voting-CD**"

.

This correspondence was dated 4-6-2006 being a few weeks prior to the 19 July 2006 County Court of Victoria decision, which upheld my appeals on all and every constitutional and other legal issue I had raised, including religious issues, then it is beyond question that this is applicable.

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As such, religious objection must include theistic beliefs (

.

But first let consider the Colonial legislation of 1871 as applicable at the time of federation;

.

QUOTE **State Aid to Religion Abolition Act 1871**

Version No. 001

State Aid to Religion Abolition Act 1871

Act No. 391/1871

Version as at 3 March 2003

TABLE OF PROVISIONS

Section *Page*

.

Version No. 001

State Aid to Religion Abolition Act 1871

Act No. 391/1871

Version as at 3 March 2003

An Act to provide for the Abolition of State Aid to Religion.

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled, and by the authority of the same, as follows:

1. Repeal of section 53 of the Constitution Act

From and after the thirty-first day of December One thousand eight hundred and seventy-five no moneys shall be set apart for the advancement of the Christian religion in Victoria under the provisions of the Fifty-third Section and for public worship under the Eighth Part of Schedule D of the "Constitution Act", and as from that day such provisions shall be and the same are hereby repealed.

2. Definitions

In the construction and for the purposes of this Act the following terms shall if not inconsistent with the context or subject matter have the respective meanings hereby assigned to them, that is to say—

"the Governor" shall mean the person administering the government acting by and with the advice of the Executive Council;

"the Minister" shall mean the responsible Minister of the Crown administering this Act;

"denomination" shall mean any church religious body sect or congregation or the members of any church formed into or acting as a body of persons for religious purposes of what kind of faith or form of belief soever;

"head or authorised representative" shall mean the person accepted as such for the time being by the Governor;

"trustee" shall mean any person holding that office for the time being, whether named as such in the Crown grant or approved of or appointed as such by the Governor, although no legal estate may be vested in such person.

3. Denominations may dispose of trust lands granted by the Crown and apply proceeds to denominational purposes

All lands which at the time of the passing of this Act have been granted by the Crown without receiving any purchase money or promised or reserved by the Crown or by the Governor permanently or temporarily for church purposes or church and school purposes or dwelling-houses for the ministers of any denomination may, subject to the provisions hereinafter contained, be disposed of by the denomination to or for the benefit of which such lands may have been granted promised or reserved, and the proceeds of disposition applied for the purposes of such denomination in such manner as the denomination may deem most beneficial.

4. Application for power to dispose of such lands to be made by head or authorised representative of denomination

Every application for leave to dispose of any such land shall be made in the form in the First Schedule hereto by the head or authorised representative of the denomination, with the consent of the trustees of any such land resident in Victoria, or of the majority thereof, and of the person or persons, if any, entitled to minister in or occupy any building upon the land.

5. Notice of application to be given by advertisement and by notice to non-consenting trustees

Such application shall be lodged at the office of the Minister, and within one month from the time of lodging the same the applicant shall give notice thereof by advertising the same at length once in the Government Gazette and once in some newspaper circulating in the neighbourhood of the land and by serving a copy of the application upon any trustee of the land resident in Victoria who shall not have consented to such application.

6. Objections to application may be lodged

Within one month from the publication of the last advertisement any person may lodge objections to the allowance of the application at the office of the Minister, and a copy of every objection so lodged shall be forwarded by the Minister to the applicant.

7. Application to be allowed if no objection lodged

If notice of the application shall have been duly given as aforesaid, and if no objection shall have been lodged within one month from the last advertisement, and if the land described in the application shall have been granted promised or reserved as aforesaid, the Governor shall allow the application; and if any objection shall have been lodged as aforesaid the Governor may allow or reject the application, or with the consent of the applicant modify the trusts thereby proposed, and if deemed expedient for the purpose of dealing with any such objection may refer the same for the inquiry and report of any person or persons to be appointed by the Governor in that behalf; and every such allowance shall be signed by the Governor and shall be in the form in the Second Schedule hereto.

8. Publication of allowance of application to be conclusive evidence that Act has been complied with and trustees named are entitled upon trusts allowed

Upon the allowance of any application, the allowance thereof, as signed by the Governor, shall be published in the Government Gazette, and such publication shall be conclusive evidence that all the provisions of this Act in respect of the application have been complied with and that the trustees named in the statement of trusts are entitled to the land therein described in fee-simple upon the trusts thereof discharged of all trusts and limitations as to the use thereof theretofore affecting the same, anything contained in the seventh section of the **"Land Act 1869"** to the contrary notwithstanding, and upon the application of such persons the Registrar of Titles under the "Transfer of Land Statute" shall register such persons as joint proprietors in fee of the said land with no survivorship.

9. Certificate of title to issue to new trustees as proprietors under "Transfer of Land Statute" and Gazette to be deposited as document declaring trusts

The certificate of title to be issued as aforesaid shall be in the same form and of the same effect as any other certificate of title issued under the provisions of the "Transfer of Land Statute" as to the title of the proprietors, the immunity of persons dealing with them, and in every other respect; and at the time of applying under this Act for a certificate of title a copy of the Government Gazette containing the allowance shall be deposited with and retained by the Registrar of Titles, under the provisions of Section thirty-eight of the said Statute, as the document declaring the trusts of the land as to which the certificate issues.

10. Governor may frame regulations

The Governor may from time to time frame alter and revoke regulations providing for the manner in which applications under this Act, or objections thereto, shall be lodged or dealt with, or for altering the forms in the Schedules to this Act, so far as consistent therewith, and for the execution of all orders matters or things arising under and consistent with this Act and not herein expressly provided for, and such regulations when published in the Government Gazette, and purporting to be signed by the Minister, shall have the force of law.

11. No reservation to be made of Crown lands for places of public worship or dwelling-houses for ministers of any religious denomination after 1st day of July 1870

So much of section six of the **"Land Act 1869"** as relates to reservations of Crown lands for places of public worship and dwelling-houses for the ministers of any religious denomination shall be and the same is hereby repealed as from the first day of July One thousand eight hundred and seventy, save as to any reservation or application for reservation which may have been made thereunder before the said date.

12. Promise or reservation of land not to be affected until application allowed

Nothing hereinbefore contained shall be deemed to affect any promise or reservation of land in the third section mentioned, unless and until an application under this Act shall be made in respect thereof, and subject to the allowance of any such application every such promise or reservation shall be given effect to as if this Act had not passed.

SCHEDULE

Section 4.

THE FIRST SCHEDULE

I head or authorised representative of the denomination known as with the consent of [*names of consenting trustees*] trustees of the land described in the subjoined statement of trusts and of [*name and address of persons so entitled if any*] being the person or persons entitled to minister in or occupy a building or buildings upon the said land, hereby apply to the Governor of the Colony of Victoria for leave to dispose of the said land by the means and for the purposes mentioned in the said statement of trusts. And I hereby certify that the said land was [*state the particulars of the grant promise or reservation of the land*] granted by the Crown on the day of or promised or reserved by on the day of for the purpose of [*state in full the purposes for which the land was expressed to have been granted promised or reserved*]: That the only trustees of the said land resident in the Colony of Victoria are [*state names and addresses of all resident trustees*] of of of

That the only buildings upon the said land are [*state generally the nature of all buildings on the land, or if none, state that there are none*] and that the only persons entitled to minister in or occupy the same are the abovenamed [*if there are no such persons state the fact and omit preceding reference to the consent of such persons*].

Signature of head or authorised representative—

We consent to this application.

Signature of trustees—

Signatures of persons entitled to minister in or occupy building or buildings—

STATEMENT OF TRUSTS

Description of Land	*Names of trustees*	*Powers of Disposition*	*Purposes to which proceeds of Disposition are to be applied*
Describe land fully by metes and bounds.	Give names, residences, and occupations of proposed trustees.	State the powers which it is proposed to vest in trustees, such as "power to sell, exchange, mortgage, or lease," and if any of such powers are to be limited, state the nature of the limitation.	State distinctly the purposes to which it is intended to apply the moneys arising from the disposition to be authorised, or to which any land taken in exchange is to be applied.

Section 7.

THE SECOND SCHEDULE

A statement of trusts having been submitted by the head or authorised representative of the denomination of under the provisions of the "*Act to provide for the abolition of State Aid to Religion*" for allowance by the Governor, the same was allowed by him on the day of 18 , and the following is the form in which such statement of trusts has been allowed [*set out statement of trusts in full from the application, subject to any modification which may have been made therein*].

As witness the hand of the Governor of the Colony of Victoria
the day of

Governor of the Colony of Victoria.

ENDNOTES

1. **General Information**

The **State Aid to Religion Abolition Act 1871** was assented to on 6 January 1871 and came into operation on 6 January 1871.

2. **Table of Amendments**

There are no amendments made to the **State Aid to Religion Abolition Act 1871** by Acts and subordinate instruments.

3. **Explanatory Details**

No entries at date of publication.

END QUOTE **State Aid to Religion Abolition Act 1871**

.

Again;

2. Definitions

In the construction and for the purposes of this Act the following terms shall if not inconsistent with the context or subject matter have the respective meanings hereby assigned to them, that is to say—

"denomination" shall mean any church religious body sect or congregation or the members of any church formed into or acting as a body of persons for religious purposes of what kind of faith or form of belief soever;

.

The word "**church**" is twice stated in it but not in regard of "**congregation**" and so any kind of "congregation" could be deemed applicable. It also states "formed into or acting as a body of persons for religious **purposes of what kind of faith or form of belief soever**". As such a religious body is any kind of religious body not just those accepted by registration by the State. Perhaps *Church of the New Faith v Commissioner of Pay-Roll Tax (vic) 1983 154 CLR 120* may indicate this to have been so. However, the non-payment of pay roll tax in my view is a different issue altogether. The purpose of the "**State Aid to Religion Abolition Act 1871**" was clearly not to provide further financial benefits to a religious organisation. Therefore the exclusion of pay roll tax would achieve the opposite then what was intended with this colonial legislation.

.

Again;

1.Repeal of section 53 of the Constitution Act

From and after the thirty-first day of December One thousand eight hundred and seventy-five no moneys shall be set apart for the advancement of the Christian religion in Victoria under the provisions of the Fifty-third Section and for public worship under the Eighth Part of Schedule D of the "Constitution Act", and as from that day such provisions shall be and the same are hereby repealed.

.

Tax exemptions are to be seen the same as "setting moneys apart" as when tax exemption is applied it means other taxpayers are to pay more as to make up for the shortfall. Therefore, tax exemption, which are De Facto Appropriation of Consolidated Revenue must be deemed unconstitutional/unlawful. At least in the State of Victoria.

.

It also must be understood that prior to Federation the Colonial Government had the powers to amend its own constitution, however, this did not continue once the Colonial Sovereign Parliament became a State constitutional Parliament upon federation.

.

Hansard *10-3-1891* Constitution Convention Debates

.

QUOTE:-

No parliament under a federation can be a constituent body; it will cease to have the power of changing its constitution at its own will.

END QUOTE

.

"Subject to this constitution" means it must be interpreted to the intentions of the Framers of the ***Constitution*** allowing for amendments made with approval by referendums.

With other words, the NSW Colonial Constitution Act effectively became amended by the ***Commonwealth of Australia Act 1900*** (UK) by legislatives powers belonging to all Colonies being invested in the Federation (Commonwealth of Australia) which were specifically listed in the Commonwealth of Australia Constitution Act 1900 (UK).

By colonial referendums this was approved by all Colonies electors.

Therefore, since Federation no State Parliament could amend its own State Constitution as it no longer was a "sovereign Parliaments" but a "constitutional Parliament", as like the Federal Parliament. This means that the State Parliament (as like the Federal Parliament) can only propose to the State electors to amend the State constitution and then the State electors must decide to approve or to VETO this proposed amendments(s).

.

Hence, ask which State Parliament since Federation actually pursued this way to amend its State constitution?

.

You may find that NSW amended its State Constitution in 1902 but was it with the required approval of the State electors by State referendum?

You find that the State of Victoria purportedly amended its State Constitution without a State referendum in 1975, etc.

Likewise so in regard of any other subsequent purported State Constitution amendments!

.

Therefore, for all purposes and intent the State of Victoria cannot provide any financial benefits to a religious body and neither so can provide for the Commonwealth to do so.

.

* What I gather from this so far is that all and any “religious funding by both the state of Victoria and /or the Commonwealth is unconstitutional? Is that it?

.

Correct.

.

* As such no funding for religious school?

.

Not exactly.

.

* But they are religious, aren’t they?

.

Religious schools are private schools but not all private schools are religious schools. For example a table is a piece of furniture but not every piece of furniture is a table, as it can be a chair, etc.

.

* I get that. So what is the difference?

.

The State is to provide “free education” and as such it doesn’t matter if the education of “X” amount is paid to a public school or a private (including religious) schools because the payment must relate to the principle education of the student of non-religious context.

.

* So, what I understand from this is that if all schools, regardless being public, private, or religious private teaches the core subjects for all school s to be the same then they all are entitled to funding in the same and equal manner. Is that it?

.

Basically, this is funding the core issues of the student across the board of any school. Therefore "free education" must relate to what is and can be provided for free at a public school should likewise be provided for free at a private school regardless if it has a religious doctrine or not.

As such, the same level of funding must be provided. Now, if a private school prefers to have their own Olympic swimming pool installed rather then using the Council baths (pool) then the extra expenses must come from other sources.

.

* You mean to say, that the rich kids still get the same funding?

.

I do not perceive that all children attending to private schools (religious or not) are all "rich kids". Some parents simply view their child may get a better education, albeit many millionaires and other achievers have based their success on public school education!

.

* Do I have it right then that what you mean is that every dollar spend on education for a student at a public school should likewise be paid to a private school regardless if they are religious or not?

.

Not exactly.

.

* Gosh, you really have a habit of confusing me, don't you?

.

It is to be paid to any school but under the condition that the monies are not used for alternative purposes such as religion.

.

* Now I get you. You are saying that the religious school cannot use the monies paid to it to fund the salary of a religious teacher or religious books, am I right?

.

That is correct. In that way, it is not spend on religious education as there is a separation of religious versus non-religious expenditure.

.

* What about a religious school by getting the moneys to fund ordinary books, etc, then being able to save moneys it used to spend on this and then redirect this for religious funding. Is not that still to the benefit of religious education?

.

Not at all. As long as the moneys are used strictly for non-religious purposes there is no issue.

.

* What about school busses to a religious school?

.

If the school bus is engaged for taking children to the school for non-religious purposes, say for match and English, then any additional religious activities are not an issue. The principle transport is then for non-religious activities. If however the children are collected for a religious exercise only then it cannot be funded with State and/or federal funding.

.

* What about public schools using funding for religious education?

.

This is a tricky one. If it is for a public school to educate students as to the different kind of religions that exist and not to specifically educate students in a particular religion then I view the funding is constitutionally permissible. However, if a public school is to fund a religious exercise, such as attending to a particular denomination but not to educate in regard of other denominations then it can be deemed religious education and cannot be funded by public money.

.

* What about celebrating Christmas, Easter, etc, in public schools?

.

This is also very tricky. The school cannot use public money to fund such a celebration but nothing is there to prevent a State school to allow for celebrations of religious events. The abolition was about abolition of funding, directly and/or indirectly and not about public school being prevented to celebrate religious events, being them Christian, Buddist, Islamic or other kind of religious festivities, as a school may seek to provide a religious education to all religions as part of the school program, and not as part of a specific religion.

.

* You mean that as long as it is not bias towards any form of religion or non-religion then it is all rights?

.

Then it can be accepted as an ordinary public education. What we have is that the constitutional rights (Victoria) of free education of students must be considered in addition to avoiding funding for religious education and Section 116 of the (federal) Constitution to which the Commonwealth is bound. Hence "***Lemon v. Kurtzman***" is set in a different scenario in the USA but still the line of argument may be observed, then followed by "***Mueller v. Allen***". But first consider ***Everson v. Board of Education***-1947.

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QUOTE ***Everson v. Board of Education-1947***
http://www.firstamendmentcenter.org/faclibrary/case.aspx?id=1073

Everson v. Board of Education (docket #: 52) (1947) [Findlaw]

Secondary Link	Everson v. Board of Education [Legal Information Institute]
Argument Date	11/20/1946
Decided	02/10/1947
Supreme Court Vote	5-4
Note	1st Amend. Non-Establishment clause applied to states
Supreme Court Ruling	Due Process Clause claim denied; Establishment Clause claim denied

Issue	Whether a board of education resolution authorizing the reimbursement of parents for fares paid for the transportation by public carrier of children attending public and Catholic schools violates the First and Fourteenth Amendments of the U.S. Constitution.
Majority Opinion	Black, J.
Dissenting Opinion	Jackson, J. (joined by Frankfurter, J.), & Rutledge, J. (joined by Frankfurter, J., Jackson, J. & Burton, J.)
Lower Court	District Court for the District of Columbia (3-judge court)
Lawyers	**For Petitioner**

Edward R. Burke and E. Hilton Jackson

For Respondent

William H. Speer

Opinion - Lower Court	Everson v. Bd. Of Ewing Tp., 44 A.2d 333 (N.J. Err. & App, 1945)
News	"Begin Case on Catholics' Use of Public Funds," Chicago Daily Tribune, Nov. 21, 1946, pg. 25
	"Opposed to Funds in Parochial Aid; Looking on the Outside But Seeing Only on the Inside," New York Times, Nov. 21, 1946, pg. 32
	"Parochial School Tax Aid Backed by Court," Los Angeles Times, Feb. 11, 1947, p. 1
	Edwards, William, "Highest Court Backs Tax Aid to Catholics; Splits in School Case Ruling, 5-4," Chicago Daily Tribune, Feb. 11, 1947, p. 1
	Stokes, Dillard, "Religious, Political Issues Split High Court; Public Fund Aid to N.J. Parochial Schools and Hatch Act Are Upheld," The Washington Post, Feb. 11, 1947, p. 1
Other	Chemerinsky, Erwin, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES (2nd ed., 2002), sect. 12.2.6.2
	Choper, Jesse, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 University of Pittsburgh Law Review 673 (1980)
	Nowak, John E. & Rotunda, Ronald D., PRINCIPLES OF CONSTITUTIONAL LAW (2ND ED., 2005), sect. 17.4
	Oaks, Dallin H., ed., THE WALL BETWEEN CHURCH AND STATE (1963)
	Sekulow, Jay Allan, WITNESSING THEIR FAITH: RELIGIOUS INFLUENCE ON SUPREME COURT JUSTICES AND THEIR OPINIONS (2006), pp. 203-238
	Tribe, Laurence, AMERICAN CONSTITUTIONAL LAW (22nd ed., 1988) sect. 14.2, 14.6

Wiecek, William M., THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941-1953 (Holmes Devise, vol. XII, 2006), pp. 261-280

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Everson v. Board of Education of the Township of Ewing (No. 52)
133 N.J.L. 350, 44 A.2d 333, affirmed.

Syllabus	Opinion [Black]	Dissent [Jackson]	Dissent [Rutledge]
HTML version	HTML version	HTML version	HTML version
PDF version	PDF version	PDF version	PDF version

Syllabus

SUPREME COURT OF THE UNITED STATES

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330 U.S. 1

Everson v. Board of Education of the Township of Ewing

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY

No. 52 Argued: November 20, 1946 --- Decided: February 10, 1947

Pursuant to a New Jersey statute authorizing district boards of education to make rules and contracts for the transportation of children to and from schools other than private schools operated for profit, a board of education by resolution authorized the reimbursement of parents for fares paid for the transportation by public carrier of children attending public and Catholic schools. The Catholic schools operated under the superintendency of a Catholic priest and, in addition to secular education, gave religious instruction in the Catholic Faith. A district taxpayer challenged the validity under the Federal Constitution of the statute and resolution so far as they authorized reimbursement to parents for the transportation of children attending sectarian schools. No question was raised as to whether the exclusion of private schools operated for profit denied equal protection of the laws; nor did the record show that there were any children in the district who attended, or would have attended but for the cost of transportation, any but public or Catholic schools.

Held:

1. The expenditure of tax raised funds thus authorized was for a public purpose, and did not violate the due process clause of the **Fourteenth Amendment**. Pp. 5-8.

2. The statute and resolution did not violate the provision of the **First Amendment** (made applicable to the states by the **Fourteenth Amendment**) prohibiting any "law respecting an establishment of religion." Pp. 8-18.

[p2]

In a suit by a taxpayer, the New Jersey Supreme Court held that the state legislature was without power under the state constitution to authorize reimbursement to parents of bus fares paid for transporting their children to schools other than public schools. 132 N.J.L. 98, 39 A.2d 75. The New Jersey Court of Errors and Appeals reversed, holding that neither the statute nor a resolution passed pursuant to it violated the state constitution or the provisions of the Federal Constitution in issue. 133 N.J.L. 350, 44 A.2d 333. On appeal of the federal questions to this Court, *affirmed,* p. 18. **[p3]**

END QUOTE ***Everson v. Board of Education-1947***

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QUOTE ***Lemon v. Kurtzman***

403 U.S. 602

Lemon v. Kurtzman

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 89 Argued: March 3, 1971 --- Decided: June 28, 1971 [*]

Rhode Island's 1969 Salary Supplement Act provides for a 15% salary supplement to be paid to teachers in nonpublic schools at which the average per-pupil expenditure on secular education is below the average in public schools. Eligible teachers must teach only courses offered in the public schools, using only materials used in the public schools, and must agree not to teach courses in religion. A three-judge court found that about 25% of the State's elementary students attended nonpublic schools, about 95% of whom attended Roman Catholic affiliated schools, and that to date about 250 teachers at Roman Catholic schools are the sole beneficiaries under the Act. The court found that the parochial school system was "an integral part of the religious mission of the Catholic Church," and held that the Act fostered "excessive entanglement" between government and religion, thus violating the Establishment Clause. Pennsylvania's Nonpublic Elementary and Secondary Education Act, passed in 1968, authorizes the state Superintendent of Public Instruction to "purchase" certain "secular educational services" from nonpublic schools, directly reimbursing those schools solely for teachers' salaries, textbooks, and instructional materials. Reimbursement is restricted to courses in specific secular subjects, the textbooks and materials must be approved by the Superintendent, and no payment is to be made for any course containing "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." Contracts were made with schools that have more than 20% of all the students in the State, most of which were affiliated with the Roman Catholic Church. The complaint challenging the constitutionality of **[p603]** the Act alleged that the church-affiliated schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. A three-judge court granted the State's motion to dismiss the complaint for failure to state a claim for relief, finding no violation of the Establishment or Free Exercise Clause.

Held: Both statutes are unconstitutional under the Religion Clauses of the **First Amendment**, as the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion. Pp. 611-625.

(a) The entanglement in the Rhode Island program arises because of the religious activity and purpose of the church-affiliated schools, especially with respect to children of

impressionable age in the primary grades, and the dangers that a teacher under religious control and discipline poses to the separation of religious from purely secular aspects of elementary education in such schools. These factors require continuing state surveillance to ensure that the statutory restrictions are obeyed and the **First Amendment** otherwise respected. Furthermore, under the Act, the government must inspect school records to determine what part of the expenditures is attributable to secular education, as opposed to religious activity, in the event a nonpublic school's expenditures per pupil exceed the comparable figures for public schools. Pp. 615-620.

(b) The entanglement in the Pennsylvania program also arises from the restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role and the state supervision of nonpublic school accounting procedures required to establish the cost of secular, as distinguished from religious, education. In addition, the Pennsylvania statute has the further defect of providing continuing financial aid directly to the church-related schools. Historically, governmental control and surveillance measures tend to follow cash grant programs, and here the government's post-audit power to inspect the financial records of church-related schools creates an intimate and continuing relationship between church and state. Pp. 620-622.

(c) Political division along religious lines was one of the evils at which the **First Amendment** aimed, and in these programs, where successive and probably permanent annual appropriations that benefit relatively few religious groups are involved, political **[p604]** fragmentation and divisiveness on religious lines are likely to be intensified. Pp. 622-624.

(d) Unlike the tax exemption for places of religious worship, upheld in *Walz v. Tax Commission,* **397 U.S. 664**, which was based on a practice of 200 years, these innovative programs have self-perpetuating and self-expanding propensities which provide a warning signal against entanglement between government and religion. Pp. 624-625.

BURGER, C.J., delivered the opinion of the Court, in which BLACK, DOUGLAS, HARLAN, STEWART, MARSHALL (as to Nos. 569 and 570), and BLACKMUN, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post,* p. 625, in which BLACK, J., joined, and in which MARSHALL, J. (as to Nos. 569 and 570), joined, filing a separate statement, *post,* p. 642. BRENNAN, J., filed a concurring opinion, *post,* p. 642. WHITE, J., filed an opinion concurring in the judgment in No. 89 and dissenting in Nos. 569 and 570, *post,* p. 661. MARSHALL, J., took no part in the consideration or decision of No. 89. **[p606]**

END QUOTE ***Lemon v. Kurtzman***

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QUOTE ***Mueller v. Allen***
463 U.S. 388

Mueller v. Allen

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-195 Argued: April 18, 1983 --- Decided: June 29, 1983

A Minnesota statute (§ 290.09, subd. 22) allows state taxpayers, in computing their state income tax, to deduct expenses incurred in providing "tuition, textbooks and transportation" for their children attending an elementary or secondary school. Petitioner Minnesota taxpayers brought suit in Federal District Court against respondent Minnesota Commissioner of Revenue and respondent parents who had taken the tax deduction for expenses incurred in sending their children to parochial schools, claiming that § 290.09,

subd. 22, violates the Establishment Clause of the **First Amendment** by providing financial assistance to sectarian institutions. The District Court granted summary judgment for respondents, holding that the statute is neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion. The Court of Appeals affirmed.

Held: Section 290.09, subd. 22, does not violate the Establishment Clause, but satisfies all elements of the "three-part" test laid down in *Lemon v. Kurtzman*, **403 U.S. 602**, that must be met for such a statute to be upheld under the Clause. Pp. 392-403.

(a) The tax deduction in question has the secular purpose of ensuring that the State's citizenry is well educated, as well as of assuring the continued financial health of private schools, both sectarian and nonsectarian. Pp. 394-395.

(b) The deduction does not have the primary effect of advancing the sectarian aims of nonpublic schools. It is only one of many deductions -- such as those for medical expenses and charitable contributions -- available under the Minnesota tax laws; is available for educational expenses incurred by all parents, whether their children attend public schools or private sectarian or nonsectarian private schools, *Committee for Public Education v. Nyquist*, **413 U.S. 756**, distinguished; and provides aid to parochial schools only as a result of decisions of individual parents, rather than directly from the State to the schools themselves. The Establishment Clause's historic purposes do not encompass the sort of attenuated financial benefit that eventually flows to parochial schools from the neutrally available tax benefit at issue. The fact that, notwithstanding § 290.09, subd. 22's facial neutrality, a particular annual statistical analysis shows that the statute's application primarily benefits religious institutions **[p389]** does not provide the certainty needed to determine the statute's constitutionality. Moreover, private schools, and parents paying for their children to attend these schools, make special contributions to the areas in which the schools operate. Pp. 396-402.

(c) Section 290.09, subd. 22, does not "excessively entangle" the State in religion. The fact that state officials must determine whether particular textbooks qualify for the tax deduction and must disallow deductions for textbooks used in teaching religious doctrines is an insufficient basis for finding such entanglement. P. 403.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, POWELL, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined *post*, p. 404. **[p390]**

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http://supct.law.cornell.edu/supct/html/historics/USSC_CR_0463_0388_ZO.html

Mueller v. Allen (No. 82-195)
676 F.2d 1195, affirmed.

Syllabus	**Opinion** [Rehnquist]	**Dissent** [Marshall]
HTML version	HTML version	HTML version
PDF version	PDF version	PDF version

REHNQUIST, J., Opinion of the Court

SUPREME COURT OF THE UNITED STATES

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463 U.S. 388

Mueller v. Allen

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-195 Argued: April 18, 1983 --- Decided: June 29, 1983

JUSTICE REHNQUIST delivered the opinion of the Court.

Minnesota allows taxpayers, in computing their state income tax, to deduct certain expenses incurred in providing for the education of their children. Minn.Stat. § 290.09, subd. 22 (1982).[n1] The United States Court of Appeals for the Eighth Circuit held that the Establishment Clause of the **First Amendment**, as made applicable to the States by the **Fourteenth Amendment**, was not offended by this arrangement. Because this question was reserved in *Committee for Public Education v. Nyquist,* **413 U.S. 756** (1973), and because **[p391]** of a conflict between the decision of the Court of Appeals for the Eighth Circuit and that of the Court of Appeals for the First Circuit in *Rhode Island Federation of Teachers v. Norberg,* 630 F.2d 855 (CA1 1980), we granted certiorari. **459 U.S. 820** (1982). We now affirm.

Minnesota, like every other State, provides its citizens with free elementary and secondary schooling. Minn.Stat. §§ 120.06, 120.72 (1982). It seems to be agreed that about 820,000 students attended this school system in the most recent school year. During the same year, approximately 91,000 elementary and secondary students attended some 500 privately supported schools located in Minnesota, and about 95% of these students attended schools considering themselves to be sectarian.

Minnesota, by a law originally enacted in 1955 and revised in 1976 and again in 1978, permits state taxpayers to claim a deduction from gross income for certain expenses incurred in educating their children. The deduction is limited to actual expenses incurred for the "tuition, textbooks and transportation" of dependents attending elementary or secondary schools. A deduction may not exceed $500 per dependent in grades K through 6 and $700 per dependent in grades 7 through 12. Minn.Stat. § 290.09, subd. 22 (1982).[n2]

[p392]

Petitioners -- certain Minnesota taxpayers -- sued in the United States District Court for the District of Minnesota claiming that § 290.09, subd. 22, violated the Establishment Clause by providing financial assistance to sectarian institutions. They named as defendants, respondents here, the Commissioner of the Department of Revenue of Minnesota and several parents who took advantage of the tax deduction for expenses incurred in sending their children to parochial schools. The District Court granted respondents' motion for summary judgment, holding that the statute was "neutral on its face and in its application, and does not have a primary effect of either advancing or inhibiting religion." 514 F . Supp. 998, 1003 (1981). On appeal, the Court of Appeals affirmed, concluding that the Minnesota statute substantially benefited a "broad class of Minnesota citizens." 676 F.2d 1195, 1205 (1982).

Today's case is no exception to our oft-repeated statement that the Establishment Clause presents especially difficult questions of interpretation and application. It is easy enough to quote the few words constituting that Clause -- "Congress shall make no law respecting an establishment of **[p393]** religion." It is not at all easy, however, to apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools. Indeed, in many of these decisions, we have expressly or implicitly acknowledged that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman,* **403 U.S. 602**, 612 (1971), quoted in part with approval in *Nyquist,* 413 U.S. at 761, n. 5.

One fixed principle in this field is our consistent rejection of the argument that "any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause. *Hunt v. McNair,* **413 U.S. 734**, 742 (1973). *See, e.g., Bradfield v. Roberts,* **175 U.S. 291** (1899); *Walz v. Tax Comm'n,* **397 U.S. 664** (1970). For example, it is now well established that a State may reimburse parents for expenses incurred in transporting their children to school, *Everson v. Board of Education,* **330 U.S. 1** (1947), and that it may loan secular textbooks to all schoolchildren within the State, *Board of Education v. Allen,* **392 U.S. 236** (1968).

Notwithstanding the repeated approval given programs such as those in *Allen* and *Everson,* our decisions also have struck down arrangements resembling, in many respects, these forms of assistance. *See, e.g., Lemon v. Kurtzman, supra; Levitt v. Committee for Public Education,* **413 U.S. 472** (1973); *Meek v. Pittenger,* **421 U.S. 349** (1975); *Wolman v. Walter,* **433 U.S. 229**, 237-238 (1977).[fn3] In this case, we **[p394]** are asked to decide whether Minnesota's tax deduction bears greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down. Petitioners place particular reliance on our decision in *Committee for Public Education v. Nyquist, supra,* where we held invalid a New York statute providing public funds for the maintenance and repair of the physical facilities of private schools and granting thinly disguised "tax benefits," actually amounting to tuition grants, to the parents of children attending private schools. As explained below, we conclude that § 290.09, subd. 22, bears less resemblance to the arrangement struck down in *Nyquist* than it does to assistance programs upheld in our prior decisions and those discussed with approval in *Nyquist.*

The general nature of our inquiry in this area has been guided, since the decision in *Lemon v. Kurtzman, supra,* by the "three-part" test laid down in that case:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion."

Id. at 612-613. While this principle is well settled, our cases have also emphasized that it provides "no more than [a] helpful signpos[t]" in dealing with Establishment Clause challenges. *Hunt v. McNair, supra,* at 741. With this caveat in mind, we turn to the specific challenges raised against § 290.09, subd. 22, under the *Lemon* framework.

Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose. Under our prior decisions, governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework. *See, e.g., Lemon v. Kurtzman, supra; Meek v. Pittenger, supra,* at 363; *Wolman v. Walter, supra,* at 236. This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose **[p395]** for the State's program may be discerned from the face of the statute.

A State's decision to defray the cost of educational expenses incurred by parents -- regardless of the type of schools their children attend -- evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated. Similarly, Minnesota, like other States, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and nonsectarian. By educating a substantial number of students, such schools relieve public schools of a correspondingly great burden -- to the benefit of all taxpayers. In addition, private schools may serve as a benchmark for public schools, in a manner analogous to the "TVA yardstick" for private power companies. As JUSTICE POWELL has remarked:

> Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with

our public schools; and in some States, they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

Wolman v. Walter, supra, at 262 (concurring in part, concurring in judgment in part, and dissenting in part). All these justifications are readily available to support § 290.09, subd. 22, and each is sufficient to satisfy the secular purpose inquiry of *Lemon.*[n4] **[p396]**

We turn therefore to the more difficult but related question whether the Minnesota statute has "the primary effect of advancing the sectarian aims of the nonpublic schools." *Committee for Public Education v. Regan,* **444 U.S. 646**, 662 (1980); *Lemon v. Kurtzman,* 403 U.S. at 612-613. In concluding that it does not, we find several features of the Minnesota tax deduction particularly significant. First, an essential feature of Minnesota's arrangement is the fact that § 290.09, subd. 22, is only one among many deductions -- such as those for medical expenses, § 290.09, subd. 10, and charitable contributions, § 290.21, subd. 3 -- available under the Minnesota tax laws.[n5] Our decisions consistently have recognized that, traditionally, "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes," *Regan v. Taxation With Representation of Wash.*, **461 U.S. 540**, 547 (1983), in part because the "familiarity with local conditions" enjoyed by legislators especially enables them to "achieve an equitable distribution of the tax burden." *Madden v. Kentucky*, **309 U.S. 83**, 88 (1940). Under our prior decisions, the Minnesota Legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference.[n6] **[p397]**

Other characteristics of § 290.09, subd. 22, argue equally strongly for the provision's constitutionality. Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools. Just as in *Widmar v. Vincent,* **454 U.S. 263**, 274 (1981), where we concluded that the State's provision of a forum neutrally "available to a broad class of nonreligious as well as religious speakers" does not "confer any imprimatur of state approval," *ibid.*, so here: "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect."[n7] *Ibid.* **[p398]**

In this respect, as well as others, this case is vitally different from the scheme struck down in *Nyquist.* There, public assistance amounting to tuition grants was provided only to parents of children in *nonpublic* schools. This fact had considerable bearing on our decision striking down the New York statute at issue; we explicitly distinguished both *Allen* and *Everson* on the grounds that "[i]n both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools." 413 U.S. at 782-783, n. 38 (emphasis in original).[n8] Moreover, we intimated that "public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," *ibid.*, might not offend the Establishment Clause. We think the tax deduction adopted by Minnesota is more similar to this latter type of program than it is to the arrangement struck down in *Nyquist.* Unlike the assistance at issue in *Nyquist,* § 290.09, subd. 22, permits all parents -- whether their children attend public school or private -- to deduct their children's educational expenses. As *Widmar* and our other decisions indicate, a program, like § 290.09, subd. 22, that neutrally provides **[p399]** state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

We also agree with the Court of Appeals that, by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject. It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to

that of aid given directly to the schools attended by their children. It is also true, however, that, under Minnesota's arrangement, public funds become available only as a result of numerous private choices of individual parents of school-age children. For these reasons, we recognized in *Nyquist* that the means by which state assistance flows to private schools is of some importance: we said that "the fact that aid is disbursed to parents, rather than to . . . schools," is a material consideration in Establishment Clause analysis, albeit "only one among many factors to be considered." 413 U.S. at 781. It is noteworthy that all but one of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the State to the schools themselves. The exception, of course, was *Nyquist,* which, as discussed previously, is distinguishable from this case on other grounds. Where, as here, aid to parochial schools is available only as a result of decisions of individual parents, no "imprimatur of state approval," *Widmar, supra,* at 274, can be deemed to have been conferred on any particular religion, or on religion generally.

We find it useful, in the light of the foregoing characteristics of § 290.09, subd. 22, to compare the attenuated financial benefits flowing to parochial schools from the section to the evils against which the Establishment Clause was designed to protect. These dangers are well described by our statement that

"[w]hat is at stake as a matter of policy [in Establishment Clause cases] is preventing that kind and degree of government involvement in religious life that, as history **[p400]** teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Nyquist,* 413 U.S. at 796, quoting *Walz v. Tax Comm'n,* 397 U.S. at 694 (opinion of Harlan, J.). It is important, however, to "keep these issues in perspective:"

At this point in the 20th century, we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. *See Walz v. Tax Comm'n,* **397 U.S. 664**, 668 (1970). The risk of significant religious or denominational control over our democratic processes -- or even of deep political division along religious lines -- is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. *Wolman,* 433 U.S. at 263 (POWELL, J., concurring in part, concurring in judgment in part, and dissenting in part). The Establishment Clause, of course, extends beyond prohibition of a state church or payment of state funds to one or more churches. We do not think, however, that its prohibition extends to the type of tax deduction established by Minnesota. The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

Petitioners argue that, notwithstanding the facial neutrality of § 290.09, subd. 22, in application, the statute primarily benefits religious institutions.[fn9] Petitioners rely, as they did **[p401]** below, on a statistical analysis of the type of persons claiming the tax deduction. They contend that most parents of public school children incur no tuition expenses, *see* Minn.Stat. § 120.06 (1982), and that other expenses deductible under § 290.09, subd. 22, are negligible in value; moreover, they claim that 96% of the children in private schools in 1978-1979 attended religiously affiliated institutions. Because of all this, they reason, the bulk of deductions taken under § 290.09, subd. 22, will be claimed by parents of children in sectarian schools. Respondents reply that petitioners have failed to consider the impact of deductions for items such as transportation, summer school tuition, tuition paid by parents whose children attended schools outside the school districts in which they resided, rental or purchase costs for a variety of equipment, and tuition for certain types of instruction not ordinarily provided in public schools.

We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an

approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled -- under a facially neutral statute -- should be of little importance in determining the constitutionality of the statute permitting such relief.

Finally, private educational institutions, and parents paying for their children to attend these schools, make special contributions to the areas in which they operate.

Parochial **[p402]** schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools.

Wolman, supra, at 262 (POWELL, J., concurring in part, concurring in judgment in part, and dissenting in part). If parents of children in private schools choose to take especial advantage of the relief provided by § 290.09, subd. 22, it is no doubt due to the fact that they bear a particularly great financial burden in educating their children. More fundamentally, whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits, discussed above, provided to the State and all taxpayers by parents sending their children to parochial schools. In the light of all this, we believe it wiser to decline to engage in the type of empirical inquiry into those persons benefited by state law which petitioners urge.[fn10]

Thus, we hold that the Minnesota tax deduction for educational expenses satisfies the primary effect inquiry of our Establishment Clause cases. **[p403]**

Turning to the third part of the *Lemon* inquiry, we have no difficulty in concluding that the Minnesota statute does not "excessively entangle" the State in religion. The only plausible source of the "comprehensive, discriminating, and continuing state surveillance," 403 U.S. at 619, necessary to run afoul of this standard would lie in the fact that state officials must determine whether particular textbooks qualify for a deduction. In making this decision, state officials must disallow deductions taken for

instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship.

Minn.Stat. § 290.09, subd. 22 (1982). Making decisions such as this does not differ substantially from making the types of decisions approved in earlier opinions of this Court. In *Board of Education v. Allen,* **392 U.S. 236** (1968), for example, the Court upheld the loan of secular textbooks to parents or children attending nonpublic schools; though state officials were required to determine whether particular books were or were not secular, the system was held not to violate the Establishment Clause. *See also Wolman v. Walter,* **433 U.S. 229** (1977); *Meek v. Pittenger,* **421 U.S. 349** (1975). The same result follows in this case.[fn11] **[p404]**

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

1. Minnesota Stat. § 290.09, subd. 22 (1982), permits a taxpayer to deduct from his or her computation of gross income the following:

Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials

used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

2. Both lower courts found that the statute permits deduction of a range of educational expenses. The District Court found that deductible expenses included:

1. Tuition in the ordinary sense.

2. Tuition to public school students who attend public schools outside their residence school districts.

3. Certain summer school tuition.

4. Tuition charged by a school for slow learner private tutoring services.

5. Tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school.

6. Tuition charged by a private tutor or by a school that is not an elementary or secondary school if the instruction is acceptable for credit in an elementary or secondary school.

7. Montessori School tuition for grades K through 12.

8. Tuition for driver education when it is part of the school curriculum.

514 F.Supp. 998, 1000 (1981). The Court of Appeals concurred in this finding.

In addition, the District Court found that the statutory deduction for "textbooks" included not only "secular textbooks" but also:

1. Cost of tennis shoes and sweatsuits for physical education.

2. Camera rental fees paid to the school for photography classes.

3. Ice skates rental fee paid to the school.

4. Rental fee paid to the school for calculators for mathematics classes.

5. Costs of home economics materials needed to meet minimum requirements.

6. Costs of special metal or wood needed to meet minimum requirements of shop classes.

7. Costs of supplies needed to meet minimum requirements of art classes.

8. Rental fees paid to the school for musical instruments.

9. Cost of pencils and special notebooks required for class.

Ibid. The Court of Appeals accepted this finding.

3. In Lemon v. Kurtzman, the Court concluded that the State's reimbursement of nonpublic schools for the cost of teachers' salaries, textbooks, and instructional materials, and its payment of a salary supplement to teachers in nonpublic schools, resulted in excessive entanglement of church and state. In Levitt v. Committee for Public Education, we struck down on Establishment Clause grounds a state program reimbursing nonpublic schools for the cost of teacher-prepared examinations. Finally, in Meek v. Pittenger and Wolman v. Walter, we held unconstitutional a direct loan of instructional materials to nonpublic schools, while upholding the loan of textbooks to individual students.

4. Section 290.09 contains no express statements of legislative purpose, and its legislative history offers few unambiguous indications of actual intent. The absence of such evidence does not affect our treatment of the statute.

5. Deductions for charitable contributions, allowed by Minnesota law, Minn.Stat. § 290.21, subd. 3 (1982), include contributions to religious institutions, and exemptions from property tax for property used for charitable purposes under Minnesota law include property used for wholly religious purposes, § 272.02. In each case, it may be that religious institutions benefit very substantially from the allowance of such deductions. The Court's holding in Walz v. Tax Comm'n, 397 U.S. 664 (1970), indicates, however, that this does not require the conclusion that such provisions of a State's tax law violate the Establishment Clause.

6. Our decision in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), is not to the contrary on this point. We expressed considerable doubt there that the "tax benefits" provided by New York law properly could be regarded as parts of a genuine system of tax

laws. Plainly, the outright grants to low-income parents did not take the form of ordinary tax benefits. As to the benefits provided to middle-income parents, the Court said:

The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute. The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families.

Id. at 790 (footnote omitted). Indeed, the question whether a program having the elements of a "genuine tax deduction" would be constitutionally acceptable was expressly reserved in *Nyquist, supra,* at 790, n. 49. While the economic consequences of the program in *Nyquist* and that in this case may be difficult to distinguish, we have recognized on other occasions that "the form of the [State's assistance to parochial schools must be examined] for the light that it casts on the substance." *Lemon v. Kurtzman,* 403 U.S. at 614. The fact that the Minnesota plan embodies a "genuine tax deduction" is thus of some relevance, especially given the traditional rule of deference accorded legislative classifications in tax statutes.

7. Likewise, in Sloan v. Lemon, 413 U.S. 825, 832 (1973), where we held that a Pennsylvania statute violated the First Amendment, we emphasized that "the State [had] singled out a class of its citizens for a special economic benefit." We also observed in Widmar that "empirical evidence that religious groups will dominate [the school's] open forum," 454 U.S. at 275, might be relevant to analysis under the Establishment Clause. We address this infra at 400-402.

8. Our full statement was:

Allen and *Everson* differ from the present litigation in a second important respect. In both cases, the class of beneficiaries included all schoolchildren, those in public as well as those in private schools. *See also Tilton v. Richardson,* [**403 U.S. 672** (1971)], in which federal aid was made available to all institutions of higher learning, and *Walz v. Tax Comm'n, supra,* in which tax exemptions were accorded to all educational and charitable nonprofit institutions. . . . Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (*e.g.,* scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. . . . Thus, our decision today does not compel . . . the conclusion that the educational assistance provisions of the "G. I. Bill," **38 U.S.C. § 1651** impermissibly advance religion in violation of the Establishment Clause.

413 U.S. at 782-783, n. 38. *See also id.* at 775.

9. Petitioners cite a "Revenue Analysis" prepared in 1976 by the Minnesota Department of Revenue, which states that

[o]nly those taxpayers having dependents in nonpublic elementary or secondary schools are affected by this law, since tuition, transportation and textbook expenses for public school students are paid for by the school district.

Brief for Petitioners 38. We fail to see the significance of the report; it is no more than a capsule description of the tax deduction provision. As discussed below, and as the lower courts expressly found, the analysis is plainly mistaken, as a factual matter, regarding the effect of § 290.09, subd. 22. Moreover, several memoranda prepared by the Minnesota Department of Revenue in 1979 -- stating that a number of specific expenses may be deducted by parents with children in public school -- clearly indicate that the summary discussion in the 1976 memorandum was not intended as any comprehensive or binding agency determination.

10. Our conclusion is unaffected by the fact that § 290.09, subd. 22, permits deductions for amounts spent for textbooks and transportation as well as tuition. In Everson v. Board of

Education, 330 U.S. 1 (1947), we approved a statute reimbursing parents of all schoolchildren for the costs of transporting their children to school. Doing so by means of a deduction, rather than a direct grant, only serves to make the State's action less objectionable. Likewise, in Board of Education v. Allen, 392 U.S. 236 (1968), we approved state loans of textbooks to all schoolchildren; although we disapproved, in Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977), direct loans of instructional materials to sectarian schools, we do not find those cases controlling. First, they involved assistance provided to the schools themselves, rather than tax benefits directed to individual parents, see supra at 399. Moreover, we think that state assistance for the rental of calculators, see App. A18, ice skates, ibid., tennis shoes, ibid., and the like, scarcely poses the type of dangers against which the Establishment Clause was intended to guard.

11. No party to this litigation has urged that the Minnesota plan is invalid because it runs afoul of the rather elusive inquiry, subsumed under the third part of the Lemon test, whether the Minnesota statute partakes of the "divisive political potential" condemned in Lemon, 403 U.S. at 622. The argument is advanced, however, by amici National Committee for Public Education and Religious Liberty et al. This variation of the "entanglement" test has been interpreted differently in different cases. Compare Lemon v. Kurtzman, 403 U.S. at 622-625, with id. at 665-666 (opinion of WHITE, J.); Meek v. Pittenger, 421 U.S. at 359-362, with id. at 374-379 (BRENNAN, J., concurring in part and dissenting in part). Since this aspect of the "entanglement" inquiry originated with Lemon v. Kurtzman, supra, and the Court's opinion there took pains to distinguish both Everson v. Board of Education, supra, and Board of Education v. Allen, supra, the Court in Lemon must have been referring to a phenomenon which, although present in that case, would have been absent in the two cases it distinguished.

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The Court's language in *Lemon* respecting political divisiveness was made in the context of Pennsylvania and Rhode Island statutes which provided for either direct payments of, or reimbursement of, a proportion of teachers' salaries in parochial schools. We think, in the light of the treatment of the point in later cases discussed above, the language must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.

END QUOTE ***Mueller v. Allen***

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* In your view the public school can teach religious aspects provided it is without bias, but the "**Establishment clause**" appears to differ with you, doesn't it?

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In my view, a public school is not teaching "religion" where it does no more but set out the difference of various religions. It is not by this seeking to profess a certain religion above that of another. For example a public school teaching about the "crusaders" would obviously have to deal with the Christian component and the Muslims who opposed the Christian s and as such this is in my view not a religious education per se but rather a public education that by this coincidentally relates to religion. I do not regard that the "**Establishment clause**" can deny the right of any public education facility to address the religious aspect of what the "crusaders" were about when they then travelled to the Middle East.

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QUOTE **Establishment clause**

http://www.firstamendmentcenter.org/rel_liberty/establishment/index.aspx

Establishment clause

The first of the First Amendment's two religion clauses reads: "Congress shall make no law respecting an establishment of religion ... ." Note that the clause is absolute. It allows *no* law. It is also noteworthy that the clause forbids more than the establishment of religion by

the government. It forbids even laws *respecting* an establishment of religion. The establishment clause sets up a line of demarcation between the functions and operations of the institutions of religion and government in our society. It does so because the framers of the First Amendment recognized that when the roles of the government and religion are intertwined, the result too often has been bloodshed or oppression.

For the first 150 years of our nation's history, there were very few occasions for the courts to interpret the establishment clause because the First Amendment had not yet been applied to the states. As written, the First Amendment applied only to Congress and the federal government. In the wake of the Civil War, however, the 14th Amendment was adopted. It reads in part that "no state shall ... deprive any person of life, liberty or property without due process of law... ." In 1947 the Supreme Court held in *Everson v. Board of Education* that the establishment clause is one of the "liberties" protected by the due-process clause. From that point on, all government action, whether at the federal, state, or local level, must abide by the restrictions of the establishment clause.

Establishment

There is much debate about the meaning of the term "establishment of religion." Although judges rely on history, the framers' other writings and prior judicial precedent, they sometimes disagree. Some, including Chief Justice William Rehnquist, argue that the term was intended to prohibit only the establishment of a single national church or the preference of one religious sect over another. Others, including a majority of the justices of the current Supreme Court, believe the term prohibits the government from promoting religion in general as well as the preference of one religion over another. In the words of the Court in *Everson*:

> "The establishment of religion clause means at least this: Neither a state nor the federal government may set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another. Neither can force a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion... . Neither a state or the federal government may, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"

To help interpret the establishment clause, the Court uses several tests, including the *Lemon,* coercion, endorsement and neutrality tests.

***Lemon* test**

The first of these tests is a three-part assessment sometimes referred to as the *Lemon* test. The test derives its name from the 1971 decision *Lemon v. Kurtzman,* in which the Court struck down a state program providing aid to religious elementary and secondary schools. Using the *Lemon* test, a court must first determine whether the law or government action in question has a bona fide secular purpose. This prong is based on the idea that government should only concern itself in civil matters, leaving religion to the conscience of the individual. Second, a court would ask whether the state action has the primary effect of advancing or inhibiting religion. Finally, the court would consider whether the action excessively entangles religion and government. While religion and government must interact at some points while co-existing in society, the concern here is that they do not so overlap and intertwine that people have difficulty differentiating between the two. Although the test has come under fire from several Supreme Court justices, courts continue to use this test in most establishment-clause cases.

***Lemon* test redux**

In its 1997 decision *Agostini v. Felton,* the Supreme Court modified the *Lemon* test. By combining the last two elements, the Court now used only the "purpose" prong and a

modified version of the "effects" prong. The Court in *Agostini* identified three primary criteria for determining whether a government action has a primary effect of advancing religion: 1) government indoctrination, 2) defining the recipients of government benefits based on religion, and 3) excessive entanglement between government and religion.

Coercion test

Some justices propose allowing more government support for religion than the *Lemon* test allows. These justices support the adoption of a test outlined by Justice Anthony Kennedy in his dissent in *County of Allegheny v. ACLU* and known as the "coercion test." Under this test the government does not violate the establishment clause unless it (1) provides direct aid to religion in a way that would tend to establish a state church, or (2) coerces people to support or participate in religion against their will. Under such a test, the government would be permitted to erect such religious symbols as a Nativity scene standing alone in a public school or other public building at Christmas. But even the coercion test is subject to varying interpretations, as illustrated in *Lee v. Weisman*, the 1992 Rhode Island graduation-prayer decision in which Justices Kennedy and Antonin Scalia, applying the same test, reached different results.

Endorsement test

The endorsement test, proposed by Justice Sandra Day O'Connor, asks whether a particular government action amounts to an endorsement of religion. According to O'Connor, a government action is invalid if it creates a perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion. She expressed her understanding of the establishment clause in the 1984 case of *Lynch v. Donnelly*, in which she states, "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." Her fundamental concern was whether the particular government action conveys "a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." O'Connor's "endorsement test" has, on occasion, been subsumed into the *Lemon* test. The justices have simply incorporated it into the first two prongs of *Lemon* by asking if the challenged government act has the purpose or effect of advancing or endorsing religion.

The endorsement test is often invoked in situations where the government is engaged in expressive activities. Therefore, situations involving such things as graduation prayers, religious signs on government property, religion in the curriculum, etc., will usually be examined in light of this test.

Neutrality

While the Court looks to the endorsement test in matters of expression, questions involving use of government funds are increasingly determined under the rubric of neutrality. Under neutrality, the government would treat religious groups the same as other similarly situated groups. This treatment allows religious schools to participate in a generally available voucher program, allows states to provide computers to both religious and public schools, and allows states to provide reading teachers to low-performing students, even if they attend a religious school. (See *Zelman v. Simmons-Harris*, 2002, and *Mitchell v. Helms*, 2000.) It also indicates that the faith-based initiatives proposed by President Bush might be found constitutional, if structured appropriately.

The concept of neutrality in establishment-clause decisions evolved through the years. Cited first as a guiding principle in *Everson*, neutrality meant government was neither ally nor adversary of religion. "Neutral aid" referred to the qualitative property of the aid, such as the funding going to the parent for a secular service such as busing. The rationale in *Everson* looked to the benefit to the parent, not to the religious school relieved of the responsibility of providing busing for its students.

Later cases recognized that all aid is in some way fungible, i.e. if a religious school receives free math texts from the state, then the money the school would have spent on secular texts can now be spent on religious material. This refocused the Court's attention not on the kind of aid that was provided, but who received and controlled the aid. Decisions involving vocational training scholarships and providing activity-fee monies to a college religious newspaper on the same basis as other student groups showed the Court focused on the individual's control over the funds and equal treatment between religious and non-religious groups.

In the 2002 case of *Zelman v. Simmons-Harris*, the plurality decision clearly defines neutrality as evenhandedness in terms of who may receive aid. A majority of the Court continues to find direct aid to religious institutions for use in religious activities unconstitutional, but indirect aid to a religious group appears constitutional, as long as it is part of a neutrally applied program that directs the money through a parent or other third party who ultimately controls the destination of the funds.

While many find this approach intuitively fair, others are dissatisfied. Various conservative religious groups raise concerns over diminishing the special place religion has historically played in constitutional law by treating religious freedom the same as every other kind of speech or discrimination claim. Strict separationist groups argue that providing government funds to religious groups violates the consciences of taxpayers whose faith may conflict with the religious missions of some groups who are eligible to receive funding using an "even-handed" approach.

Conclusion

Although the Court's interpretation of the establishment clause is in flux, it is likely that for the foreseeable future a majority of the justices will continue to view government neutrality toward religion as the guiding principle. Neutrality means not favoring one religion over another, not favoring religion over non-religion and vice versa.

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END QUOTE **Establishment clause**

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QUOTE
374 U.S. 203

School District of Abington Township, Pennsylvania v. Schempp

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 142 Argued: February 27-28, 1963 --- Decided: June 17, 1963 >GO>*

Because of the prohibition of the **First Amendment** against the enactment by Congress of any law "respecting an establishment of religion," which is made applicable to the States by the **Fourteenth Amendment**, no state law or school board may require that passages from the Bible be read or that the Lord's Prayer be recited in the public schools of a State at the beginning of each school day -- even if individual students may be excused from attending or participating in such exercises upon written request of their parents. Pp. 205-227.
228 Md. 239, 179 A.2d 698, reversed. [p*205]
END QUOTE

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QUOTE ***Marsh v. Chambers***
463 U.S. 783

Marsh v. Chambers

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-23 Argued: April 20, 1983 --- Decided: July 5, 1983

The Nebraska Legislature begins each of its sessions with a prayer by a chaplain paid by the State with the legislature's approval. Respondent member of the Nebraska Legislature brought an action in Federal District Court, claiming that the legislature's chaplaincy practice violates the Establishment Clause of the **First Amendment**, and seeking injunctive

relief. The District Court held that the Establishment Clause was not breached by the prayer, but was violated by paying the chaplain from public funds, and accordingly enjoined the use of such funds to pay the chaplain. The Court of Appeals held that the whole chaplaincy practice violated the Establishment Clause, and accordingly prohibited the State from engaging in any aspect of the practice.

Held: The Nebraska Legislature's chaplaincy practice does not violate the Establishment Clause. Pp. 786-795.

(a) The practice of opening sessions of Congress with prayer has continued without interruption for almost 200 years, ever since the First Congress drafted the **First Amendment**, and a similar practice has been followed for more than a century in Nebraska and many other states. While historical patterns, standing alone, cannot justify contemporary violations of constitutional guarantees, historical evidence in the context of this case sheds light not only on what the drafters of the **First Amendment** intended the Establishment Clause to mean, but also on how they thought that Clause applied to the chaplaincy practice authorized by the First Congress. In applying the **First Amendment** to the states through the **Fourteenth Amendment**, it would be incongruous to interpret the Clause as imposing more stringent **First Amendment** limits on the states than the draftsmen imposed on the Federal Government. In light of the history, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke divine guidance on a public body entrusted with making the laws is not, in these circumstances, a violation of the Establishment Clause; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. Pp. 786-792.

(b) Weighed against the historical background, the facts that a clergyman of only one denomination has been selected by the Nebraska Legislature **[p784]** for 16 years, that the chaplain is paid at public expense, and that the prayers are in the Judeo-Christian tradition do not serve to invalidate Nebraska's practice. Pp. 792-795.

675 F.2d 228, reversed.

BURGER, C.J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 795. STEVENS, J., filed a dissenting opinion, *post*, p. 822.

END QUOTE ***Marsh v. Chambers***

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QUOTE ***Lynch v. Donnelly***

465 U.S. 668

Lynch v. Donnelly

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82-1256 Argued: October 4, 1983 --- Decided: March 5, 1984

Id. at 123. *See also Stone v. Graham*, **449 U.S. 39**, 40-41 (1980) (per curiam); *Wolman v. Walter*, **433 U.S. 229**, 236-236 (1977). In addition, the Court's citation of *Larson v. Valente*, **456 U.S. 228** (1982), also fails to support the Court's assertion. In *Larson*, we first reviewed a state law granting a denominational preference under a "strict scrutiny" analysis, *id.* at 246-251, but then concluded by finding the statute unconstitutional under the Lemon analysis as well. *Id.* at 251-255. Thus, despite the Court's efforts to evade the point, the fact remains that *Marsh v. Chambers*, **463 U.S. 783** (1983), is the only case in which the Court has not applied either the *Lemon* or a "strict scrutiny" analysis. I can only

conclude that, with today's unsupported assertion, the Court hopes to provide a belated excuse for the failure in *Marsh* to address the analysis of the *Lemon* test.

3. See Larkin v. Grendel's Den, Inc., supra, at 123; Widmar v. Vincent, 454 U.S. 263, 271 (1981); Wolman v. Walter, 433 U.S. 229, 236 (1977); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). As JUSTICE O'CONNOR's concurring opinion rightly observes, this test provides a helpful analytical tool in considering the central question posed in this case -- whether Pawtucket has run afoul of the Establishment Clause by endorsing religion through its display of the creche. Ante at 690.

4. I find it puzzling, to say the least, that the Court today should find "irrelevant," ante at 681, n. 7, the fact that the city's secular objectives can be readily and fully accomplished without including the creche, since only last Term, in Larkin v. Grendel's Den, Inc., 459 U.S. at 123-124, the Court relied upon precisely the same point in striking down a Massachusetts statute which vested in church governing bodies the power to veto applications for liquor licenses. It seems the Court is willing to alter its analysis from Term to Term in order to suit its preferred results.

5. Several representatives of Pawtucket's business community testified that, although the overall Christmas display played an important role in promoting downtown holiday trade, the display would serve this purpose equally well even if the creche were removed. App. 133, 135, 139-140. The Mayor also testified that, if the nativity scene had to be eliminated, the city would continue to erect the annual display without it. Id. at 115.

6. The District Court also admitted into evidence, without objection from petitioners, a considerable amount of correspondence received by Mayor Lynch in support of maintaining the creche in the city's Christmas display. One such letter, which appears to be representative of the views of many, congratulates the Mayor on his efforts "to keep 'Christ' in Christmas. . . ." App. 161. For the District Court's findings concerning the meaning of these letters, see 525 F.Supp. 1150, 1162 (RI 1981) ("Overall the tenor of the correspondence is that the lawsuit represents an attack on the presence of religion as part of the community's life, an attempt to deny the majority the ability to express publically its beliefs in a desired and traditionally accepted way"). Furthermore, as the District Court found,

> the City has accepted and implemented the view of its predominantly Christian citizens that it is a "good thing" to have a creche in a Christmas display . . . because it is a good thing to "keep Christ in Christmas."

Id. at 1173.

7. In this regard, the views expressed by the California Supreme Court in considering a similar issue are particularly relevant:

> When a city so openly promotes the religious meaning of one religion's holidays, the benefit reaped by that religion and the disadvantage suffered by other religions is obvious. Those persons who do not share those holidays are relegated to the status of outsiders by their own government; those persons who do observe those holidays can take pleasure in seeing the symbol of their belief given official sanction and special status.

Fox v. City of Los Angeles, 22 Cal.3d at 803, 687 P.2d at 670 (striking down as unconstitutional the erection of an illuminated cross in front of city hall). *See also Lowe v. City of Eugene,* 264 Ore. at 644-546, 463 P.2d at 363.

8. See App. 104.

9. The suggestion in Mueller v. Allen, 463 U.S. 388, 403-404, n. 11 (1983), relied upon by the Court today, see ante at 684; ante at 689 (O'CONNOR, J., concurring), that inquiry into potential political divisiveness is unnecessary absent direct subsidies to church-sponsored schools or colleges, derives from a distorted reading of our prior cases. Simply because the Court in Lemon -- a case involving such subsidies -- inquired into potential divisiveness while distinguishing Everson and Allen -- cases not involving such subsidies -- does not provide any authority for the proposition that the Court in Lemon meant to confine the

divisiveness inquiry only to cases factually identical to Lemon itself. Indeed, in Walz, the Court considered the question of divisiveness in the context of state tax exemptions to all religious institutions. I agree, however, with JUSTICE O'CONNOR's helpful suggestion that, while political divisiveness is "an evil addressed by the Establishment Clause," the ultimate inquiry must always focus on "the character of the government activity that might cause such divisiveness." Ante at 689. Having said that, I should also emphasize that I disagree fundamentally with JUSTICE O'CONNOR's apparent conclusion that Pawtucket's inclusion of the creche is not the kind of governmental act that may engender sharp division along religious lines. The contrary is demonstrated by the history of this case.

10. This and similar issues relating to governmental endorsement of religious symbols has engendered continuing controversy which has reached the courts on many occasions. See, e.g., American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (CA11 1983); Florey v. Sioux Falls School Dist., 619 F.2d 1311 (CA8 1980); Allen v. Morton, 161 U.S.App.D.C. 239, 495 F.2d 65 (1973); Allen v. Hickel, 138 U.S.App.D.C. 31, 424 F.2d 944 (1970); McCreary v. Stone, 575 F.Supp. 1112 (SDNY 1983); Citizens Concerned for Separation of Church and State v. Denver, 508 F.Supp. 823 (Colo.1981); Russell v. Mamaroneck, 440 F.Supp. 607 (SDNY 1977); Lawrence v. Buchmueller, 40 Misc.2d 300, 243 N.Y.S.2d 87 (Sup.Ct.1963). Given the narrowness of the Court's decision today, see supra at 694-695, and n. 1, the potential for controversy is unlikely to abate.

11. The Court makes only a half-hearted attempt, see ante at 680-681, 682-683, to grapple with the fact that Judge Pettine's detailed findings may not be overturned unless they are shown to be "clearly erroneous." Fed.Rule Civ.Proc. 52(a). See Pullman-Standard v. Swint, 456 U.S. 273, 285-290 (1982). In my view, petitioners have made no such showing in this case. JUSTICE O'CONNOR's concurring opinion properly accords greater respect to the District Court's findings, but I am at a loss to understand how the court's specific and well-supported finding that the city was understood to have placed its stamp of approval on the sectarian content of the creche can, in the face of the Lemon test, be dismissed as simply an "error as a matter of law." Ante at 694.

Moreover, although the Court brushes the point aside with little explanation, *see ante* at 687, n. 13, the *Lemon* decision's three-prong analysis is not the only available standard of review. As the Court of Appeals recognized, the "strict scrutiny" analysis adopted in *Larson v. Valente*, 456 U.S. at 244-246, addresses situations in which a governmental policy or practice grants official preference to one religious denomination over another. 691 F.2d 1029, 1034-1035 (CA1 1982). While I am inclined to agree with the Court of Appeals that Pawtucket's practice fails this test, it is not necessary that I address this point in view of my conclusion that the city's inclusion of the creche violates the standards fixed in *Lemon.* Furthermore, I continue to believe that the test I set forth in *Schempp* is an appropriate means of determining whether rights guaranteed by the Establishment Clause have been infringed. In my view,

> those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice

must be struck down. 374 U.S. at 294-295. In the present case, I particularly believe the third element of this test is not met, since all of Pawtucket's governmental goals -- celebrating the holiday season and promoting commerce -- can be fully realized without the use of the creche by employing such wholly secular means as Santa Claus, reindeer, and cutout figures. *See supra* at 699-700.

12. Indeed, in the aid-to-sectarian-schools cases, the state financing schemes under review almost always require us to focus on a specific element that may violate the Establishment Clause, even though it is a part of a complex and otherwise secular statutory framework.

See, e.g., Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977). See also Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) (BLACKMUN, J., dissenting).

13. See R. Brown, The Birth of the Messiah (1977); W. Auld, Christmas Traditions (1931); A. McArthur, The Evolution of the Christian Year (1953).

14. For Christians, of course, the essential message of the nativity is that God became incarnate in the person of Christ. But just as fundamental to Jewish thought is the belief in the "non-incarnation of God, . . . [t]he God in whom [Jews] believe, to whom [Jews] are pledged, does not unite with human substance on earth." M. Buber, Israel and the World (1948) (reprinted in F. Talmage, Disputation and Dialogue: Readings in the Jewish-Christian Encounter 281-282 (1975)) (emphasis deleted). This distinction, according to Buber, "constitute[s] the ultimate division between Judaism and Christianity." Id. at 281. See also R. Reuther, Faith and Fratricide 246 (1974).

Similarly, those who follow the tenets of Unitarianism might well find Pawtucket's support for the symbolism of the creche, which highlights the Trinitarian tradition in Christian faith, to be an affront to their belief in a single divine being. *See* J. Williams, What Americans Believe and How They Worship 316-317 (3d ed.1969). *See also* C. Olmstead, History of Religion in the United States 296-299 (1960).

15. Both the District Court and the Court of Appeals recognized that Christmas comprises both secular and sectarian elements, and that this distinction is of constitutional importance. See 525 F.Supp. at 1163-1164; 691 F.2d at 1032-1033; id. at 1035-1037 (Bownes, J., concurring). In addition, many observers have explained that historically the Christmas celebration derives both from traditional, folk elements such as gift-giving and winter seasonal celebrations, as well as from Christian religious elements. See, e.g., J. Barnett, The American Christmas, A Study in National Culture 9-14 (1954) (hereafter Barnett); R. Meyers, Celebrations: The Complete Book of American Holidays 309-344 (1972); B. Rosenthal & N. Rosenthal, Christmas 14-15 (1980).

16. It is worth noting that Christmas shares the list of federal holidays with such patently secular, patriotic holidays as the Fourth of July, Memorial Day, Washington's Birthday, Labor Day, and Veterans Day. See 5 U.S.C. § 6103(a). We may reasonably infer from the distinctly secular character of the company that Christmas keeps on this list that it too is included for essentially secular reasons.

17. See W. Auld, Christmas Traditions (1931); A. McArthur, The Evolution of the Christian Year (1953).

18. As one commentator has observed:

> Today, of course, it is admitted even by Catholic exegetes that [the Biblical stories recounting Christ's birth] are a collection of largely uncertain, mutually contradictory, strongly legendary and ultimately theologically motivated narratives, with a character of their own. Unlike the rest of Jesus' life, there are dream happenings here and angels constantly enter on the scene and leave it -- as heavenly messengers of God announcing important events.

H. Kung, On Being A Christian 451 (E. Quinn trans., 1976) (footnote omitted). *See also* R. Brown, The Birth of the Messiah 25-41 (1977); Elliott, The Birth and Background of Jesus of Nazareth, 28 History Today 773, 774-780 (1978).

19. Many Christian commentators have voiced strong objections to what they consider to be the debasement and trivialization of Christmas through too close a connection with commercial and public celebrations. See, e.g., Kelley, Beyond Separation of Church and State, 5 J. Church & State 181 (1963). See generally Barnett 55-57.

20. See A. Stokes & L. Pfeffer, Church and State in the United States 383 (rev. ed.1964); R. Morgan, The Supreme Court and Religion 126 (1972); Barnett 68 (discussing opposition by Jews and other non-Christian religious groups to public celebrations of Christmas). See also Talmage, supra, n. 14.

21. See N. Frye, The Secular Scripture 14-15 (1976).

22. O. von Simson, The Gothic Cathedral 27 (1956). See also E. Panofsky Meaning in the Visual Arts (1974). Compare Justice Jackson's explanation of his view that the study of religiously inspired material can, in the correct setting, be made a part of a secular educational program:

> [m]usic without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view.

Illinois ex rel. McCollum v. Board of Education, **333 U.S. 203**, 236 (1948) (concurring opinion).

23. The constitutional problems posed by the religious antecedents of the early Thanksgiving celebrations were well recognized by Thomas Jefferson. Refusing on Establishment Clause grounds to declare national days of thanksgiving or fasting, Jefferson explained:

> I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, disciplines, or exercises. . . . [I]t is only proposed that I should recommend, not prescribe, a day of fasting and prayer. . . . [But] I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines. . . . Fasting and prayer are religious exercises; the enjoining them an act of discipline.

11 Jefferson's Writings 428-430 (1904) (emphasis deleted). *See generally* L. Pfeffer, Church, State and Freedom 266 (1967).

24. Sutherland, Book Review, 40 Ind.L.J. 83, 86 (1964) (quoting Dean Rostow's 1962 Meiklejohn Lecture delivered at Brown University).

25. The Court's insistence upon pursuing this vague historical analysis is especially baffling since even the petitioners and their supporting amici concede that no historical evidence equivalent to that relied upon in Marsh, McGowan, or Walz supports publicly sponsored Christmas displays. At oral argument, counsel for petitioners was asked whether there is "anything we can refer to to let us know how long it has been the practice in this country for public bodies to have nativity scenes displayed?" Counsel responded:

> Specifically, I cannot. . . . The recognition of Christmas [as a public holiday] began in the middle part of the last century . . . but specifically with respect to the use of the nativity scene, we have been unable to locate that data.

Tr. of Oral Arg. 8.

In addition, the Solicitor General, appearing as *amicus* in support of petitioners, was asked: "Do we have . . . evidence [of the intent of the Framers] here with respect to the display of a nativity scene?" He responded: "Not with that degree of specificity." *Id.* at 22-23.

26. See S. Cobb, The Rise of Religious Liberty in America 209 (rev. ed.1970). For an example of this notorious Puritan antipathy to the holiday, consider the remarks of Judge Sewell, a Puritan, who in 1685 expressed his concerns about the influence of public celebration of Christmas:

> Some, somehow observe the day, but are vexed, I believe, that the Body of the People Profane it; and, blessed be God, no Authority yet to compel them to keep it.

Quoted in Barnett 3.

27. See generally Barnett 4-6, 21-22; Sweet, Christmas in American History, 22 Chi.Theol.Sem.Register 12, 14 (Nov.1932); R. Meyers, Celebrations: The Complete Book of American Holidays 314-315 (1972). Some indication of this denominational opposition to the religious celebration of Christmas can be gleaned from the following account of Christmas services in the New York Daily Times for December 26, 1855:

> The churches of the Presbyterians, Baptists and Methodists were not open on Dec. 25 except where some Mission Schools had a celebration. They do not accept the day as a Holy One, but the Episcopalian, Catholic and German Churches were all open. Inside they were decked with evergreens.

Quoted in Barnett 8.

In addition, consider the account written in 1874 of Henry Ward Beecher, a Congregationalist, describing his New England childhood:

To me, Christmas is a foreign day, and I shall die so. When I was a boy, I wondered what Christmas was. I knew there was such a time, because we had an Episcopal church in our town and I saw them dressing it with evergreens. . . . A little later, I understood it was a Romish institution, kept up by the Romish Church. Brought up in the strictest state of New England, brought up in the most literal style of worship . . . I passed all my youth without any knowledge of Christmas, and so I have no associations with the day.

Quoted in Meyers, *supra* n. 15, at 315-316.

28. The role of these religious groups in the struggle for disestablishment and their place in the history of the Establishment Clause have already been chronicled at some length in our cases, and therefore I will not repeat that history here. See Everson v. Board of Education, 330 U.S. 1, 9-15 (1947); Engel v. Vitale, 370 U.S. 421, 428, and n. 10 (1962); Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. at 770, and n. 28. For more comprehensive discussions of the efforts of these denominations to bring about disestablishment, see S. Cobb, The Rise of Religious Liberty in America (rev. ed.1970); B. Bailyn, The Ideological Origins of the American Revolution 257-263 (1967); W. McLoughlin, New England Dissent: 1630-1833 (1971); L. Pfeffer, Church, State and Freedom (1967).

29. See Barnett 2-6.

30. For a compilation of these developments, see id. at 19-20.

31. Ch. 167, 16 Stat. 168. There is no suggestion in the brief congressional discussion concerning the decision to declare Christmas Day a public holiday in the District of Columbia that Congress meant to do anything more than to put the District on equal footing with the many States that had declared those days public holidays by that time. See Cong.Globe, 41st Cong., 2d Sess., 4805 (1870).

Significantly, it was not until 1885 that Congress provided holiday payment for federal employees on December 25. *See* J.Res. 5, 23 Stat. 516.

32. See Barnett 11-12; Meyers, supra, n. 15. The symbol of the creche as an artifact of Christmas celebration apparently owes its origins to St. Francis of Assisi who, according to most accounts, first popularized the ritual reenactment of the birth of Christ by erecting a manger attended by townspeople who played the now-traditional roles of shepherds, Magi, etc., in the village of Greccio, Italy, in 1224. See W. Auld, Christmas Traditions 56 (1931); M. Krythe, All About Christmas 85 (1954).

33. One commentator has noted that the increasing secularization of the Christmas celebration which occurred during the 19th century led

members of the Puritan and evangelical churches [to be] less inclined to oppose the secular celebration when it no longer symbolized the religious and political dominance of the Church of England. This tolerance increased during the nineteenth century, and undoubtedly encouraged [the] popularity [of the celebration of Christmas].

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Barnett 6; *see also id.* at 11-12, 22-23.

http://supct.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZO.html

BURGER, C.J., Opinion of the Court

SUPREME COURT OF THE UNITED STATES

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465 U.S. 668

Lynch v. Donnelly

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82-1256 Argued: October 4, 1983 --- Decided: March 5, 1984

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Establishment Clause of the **First Amendment** prohibits a municipality **[p671]** from including a creche, or Nativity scene, in its annual Christmas display.

I

Each year, in cooperation with the downtown retail merchants' association, the city of Pawtucket, R.I., erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation -- often on public grounds -- during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. All components of this display are owned by the city.

The creche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5" to 5'. In 1973, when the present creche was acquired, it cost the city $1,365; it now is valued at $200. The erection and dismantling of the creche costs the city about $20 per year; nominal expenses are incurred in lighting the creche. No money has been expended on its maintenance for the past 10 years.

Respondents, Pawtucket residents and individual members of the Rhode Island affiliate of the American Civil Liberties Union, and the affiliate itself, brought this action in the United States District Court for Rhode Island, challenging the city's inclusion of the creche in the annual display. The District Court held that the city's inclusion of the creche in the display violates the Establishment Clause, 525 F.Supp. 1150, 1178 (1981), which is binding on the states through the **[p672]** **Fourteenth Amendment**. The District Court found that, by including the creche in the Christmas display, the city has "tried to endorse and promulgate religious beliefs," *id.* at 1173, and that "erection of the creche has the real and substantial effect of affiliating the City with the Christian beliefs that the creche represents." *Id.* at 1177. This "appearance of official sponsorship," it believed, "confers more than a remote and incidental benefit on Christianity." *Id.* at 1178. Last, although the court acknowledged the absence of administrative entanglement, it found that excessive entanglement has been fostered as a result of the political divisiveness of including the creche in the celebration. *Id.* at 1179-1180. The city was permanently enjoined from including the creche in the display.

A divided panel of the Court of Appeals for the First Circuit affirmed. 691 F.2d 1029 (1982). We granted certiorari, **460 U.S. 1080** (1983), and we reverse.

II

A

This Court has explained that the purpose of the Establishment and Free Exercise Clauses of the **First Amendment** is

> to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.

Lemon v. Kurtzman, **403 U.S. 602**, 614 (1971). At the same time, however, the Court has recognized that

total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.

Ibid. In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible. **[p673]**

The Court has sometimes described the Religion Clauses as erecting a "wall" between church and state, *see, e.g., Everson v. Board of Education*, **330 U.S. 1**, 18 (1947). The concept of a "wall" of separation is a useful figure of speech probably deriving from views of Thomas Jefferson.[n1] The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.

No significant segment of our society, and no institution within it, can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation. . . ." *Committee for Public Education & Religious Liberty v. Nyquist*, **413 U.S. 756**, 760 (1973). Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. *See, e.g., Zorach v. Clauson*, **343 U.S. 306**, 314, 315 (1952); *Illinois ex rel. McCollum v. Board of Education*, **333 U.S. 203**, 211 (1948). Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. *Zorach, supra*, at 314. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the **First Amendment**'s guaranty of the free exercise of religion." *McCollum, supra*, at 211-212.

B

The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees. A significant example **[p674]** of the contemporaneous understanding of that Clause is found in the events of the first week of the First Session of the First Congress in 1789. In the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid Chaplains for the House and Senate. In *Marsh v. Chambers*, **463 U.S. 783** (1983), we noted that 17 Members of that First Congress had been Delegates to the Constitutional Convention where freedom of speech, press, and religion and antagonism toward an established church were subjects of frequent discussion. We saw no conflict with the Establishment Clause when Nebraska employed members of the clergy as official legislative Chaplains to give opening prayers at sessions of the state legislature. *Id.* at 791.

The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's emphasis that the First Congress

was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument, *Myers v. United States*, **272 U.S. 52**, 174-175 (1926). It is clear that neither the 17 draftsmen of the Constitution who were Members of the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of congressional Chaplains to offer daily prayers in the Congress, a practice that has continued for nearly two centuries. It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers.

C

There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. Seldom in our opinions was this more affirmatively expressed than in Justice Douglas' opinion for the Court validating a program allowing release of **[p675]** public school students from classes to attend off-campus religious exercises. Rejecting a claim that the program violated the Establishment Clause, the Court asserted pointedly:

> We are a religious people whose institutions presuppose a Supreme Being.

Zorach v. Clauson, supra, at 313. *See also Abington School District v. Schempp,* **374 U.S. 203**, 213 (1963).

Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders. Beginning in the early colonial period long before Independence, a day of Thanksgiving was celebrated as a religious holiday to give thanks for the bounties of Nature as gifts from God. President Washington and his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration[n2] and Congress made it a National Holiday more than a century ago. Ch. 167, 16 Stat. 168. That holiday has not lost its theme of expressing thanks for Divine aid[n3] any more than has Christmas lost its religious significance. **[p676]**

Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from the same public revenues that provide the compensation of the Chaplains of the Senate and the House and the military services. *See* J.Res. 5, 23 Stat. 516. Thus, it is clear that Government has long recognized -- indeed it has subsidized -- holidays with religious significance.

Other examples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," **36 U.S.C. § 186** which Congress and the President mandated for our currency, *see* **31 U.S.C. § 5112**(d)(1) (1982 ed.), and in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children -- and adults every year.

Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in **[p677]** Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages.[n4] The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent -- not seasonal -- symbol of religion: Moses with the Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.

There are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage. Congress has directed the President to proclaim a National Day of Prayer each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." **36 U.S.C. § 169h**. Our Presidents have repeatedly issued such Proclamations.[n5] Presidential Proclamations and messages have also issued to commemorate Jewish Heritage Week, Presidential Proclamation No. 4844, 3 CFR 30 (1982), and the Jewish High Holy Days, 17 Weekly Comp. of Pres.Doc. 1058 (1981). One cannot look at even this brief resume without finding that our history is pervaded by expressions of religious beliefs such as are found in *Zorach.* Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, **[p678]** as Justice Douglas observed,

governmental action has "follow[ed] the best of our traditions" and "respect[ed] the religious nature of our people." 343 U.S. at 314.

III

This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. We have refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as *illuminated by history*." *Walz v. Tax Comm'n*, **397 U.S. 664**, 671 (1970) (emphasis added). In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic, and has been uniformly rejected by the Court. Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith -- as an absolutist approach would dictate -- the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so. *See Walz, supra,* at 669. Joseph Story wrote a century and a half ago:

The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.

3 J. Story, Commentaries on the Constitution of the United States 728 (1833).

In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause, like the Due Process Clauses, is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." *Walz, supra,* at 668. The line between permissible relationships and those barred by the Clause can no **[p679]** more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon,* 403 U.S. at 614.

In the line-drawing process, we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. *Lemon, supra.* But we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. *See, e.g., Tilton v. Richardson,* **403 U.S. 672**, 677-678 (1971); *Nyquist,* 413 U.S. at 773. In two cases, the Court did not even apply the *Lemon* "test." We did not, for example, consider that analysis relevant in *Marsh v. Chambers,* **463 U.S. 783** (1983). Nor did we find *Lemon* useful in *Larson v. Valente,* **456 U.S. 228** (1982), where there was substantial evidence of overt discrimination against a particular church.

In this case, the focus of our inquiry must be on the creche in the context of the Christmas season. *See, e.g., Stone v. Graham,* **449 U.S. 39**"]**449 U.S. 39** (1980) (per curiam); **449 U.S. 39** (1980) (per curiam); *Abington School District v. Schempp*, **374 U.S. 203** (1963). In *Stone,* for example, we invalidated a state statute requiring the posting of a copy of the Ten Commandments on public classroom walls. But the Court carefully pointed out that the Commandments were posted purely as a religious admonition, not

integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.

449 U.S. at 42. Similarly, in *Abington,* although the Court struck down the practices in two States requiring daily Bible readings in public schools, it specifically noted that nothing in the Court's holding was intended to

indicat[e] that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently **[p680]** with the **First Amendment**.

374 U.S. at 225. Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.

The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations. *See, e.g., Stone v. Graham, supra,* at 41; *Epperson v. Arkansas,* **393 U.S. 97**, 107-109 (1968); *Abington School District v. Schempp, supra,* at 223-224; *Engel v. Vitale,* **370 U.S. 421**, 424-425 (1962). Even where the benefits to religion were substantial, as in *Everson v. Board of Education,* **330 U.S. 1** (1947); *Board of Education v. Allen,* **392 U.S. 236** (1968); *Walz, supra;* and *Tilton, supra,* we saw a secular purpose and no conflict with the Establishment Clause. *Cf. Larkin v. Grendel's Den, Inc.,* **459 U.S. 116** (1982).

The District Court inferred from the religious nature of the creche that the city has no secular purpose for the display. In so doing, it rejected the city's claim that its reasons for including the creche are essentially the same as its reasons for sponsoring the display as a whole. The District Court plainly erred by focusing almost exclusively on the creche. When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society, a variety of motives and purposes are implicated. The city, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The creche in the display depicts the historical origins of this traditional event long recognized as a National Holiday. *See Allen v. Hickel,* 138 U.S.App.D.C. 31, 424 F.2d 944 **[p681]** (1970); *Citizens Concerned for Separation of Church and State v. City and County of Denver,* 526 F.Supp. 1310 (Colo.1981).

The narrow question is whether there is a secular purpose for Pawtucket's display of the creche. The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.[n6] The District Court's inference, drawn from the religious nature of the creche, that the city has no secular purpose was, on this record, clearly erroneous.[n7]

The District Court found that the primary effect of including the creche is to confer a substantial and impermissible benefit on religion in general, and on the Christian faith in particular. Comparisons of the relative benefits to religion of different forms of governmental support are elusive and difficult to make. But to conclude that the primary effect of including the creche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, *Board of Education v. Allen, supra;*[n8] expenditure of public funds for transportation of **[p682]** students to church-sponsored schools, *Everson v. Board of Education, supra;*[n9] federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, *Tilton v. Richardson,* **403 U.S. 672** (1971);[n10] noncategorical grants to church-sponsored colleges and universities, *Roemer v. Board of Public Works,* **426 U.S. 736** (1976); and the tax exemptions for church properties sanctioned in *Walz v. Tax Comm'n,* **397 U.S. 664** (1970). It would also require that we view it as more of an endorsement of religion than the Sunday Closing Laws upheld in *McGowan v. Maryland,* **366 U.S. 420** (1961); [n11] the release time program for religious training in *Zorach v. Clauson,* **343 U.S. 306** (1952); and the legislative prayers upheld in *Marsh v. Chambers,* **463 U.S. 783** (1983).

We are unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause. What was said about the legislative prayers in *Marsh, supra,* at 792, and implied

about the Sunday Closing Laws in *McGowan* is true of the city's inclusion of the creche: its "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions." *See McGowan, supra,* at 442.

This case differs significantly from *Larkin v. Grendel's Den, Inc., supra,* and *McCollum,* where religion was substantially **[p683]** aided. In *Grendel's Den,* important governmental power -- a licensing veto authority -- had been vested in churches. In *McCollum,* government had made religious instruction available in public school classrooms; the State had not only used the public school buildings for the teaching of religion, it had afford[ed] sectarian groups an invaluable aid . . . [by] provid[ing] pupils for their religious classes through use of the State's compulsory public school machinery. 333 U.S. at 212. No comparable benefit to religion is discernible here.

The dissent asserts some observers may perceive that the city has aligned itself with the Christian faith by including a Christian symbol in its display, and that this serves to advance religion. We can assume, *arguendo,* that the display advances religion in a sense; but our precedents plainly contemplate that, on occasion, some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Nyquist,* 413 U.S. at 771; *see also Widmar v. Vincent,* **454 U.S. 263**, 273 (1981). Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

The District Court found that there had been no administrative entanglement between religion and state resulting from the city's ownership and use of the creche. 525 F.Supp. at 1179. But it went on to hold that some political divisiveness was engendered by this litigation. Coupled with its finding of an impermissible sectarian purpose and effect, this persuaded the court that there was "excessive entanglement." The Court of Appeals expressly declined to **[p684]** accept the District Court's finding that inclusion of the creche has caused political divisiveness along religious lines, and noted that this Court has never held that political divisiveness alone was sufficient to invalidate government conduct.

Entanglement is a question of kind and degree. In this case, however, there is no reason to disturb the District Court's finding on the absence of administrative entanglement. There is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the creche. No expenditures for maintenance of the creche have been necessary; and since the city owns the creche, now valued at $200, the tangible material it contributes is *de minimis.* In many respects, the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries. There is nothing here, of course, like the "comprehensive, discriminating, and continuing state surveillance" or the "enduring entanglement" present in *Lemon,* 403 U.S. at 619-622.

The Court of Appeals correctly observed that this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct. And we decline to so hold today. This case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into potential political divisiveness is even called for, *Mueller v. Allen,* **463 U.S. 388**, 403-404, n. 11 (1983). In any event, apart from this litigation, there is no evidence of political friction or divisiveness over the creche in the 40-year history of Pawtucket's Christmas celebration. The District Court stated that the inclusion of the creche for the 40 years has been "marked by no apparent dissension," and that the display has had a "calm history." 525 F.Supp. at 1179. Curiously, it went on to hold that the political divisiveness engendered by this lawsuit was evidence of excessive entanglement. A litigant cannot, by the very act of commencing a

lawsuit, however, create the appearance **[p685]** of divisiveness and then exploit it as evidence of entanglement.

We are satisfied that the city has a secular purpose for including the creche, that the city has not impermissibly advanced religion, and that including the creche does not create excessive entanglement between religion and government.

IV

JUSTICE BRENNAN describes the creche as a "re-creation of an event that lies at the heart of Christian faith," *post* at 711. The creche, like a painting, is passive; admittedly it is a reminder of the origins of Christmas. Even the traditional, purely secular displays extant at Christmas, with or without a creche, would inevitably recall the religious nature of the Holiday. The display engenders a friendly community spirit of goodwill in keeping with the season. The creche may well have special meaning to those whose faith includes the celebration of religious Masses, but none who sense the origins of the Christmas celebration would fail to be aware of its religious implications. That the display brings people into the central city, and serves commercial interests and benefits merchants and their employees, does not, as the dissent points out, determine the character of the display. That a prayer invoking Divine guidance in Congress is preceded and followed by debate and partisan conflict over taxes, budgets, national defense, and myriad mundane subjects, for example, has never been thought to demean or taint the sacredness of the invocation. [n12]

Of course, the creche is identified with one religious faith, but no more so than the examples we have set out from prior cases in which we found no conflict with the Establishment **[p686]** Clause. *See, e.g., McGowan v. Maryland,* **366 U.S. 420** (1961); *Marsh v. Chambers,* **463 U.S. 783** (1983). It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so "taint" the city's exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol -- the creche -- at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings. If the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

The Court has acknowledged that the "fears and political problems" that gave rise to the Religion Clauses in the 18th century are of far less concern today. *Everson,* 330 U.S. at 8. We are unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.

V

That this Court has been alert to the constitutionally expressed opposition to the establishment of religion is shown in numerous holdings striking down statutes or programs as violative of the Establishment Clause. *See, e.g., Illinois ex rel. McCollum v. Board of Education,* **333 U.S. 203** (1948); *Epperson v. Arkansas,* **393 U.S. 97** (1968); *Lemon v. Kurtzman, supra; Levitt v. Committee for Public Education & Religious Liberty,* **413 U.S. 472** (1973); *Committee* **[p687]** *for Public Education & Religious Liberty v. Nyquist,* **413 U.S. 756** (1973); *Meek v. Pittenger,* **421 U.S. 349** (1975); and *Stone v. Graham,* **449 U.S. 39** (1980). The most recent example of this careful scrutiny is found in the case invalidating a municipal ordinance granting to a church a virtual veto power over the licensing of liquor establishments near the church. *Larkin v. Grendel's Den, Inc.,* **459 U.S. 116** (1982). Taken

together, these cases abundantly demonstrate the Court's concern to protect the genuine objectives of the Establishment Clause. It is far too late in the day to impose a crabbed reading of the Clause on the country.

VI

We hold that, notwithstanding the religious significance of the creche, the city of Pawtucket has not violated the Establishment Clause of the **First Amendment**.[fn13] Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

1. See Reynolds v. United States, 98 U.S. 145, 164 (1879) (quoting reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (January 1, 1802)).

2. The day after the First Amendment was proposed, Congress urged President Washington to proclaim

a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God.

See A. Stokes & L. Pfeffer, Church and State in the United States 87 (rev. 1st ed.1964). President Washington proclaimed November 26, 1789, a day of thanksgiving to "offe[r] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions. . . ." J. Richardson, A Compilation of the Messages and Papers of the Presidents 1789-1897, p. 64 (1899).

Presidents Adams and Madison also issued Thanksgiving Proclamations, as have almost all our Presidents, *see* 3 A. Stokes, Church and State in the United States 180-193 (1950), through the incumbent, *see* Presidential Proclamation No. 4883, 3 CFR 68 (1982).

3. An example is found in President Roosevelt's 1944 Proclamation of Thanksgiving:

[I]t is fitting that we give thanks with special fervor to our Heavenly Father for the mercies we have received individually and as a nation and for the blessings He has restored, through the victories of our arms and those of our Allies, to His children in other lands.

* * * *

To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas.

Presidential Proclamation No. 2629, 58 Stat. 1160.

President Reagan and his immediate predecessors have issued similar Proclamations. *See, e.g.,* Presidential Proclamation No. 5098, 3 CFR 94 (1984); Presidential Proclamation No. 4803, 3 CFR 117 (1981); Presidential Proclamation No. 4333, 3 CFR 419 (1971-1975 Comp.); Presidential Proclamation No. 4093, 3 CFR 89 (1971-1975 Comp.); Presidential Proclamation No. 3752, 3 CFR 75 (1966-1970 Comp.); Presidential Proclamation No. 3560, 3 CFR 312 (1959-1963 Comp.).

4. The National Gallery regularly exhibits more than 200 similar religious paintings.

5. See, e.g., Presidential Proclamation No. 5017, 3 CFR 8 (1984); Presidential Proclamation No. 4795, 3 CFR 109 (1981); Presidential Proclamation No. 4379, 3 CFR 486 (1971-1975 Comp.); Presidential Proclamation No. 4087, 3 CFR 81 (1971-1975 Comp.); Presidential Proclamation No. 3812, 3 CFR 155 (1966-1970 Comp.); Presidential Proclamation No. 3501, 3 CFR 228 (1959-1963 Comp.).

6. The city contends that the purposes of the display are "exclusively secular." We hold only that Pawtucket has a secular purpose for its display, which is all that Lemon v. Kurtzman, 403 U.S. 602 (1971), requires. Were the test that the government must have "exclusively secular" objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated.

7. JUSTICE BRENNAN argues that the city's objectives could have been achieved without including the creche in the display, post at 699. True or not, that is irrelevant. The question is whether the display of the creche violates the Establishment Clause.

8. The Allen Court noted that "[p]erhaps free books make it more likely that some children choose to attend a sectarian school. . . ." 392 U.S. at 244.
9. In Everson, the Court acknowledged that "[i]t is undoubtedly true that children are helped to get to church schools," and that
some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets. . . .
330 U.S. at 17.
10. We recognized in Tilton that the construction grants "surely aid[ed]" the institutions that received them. 403 U.S. at 679.
11.
In *McGowan v. Maryland* . . . , Sunday Closing Laws were sustained even though one of their undeniable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services.
Committee for Public Education & Religious Liberty v. Nyquist, **413 U.S. 756**, 775-776 (1973).
12. JUSTICE BRENNAN states that "by focusing on the holiday 'context' in which the nativity scene appear[s]," the Court "seeks to explain away the clear religious import of the creche,"post, at 705, and that it has equated the creche with a Santa's house or reindeer,post, at 711-712. Of course, this is not true.
13. The Court of Appeals viewed Larson v. Valente, 456 U.S. 228 (1982), as commanding a "strict scrutiny" due to the city's ownership of the $200 creche which it considers as a discrimination between Christian and other religions. It is correct that we require strict scrutiny of a statute or practice patently discriminatory on its face. But we are unable to see this display, or any part of it, as explicitly discriminatory in the sense contemplated in Larson.

http://supct.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZC.html
O'CONNOR, J., Concurring Opinion
SUPREME COURT OF THE UNITED STATES

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465 U.S. 668

Lynch v. Donnelly

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82-1256 Argued: October 4, 1983 --- Decided: March 5, 1984

JUSTICE O'CONNOR, concurring.
I concur in the opinion of the Court. I write separately to suggest a clarification of our Establishment Clause doctrine. The suggested approach leads to the same result in this case as that taken by the Court, and the Court's opinion, as I read it, is consistent with my analysis.
I
The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive **[p688]** entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined

along religious lines. *E.g., Larkin v. Grendel's Den, Inc.,* **459 U.S. 116** (1982). The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message. *See generally Abington School District v. Schempp,* **374 U.S. 203** (1963).

Our prior cases have used the three-part test articulated in *Lemon v. Kurtzman,* **403 U.S. 602**, 612-613 (1971), as a guide to detecting these two forms of unconstitutional government action.[*] It has never been entirely clear, however, **[p689]** how the three parts of the test relate to the principles enshrined in the Establishment Clause. Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device.

II

In this case, as even the District Court found, there is no institutional entanglement. Nevertheless, the respondents contend that the political divisiveness caused by Pawtucket's display of its creche violates the excessive entanglement prong of the *Lemon* test. The Court's opinion follows the suggestion in *Mueller v. Allen,* **463 U.S. 388**, 403-404, n. 11 (1983), and concludes that "no inquiry into potential political divisiveness is even called for" in this case. *Ante* at 684. In my view, political divisiveness along religious lines should not be an independent test of constitutionality.

Although several of our cases have discussed political divisiveness under the entanglement prong of *Lemon, see, e.g., Committee for Public Education & Religious Liberty v. Nyquist,* **413 U.S. 756**, 796 (1973); *Lemon v. Kurtzman, supra,* at 623, we have never relied on divisiveness as an independent ground for holding a government practice unconstitutional. Guessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise, in part because the existence of the litigation, as this case illustrates, itself may affect the political response to the government practice. Political divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion. But the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself. The entanglement prong of the *Lemon* test is properly limited to institutional entanglement. **[p690]**

III

The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the creche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the creche and what message the city's display actually conveyed. The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the city's action.

The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions of the speaker. Other listeners do not have or will not seek access to such evidence of intent. They will rely instead on the words themselves; for them, the message actually conveyed may be something not actually intended. If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

A

The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement **[p691]** is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes. In *Stone v. Graham,* **449 U.S. 39** (1980), for example, the Court held that posting copies of the Ten Commandments in schools violated the purpose prong of the *Lemon* test, yet the State plainly had some secular objectives, such as instilling most of the values of the Ten Commandments and illustrating their connection to our legal system, *but see* 449 U.S. at 41. *See also Abington School District v. Schempp,* 374 U.S. at 223-224. The proper inquiry under the purpose prong of *Lemon,* I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.

Applying that formulation to this case, I would find that Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions. The evident purpose of including the creche in the larger display was not promotion of the religious content of the creche, but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.

The District Court's finding that the display of the creche had no secular purpose was based on erroneous reasoning. The District Court believed that it should ascertain the city's purpose in displaying the creche separate and apart from the general purpose in setting up the display. It also found that, because the tradition-celebrating purpose was suspect in the court's eyes, the city's use of an unarguably religious symbol "raises an inference" of intent to endorse. When viewed in light of correct legal principles, the District Court's finding of unlawful purpose was clearly erroneous.

B

Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, **[p692]** even as a primary effect, advancement or inhibition of religion. The laws upheld in *Walz v. Tax Comm'n,* **397 U.S. 664** (1970) (tax exemption for religious, educational, and charitable organizations), in *McGowan v. Maryland,* **366 U.S. 420** (1961) (mandatory Sunday closing law), and in *Zorach v. Clauson,* **343 U.S. 306** (1952) (released time from school for off-campus religious instruction), had such effects, but they did not violate the Establishment Clause. What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Pawtucket's display of its creche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the creche. Although the religious and indeed sectarian significance of the creche, as the District Court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display -- as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious

content of the holiday, just as government celebration of Thanksgiving is not so understood. The creche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols, as it was in Pawtucket.

These features combine to make the government's display of the creche in this particular physical setting no more an endorsement of religion than such governmental "acknowledgments" **[p693]** of religion as legislative prayers of the type approved in *Marsh v. Chambers*, **463 U.S. 783** (1983), government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court." Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. The display of the creche likewise serves a secular purpose -- celebration of a public holiday with traditional symbols. It cannot fairly be understood to convey a message of government endorsement of religion. It is significant in this regard that the creche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the creche in its annual Christmas display for some years. For these reasons, I conclude that Pawtucket's display of the creche does not have the effect of communicating endorsement of Christianity.

The District Court's subsidiary findings on the effect test are consistent with this conclusion. The court found as facts that the creche has a religious content, that it would not be seen as an insignificant part of the display, that its religious content is not neutralized by the setting, that the display is celebratory and not instructional, and that the city did not seek to counteract any possible religious message. These findings do not imply that the creche communicates government approval of Christianity. The District Court also found, however, that the government was understood to place its imprimatur on the religious content of the creche. But whether a government activity communicates endorsement of religion is not a question of simple historical fact. **[p694]** Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts. The District Court's conclusion concerning the effect of Pawtucket's display of its creche was in error as a matter of law.

IV

Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded. Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny.

The city of Pawtucket is alleged to have violated the Establishment Clause by endorsing the Christian beliefs represented by the creche included in its Christmas display. Giving the challenged practice the careful scrutiny it deserves, I cannot say that the particular creche display at issue in this case was intended to endorse or had the effect of endorsing Christianity. I agree with the Court that the judgment below must be reversed.

* The Court wrote in Lemon v. Kurtzman that a statute must pass three tests to withstand Establishment Clause challenge.

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."
403 U.S. at 612-613 (citations omitted). Though phrased as a uniformly applicable test for constitutionality, this three-part test "provides 'no more than [a] helpful signpos[t]' in dealing with Establishment Clause challenges." *Mueller v. Allen*, **463 U.S. 388**, 394 (1983) (quoting *Hunt v. McNair*, **413 U.S. 734**, 741 (1973)).
ref
Moreover, the Court has held that a statute or practice that plainly embodies an intentional discrimination among religions must be closely fitted to a compelling state purpose in order to survive constitutional challenge. *See Larson v. Valente*, **456 U.S. 228** (1982). As the Court's opinion observes, *ante* at 687, n. 13, this case does not involve such discrimination. The *Larson* standard, I believe, may be assimilated to the *Lemon* test in the clarified version I propose. Plain intentional discrimination should give rise to a presumption, which may be overcome by a showing of compelling purpose and close fit, that the challenged government conduct constitutes an endorsement of the favored religion or a disapproval of the disfavored.
END QUOTE ***Lynch v. Donnelly***

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QUOTE ***LEE et al. v. WEISMAN***

LEE et al. *v.* WEISMAN, PERSONALLY AND AS NEXT FRIEND OF WEISMAN

certiorari to the united states court of appeals for the first circuit

No. 90-1014. Argued November 6, 1991 — Decided June 24, 1992
Principals of public middle and high schools in Providence, Rhode Island, are permitted to invite members of the clergy to give invocations and benedictions at their schools' graduation ceremonies. Petitioner Lee, a middle school principal, invited a rabbi to offer such prayers at the graduation ceremony for Deborah Weisman's class, gave the Rabbi a pamphlet containing guidelines for the composition of public prayers at civic ceremonies, and advised him that the prayers should be nonsectarian. Shortly before the ceremony, the District Court denied the motion of respondent Weisman, Deborah's father, for a temporary restraining order to prohibit school officials from including the prayers in the ceremony. Deborah and her family attended the ceremony, and the prayers were recited. Subsequently, Weisman sought a permanent injunction barring Lee and other petitioners, various Providence public school officials, from inviting clergy to deliver invocations and benedictions at future graduations. It appears likely that such prayers will be conducted at Deborah's high school graduation. The District Court enjoined petitioners from continuing the practice at issue on the ground that it violated the Establishment Clause of the First Amendment. The Court of Appeals affirmed.
Held: Including clergy who offer prayers as part of an official public school graduation ceremony is forbidden by the Establishment Clause. Pp. 7-19.
(a) This Court need not revisit the questions of the definition and scope of the principles governing the extent of permitted accommodation by the State for its citizens' religious beliefs and practices, for the controlling precedents as they relate to prayer and religiousexercise in primary and secondary public schools compel the holding here. Thus, the Court will not reconsider its decision in *Lemon* v. *Kurtzman*, 403 U.S. 602. The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause, which guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state]

religion or religious faith, or tends to do so." *Lynch* v. *Donnelly,* 465 U.S. 668, 678. Pp. 7-8.

(b) State officials here direct the performance of a formal religious exercise at secondary schools' promotional and graduation ceremonies. Lee's decision that prayers should be given and his selection of the religious participant are choices attributable to the State. Moreover, through the pamphlet and his advice that the prayers be nonsectarian, he directed and controlled the prayers' content. That the directions may have been given in a good faith attempt to make the prayers acceptable to most persons does not resolve the dilemma caused by the school's involvement, since the government may not establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds. Pp. 8-11.

(c) The Establishment Clause was inspired by the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. Prayer exercises in elementary and secondary schools carry a particular risk of indirect coercion. *Engel* v. *Vitale,* 370 U.S. 421; *Abington School District* v. *Schempp,* 374 U.S. 203. The school district's supervision and control of a high school graduation ceremony places subtle and indirect public and peer pressure on attending students to stand as a group or maintain respectful silence during the invocation and benediction. A reasonable dissenter of high school age could believe that standing or remaining silent signified her own participation in, or approval of, the group exercise, rather than her respect for it. And the State may not place the student dissenter in the dilemma of participating or protesting. Since adolescents are often susceptible to peer pressure, especially in matters of social convention, the State may no more use social pressure to enforce orthodoxy than it may use direct means. The embarrassment and intrusion of the religious exercise cannot be refuted by arguing that the prayers are of a *de minimis* character, since that is an affront to the Rabbi and those for whom the prayers have meaning, and since any intrusion was both real and a violation of the objectors' rights. Pp. 11-15.

(d) Petitioners' argument that the option of not attending the ceremony excuses any inducement or coercion in the ceremony itself is rejected. In this society, high school graduation is one of life'smost significant occasions, and a student is not free to absent herself from the exercise in any real sense of the term "voluntary." Also not dispositive is the contention that prayers are an essential part of these ceremonies because for many persons the occasion would lack meaning without the recognition that human achievements cannot be understood apart from their spiritual essence. This position fails to acknowledge that what for many was a spiritual imperative was for the Weismans religious conformance compelled by the State. It also gives insufficient recognition to the real conflict of conscience faced by a student who would have to choose whether to miss graduation or conform to the state sponsored practice, in an environment where the risk of compulsion is especially high. Pp. 15-17.

(e) Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh* v. *Chambers,* 463 U.S. 783, which condoned a prayer exercise. The atmosphere at a state legislature's opening, where adults are free to enter and leave with little comment and for any number of reasons, cannot compare with the constraining potential of the one school event most important for the student to attend. Pp. 17-18.

908 F. 2d 1090, affirmed.

Kennedy, J., delivered the opinion of the Court, in which Blackmun, Stevens, O'Connor, and Souter, JJ., joined. Blackmun, J., and Souter, J., filed concurring opinions, in which Stevens and O'Connor, JJ., joined. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and White and Thomas, JJ., joined.

END QUOTE ***LEE et al. v. WEISMAN***

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There always may be people who have an issue with religion, but what we need to address is what is constitutionally appropriate.
The Authorities quoted above cover a wide range of decisions and in my view, allowing for Victorian conditions, tax exemptions are unconstitutional. This is because both the Victorian Colonial Parliament as well as the Framers of the (federal) Constitution (***Commonwealth of Australia Constitution Act 1900*** (UK) specifically intended a separation of funding (direct or indirect). However, I do not regard there was any intention as to discriminate as to the right of any student, at least in the state of Victoria, to provide any student with "free education" and as such the basis of providing funding to private schools (including to religious school) should be in equal manner provided none of the funding is used for specific religious purposes. In any event we must ensure that funding by the state and the Commonwealth are on an equal basis to all students.
END QUOTE Chapter 456
.
The content of this correspondence is intended to be published also in one of my forthcoming books, as to enable the community to be aware of what was submitted.
.
While my 9 children are all adults nevertheless having struggled for so long to try to get some decent understanding as to provide education without any discrimination my reason for writing also is so hopefully others may not have to suffer the hardship that I encountered in the past. Likewise, students will never again be humiliated or otherwise subjected to a form of terrorism because a school considers it more important to pursue money then to accept its first duty is to provide any student with an environment of peace and tranquillity to receive education.
Awaiting your response, **G. H. SCHOREL-HLAVKA**
END QUOTE 1-4-2008 correspondence to Federal Education Minister and Deputy PM Julia Gillard
.
QUOTE 8 July 2008 correspondence to Mr Kevin Rudd PM
How to deal constitutionally with abuses regarding CHILDREN-etc! - Fw: Contact your PM
Tuesday, 8 July, 2008 2:51 AM
From:
"Gerrit H. Schorel-Hlavka" <inspector_rikati@yahoo.com.au>
To:
inspector_rikati@yahoo.com.au
Cc:
jvrevolove@hotmail.com, johann5@ozonline.com.au, poetrylark@yahoo.com, hunterman@goconnect.net, niksfree@aanet.com.au, swulrich@bigpond.net.au, globalsov@gmail.com, csgroups@iprimus.com.au, srd_one@yahoo.com.au, ariley@coolcats.net.au, mjbond@gmail.com, sadri_a@optusnet.com.au, elspeth.young@petos.com.au, johnabbott@dodo.com.au... more

The email below was forwarded to Kevin Rudd in three parts but below reproduced as one document.

--- On **Tue, 8/7/08, autoreply@pm.gov.au <*autoreply@pm.gov.au*>** wrote:
From: autoreply@pm.gov.au <autoreply@pm.gov.au>
Subject: Contact your PM: your message was successfully submitted [SEC=UNCLASSIFIED]
To: inspector_rikati@yahoo.com.au
Received: Tuesday, 8 July, 2008, 2:41 AM

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Contact your Prime Minister
---------------------------
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Thank you for your message to the Prime Minister.

Below is a copy of your comments to the Prime Minister for your records.

If you have supplied a postal address, a reply may be sent to you via Australia
Post. Your message may also be forwarded to other Federal Ministers for their consideration.

This is an automatically generated email. Please do not reply to this email as this address is not monitored. If you have any
problems with this service please contact the Web Administrator through the site feedback service at www.pm.gov.au/feedback/

---------- Copy of your comments ----------

Name: Mr. Gerrit Schorel-Hlavka

Email Address: inspector_rikati@yahoo.com.au

Postal Address: 107 Graham Road Viewbank Victoria 3084 Australia

Subject: How to deal constitutionally with abuses regarding CHILDREN-etc! Part

Kevin,

.

REFERENCE: How to deal
constitutionally with abuses regarding CHILDREN-etc!

.

yet again there are reports of children being caused to work long hours and denied proper education in the Church of Scientology and I understand simular matters were reported about Exclusive Brethern, etc.

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While the High Court of Australia may
correctly have held that Scientology may be a RELIGION, in my view it erred in failing to consider the history of legislation prior to federation by the State of Victoria and the intentions of the Framers of the constitution as set out below.

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http://en.wikipedia.org/wiki/Scientology_as_a_state-recognized_religion
QUOTE
[edit] Australia
In 1982, there was a ruling by the High Court of Australia, in Church of the New Faith v. Commissioner Of Pay-roll Tax. The court ruled that the government of Victoria could not deny the Church the right to operate in Victoria under the legal status of "religion." All three judges in the case found that the Church of the New Faith (Church of
Scientology) was a religion. Justices Mason and Brennan said (referring to the Church of Scientology as "the Corporation"):

The question to which the evidence was directed was not whether the beliefs, practices and observances of the persons in ultimate command of the organization constituted a religion but whether those of the general group of adherents constituted a religion. The question which the parties resolved to litigate must be taken to be whether the beliefs, practices and
observances which the general group of adherents accept is a religion.

And in conclusion:

It follows that, whatever be the intentions of Mr. Hubbard and whatever be the motivation of the Corporation, the state of the evidence in this case requires a finding that the general group of adherents have a religion. The question whether their beliefs, practices and observances are a religion must, in the state of that evidence, be answered affirmatively. That answer, according to the conventional basis adopted by the parties in fighting the case, must lead to a judgment for the Corporation.

Justice Murphy said:

Conclusion. The applicant has easily discharged the onus of showing that it is religious. The conclusion that it is a religious institution entitled to the tax exemption is irresistible.

and

The conclusion to which we have ultimately come is that Scientology is, for relevant purposes, a religion. With due respect to Crockett J. and the members of the Full Supreme Court who reached a contrary conclusion, it seems to us that there are elements and characteristics of Scientology in Australia , as disclosed by the evidence, which cannot be denied.
END QUOTE
.
http://74.6.146.244/search/cache?ei=UTF-8&p=%22Church+of+the+New+Faith+v+Commissioner+of+Pay-Roll+Tax%22&fr=slv1-&u=www.cdi.gov.au/submissions/183-ChurchofScientologyAsiaPacificRegion.doc&w=%22church+of+the+new+faith+v+commissioner+of+pay+roll+tax%22&d=Z1aCOPH_QQAX&icp=1&.intl=au
QUOTE
Church of Scientology Asia Pacific Region
Office of Special Affairs
Inquiry Into The Definition Of Charities
And Related Organisations
C/-The Treasury,
Parkes Place,
Parkes,
A.C.T. 2600,
14 January, 2001
Dear Sir,
We refer to your Issues paper ("the Paper") headed "Inquiry Into The Definition Of Charities And Related Organisations" and your invitation for submissions to be made in respect of that Inquiry.
Whilst the Inquiry is concerned with "definitional issues" generally those "definitional issues" are presumably most particularly relevant to the income tax law, and it is with that law that this letter is concerned.
Whilst the Paper stated that submissions should be made no later than 31 December 2000, your press release of 14 December 2001 advised that you are prepared to accept submissions lodged after that date provided they are lodged by 19 January 200 1.

The Church of Scientology ("the Church") is an Australian religious institution which has a physical presence in Australia and which incurs expenditure and pursues objectives principally in Australia . As a consequence all the income derived by the
Church is exempt from Australian income tax.
The Church is satisfied with this aspect of the Australian income tax law and does not believe that this aspect of the Australian income tax law - so far as it is concerned - requires amendment. It submits that it is a fundamental feature and expectation of Australian society that religious institutions should not be subject to income tax.
It is also submitted that for organizations, such as religious organizations, that perform a wide spectrum of charitable activities, it is not appropriate to define the various activities differently (or to attempt to
distinguish between commercial and non-commercial activities undertaken by the religious organization).
Commercial activities undertaken by a religion are always ancillary to the religion; they are designed to enable the furtherance of the religion (and associated charitable activities undertaken by the religion). As Murphy J. stated in the Church of the New Faith v. Commissioner of Pay-roll Tax (Vic.) 83 ATC 4652 "Commercialization is so characteristic of organized religion that it is absurd to regard it as [disqualifying a religion]".
It is submitted that all of the activities undertaken by a religion should be regarded as being integral to the religion, and should not be discretely treated for income tax purposes. Not
only would any such treatment be contrary to community expectations, but would introduce further technical and administrative complexities into the taxation law.
Notwithstanding our general acceptance of the current tax law there are a number of overseas entities associated with the Church, which are not exempt, or may not be exempt, from Australian income tax since they do not have a physical presence in Australia .
In particular there are various overseas affiliates of the Church either being its parent church, or various entities established to support that parent church and other churches affiliated with that church, which provide
services to the Church. Various payments are made to these overseas affiliates. Royalty withholding tax might be payable in respect of some of these payments so made.
It is submitted that payments made by a charity (including a religious organization) exempt from Australian tax to an overseas institution (which is exempt from tax in that overseas jurisdiction) should not be subject to Australian tax (including withholding tax).
Such an exemption would reflect the policy of Australian tax law - that is, that n Australian charity (including an Australian religious institution) should not be subject to taxation. Given that normally a payee requires a payer to absorb withholding tax the imposition of withholding tax on a
payment made by an Australian charity is in substance normally the imposition of a tax on that Australian charity.
Whilst this is the case in respect of withholding tax generally, the effective imposition of tax on an Australian charity might be said to be particularly contrary to the spirit of the tax law, where tax is levied on a payment made by one charity to another (albeit that that other charity does not have a presence in Australia).
Yours faithfully,
Rev. Vicki Hanna
Church of Scientology
END QUOTE
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Adelaide Company of Jehovah's Witnesses Incorporated -v- The Commonwealth [1943] HCA 12; (1943) 67 CLR 116 (14 June 1943)

RICH J
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The attitude of the law both civil and criminal towards all religions depends fundamentally on the safety of the State.

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HANSARD *2-3-1898* Constitution Convention Debates

Mr. HIGGINS (Victoria).-I was not aware that this clause would come on so soon; but, inasmuch as I have spoken to the words in the preamble so recently, I think I shall be able to save honorable members the infliction of a long speech on this subject. My idea is to make it clear beyond doubt that the powers which the states individually have of making such laws as they like with regard to religion shall remain undisturbed and unbroken, and to make it clear that in framing this Constitution there is no intention whatever to give to the Federal Parliament the power to interfere in these matters. **My object is to leave the reserved rights to the states where they are, to leave the existing law as it is; and just as each state can make its own factory laws, or its own laws as to the hours of labour, so each state should be at full liberty to make such laws as it thinks fit in regard to Sunday or any other day of rest.**

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HANSARD *8-2-1898* Constitution Convention Debates

Mr. BARTON.-Yes; those who say that the people are always

right might say that it was a good thing. My honorable and learned friend will have many successors, and so shall I. But if the enlightenment of this day supposes itself to be right in saying that the free exercise of religion should not be prohibited, the question arises, should not a provision to that effect be placed in the Constitution? The trouble arises when you try to insert a proviso modifying this prohibition. For instance, if it were desired to prevent the application of the clause to any fiendish or demoralizing rite, that might be done by inserting the words "so long as these observances are inconsistent with the criminal laws of the state," because if there were no criminal law in existence at the time with which these observances were inconsistent, it would be possible for the state to pass such a law, and so, to use a common expression, euchre the whole business. I think, however, that we can do remarkably well without the clause at

all.

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As such States have every power to deal with criminal offences against State laws.

Below I have quoted a submission by **Scientology** for being a religion and for this being able to get tax exemption because of the raising of funds for religion including commercial activities. This I
view is in fact unconstitutional.
I understand that the High Court of Australia made a ruling that Scientology is a religion, but in my view this cannot whatsoever make a case for tax-exemption because;

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71-391a001doc-State Aid to Religion Abolition Act 1871

2. Definitions

In the construction and for the purposes of this Act the following terms shall if not inconsistent with the context or subject matter have the respective meanings hereby assigned to them, that is to say—

"denomination" shall mean any church religious body sect or congregation or the members of any church formed into or acting as a body of persons for religious purposes of what kind of faith or form of

belief soever;

.

Therefore it would be inappropriate for the State of Victoria to determine that Scientology for being a religion then is to be deemed a not for profit religion (denomination) and for this to be tax exempted.

.

The High Court of Australia in its judgment failed to take consideration of this.

.

116 Commonwealth not to legislate in respect of religion
The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

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Hansard 2-3-1898 Constitution Convention Debates

Mr. REID.-**I suppose that money could not be paid to any church under this Constitution?**

Mr. BARTON.-**No; you have only two powers of spending money, and a**

church could not receive the funds of the Commonwealth under either of them.

[start page 1773]

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Hansard 2-3-1898 Constitution Convention Debates

Mr. OCONNOR.-Yes. But the amendment of the American Constitution to which the honorable and learned member refers was rendered

necessary by the fact that there is not the definite division of powers in that Constitution that we have in our Constitution. **I cannot imagine that clause 52 gives any ground from which it could be argued that the Federal Parliament has the right to interfere in regard to the exercise of religion, or to deal with religion in any way.**

.

The Commonwealth of Australia therefore cannot interfere with religious practices but the States can. The Commonwealth neither can provide FUNDING for religious practices by way of taxation exemptions or tax deductions and the State of
Victoria clearly already prior to federation separated State and Church and as such when it joined the federation it had this embedded principal in the Constitution.

.

Therefore I view that any DENOMINATION cannot have tax concessions on the basis that it is a religion because this is unconstitutional, both for the commonwealth and the State of Victoria .

.

Further, I view that the Commonwealth
for itself should determine what is deemed to be for federal purposes a not-for-profit organisation AND IT CANNOT ALLOW REGISTRATION OF ANY ORGANISATION ON BASIS OF BEING A RELIGION.

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Therefore there must be a separation of non-commercial purposes and commercial purposes and profits must be made taxable. We must stop this elaborate rip of upon taxpayers by denominations by stopping tax exemptions for denominations.
.
This has nothing to do with the social welfare work performed by denominations, as where the religious body can show that it spend monies towards assisting the poor, regardless of his/her religious beliefs or the lack thereof, then it would be appropriate for those purposes for the Commonwealth to allow registration as a not0-for-profit organisation for this part.
.
The USA courts have extensively canvassed the issue of funding in particular to religious bodies providing education and I have in my past published books in the INSPECTOR-RIKATI® series extensively canvassed this and as such do not need to repeat the same, however it came down to it that the Federal Government is to fund education cost of students attending religious schools provided that the funding was used for secular and so non-religious purposes.
.
The Commonwealth clearly does have legislative powers to prohibit any not-for-profit organisation to be entitled to the registration as a not-for-profit organisation where it fails to provide for compliance with State and/or federal laws regarding conditions of under age children and/or where the not-for-profit organisation uses a condition of secrecy towards State and/or federal law enforcement officers and other State and/or federal staff to ensure that laws governing children are not breaches.
.
What this would amount to is that any not-for-profit organisation, regardless of being a denomination or not, would be put on notice that if they are employing children contrary to legal provisions under State and/or federal laws then their registration will be deemed invalid and they will be liable for taxation in an ordinary manner as any other business.
.
Currently we have organisations such as Exclusive Brethern and the church of Scientology and others who are purported to be not-for-profit organisation but are in a veil of secrecy that defies to be a not-for-profit organization. Hence, any business that purposes to be a not-for-profit organisation must be deemed accountable to the general public, as after all it is depriving the general public of taxation being paid by it, and therefore in all its conduct must remain transparent.
.
Take for example the Salvation Army. For tax exemption purposes it would require to be divided in two parts for accountability. One part would be for being a not-for-profit organisation where it can account for all monies raised being invested into assisting people regardless of their religious beliefs and another part in its religious collections that cannot be tax exempted as to allow this is unconstitutional.
.
Therefore, any organisation that seeks registration for not-for-profit organisation must separate its religious part as this cannot be allowed to be tax exempted.
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QUOTE
The Church of Scientology ("the Church") is an Australian religious institution which has a physical presence in Australia and which incurs expenditure and pursues objectives principally in Australia . As a consequence all the income derived by the Church is exempt from Australian income tax.
END QUOTE

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Again

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Hansard 2-3-1898 Constitution Convention Debates

Mr. REID.-**I suppose that money could not be paid to any church under this Constitution?**

Mr. BARTON.-**No; you have only two**

powers of spending money, and a church could not receive the funds of the Commonwealth under either of them.

[start page 1773]

.

Providing tax exemptions clearly is providing funding.

.

HANSARD *1-3-1898* **Constitution Convention Debates**

Mr. GORDON.- The court may say-"**It is a good law, but as it technically infringes on the Constitution we will have to wipe it out.**"

.

Again, there is no issue where tax-exemption is provided for secular matters. However, if any denomination is limiting its assistance to the needy to religious membership of a denomination then it cannot be deemed to be entitled to be classified as a not-for-profit organisation.

.

As I understand it about the assistance provided by the Salvation Army it does not stipulate and neither enforce any religious conduct or membership but will assist any person irrespective of having a religious beliefs. As such, this is the kind of welfare assistance I deem for that part would be entitled to receive not-for-profit tax exemption, where as other denominations that are ambivalent in

providing services and/or those who require membership of their denomination could not be deemed to classify for not-for-profit tax exemptions.

.

When any organisation (religious or not) pursues a tax exemption it must be deemed that the organisation is telling the world that they are in it for the good of others and not seeking to make a profit at the expense of the tax payers. Hence, such organisations must then be held to comply to a certain code of conduct that they will observe all relevant State and Federal legal provisions and failing to do so their status as a not-for-profit organisation will be deemed to be void.

.

Organisations who now may exploit under age children may then realise that they better do not because they could loose their status of being a not-for-profit organisation and so applicable from when the breaches of law were occurring. As such, even if breaches were finally detected some years later having been occurring over the years the taxation would then have to be adjusted for those years that the breaches were found to have occurred.

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HANSARD

8-2-1898 **Constitution Convention Debates**

Mr. HIGGINS.-I did not say that it took place under this clause, and the honorable member is quite right in saying that it took place under the next clause; **but I am trying to point out that laws would be valid if they had one motive, while they would be invalid if they had another**

motive.

.
Therefore any ;legislation targeted upon religions, at least by the commonwealth, could be deemed unconstitutional, but if it were to apply to all businesses seeking not-for-profit registration then it would not be unconstitutional.

.In my past published books I exposed how a not-for-profit (non-religious) organisation was having children allegedly in apprenticeship even so after a
mere few weeks to tell them there was no work while the not-for-profit organisation was collecting thousands of dollars in apprenticeship training.
.
In my view this company was abusing the not-for-profit registration by making huge profits. Hence I view that any not-for-profit organisation must declare every cent it spend so the public can hold them accountable. Also that there must be a legislation in place that any not-for-profit organisation must not exceed a certain percentage of wages, etc.
.
As I understand it we had a councillor who reportedly raised hundreds of thousands of dollars and about 10% ended up with charities and the rest he appeared to have paid to himself for consultancy fees. This to me underlines the gross abuse and mismanagement of the not-for-profit registration and the tax exemption by this.
.
We also have that collections for not-for-profit organisations are being done by companies who then may pay less then 10% of donations to the charity. Yet the entire donation somehow is made tax deductible. What we therefore have is that if I were to own a not-for-profit business and were wanting to reduce my own taxable income then I could effectively make a donation to my own not-for-profit
business and score tax-emption for the monies received from this not-for-profit business and also have a tax deduction for the monies so donated. A double whammy, so to say.
.
In my view, the registration for not-for-profit companies should be federally controlled and then states could adopt the federal system. It would then exclude not-for-profit registration on pure religious grounds!
.
It would mean that no longer tax payers are ripped of by the unpaid taxes being sent overseas! After all
whenever any not-for-profit organisation is excluded from paying taxes it means that taxpayers have to make up the shortfall!
.
We either have a constitution or we don't and it is long overdue that we adhere to the constitutional provisions and limitations.
.
HANSARD *31-1-1898* Constitution Convention Debates

Mr. SOLOMON.- We shall not only look to the Federal Judiciary for the protection of our interests, but also for the just interpretation of the Constitution:

.
Regretfully, you will find that the High court of Australia in its various judgements fails to appropriately consider the intentions of the Framers of the Constitution
Still, having set out the above I urge that you ensure urgent and appropriate action is taken so any business that seeks to have a not-for-profit registration for tax-exemption purposes does earn that right by being secular in its conduct and obeys all legislative provisions such as those applicable to under age children, including their education and work hours.
.
Gerrit

.

Mr. G. H. Schorel-Hlavka

.

8-7-2008

Mr. G. H. Schorel-Hlavka MAY JUSTICE ALWAYS PREVAIL® 107 Graham Road Viewbank, 3084, Victoria, Australia Ph/Fax 03-94577209 International 61394577209 . "CONSTITUTIONALIST" and Author of books in the INSPECTOR-RIKATI® series on certain constitutional and other legal issues.
Website; http://www.schorel-hlavka.com Blog; http://au.360.yahoo.com/profile-ijpxwMQ4dbXm0BMADq1lv8AYHknTV_QH .

"JUSTICE IS IN THE EYE OF THE BEHOLDER AND CLOUDED BY HIS/HER SIGHT DEFICIENCY"
END QUOTE 8 July 2008 correspondence to Mr Kevin Rudd PM

.

QUOTE **Chapter NOT FOR PROFIT-MUNICIPAL COUNCILS-ETC**

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Chapter NOT FOR PROFIT-MUNICIPAL COUNCILS-ETC

.

* Gerrit, in your past communications with **Prime Minister Kevin Rudd** and the **ATO** (Australian Taxation Office) did you ever raise the issue that the Commonwealth cannot fund religion and so neither provide tax concessions?

.

**INSPECTOR-RIKATI®**, actually I did but my 8 July 2008 correspondence to **Kevin** has so fat not been addressed as I have not received any response in that regard and with the **ATO** I think they better get themselves more competent lawyers who at least have some understanding as to what is constitutionally applicable before they present themselves again before the High Court of Australia.

.

* Why is that?

.

Well they had this case ***Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) 1983 154 Clr 120 [1983] HCA 40; (1983) 154 CLR 120 (27 October 1983)*** regarding the provisions of **Pay-roll Tax Act 1971 (Vict.),s. 10(b)** and in it was stated "**the corporation then appealed to the Full Court.**" And "**and the corporation now applies for special leave to appeal against that dismissal.**".

Well when you check the ***Commonwealth Constitution Act 1900*** (UK) you find that it provides legislative powers for the Commonwealth in regard of; "(xx) **foreign corporations**", and trading or financial corporations formed within the limits of the Commonwealth" as such anything to deal with "companies" is a federal power not a state power.
Further, the Colony of Victoria legislated a separation of State and Church by way of 71-391a001doc-***State Aid to Religion Abolition Act 1871***

QUOTE

2.Definitions

In the construction and for the purposes of this Act the following terms shall if not inconsistent with the context or subject matter have the respective meanings hereby assigned to them, that is to say—

"denomination" shall mean any church religious body sect or congregation or the members of any church formed into or acting as a body of persons for religious purposes of what kind of faith or form of belief soever;

END QUOTE

.

Therefore it would be inappropriate for the State of Victoria to determine that Scientology for being a religion then is to be deemed a not for profit religion (denomination) and for this to be tax exempted.

.

The High Court of Australia in its judgment failed to take consideration of this.

.

QUOTE

> **116 Commonwealth not to legislate in respect of religion**
> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

END QUOTE

.

Hansard 2-3-1898 Constitution Convention Debates

QUOTE

> **Mr. REID**.-**I suppose that money could not be paid to any church under this Constitution?**
>
> **Mr. BARTON**.-**No; you have only two powers of spending money, and a church could not receive the funds of the Commonwealth under either of them.**
>
> [start page 1773]

END QUOTE

.

Hansard 2-3-1898 Constitution Convention Debates

QUOTE

> **Mr. OCONNOR**.-Yes. But the amendment of the American Constitution to which the honorable and learned member refers was rendered necessary by the fact that there is not the definite division of powers in that Constitution that we have in our Constitution. **I cannot imagine that clause 52 gives any ground from which it could be argued that the Federal Parliament has the right to interfere in regard to the exercise of religion, or to deal with religion in any way.**

END QUOTE

.

Scientology it self submitted in the past;

http://74.6.146.244/search/cache?ei=UTF-8&p=%22Church+of+the+New+Faith+v+Commissioner+of+Pay-Roll+Tax%22&fr=slv1-&u=www.cdi.gov.au/submissions/183-ChurchofScientologyAsiaPacificRegion.doc&w=%22church+of+the+new+faith+v+commissioner+of+pay+roll+tax%22&d=Z1aCOPH_QQAX&icp=1&.intl=au

QUOTE

> It is submitted that all of the activities undertaken by a religion should be regarded as being integral to the religion, and should not be discretely treated for income tax purposes.

END QUOTE

.

Because of the submission "**It is submitted that all of the activities undertaken by a religion should be regarded as being integral to the religion**" in fact then all of its activities are by this subject to ordinary taxation provisions and none can be excluded as otherwise it would offend the provisions of the constitution and the principles embedded in it.

.

When the Framers of the Constitution debated "**excise and customs**" duties it was **Edmund Barton** (later Prime Minister and there after judge of the High Court of Australia) who made clear that States could not interfere with the Commonwealth of Australia legislative powers whatsoever and would be bound to pay customs and excise duties as like anyone else as otherwise the States could get railway rails cheaper then other businesses and that was not what was intended by this.

Therefore, the issue the High Court of Australia was dealing with if the *Church of the New Faith* (now known as ***Scientology***) was a religion or not in my view was showing the High court of Australia never comprehended what was constitutionally applicable as the State of Victoria bound by the ***State Aid to Religion Abolition Act 1871*** had federated on the basis of separation of State and church and that no longer funding could be provided.

.

But, it goes much further then that, the Commonwealth by s116 of the constitution cannot accept the registration of any company as a **denomination** organisation to exclude it from taxes and hence the not for profit organisation on basis of being a denomination is unconstitutional both for the State and/or the Commonwealth.

.

More over, no company can register in a State as a **NOT FOR PROFIT** organisation as the Framers of the constitution made clear that once the commonwealth exercised any powers provided to it in the Constitution then from that day the Commonwealth legislated the States no longer could exercise any legislative powers. With taxation it was held that States had state legislative powers but could not levy tax on any area that the Commonwealth had legislative powers and exercised this. With other word, if the Commonwealth were to legislate for a land tax then the States would be ousted to raise land taxes.

.

Getting back to the **NOT FOR PROFIT** registrations, the States therefore have no constitutional powers to legislate for any **DENOMINATION** to be excluded as a company from taxes of any kind because company legislation is a Commonwealth power.

.

The Commonwealth cannot provide funding for religions and so neither tax deductions and tax rebates or for that matter for others to have tax deductions because they donated to a denomination (religious organization).

.

There are organizations, being it that they are religious organizations or not who do provide services to the community and the **Salvation Army** is one of them.

When one consider the numerous USA Supreme Court decision in regard of the same provisions in the USA Constitution they made it very clear that for example funding for non religious purposes (such as school books) would be appropriate provided the monies were not used for religious matters. As such, the issue is that if a denomination (religious organization) split its religious services section from its welfare organization and keep them separate than I view the commonwealth could allow for tax concessions for the welfare section services albeit excluding the religious services. As such the religious organization has the onus to show separate bookkeeping as to avoid monies being transferred to its religious service section.

.

The states who provide pay roll tax, etc, also by the separation of Church and State has to apply the same.

.

The Commonwealth cannot adopt State **NOT FOR PROFIT** provisions but must legislate for itself in that regard and failing there being any then the commonwealth must re-assess all such **NOT FOR PROFIT** registered companies and calculate ordinary taxation.

.

As **Edmund Barton** (Later Prime Minister) made clear that the State couldn't interfere with Commonwealth legislative powers.

.

* What about local councils?

.

You mean "Municipal Councils" as constitutionally the "State Government" is the "local council"?

.

* You know what I mean.

.

They can neither exclude religious organizations of rates and other taxes on basis of belonging to a denomination or because they are registered as a **NOT FOR PROFIT** organization as it is likewise bound by the federal constitution.

.

* What about councillors making special grants to a religious organization, you know how councillors in **Banyule City Council** can allocate up to $20,000.00 towards their pet-projects?

.

#

First of all, it is in my view a sheer and utter nonsense for any councillor to play **Santa Clause** with the monies extorted from ratepayers, where they are struggling to survive and make end's meet.

.

* What do you mean with extorted?

.

If it is not for a lawful purpose then I view it is extortion using ordinary powers to achieve the payments.

.

* Are you saying that a Council cannot fund religious services projects, say for replacement of stained window or that kind?

.

Precisely. It is a religious matter and therefore no council has the power to provide funding for anything that relates to religion.

.

With the Salvation Army you will find that it is not concerned with what religion you practice if any at all, it simply provides assistance to people in need, whom ever they are, and hence this part in my view appropriately can be funded by tax payers being it by way of tax deductions, tax exclusion, etc. However if the **Salvation Army** wanted a new carpet in a chapel then this would not be within the powers of Federal or State government to provide for this in any way whatsoever, not even to allow for tax deduction for those who fund it and municipal councils are bound by the restrictions that applied to State Governments.

.

The State granted municipal councils certain powers and therefore it cannot grant more powers to a municipal council it doesn't have itself.

.

* What about the exclusion of political parties from taxation, like the one that now has a Senator in the Federal Parliament?

.

Firstly, if the party is a religious organization it would be excluded from any tax exclusion not applicable otherwise to other organizations. Secondly, where it deal with non religious political parties in general then it neither can provide for tax exclusions unless this so was registered under Commonwealth law for so far we deal with political parties registered as companies.
Most businesses are so to say jumping on the bandwagon to register as some form of corporation to try to exclude personal liability to some extend not realizing that by this they are falling under federal legislation.

* What about states registering companies?

.

You cannot have both the Commonwealth and the States covering the same legislative power and as I indicated above that the Commonwealth was provided with this legislative power then technically any State registration as to any company is to be deemed **NULL AND VOID** from the day the Commonwealth commenced to exercise its legislative powers.

.

* What about any State registration prior to the Commonwealth commenced to legislate?

.

the Framers of the Constitution made clear that once the Commonwealth commenced to legislate then all this was the only issue however those who had complied with State legislation now fell under Commonwealth legislation. They also made clear that the Commonwealth could not make a criminal by retrospective legislation, etc. As such, if a company was validly registered under State legislation and the Commonwealth then commenced to legislate for the Commonwealth then had to keep in mind that it would not cause companies to be in breach of law where they had acted validly under State laws. As such, the Commonwealth has an onus that when it exercises its legislative powers to ensure it does so in a reasonable manner. It may be for example that the Commonwealth may object to certain parts of State registration legislation and for this legislate a time period for companies to adjust to new Commonwealth powers. However, because the commonwealth must provide legislation for "**the whole of the Commonwealth**" it cannot therefore exclude some but not others from its legislation. Meaning that at all times the legislation must be to provide all companies the same regime.

.

* What happened about your objection to the GST when you wrote to the ATO?

.

As I stated the ***O'Meara*** decision by the Federal Court of Australia was ill conceived because the Framers of the Constitution made clear that no Taxation legislation in its final format can be applied to raise taxes from more then one item and they specifically referred to the "**rail**" and the "**post**" (on farmers land). Now the **GST** might be deemed to be a supply tax but still it applies then to both the "rail" and the "post" and therefore is unconstitutional. You can pretend it applies to service or whatever but in the end the end result is the same it applies to more then one article and therefore unconstitutional.
Hansard *14-4-1897* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)
QUOTE

Mr. HIGGINS:

What is meant by one subject of taxation? Suppose a land tax is imposed, you tax **posts** and **rails**. That may be argued not to be a law dealing with one subject.

END QUOTE

.

QUOTE

So far as the expression "laws" or "Acts" is concerned, that deals with the law when it is passed, and such an expression to my mind clearly means that even after that

which is a Bill has become law. if it deals with anything more than the imposition of taxation, it will be unconstitutional, and the Federal High Court can decide that it is unconstitutional and void; so when an Act affecting to deal with more than taxation, and yet is a Tax Bill, happens to be carried through both Houses and assented to in contravention of this provision, that would be an unconstitutional and therefore a void Act.

END QUOTE

.

While the ATO in its correspondence to me claimed that the GST is a tax on businesses, the truth is that the Senate inquiry to investigate the application of a GST dealt with a tax on consumers. There is no constitutional power for the commonwealth (for the Crown) to give taxation powers to traders and neither to impose to their likings the GST or not. As the Framers of the Constitution made clear Commonwealth law could only be enforced through State Courts by Judicial decision and hence no Municipal City Council either has a constitutional position to charge GST in regard of ratepayers because it is not a judicial decision, as no municipal council had judicial powers. As I explained previously also to the ATO all unconstitutionally collected GST must be refunded to the people against whom it was charged.

.

The following applies as much to Federal laws of the Commonwealth of Australia as it does to federal laws in the USA;
http://familyguardian.tax-tactics.com/Subjects/LawAndGovt/ChallJurisdiction/AuthoritiesArticle/AuthOnJurisdiction.htm

- The general misconception is that any statute passed by legislators bearing the appearance of law constitutes the law of the land. The U.S. Constitution is the supreme law of the land, and any statute, to be valid, must be in agreement. It is impossible for both the Constitution and a law violating it to be valid; one must prevail. This is succinctly stated as follows:

  The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it. An unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.

  Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. . .

  A void act cannot be legally consistent with a valid one. An unconstitutional law cannot operate to supersede any existing valid law. Indeed, insofar as a statute runs counter to the fundamental law of the land, it is superseded thereby.

  No one is bound to obey an unconstitutional law and no courts are bound to enforce it.

Sixteenth American Jurisprudence
Second Edition, 1998 version, Section 203 (formerly Section 256)

.

Quick & Garran's "***Annotated Constitution of the Commonwealth of Australia***" more accurately and more meaningfully says that;

"A law in excess of the authority conferred by the Constitution is no law; it is wholly void and inoperative; it confers no rights, it imposes no duties; it affords no protection.".

.

Hansard *1-3-1898* Constitution Convention Debates

Mr. GORDON.-

Once a law is passed anybody can say that it is being improperly administered, and it leaves open the whole judicial power once the question of *ultra vires* is raised.

.

Again;

and it leaves open the whole judicial power once the question of *ultra vires* is raised

.

Actually "**Chapter 607-ATO & GST-TELSTRA**" of my previous published book set this out in more details as well as other matters.

.

Hansard 8-2-1898 **Constitutional Convention Debates**

Mr. O'CONNOR.-I do not think so. **We are making a Constitution which is to endure, practically speaking, for all time. We do not know when some wave of popular feeling may lead a majority in the Parliament of a state to commit an injustice by passing a law that would deprive citizens of life, liberty, or property without due process of law.**

.

And

Mr. O'CONNOR.-No, it would not; and, as an honorable member reminds me, there is a decision on the point. **All that is intended is that there shall be some process of law by which the parties accused must be heard.**

And

Mr. O'CONNOR.-With reference to the meaning of the term due process of law, there is in Baker's *Annotated Notes on the Constitution of the United States*, page 215, this statement-

Due process of law does not imply that all trials in the state courts affecting the property of persons must be by jury. **The requirement is met if the trial be in accordance with the settled course of judicial proceedings, and this is regulated by the law of the state.**

If the state law provides that there shall be a due hearing given to the rights of the parties-

Mr. BARTON.-**And a judicial determination.**

Mr. O'CONNOR.-**Yes, and a judicial determination-that is all that is necessary.**

.

Hansard *2-3-1898* Constitution Convention Debates

Mr. BARTON.-Yes; and here we have a totally different position, **because the actual right which a person has as a British subject-the right of personal liberty and protection under the laws-is secured by being a citizen of the States.** It must be recollected that the ordinary rights of liberty and protection by the laws **are not among the subjects confided to the Commonwealth**.

.

The Commonwealth of Australia has no constitutional powers of the liberty of a person, as this lies with the States.

.

Hansard *1-3-1898* Constitution Convention Debates

Mr. HIGGINS.-But suppose they go beyond their power?

Mr. GORDON.-It is still the expression of Parliament. Directly a Ministry seeks to enforce improperly any law the citizen has his right.

.

I take the position that therefore **Banyule City Council** has no legal position to apply **GST** without first having obtained a Court order to do so. To allow otherwise would mean the Commonwealth would place itself above the Constitution and disregard the judiciary specifically established to determine any conflict of laws.

.

It may be odd for a city council having to pursue legalities of matters but then if **Banyule City Council** seeks to enforce GST legislation contrary to my objection then it cannot do anything unless it first obtains a Court order by way of **JUDICIAL DETERMINATION**,

.

Lets try to use an example.

If the Commonwealth were to legislate that I can remove any funds **Banyule City Council** collected and hand it over to the Federal treasury, would not then **Banyule City Council** in the first place argue that the Commonwealth lack such constitutional powers and therefore it isn't relevant if the legislation authorize me to remove their funds (monies) as unless there is a court order to provide for it the legislation enacted by the Commonwealth has no legal force?

And likewise if **Banyule City Council** is extorting monies from me under the purported GST provisions I am equally entitled to demand it provide me with a copy of the relevant court order to prove it is duly and properly authorized to do so. Indeed, where it squanders my rates also on items I deem unconstitutional it even further is an issue I hold the **Banyule City Council** as any other city council should do is to prove their judicial order to be entitled to act as such.

.

If a police officer attends to my residence without WARRANT issue and attempts to enter my property I have my common law rights to prevent this.

.

If a police officer attends to my property and seek to remove from my property under all kinds of threats my motor vehicle without a WARRANT issue again I have my common law rights to oppose this.

.

I do not need to go to Court to obtain a prohibition order against the police as by common law not even the queen can enter my property without my consent.

.

Banyule City Council as such, while not entering my property as to the land I owe, by charging GST are equally removing from me under their demands "property" (monies) by inducing me to pay rates that include GST.

.

As like the police officer I do not have to go to Court to oppose this unconstitutional conduct rather **Banyule City Council** has to prove it acts lawful by way of Court determination against me, that it can charge GST.

.

As I corresponded to **Prime Minister Kevin Rudd** where is the constitutional powers to legislate as to environment and cause **Banyule City Council** to incur about 1.2 million dollars to change light globes for special light globes?

In my view there simply is not such legislative powers and I view that **Banyule City Council** before considering any of this kind of legislation to be enforceable should have had matters appropriately researched.

I am well aware that more then likely no councillor ever considered the fact that he/she must act appropriately and cannot merely demand monies from ratepayers irrespective if the purpose for which the monies or part thereof is being use is unconstitutional/unlawful but where they are councillors they better realize they do have obligations towards ratepayers.

The same is with **Banyule City Council** as like other councils and organizations such as **WATER** corporations, etc, having somehow been authorized by the State government to apply overdue interest and other charges. Well the Framers of the Constitution provided corporations powers to the Commonwealth and also provided for

Constitution. Subsection 51

QUOTE

> (xiii) banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;

END QUOTE

.

Therefore, it would be **UNCONSTITUTIONAL** for State Parliaments to legislate for municipal councils, water boards, and others to be able to charge interest rates as they are governed under the term of "**trading companies**" (as was applicable at the time of federation – and therefore still applicable) as to being deemed to be businesses that are not banking companies but are nevertheless lending monies, etc.

.

Yet we find scrupulous municipal councils, water boards and others relentlessly pursuing people even to use debt collectors to enforce also interest even so no constitutional position as such exist.

Unless such companies are within commonwealth law registered to be allowed to operate as "trading companies" I view they have no power to enforce such interest and other charges.

.

Indeed it circumvent the **DUE PROCESS** that is applicable within the constitution because it allows a form of terrorism upon the citizen.

To give an example.

Telstra engaged a few years back a debt collector as to try to collect about $700.00 plus from me even so the bill was not in my name and neither authorized for this. Indeed, I had never visited the location where the bill was created.

Telstra had nevertheless disregard privacy laws and disclosed my identity and the Debt Collector Agency then began its campaign of terrorist to try to get me to pay the outstanding account. Finally getting fed up with it I wrote to them that I would pursue a court order against them if they did not stop. They did.

.

Then I have this current matter with a **WATER** board that delivered **WATER** to one of my properties on request of the person who occupies the property and engaged in a contract with the **WATER** board for this. I was provided with accounts and it was made clear that under legislative provisions I was obligated, as owner of the property, to pay. Not wanting to have a bad credit rating I ended up paying. Only later to discover that because I was paying the same bill as the occupier had also done the occupier simply stopped to pay the bill. This then became more complicated. The **WATER** board then making clear it would charge interest against me and place the matter in hands of a Debt Collection Agency.

While to keep the **STATUS QUO** I made further transfer of funding, actually in excess to what the bills were, indicating it was not to be seen I accepted liability I did however request a copy of the legislation they relied upon.

They provided by facsimile a copy and it turns out the legislation didn't at all provide the powers the **WATER** board had claimed but in fact stipulates that the **WATER** board is to deal with the account holder. Neither did it provide any provision that a **WATER** board can fraudulently obtain payment from the occupier who was the account holder as well as from the property owner.

As such what we have is a form of **TERRORISM** deployed by a local **WATER** authority seeking to manipulate its powers and generally getting away with it.

.

It is this kind of criminal conduct that is going on where we as a society have lost the plot and forget about the so called **TERRORIST** walking about with weapons as we find that **TERRORISM** is rife by those who are supposed to provide public service.

.

We have had incidents of a municipal council selling wrongly the property of a resident, etc, and this should come to an end. We must return to a law and order and consider that Federal, State/Territorial and so also municipal councils can only act within the provisions of "**peace, order and good government**". Meaning that no municipal council can enforce its own laws against a citizen without a Court's judicial order.

It is a fundamental principle of constitutions that Court provide a judicial decision and no one has the right to take the law into their own hands, not even municipal councils.

.

A stark welcoming conduct was when **Cr Dean Sheriff** on 14 July 2008 as I understood it made clear to fellow councillors to show some common decency to struggling ratepayers and that re should be no issue not to seek appropriate powers from the State government to perform this service to ratepayers. This is the kind of spirit one can find among the Framers of the Constitution that it is not every one look after himself but that there is a understanding that by looking after your fellow man you look after yourself.

Indeed **Mr Howe** in 1891, 1897 and again in 1898 pursued this principle to get finally the majority of the delegates at the Constitution Convention to accept that "(xxiii) **invalid and old-age pensions**" was to be part of the federation by having it in the constitution. Unbeknown to many this in fact included the poor, homeless, lunatics, paupers, etc actually all are also falling within this provision but unless you are a constitutionalist who has extensive researched these matters it would be unknown to a person, including constitutional law professors.

Anyone who heard **Cr Dean Sheriff** talking (14-7-2008) and read what **Mr Howe** stated would beyond doubt hold that they appear to be molded from the same material, that is truly desiring to look after their fellow mean and not just only their own personal benefits.

This was the spirit of federation but regretfully councillors these days do not appear to show this exemplary kind of attitude.

.

Councillors are to represent the ratepayers and not to terrorize them and ignore their wellbeing.

.

Let say for example some street fire breaks out that people have to be evacuated. Now you might be hard pressed to find any municipal council having a disaster plan in place that would enable an immediate disaster plan to be available to remove the old and the infirm and the disabled from residential places that need to be evacuated. There simply appears to be system in place to address such an issue. As such what are municipal councils for if the basic needs of residence are ignored?

.

Municipal councils are there in the first place to promote the residents health and wellbeing and what is best in general for the community but when it comes to the crunch more then likely a person needing help in an emergency will have next to no assistance.

.

People who lack the funds to live ordinary may have to cut cost for the ever increasing rates and by this may even have to do without telephone connection and then lack any ability to be in contact with emergency services when the need arises.

.

Indeed why have municipal councils if they basically try to operate as some additional level of government while the very purpose for which they were created is slowly ignored more and more?

.

Hansard *8-2-1898* Constitution Convention Debates

Mr. CARRUTHERS.-

> The **citizens** of each state, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be **citizens** of the Commonwealth, and shall be entitled to all the privileges and immunities of **citizens** of the Commonwealth in the several states, and a state shall not make or enforce any law abridging any privilege or immunity of **citizens** of the Commonwealth, nor shall a state deprive any person of life, liberty, or property without **due process of law**, or deny to any person within its jurisdiction the equal protection of its laws.

.

Even this seems to be lacking where a municipal council is more concerned of raising rates no matter what hardship there might be and apply, albeit unconstitutionally, interest, while spending on their kind of pet-projects no matter how unconstitutionally or otherwise unlawful this might be.

In my view in general they have lost the plot.

* Wasn't there a book distributor making clear that if you didn't provide an ABN number it was bound to deduct 48.5% of the invoice in regard of **GST** because the legislation provides for this?

.

Yes, and I then made clear they would not be able to get a single copy from me because this legislation is unconstitutional and no one is going to force me to comply with unconstitutional legislation as only a State court can determine these matters.

.

* And?

.

They have indicated they will pay the full invoice price.

.

* Did they?

.

For so far I have decided not to have any dealing with them because I do not like it that they tried to go against my constitutional rights. So, no need to forward any invoice because I refused to provide them with that they requested to be supplied with.

.

* But would this not be financial harmful to you having such large distributor not being provided with books to sell?

.

In life one has either principles or not. As an Attorney I assisted many over the decades in their litigation but never charged for this as I do not prostitute myself in that regard. I have no obligations therefore towards anyone to deceive the courts or otherwise act against any persons interest, not even to that of the opponent.

.

* So, you view lawyers prostitute themselves?

.

My view is that in general they do as they take the side of a party regardless if this provides **JUSTICE** to the other party. I have no such limitations or inappropriate considerations as one party may call me in and I might end up assisting both parties or assist the opponent party instead. That is the condition I have always stipulated for me to assist anyone in the litigation, they take it or leave it.

.

* I just was wondering. If a **NOT FOR PROFIT** organization made a donation to a denomination (religious organization) in regard of religious matters would that be a problem?

.

It would be an abuse of the **NOT FOR PROFIT** status as it would be a backdoor approach to fund religious services. As such the **NOT FOR PROFIT** status has been abandoned and should be stripped.

.

* Would you say your wife is religious?

.

Yes.

.

* And does she share your views about excluding religious organization in regard of tax deductions?

.

Actually, she find it sickening politicians going to large church organizations prior to and during an election trying to score their votes as she holds that religion is a persons personal choice and should not be use in politics. Also, she views that large companies operating under the shield of being a denomination and so gain tax exclusion is to undermine what religion is about. Essentially nothing less then when reportedly Jesus overturned the tables of the money makers. Religious belief is a mental status of a person and if you turn this in a money spinning enterprise it is no longer for purpose of religious beliefs.

.

In my view the late Mother Teresa was a clear example where she showed her religious belief to assist the poor regardless of their known religious status and not for trying to make money out of it all.

.

* I understand there are council elections coming up and I wonder if you are going to stand for council again?

.

to tell you the truth I do not know because I have reservations about the ever escalating fee for candidates to nominate both in the municipal elections, State elections and Federal elections. In fact for this I boycotted the last State and Federal election because it is unconstitutional to raise any fee as the Framers of the Constitution made clear that even the poor should be able to stand as a candidate. Now, if you are , such as in federal elections, going to demand some $500.00 payment for a candidate to stand for election then effectively many of the poor would be excluded to stand as a candidate. As the Framers of the Constitution made clear the fact that a person might be poor doesn't mean the person is less competent. As they explained a person could end up poor by no fault of his own and then still could be competent in representing electors as his unfortunate loss of wealth should not alter his ability.

.

* But don't candidates get if back if they get more then a certain percentage?

.

well, you could register as a candidate and to your knowledge you will be the only challenger to a sitting candidate and then just before closing of nominations something occurs that inspire others to stand as candidates also. Now you lacking the huge finances to campaign

end up with, say, 2% of the votes while the rich can afford a huge advertise campaign as they know they will get it back in the unconstitutional "payment per primary vote". As such, the lection process is unconstitutionally stacked for political party candidates as they know they get at least a certain amount of votes and so can pre-spend on advertising and the poor candidate, no matter his ability to provide appropriate representation is basically railroaded of having any opportunity to be elected.

I for one would know that not s single member of any State/Territorial or Federal Parliament would be able to comprehend what is constitutionally applicable as I do. This is not bragging but reality, as if they did we would not have this utter legal mess we are in now. Yet, in elections I have basically no hope in the world to get elected on basis of competence because I am not willing to spend huge amount of monies on an election campaign. As such, raising the allowances/salaries for councillors/Members of Parliament and/or Ministers of the Crown only ensure you get more likely the rot rather then the competent to represent the electors.

Prior to federation it was an issue of "**HONOUR**" to represent electors but this now is more about how they can abuse and misuse their position as much as possible for their own personal gain, etc.

.

* You realize of course some people may not like your statements?

.

In life you never can please everyone and in particularly not those who are offended by being exposed. You find people have acted in a certain manner because others have done so before them and they simply are like **ZOMBIES** and the **Banyule City Council** is a clear example of this where they were voting on something like a "special charge" without anyone of them bothering to first ascertain what was legally appropriate despite that I had given the effort to set it out in my written submission and complicated by a SUPPLEMENT as well as oral submission. And the same is happening also in State/Territorial and Federal Parliaments.

.

Re: AUSTRALIAN CAPITAL EQUITY PTY. LTD. And: ROGER DAVID BARNARD BEALE, SECRETARY TO THE DEPARTMENT OF TRANSPORT AND COMMUNICATIONS; ROBERT LINDSAY COLLINS, MINISTER OF STATE FOR TRANSPORT AND COMMUNICATIONS and THE COMMONWEALTH OF AUSTRALIA No. WA G14 of 1993 FED No. 141 Legislation (1993) 114 ALR 50 (1993) 41 FCR 242 (1993) 30 ALD 849 (extract)

> **His Honour concluded that in the case before him the publication of the instrument was essential to the valid exercise of the power and that no distinction could be drawn between the publication of the notice and the exercise of the power.**

.

Therefore, where **Banyule City Council** published incorrectly details of the ***Rosanna Shopping Village*** in regard of the "**special charge**" then for this also it was not a valid publication as required un the provisions of the ***Local Government Act 1989***.

This is the kind of representation we end up with where they seem to be in the position because they have a cozy income from it rather then wanting to do the right thing to those they represent. I challenge any lawyer (being a so called constitutional expert or not) they have ever pursued as many constitutional issues as I have, even so I have done it without being paid for it! Basically any donkey can be elected to a council/parliament and his only disqualification might be to be an animal rather then his intelligent as a donkey by not saying anything but just barking would provide the same as the infamous Australian Democrats advertisement during the 2001 Federal election of having barking dogs. At least a donkey would not vote for nonsense as it doesn't now how to vote.

.

The same actually is with lawyers and those so called law professors. One judge after having been appointed to the High Court of Australia refused to hand down a decision as he made known he didn't know the constitutional issues involved. This is the kind of competence the judge portrayed that being appointed to the High Court of Australia doesn't mean he comprehended what the Constitution stands for.

.

What is so terrible in regard of this all is that we had the Framers of the Constitution working their guts out over many years to provide us with a democratic system and we had many a soldier losing his life in seeking to protect the interest of this Australian democratic system and yet it all is jeopardized by people who are more interested in what they can get out of it for themselves then to be truly proper representatives for the people they represent.

That is why we need an **OFFICE OF THE GUARDIAN**, a constitutional council, that Advises the Government, the People, the parliament and the courts as to what are the constitutional powers and limitations so finally we can even have the **ZOMBIES** representing us becoming aware what is constitutionally appropriate

.

Parliament never should have an issue about breast feeding babies in it as that underlines how low we have sunk. It is after all the parliament to legislate for the good of the general community within constitutional powers and not that elected representatives are side tracked because some woman may desire to flash her breast in the Parliament to feed some baby. Anyone who fails to understand this simply doesn't belong in the Parliament. People at times can loose a court case pending where a comma may be stated in the legislation that is considered by the court and as such it is essential that those who are in the Parliament have ample and sufficient concentration about legislation and not be side tracked by a crying baby, etc.

.

We do not see police women standing on a corner directing traffic while breast feeding a baby or holding a baby because simply this got nothing to do with equality but with the issue of that you must be able to perform a function for which you are being employed or otherwise being paid for.

.

I recall some 20 years ago while sitting at a lake talking to a woman holding a baby she suddenly without warning exposed her breast and started to feed the baby. It didn't worry me as I simply continued to talk to her as if nothing was happening. If the mother held the baby needed to be fed then so be it. In the circumstances I held there was no issue with this, however I do not accept that the parliament is the place to do the same because the purpose of the Parliament is to legislate as to very serious issues and every letter and comma is of vital importance and can make the difference to a person being defeated in court or not. Hence, any detraction that is not relevant to the proceedings itself must be avoided, so the feeding of babies in the House.

.

* I think we got a bit of track about the **NOT FOR PROFIT** issue, don't you think?

.

Perhaps to some extend but then if we have parliamentarians voting on Bills being side tracked by non parliamentarian matters then no wonder we are ending up in this huge legal mess. Perhaps the time comes we are going to have female councillors flashing their boobs in the council chamber to feed some baby? Are we going to have female lawyers of the **ATO** standing in court while breast feeding their babies? Perhaps the female judge dealing with cases while feeding a baby?

.

No one really may understand let alone what is appropriate with this whole **NOT FOR PORFIT** registration because they are all too busy considering how to accommodate for breastfeeding mothers instead of addressing themselves to what is constitutionally or otherwise legally appropriate.

.

* Now that you attended to the council meeting of **Banyule City Council** after years of not having done so are you eager to visit again as I understood you used to go fortnightly some decades ago?

.

That was decades ago and this involved another city council where prior to council meeting there was an opportunity to get together and have coffee, cake and sandwiches for consumption. I was then secretary of the local progress association and had great respect for the kind of councilor's we then had!

.

* And now?

.

See my previous answer!

.

END QUOTE **Chapter NOT FOR PROFIT-MUNICIPAL COUNCILS-ETC**

While this overall document may be deemed extensive it is not even addressing by a long shot all issues.

Because there is so misconception about how the constitution really applies I have taken the time to try to point out certain issues to some, albeit limited, extend so that it might be come clear that any taxation reform must be in consideration of the above as to avoid having yet again an all out so called tax reform only to start again all over again because no one really bothered to consider the true meaning and application of the constitution.

.

Here we have so much about religion, taxation and other matters and when some citizen like Mr Francis James Colosimo seeks to assist others in what he views is to do God's work then just check out in the quoted correspondence below what is done onto him!

.

QUOTE 18-3-2010 CORRESPONDENCE

WITHOUT PREJUDICE

John Griffin 18-3-2010
Office of the Executive Director, Courts
Level 26
121 Exhibition Street,
Melbourne Victoria 3000
GPO Box 4356
Melbourne Victoria 3001
Telephone 8684 0805
Facsimile 8684 0809 **Your ref; CD/10/101256**

.

. **AND TO WHOM IT MAY CONCERN**

.

16-3-2010

.

Cc; * **Mr & Mrs Colosimo**, 72 Shuter Avenue, Greendale, Vic 3341 francesco.c@live.com.au
* Deputy Registrar **Ashe Whitaker** VCAT – Guardian List) vcat@vcat.vic.gov.au
* **Mr Brendan Hoysted** brendan.hoysted@justice.vic.gov.au
* **Her Honour Harbison J** /o david.harbison@countycourt.vic.gov.au
* **Victorian Government Solicitors Office**, 1072628 C/o Monika Pekevska Stephen.Lee@vgso.vic.gov.au
* Senior Member **Ms Preuss** vcat@vcat.vic.gov.au

.

Ref; **G54449/00** (including **V2/2007** & **P194/2007** and other related proceedings) **Mr Francis James Colosimo** Re **John Griffin-foreclosure- etc.**

.
Sir,

I refer to your document:

QUOTE

Copy of (CD-10-101256) -- EDC Email to Mr Andrew Moyle in Response to VCAT Complaint of a General Nature.PDF

END QUOTE

.

I am representing (within the meaning of s.62 of the vcaata1998428) Mr Francis James Colosimo. Within s.143 of the vcaata I have the rights of a solicitor in representing Mr Francis James Colosimo.

.

Below I have set out some matters albeit in condensed format and not at all setting out all relevant issues, as to give you an indication this is not at all an issue so to say before the courts but one that is a gross abuse and misuse of the legal processes and must be stopped forthwith.

.

It is because I have such a high regard for the constitution, as after all I am a **CONSTITUTIONALIST** also, I pursue matter vigorously so we can assure that citizens can be provided with the constitutional and other legal benefits they are entitled upon but regretfully far to often are wrongly denied.

..

Let me briefly set out the legal issues.

.

Mr Francis James Colosimo is a devout religious person and has been in the process assisting people with distributing food, etc. for purpose of storage he was able to obtain a "**shed**" that had been registered previously with Footscray TAFE College as a "**shed**"

.

Mr Francis James Colosimo commenced to erect this shed for purpose of storage of items, in regard of his religious conduct to assist others, but Moorabool Shire Council then commenced a persistent harassment upon him by issuing all kinds of notices of which not a single one was actually issued according to law. I will not delve into precise details to avoid this correspondence becoming too long but further details can be obtained from me.

In the process it issued a **Penalty Infringement Notice** in accordance with the Infringement Act 2006 only can be enforced before a Court. VCAT (Victorian Civil and Administrative Tribunal) is not a court and not therefore permitted to deal with enforcement of such notice, which in any event was defectively issued.

.

The last notice issued by Moorabool Shire Council was dated both 7 and 17 January 2007 which cancelled a previous notice and such cancellation can only be permitted provided the "**shed**" was in compliance with the ***Building Act*** and the **Building Regulations** and as such that should for all purposes and intend to have been the end of the matter. However it appears to me that Coral Lynnette Young for the Moorabool Shire Council didn't care less about the 7 and 17 January 2007 notice and simply went ahead to institute on 22 January 2007 proceedings in VCAT, even so again by the terms of the Infringement Act 2006 VCAT has no jurisdiction.

.

Mr Francis James Colosimo, appearing unrepresented, objected to the jurisdiction of VCAT and also made known he relied upon his constitutional rights. (***The Commonwealth of Australia Constitution Act 1900 (***UK)

.

Any legal practitioner ought to be well aware that when an **OBJECTION TO JURISDICTION** has been made then the judicial officer cannot proceed with hearing the matter unless he/she first dispose of the **OBJECTION TO JURISDICTION** by formal reason of judgment and orders.

This never eventuated before VCAT despite 15 hearings so far! Hence, none of the hearings and any orders were having any LEGAL FORCE.

.

Worse is that during an 28 May 2007 **EX PARTE** Application VCAT member martin Philips then changed it that Mr Francis James Colosimo had build a "second **dwelling**" even so none of the notices issued by Moorabool Shire Council related to the erection of a "second **dwelling**" as such VCAT was seemingly enforcing a non-existing charge. The State of Victoria via the Parliament provided various legislative provisions which clearly differentiate between an "**outbuilding**" (**shed**) and a "dwelling" and indeed for over one hundred years the High Court of Australia also differentiated between an "**outbuilding**" (including a "**shed**") and a "**dwelling**".

.

On 30 may 2007 VCAT member Mr Martin issued orders for the "second **dwelling**" to be demolished, albeit Moorabool Shire Council seemed to have concealed from him that in fact the "**shed**" was by 7 and 17 January 2007 notice held to be in compliance with legal requirements.

.

Moorabool Shire Council then through its solicitors Maddock Lawyers pursued contempt proceedings and not less then 6 CONTEMPT hearings were conducted before Her Honour Harbison J as member for VCAT.

.

On 12 June 2008 Her Honour Harbison J requested the Office of the Public Advocate to investigate if Mr Francis James Colosimo conduct was "**WILLFUL**". As far as I am aware off by as to date the office of the Public Advocate never bothered to do so but did nevertheless institute proceedings against Mr Francis James Colosimo in the guardianship List for orders of Administration which on 29 October 2008 were issued.

.

An application for review was filed .

.

In December 2008 Mr Francis James Colosimo finally was able to get in contact with me and requested me to assist him in the VCAT litigation as he understood that I am a **CONSTITUTIONALIST**. This I did subsequently.

.

On 27 January 2009 I appeared before VCAT Senior member ms Preuss and having already submitted extensive written material prior to the review hearing I submitted that there was an **OBJECTION TO JURISDICTION** and also objected to Maddocks Lawyers for Moorabool Shire Council to be present as they had no legal standing, VCAT Senior Member Ms Preuss eventually ordered them to leave. I also submitted that the 29 October 2008 orders be set aside. This VCAT Senior Member Ms Preuss refused to do albeit she ordered that State Trustees Limited could not act on those orders other then what she stipulated.

I also submitted to be provided with the files, etc, and VCAT Senior Member Ms Preuss made known that the files would be provided to me, however up to this day this was refused and this despite numerous reminders. In fact I was not even provided by VCAT a copy of the 27 January 2009 orders, which I discovered months later were incorrectly issued but a request to correct them under the slip rule (s.119 of vcaata) was refused.

.

It was clear to me that VCAT Senior Member Ms Preuss lacked any proper understanding as to The **RULE OF LAW**, **NATURAL JUSTICE** and **DUE PROCESS OF LAW** as she blatantly disregarded to formally deal with the **OBJECTION TO JURISDICTION**.

.

More over she neither attended to the core issue for which Her Honour Harbison J requested the Office of the Public Advocate to investigate and that is if Mr Francis James Colosimo acted **WILLFUL** in contempt.

.

As I understand it to be ordinary a review within the Guardianship List requires a Senior Member to consider all matter **DE NOVO**. Hence VCAT Senior Member Ms Preuss was therefore to address first of all if Mr Francis James Colosimo acted **WILLFULLY** in CONTEMPT. This she never did to my knowledge despite hearing on 27-1-2009, 2-9-2009, 22-10-2009, 27-1-2010 and 16-2-2010.

.

On 16 March 20009 I appeared before Her Honour Harbison J and submitted to Her Honour Harbison J that the CONTEMPT proceedings had no legal validity and basically the lawyers had used Her Honour Harbison J as a fool., etc. I specifically stated that Mr Francis James Colosimo didn't even know if he was facing a criminal or a civil case. Her Honour Harbison J in the end accepted my submission to **PERMANENT STAY** the CONTEMPT proceedings. By then the office of the Public Advocate had still not commenced any investigation as requested on 12 June 2008 if Mr Francis James Colosimo acted **WILLFULLY** in CONTEMPT.

Her Honour ordered, upon my submission, that I be provided with copies of all transcripts of the 6 CONTEMPT hearings and also a copy of the 16 march 2009 transcript be placed on the guardianship List case.

Subsequently to receiving the TRANSCRIPTS I discovered that in fact Her Honour Harbison J never had actually formally charged Mr Francis James Colosimo with CONTEMPT, and yet correspondence of Victoria Legal Aid to Mr Francis James Colosimo advised him to purge his CONTEMPT.

.

As I understand it a woman is either pregnant or not but there is no such thing as a woman being half pregnant.

.

There fore either Mr Francis James Colosimo was charged with CONTEMPT or not. As he was never formally charged with CONTEMPT there never could never be any case to answer either.

If however the office of the Public Advocate had investigate as per 12 June 2008 request of Her Honour Harbison J if Mr Francis James Colosimo had acted **WILLFULLY** in CONTEMPT, then Mr Brendan Hoysted, duty officer of the Office of the Public Advocate would have had to report back that as Her Honour Harbison J had omitted to formally charge Mr Francis James Colosimo then there was nothing to investigate.

.

However what Brendan Hoysted, duty officer of the Office of the Public Advocate did was to pursue nevertheless an application for Administration on 29 October 2008 and obtained orders but limited to matters relating to Moorabool Shire Council only.

.

Again, a woman is either pregnant or not but she cannot be half-pregnant.

.

What now was held by VCAT Member Graves that Mr Francis James Colosimo was deemed mentally able to manage his own affairs but those relating to Moorabool Shire Council.

.

The supreme Court of Victoria, as I understand it, in the past set aside orders for suspended sentence against a (non related) party as the supreme Court of Victoria held that the sentencing judge could only invoke the powers provided by the vcaaata and not otherwise because no right of appeal existed in regard of any suspended sentence.

.

Yet, we have that nevertheless the guardianship List is misused to force ahead against mr Francis James Colosimo cost, etc, derived for the purported CONTEMPT proceedings even so this cannot be achieved. This is a gross misuse of CONTEMPT proceedings.

.

While VCAT in the guardianship List ordinary may have legislative powers to deal with administration matters in this case however this was not an ordinary application but one derived

from the request of Her Honour Harbison J for the Office of the Public Advocate to investigate if Mr Francis James Colosimo acted **WILLFULLY** in CONTEMPT. At no time did VCAT member Graves on 29 October 2008 or VCAT Senior member Ms Preuss ever attend to this issue, and as such all and any orders issued were for this also outside the jurisdiction of VCAT guardianship List. If jurisdiction had existed, something that was never invoked, then the first issue for the Guardianship List hearings should have been to investigate the issue of Mr Francis James Colosimo acted **WILLFULLY** in CONTEMPT. It is not relevant if the Office of the Public Advocate or for that matter "any person" can make an application for guardianship/administration because this related specifically to a request by Her Honour Harbison J regarding purported CONTEMPT proceedings and then the guardianship List is very limited to the powers it can exercise. It cannot be used to achieved something not within the ordinary CONTEMPT powers for a judge as a sentence.

.

In my view VCAT Senior Member ms Preuss lacks any competence in the Mr Francis james colosimo case to appropriately deal with the relevant legal issues and has in my view acted maliciously against mr Francis James colosimo to cause uncalled EMOTIONAL, MENTAL and FINANCIAL har,m upon mr Francis James colosimo.

.

As I understand it in law "malicious" is when a judicial officer not just act;'s without jurisdiction but acts in a persistend manner to defy the RULE OF LAW and/or DUE PROCESS OF LAW where a FAIR MINDED PERSON can take the view that the persistent conduct was uncalled for.

.

Again, Mr Francis James colosimo on 2 September 2009 personally made known to VCAT Senior member Ms Preuss that the protracted litigation prevented him to work normal hours to earn an income to pay his bills.

.

In my view any competent judicial officer should have, so to say, thrown out of the window the application of the office of the Public Advocate but somehow VCAT Senior Member Ms Preuss seemed to me to disregard even **NATURAL JUSTICE**., and went so to say on a counter attack on 2 September 2009 as I understood it to be to accuse Mr Francis James Colosimo of being in breach of legal provisions. Yet, to my knowledge there is no reliable evidence, and this I also submitted to Her Honour Harbison J on 16 March 2009, to prove Mr Francis James Colosimo acted unlawfully erecting his "**shed**".

As a matter of fact during these proceedings Moorabool Shire Council solicitors Maddocks Lawyers filed a copy of the Authority;

Cotsonis v Darebin CC [2005] VCAT 232 (15 February 2005)

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION

QUOTE

15 The definition of dwelling in the Darebin Planning Scheme is as follows:

> Dwelling A building used as a selfcontained residence which must include:
> a) a kitchen sink;
> b) food preparation facilities;
> c) a bath or shower; and
> d) a closet pan and wash basin.
> It includes out-buildings and works normal to a dwelling.

END QUOTE

.

As I submitted to Her Honour Harbison J the State parliament specifically legislated as to the difference between a "**dwelling**" and an "**outbuilding**" (**shed**) and Moorabool Shire Council solicitors Maddocks Lawyers filing a copy of the Authority ***Cotsonis v Darebin CC [2005]***

VCAT 232 (15 February 2005) by proved there was no "second **dwelling**" as the "**shed**" did not have the items required to be considered a "**dwelling**".

As such, so to say Moorabool Shire Council solicitors Maddocks Lawyers filing a copy of the Authority ***Cotsonis v Darebin CC [2005] VCAT*** backfired upon them to precisely prove the contrary to what they were on about. Obviously there was a lot more wrong with the case but it already shows that this was an utter protracted **VEXATIOUS** litigation totally uncalled for.

.

However, VCAT had all along published details on its website and Moorabool shire council also has cooperated as to have an article published in the MELTON MOORABOOL LEADER regarding the case.

.

As Author of books in the INSPECTOR-RIKATI® series on certain constitutional and other legal issues and representing Mr Francis James colosimo and mr Francis James colosimo requesting me to publish details I decided to do so but made sure to request him to place in writing his consent that I could publish, this he did.

.

Ordinary vcaata prohibits the publication of details that could identify a person, albeit the publication of details that doesn't identify a person is permissible. We have however that Moorabool shire Council and VCAT both were involved in presenting a certain version to the general public and as such actually were slandering mr Francis James colosimo as both failed to set out the true legal circumstances.

.

I therefore registered a title for a book;

.

INSPECTOR-RIKATI® on VCAT as a STAR CHAMBER & KANGAROO COURT-No1
A Book on DVD about the injustice upon Mr Francis James Colosimo
ISBN 978-0-9803712-7-7

.

As a registered publisher I am entitled to publish books about legal matters as any publisher does in regard of LAW REPORTS, etc.

.

However, it seems so to say it was becoming a bit hot under the collar for VCAT Senior Member Ms Preuss that the **TRUTH** was being published and Victorian government solicitors Office Stephen Lee in his 5 February 2010 correspondence demanded that I remove the publications of http://www.scribd.com/InspectorRikati and other publications under my control.

.

I responded that my publications were lawfully published.

.

On 16 February 2010 VCAT Senior member Ms Preuss then made clear she was not proceeding with the case itself but was going to deal with me for (as far as I reasonable can recall);

- publishing material on the Internet
- making derogative comments upon her
- my competence to represent Mr Francis James Colosimo

.

As to the publication, I explained to VCAT Senior Member Ms Preuss that she misconceived the legislation as it didn't prohibit publication but publication that could identify a party. As both Moorabool Shire Council in 2006 and VCAT since 2007 had published the identity of Mr Francis James Colosimo then I could not do anything that already was done by Moorabool Shire council and VCAT themselves. Indeed, as I pointed out VCAT was publishing the identities of persons in the DAILY LAW LIST and as such before any hearings were held the identities of persons was already made known to the world on VCAT's own website.

.

VCAT Senior Member Ms Preuss then made known to go to the next issue which was about my statements. I again pointed out that as she never had actually invoked jurisdiction then whatever criticism or views I expressed were not those regarding a judicial officer because she never was acting as a judicial officer by having failed from onset to invoke jurisdiction.

.

There is no such thing as a judicial officer to invoke jurisdiction merely by assuming there is jurisdiction as a judicial officer must invoke jurisdiction when this is challenged by formally dismissing the **OBJECTION TO JURISDICTION** and failing to do so she doesn't act with judicial authority.

.

VCAT Senior Member Ms Preuss then went on to the issue as to my competence to represent Mr Francis James Colosimo and Mr Francis James Colosimo asked her, so to say, lay off me, but VCAT Senior Member Ms Preuss disregarded this despite that Mr Francis James Colosimo became very much frustrated by this to the extend that he finally became so unwell that the hearing had to be temporary adjourned. I was left with an ill Mr Francis James Colosimo and not even the clerk was left behind to man the telephone in case of an ambulance needed to be called. State Trustees Limited lawyers refused any kind of assistance while I approached them outside the hearing room and Mr Brendan Hoysted duty officer of the Office of the Public Advocate also had left leaving me alone in the hearing room with the ill Mr Francis James Colosimo and lacking any assistance being provided I was left no alternative but to leave the ill Mr Francis James Colosimo alo0ne in the hearing room while searching for medical assistance, which I subsequently obtained as the front desk and subsequently an ambulance was called and Mr Francis James Colosimo was taken to hospital . After this VCAT Senior Member Ms Preuss returned and adjourned the matter. It must be stated that on 20 March 2009 Mr Francis James Colosimo then also attended to hospital subsequent to the 16 March 2009 hearing before Her Honour Harbison J where then despite my request to adjourn the proceedings I was given the understanding by Mr David Harbison J that even if Mr Francis James Colosimo was in hospital the proceedings would go ahead, this even so he was made well aware that VCAT Senior Member Ms Preuss in her 27 January 2009 orders had referred to the 16 March 2009 hearing to be adjourned. As such twice Mr Francis James Colosimo ended up attending to hospital due to the VCAT total disregard about his health and wellbeing. To me this is utter callous conduct in particular where Her Honour Harbison J never had formally charged Mr Francis James Colosimo and neither had the Office of the Public Advocate complained with the 12 June 2008 request to investigate if Mr Francis James Colosimo acted **WILLFULLY** in CONTEMPT.

.

It should be understood that Moorabool Shire Council and VCAT both having been involved in publications, albeit of course their own so to say twisted version of events, this has also if not directly then indirectly resulted to difficulties for Mr Francis James Colosimo to obtain fulltime employment and in addition to this the conduct of VCAT Senior Member Ms Preuss to persist with protracted VEXATIOUS hearings without ever invoking jurisdiction has resulted that Mr Francis James Colosimo has been unable to earn sufficient income to maintain payments, such as his mortgage, and this was made well known to VCAT Senior Member Ms Preuss on 22 October 2009. Yet, despite this she did absolutely nothing to alleviate the problems with the protracted VEXATIOUS litigation but rather seemed to mount an attack upon my person as to compound to the problems.

.

Proceedings are **VEXATIOUS** when there is no legal merit in the proceedings.

.

It is obvious that VCAT Senior Member Ms Preuss failed on 27 January 2009 (as did others before her) to invoke jurisdiction.

.

VCAT Senior Member Ms Preuss, even so in my view no legitimate evidence existed for this ordered on 27 January 2009 that Mr Francis James Colosimo couldn't appoint an Enduring Power of Attorney, and maintained this, and indeed refused to set aside these orders, even so since she herself admitted during hearings that the medical evidence indicates Mr Francis James Colosimo is competent to appoint a Enduring Power of Attorney. As such, by maintaining, and without invoking jurisdiction, the orders she prevented any Enduring power of Attorney to assist Mr Francis James Colosimo in dealing with certain financial affairs.

.

Further, despite the review **DE NOVO** VCAT Senior Member Ms Preuss at no time requested Mr Brendan Hoysted, duty officer of the Office of the Public Advocate to provide his investigation report about if Mr Francis James Colosimo acted **WILLFULLY** in CONTEMPT, as per request of Her Honour Harbison J of 12 June 2008. And as such never bothered to deal with the basic. Indeed, despite the review by 27 January 2009 when the review commenced to my knowledge Mr Brendan Hoysted, duty officer of the Office of the Public Advocate had not provided any further material as to the review application and it seems to me that VCAT Senior Member Ms Preuss was and continued to do so to disregard **DUE PROCESS OF LAW** and simply isn't concerned about the rights of Mr Francis James Colosimo and by this his inability be employed to earn sufficient income to pay his bills.

.

Hence, as I understand it the bank now pursuing foreclosure of the property is in my view directly the result of the as I view it blatant disregard by VCAT and so also in particular VCAT Senior Member Ms Preuss to conduct matters by **DUE PROCESS OF LAW**, and hence Mr Francis James Colosimo can't be blamed for lacking sufficient funds to pay his bills.

Regardless if VCAT Senior Member Ms Preuss never invoked jurisdiction no one can deny that State Trustees Limited purportedly appointed by VCAT on 29 October 2008 but subject to the 27 January 2009 orders, are going on as to contemplate action against the wishes and intentions of Mr Francis James Colosimo, including foreshadowing the sale of the property and acting time and time again directly in violation of the terms of the orders.

.

As Mr Francis James Colosimo as I view it is directly the result of the conduct of VCAT then I view it would be inappropriate to hold it against Mr Francis James Colosimo that he cannot service his bills. After all VCAT by its conduct obstructed him doing so.

.

The matters are more serious because VCAT Senior Member Ms Preuss is dealing with a Guardianship List where one would at least expect some compassion towards a person subject to its litigation but in my view there was nothing but cold blooded obstruction.

.

It also must be noted that as I recall it, when on 27 January 2010 I submitted to VCAT Senior Member Ms Preuss that the office of the Public Advocate had failed to present any evidence as none was filed and served, to support the application for administration then VCAT Senior Member Ms Preuss declared that she had taken over the application. As such, VCAT Senior Member Ms Preuss was sitting in judgment what was now her own application and refusing to provide any evidence to Mr Francis James Colosimo as to what she relied upon as to the application for administration. To me this is an extra ordinary absurd manner to deal with any case. Indeed, as a **CONSTITUTIONALIST** I am well aware that the Framers of the Constitution made clear that civil rights was not in the hands of any government but prosecuting criminals is. As such, where VCAT is an organ of the State government it cannot deal with the civil rights of Mr Francis James Colosimo and the matter should have been dealt with before a Chapter III court.

.

In my view there must be an **IMPARTIAL** **JUDICIAL INQUIRY** as to the conduct of VCAT in regard of matters relating to Mr Francis James Colosimo also as it appears to me that this is a

modus operandi with VCAT to disregard **DUE PROCESS OF LAW**, **NATURAL JUSTICE**, and the **RULE OF LAW**.

No matter how much the litigation may be without jurisdiction it cannot be disregarded that VCAT nevertheless persisted with State Trustees Limited (another State organ) to make arrangements to have a lawful erected shed to be demolished, etc. As such Mr Francis James Colosimo could present, through me or otherwise, his constitutional and other legal rights but it was very clear to me that VCAT Senior Member Ms Preuss couldn't give a darn about this but is only interested to so to say do her own thing regardless what is legally permissible. No one can then blame Mr Francis James Colosimo for falling ill and being unable to service his bills as this I view is the result of the deliberate conduct by VCAT and others.

.

This is not a case where Mr Francis James Colosimo acted deliberately as some lawbreaker but where so many lawyers were involved (about 20 if one include judicial officers)) who all persisted in perverting the cou8rse of **JUSTICE** to every extend as to get their way regardless of knowing or could have known from the material I provided that Mr Francis James Colosimo was innocent of any wrongdoing having erected the shed.

.

This is a case where Mr Francis James Colosimo was never formally charged with any offence, albeit fancy a charge that he is charged with CONTEMPT for lawfully erecting a shed! Yet, we find that the very other participants in this mess/mesh regardless of what I view a conspiracy to pervert the course of **JUSTICE**, none of them so far have been held legally accountable.

.

While VCAT Senior Member Ms Preuss on 16 February 2010 made known that I complain about everyone, I view that as the representative of Mr Francis James Colosimo I should not shiver or be afraid to expose the **TRUTH**!

.

As I submitted to Her Honour Harbison J on 16 March 2009 if Mr Francis James Colosimo was guilty of CONTEMPT then he deserved to be punished, but likewise so should anyone else who acted in breach of law.

.

In my view, this entire concocted litigation is **VEXATIOUS** from onset and considering that three solicitors of Maddocks Lawyers were involved to draft the 22 January 2007 application who after all are **OFFICERS OF THE COURT** being members of the Bar of the **SUPREME COURT OF VICTORIA**, then I view they and other lawyers likewise are placing the **SUPREME COURT OF VICTORIA** in disrepute.

.

In my view no **SUPREME COURT** can allow members of the Bar to act in defiance of their oath given when being admitted to the Bar of the **SUPREME COURT**!

Neither do I view the Attorney-General of Victoria or any of his staff can disregard this conduct and must ensure that an **IMPARTIAL JUDICIAL INQUIRY** is conducted in these matters.

As the representative of Mr Francis James Colosimo I have no fear for my conduct to be investigated as much as that of others because I have all along looked forwards to an **IMPARTIAL JUDICIAL INQUIRY** to be held.

.

In my view while such **IMPARTIAL JUDICIAL INQUIRY** is conducted the bank should hold of and if indeed an **IMPARTIAL JUDICIAL INQUIRY** does conclude that VCAT and others perverted the course of **JUSTICE** and/or otherwise obstructed the course of **JUSTICE** then those responsible are held financially accountable for these and other financial cost.

.

As I view it, when a judicial officer acts without jurisdiction and continue to do so "**maliciously**", such as persistent, then this judicial officer technically acted in private capacity and can be personally held liable for any cost that directly/indirectly resulted of such "**malicious**"

conduct. Those who occupy judicial positions always must be aware that the courts/tribunals are not a cloistered virtue (LORD ATKIN in ***AMBARD v ATTORNEY-GENERAL for TRINIDAD and TABAGO*** (1936) A.C. 332, at 335) and where conduct of any person otherwise occupying a judicial position is as such to be unbecoming to a judicial office holder then so shall the verdict be upon that person. As only by this can the court earn respect of citizens. As where it fails to do so that citizens rightful can question the integrity of the legal processes and then it may regretfully lead to citizens taking the law into their own hands because the legal processes are no more of the standard to reflect a democratic society.

.

As the representative of Mr Francis James Colosimo I claim no immunity for Mr Francis James Colosimo if he had unlawfully erected the shed but likewise neither should anyone else claim immunity of their legal wrongdoings.

.

This is not some error of judgment by a person but a compounding protracted conduct involving numerous lawyers and while the Victorian Government Solicitors Office by way of Stephen Lee and VCAT Senior Member Ms Preuss may resent that I publish the **TRUTH** on the Internet to counteract the deceptive versions previously published with assistance of Moorabool Shire Council and also by VCAT this however cannot be regarded as being unlawful.

.

As I have submitted previously to VCAT Senior Member Ms Preuss she should have disqualified herself for being bias, etc, but somehow it appears to me common sense isn't within her capacity to be applied. Hence, in the process Mr Francis James Colosimo continues to suffer **EMOTIONALLY**, **MENTALLY** and **FINANCIALLY** as while Ms Preuss has not a shred of evidence that Mr Francis James Colosimo acted unlawfully erecting his "**shed**" she nevertheless has not withdrawn her claim she made on 2 September 2009 and as such persist in what I consider to be **KANGAROO COURT** and **STAR CHAMBER COURT** kind of litigation to the detriment of Mr Francis James Colosimo.

.

While I personally do not practice any religious faith nevertheless I deplore the kind of conduct as I perceived it to be for both Moorabool Shire Council as wells as VCAT to basically seek to ridicule Mr Francis James Colosimo for seeking to rely upon his faith. Surely VCAT having imprisoned persons in the past about their criticism on religious conduct of others should then be the last to pursue this kind of deplorable conduct. Mr Francis James Colosimo is entitled to be shown the respect to his religious views and not be ridiculed about it, in particular where the "**shed**" was for the work Mr Francis James Colosimo views is the work of "**God**" for him to assist others who are in need. It is irrelevant if others may or may not accept his reasoning about "**God**" as what is relevant is that Mr Francis James Colosimo's conduct was not and neither intended to be in breach of any laws and to the contrary for public purposes to assist those in need.

.

In my view, VCAT should forthwith set aside all and any orders it issued over the years of the protracted **VEXATIOUS** litigations because not a single one was issued having invoked jurisdiction. In my view the bank should hold of pending the **IMPARTIAL JUDICIAL INQUIRY** being completed as after all it could then easily gets its monies from those responsible for this elaborate mess/mesh.

.

As was made known to VCAT Senior Member Ms Preuss Mr Francis James Colosimo borrowed certain monies from the bank which was used to assist a couple to purchase a home, however they failed to repay the monies and have allegedly separated and as such as I submitted on 22 October 20009 Mr Francis James Colosimo, or so the bank could legitimately put a caveat upon that property to retrieve any overdue outstanding monies and further cost. With State Trustees Limited as administrators it made no attempt and neither seemed to have any intention to seek to

recover this overdue monies and this underlines that State Trustees Limited were not interested to act in the interest of Mr Francis James Colosimo. As VCAT Senior Member Ms Preuss on 27 January 2009 prohibited Mr Francis James Colosimo to appoint an Enduring Power of Attorney by this she also prevented him any opportunity to recover or attempt to recover those monies and Mr Francis James Colosimo himself was unaware he can seek to recover monies as such. It should therefore be obvious that the conduct of VCAT Senior member Ms Preuss, State Trustees Limited and the office of the Public Advocate isn't to assist Mr Francis James Colosimo at all but rather they are combined obstructing Mr Francis James Colosimo to obtain JUSTICE and so aided by Moorabool Shire Council and its solicitors Maddocks Lawyers.

.

It should be clear that if the bank were to put a caveat on the property that used the monies Mr Francis James Colosimo lend for the purchase of that property and if needed were to sell it to retrieve the monies then Mr Francis James Colosimo financial position would be considerably different and his own property would be save from being sold. While it may be commendable that Mr Francis James Colosimo in his desire to act in "**God**'s" work to assist others it never should be that he is to loose his own property because others he unselfishly assisted are taking advantage of him.

.

It is also regrettable that VCAT Senior Member Ms Preuss doesn't recognise that State Trustees Limited didn't conduct themselves in the best interest of Mr Francis James Colosimo and neither intended to do so not even sorting out the issue of permit (there was none needed for a lawfully erected shed!) as ordered by 29 October 2008 Graves administration orders and it all ended up more and more in a shambles and Mr Francis James Colosimo still holds on to his faith in "**God**" that eventually it all will be appropriately resolved.

.

As his representative I am not seeking anyone to convert to any religious faith, just that they act appropriately to ensure that what this democratic society is about is shown to be right and that is **NATURAL JUSTICE**, the **RULE OF LAW** and **DUE PROCESS OF LAW**. If that is provided then I have no doubt Mr Francis James Colosimo and his family finally can enjoy the piece and tranquillity they all along were entitled upon to have.

.

It should be made clear at no time during proceedings did I ever submit to disregard any legal provisions to the contrary I pursue a proper application of legal provisions! Again, as VCAT is not a court of law it cannot invoke federal jurisdiction and hence neither can deal with (federal) constitutional issues. Regretfully this is something VCAT doesn't seem to comprehend, and correspondences to the President of VCAT and the Presidents Review resulted to nothing!

.

MAY JUSTICE ALWAYS PREVAIL®

.

Awaiting your response, **G. H. Schorel-Hlavka**

END QUOTE 18-3-2010 CORRESPONDENCE

.

I will not reproduce the entire correspondence to Mr John Howard of 11-7-2004 but safe to say that I have pursued time and time again the fair and proper application of funding in regard of religious education facilities.

.

QUOTE **Chapter 677 Education FUNDING- Private schools- Religion**

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Chapter 677 Education FUNDING- Private schools- Religion

.

* Gerrit, I am really confused as to if a religious school is a private school and if it then can be funded or not! What is your opinion?

.

**INSPECTOR-RIKATI®**, in this Chapter I am going to set out why funding of students regardless of attending to a public, religious or private school should be equal when it comes to certain items, such as those listed in Schedule 2 of the ***Education Act 1958*** (Victoria). The set out below attends to both State and Federal funding, but to get some understanding about matters I will be quoting legislative provisions of both State, commonwealth and other jurisdictions , etc.

.

See also the enclosed document;
QUOTE

WITHOUT PREJUDICE

Mr John Howard 11-7-2004
Parliament House Canberra,
Fax 02 6273 4100
Ph; 02 6277 7700 **Ref; Religion, education, riparian rights, war, rights, etc.**
END QUOTE

.

Also consider;
HANSARD *10-3-1891* CONSTITUTION CONVENTION DEBATES
QUOTE **Mr. DIBBS:**

> Whenever I have the opportunity I will do my utmost to cut down the military spirit and to instil into the people of this land a love of their homes, and also the necessity of defending them in the only legitimate manner. As the, the hon. member, Sir George Grey, said, either yesterday or in his speech the other day at the Town Hall, we should educate our people up to all of this, and especially in New South Wales, where we are giving the people of the country practically a free education-and it should be common to all Australia-we should instil into the minds of our children the necessity for training, **and, as a *quid pro quo* for that free education,** we should demand from them a certain amount of proficiency in the use of arms, which of itself would lay the basis of a military organisation for the purposes [start page 188] of defence only.

END QUOTE

.

As shown below;
END QUOTE **Chapter 677 Education FUNDING- Private schools- Religion**

.

What is important to note is that my issue is not that any organization, regardless of being religious or not, should not be registered for **NON PROFIT** (**NOT-FOR-PROFIT**) where they are doing a job to assist the general community but rather that any entity registered for this purpose doesn't act in contradiction to what is legally permissible and neither acts contrary to the interest of the general public. When then we have reports about religious organizations having compounds, acting to deprive a person of their rights/freedoms, etc and going about so to say as a bunch of criminals then I do have genuine concerns about this and I view that those dealing with taxation issues should keep in mind they are not giving away, either directly or indirectly their own money but rather that of the taxpayers and as such must hold those entities accountable that in every way they act lawfully and in the spirit of what society is entitled to demand. Therefore the conditions spilled out above as to certain obligations to anyone who is registered as a **NON PROFIT** (**NOT-FOR-PROFIT**) entity should be applied. It is then in the ends of such **NON PROFIT** (**NOT-FOR-PROFIT**) registered entity if it desires to squander this registration or will act in compliance with it.

.

* I hate to ask you any further question as the moment I do you might just start another 500 or so explanation, so I better say goodnight.

.

Come on you enjoy people fighting for the cause of **JUSTICE**, don't you? Good night.

.

* I am not going to enter in any further discussion because I know your fingers are itching to continue typing.

.

Ok, good night.

.

END QUOTE **Chapter 0008 SUBMISSION - taxation issues non-profit-etc**

.

QUOTE **Chapter NOT FOR PROFIT-MUNICIPAL COUNCILS-ETC**

Chapter NOT FOR PROFIT-MUNICIPAL COUNCILS-ETC

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* Gerrit, in your past communications with **Prime Minister Kevin Rudd** and the **ATO** (Australian Taxation Office) did you ever raise the issue that the Commonwealth cannot fund religion and so neither provide tax concessions?

.

**INSPECTOR-RIKATI®**, actually I did but my 8 July 2008 correspondence to **Kevin** has so fat not been addressed as I have not received any response in that regard and with the **ATO** I think they better get themselves more competent lawyers who at least have some understanding as to what is constitutionally applicable before they present themselves again before the High Court of Australia.

.

* Why is that?

.

Well they had this case ***Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) 1983 154 Clr 120 [1983] HCA 40; (1983) 154 CLR 120 (27 October 1983)*** regarding the provisions of **Pay-roll Tax Act 1971 (Vict.),s. 10(b)** and in it was stated "**the corporation then appealed to the Full Court.**" And "**and the corporation now applies for special leave to appeal against that dismissal.**".

Well when you check the ***Commonwealth Constitution Act 1900*** (UK) you find that it provides legislative powers for the Commonwealth in regard of; "(xx) **foreign corporations**", and trading or financial corporations formed within the limits of the Commonwealth" as such anything to deal with "companies" is a federal power not a state power.
Further, the Colony of Victoria legislated a separation of State and Church by way of 71-391a001doc-***State Aid to Religion Abolition Act 1871***

QUOTE

2.Definitions

In the construction and for the purposes of this Act the following terms shall if not inconsistent with the context or subject matter have the respective meanings hereby assigned to them, that is to say—

"denomination" shall mean any church religious body sect or congregation or the members of any church formed into or acting as a body of persons for religious purposes of what kind of faith or form of belief soever;

END QUOTE

.

Therefore it would be inappropriate for the State of Victoria to determine that Scientology for being a religion then is to be deemed a not for profit religion (denomination) and for this to be tax exempted.

.

The High Court of Australia in its judgment failed to take consideration of this.

.

QUOTE

> **116 Commonwealth not to legislate in respect of religion**
> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

END QUOTE

.

Hansard 2-3-1898 Constitution Convention Debates

QUOTE

> **Mr. REID**.-**I suppose that money could not be paid to any church under this Constitution?**
>
> **Mr. BARTON**.-**No; you have only two powers of spending money, and a church could not receive the funds of the Commonwealth under either of them.**
>
> [start page 1773]

END QUOTE

.

Hansard 2-3-1898 Constitution Convention Debates

QUOTE

> **Mr. OCONNOR**.-Yes. But the amendment of the American Constitution to which the honorable and learned member refers was rendered necessary by the fact that there is not the definite division of powers in that Constitution that we have in our Constitution. **I cannot imagine that clause 52 gives any ground from which it could be argued that the Federal Parliament has the right to interfere in regard to the exercise of religion, or to deal with religion in any way.**

END QUOTE

.

Scientology it self submitted in the past;

http://74.6.146.244/search/cache?ei=UTF-8&p=%22Church+of+the+New+Faith+v+Commissioner+of+Pay-Roll+Tax%22&fr=slv1-&u=www.cdi.gov.au/submissions/183-ChurchofScientologyAsiaPacificRegion.doc&w=%22church+of+the+new+faith+v+commissioner+of+pay+roll+tax%22&d=Z1aCOPH_QQAX&icp=1&.intl=au

QUOTE

> It is submitted that all of the activities undertaken by a religion should be regarded as being integral to the religion, and should not be discretely treated for income tax purposes.

END QUOTE

.

Because of the submission "**It is submitted that all of the activities undertaken by a religion should be regarded as being integral to the religion**" in fact then all of its activities are by this

subject to ordinary taxation provisions and none can be excluded as otherwise it would offend the provisions of the constitution and the principles embedded in it.

.

When the Framers of the Constitution debated "**excise and customs**" duties it was **Edmund Barton** (later Prime Minister and there after judge of the High Court of Australia) who made clear that States could not interfere with the Commonwealth of Australia legislative powers whatsoever and would be bound to pay customs and excise duties as like anyone else as otherwise the States could get railway rails cheaper then other businesses and that was not what was intended by this.

Therefore, the issue the High Court of Australia was dealing with if the *Church of the New Faith* (now known as ***Scientology***) was a religion or not in my view was showing the High court of Australia never comprehended what was constitutionally applicable as the State of Victoria bound by the ***State Aid to Religion Abolition Act 1871*** had federated on the basis of separation of State and church and that no longer funding could be provided.

.

But, it goes much further then that, the Commonwealth by s116 of the constitution cannot accept the registration of any company as a **denomination** organisation to exclude it from taxes and hence the not for profit organisation on basis of being a denomination is unconstitutional both for the State and/or the Commonwealth.

.

More over, no company can register in a State as a **NOT FOR PROFIT** organisation as the Framers of the constitution made clear that once the commonwealth exercised any powers provided to it in the Constitution then from that day the Commonwealth legislated the States no longer could exercise any legislative powers. With taxation it was held that States had state legislative powers but could not levy tax on any area that the Commonwealth had legislative powers and exercised this. With other word, if the Commonwealth were to legislate for a land tax then the States would be ousted to raise land taxes.

.

Getting back to the **NOT FOR PROFIT** registrations, the States therefore have no constitutional powers to legislate for any **DENOMINATION** to be excluded as a company from taxes of any kind because company legislation is a Commonwealth power.

.

The Commonwealth cannot provide funding for religions and so neither tax deductions and tax rebates or for that matter for others to have tax deductions because they donated to a denomination (religious organization).

.

There are organizations, being it that they are religious organizations or not who do provide services to the community and the **Salvation Army** is one of them.

When one consider the numerous USA Supreme Court decision in regard of the same provisions in the USA Constitution they made it very clear that for example funding for non religious purposes (such as school books) would be appropriate provided the monies were not used for religious matters. As such, the issue is that if a denomination (religious organization) split its religious services section from its welfare organization and keep them separate than I view the commonwealth could allow for tax concessions for the welfare section services albeit excluding the religious services. As such the religious organization has the onus to show separate bookkeeping as to avoid monies being transferred to its religious service section.

.

The states who provide pay roll tax, etc, also by the separation of Church and State has to apply the same.

.

The Commonwealth cannot adopt State **NOT FOR PROFIT** provisions but must legislate for itself in that regard and failing there being any then the commonwealth must re-assess all such **NOT FOR PROFIT** registered companies and calculate ordinary taxation.

.

As **Edmund Barton** (Later Prime Minister) made clear that the State couldn't interfere with Commonwealth legislative powers.

.

* What about local councils?

.

You mean "Municipal Councils" as constitutionally the "State Government" is the "local council"?

.

* You know what I mean.

.

They can neither exclude religious organizations of rates and other taxes on basis of belonging to a denomination or because they are registered as a **NOT FOR PROFIT** organization as it is likewise bound by the federal constitution.

.

* What about councillors making special grants to a religious organization, you know how councillors in **Banyule City Council** can allocate up to $20,000.00 towards their pet-projects?

.

#

First of all, it is in my view a sheer and utter nonsense for any councilor to play **Santa Clause** with the monies extorted from ratepayers, where they are struggling to survive and make end's meet.

.

* What do you mean with extorted?

.

If it is not for a lawful purpose then I view it is extortion using ordinary powers to achieve the payments.

.

* Are you saying that a Council cannot fund religious services projects, say for replacement of stained window or that kind?

.

Precisely. It is a religious matter and therefore no council has the power to provide funding for anything that relates to religion.

.

With the Salvation Army you will find that it is not concerned with what religion you practice if any at all, it simply provides assistance to people in need, whom ever they are, and hence this part in my view appropriately can be funded by tax payers being it by way of tax deductions, tax exclusion, etc. However if the **Salvation Army** wanted a new carpet in a chapel then this would not be within the powers of Federal or State government to provide for this in any way whatsoever, not even to allow for tax deduction for those who fund it and municipal councils are bound by the restrictions that applied to State Governments.

.

The State granted municipal councils certain powers and therefore it cannot grant more powers to a municipal council it doesn't have itself.

.

* What about the exclusion of political parties from taxation, like the one that now has a Senator in the Federal Parliament?

.

Firstly, if the party is a religious organization it would be excluded from any tax exclusion not applicable otherwise to other organizations. Secondly, where it deal with non religious political parties in general then it neither can provide for tax exclusions unless this so was registered under Commonwealth law for so far we deal with political parties registered as companies.
Most businesses are so to say jumping on the bandwagon to register as some form of corporation to try to exclude personal liability to some extend not realizing that by this they are falling under federal legislation.

* What about states registering companies?

.

You cannot have both the Commonwealth and the States covering the same legislative power and as I indicated above that the Commonwealth was provided with this legislative power then technically any State registration as to any company is to be deemed **NULL AND VOID** from the day the Commonwealth commenced to exercise its legislative powers.

.

Hansard *30-3-1897* Constitution Convention Debates

QUOTE **Mr. REID:**

> **We must make it clear that the moment the Federal Parliament legislates on one of those points enumerated in clause 52, that instant the whole State law on the subject is dead. There cannot be two laws, one Federal and one State, on the same subject. But that I merely mention as almost a verbal criticism, because there is no doubt, whatever that the intention of the framers was not to propose any complication of the kind.**

END QUOTE

.

Hansard *30-3-1897* Constitution Convention Debates

QUOTE

> The Hon. R.E. O'CONNOR (New South Wales)[3.18]: We ought to be careful not to load the commonwealth with any more duties than are absolutely necessary. **Although it is quite true that this power is permissive, you will always find that if once power is given to the commonwealth to legislate on a particular question, there will be continual pressure brought to bear on the commonwealth to exercise that power. The moment the commonwealth exercises the power, the states must retire from that field of legislation.**

END QUOTE

.

Hansard *2-3-1898* Constitution Convention Debates

QUOTE

> **Mr. OCONNOR**.-**Directly it is exercised it becomes an exclusive power**, and there is no doubt that it will be exercised.

END QUOTE

.

That is also why the State Land Taxes are unconstitutional because since3 11 November 1910 this became an exclusive Commonwealth power and as any Commonwealth legislative power is to be “uniform” then no State can later divert from this, regardless that since 1952 the Commonwealth abolished land taxes. Once a Federal legislative power then always a federal legislative power.

.

* What about any State registration prior to the Commonwealth commenced to legislate?

.

the Framers of the Constitution made clear that once the Commonwealth commenced to legislate then all this was the only issue however those who had complied with State legislation now fell under Commonwealth legislation. They also made clear that the Commonwealth could not make a criminal by retrospective legislation, etc. As such, if a company was validly registered under State legislation and the Commonwealth then commenced to legislate for the Commonwealth then had to keep in mind that it would not cause companies to be in breach of law where they had acted validly under State laws. As such, the Commonwealth has an onus that when it exercises its legislative powers to ensure it does so in a reasonable manner. It may be for example that the Commonwealth may object to certain parts of State registration legislation and for this legislate a time period for companies to adjust to new Commonwealth powers. However, because the commonwealth must provide legislation for "**the whole of the Commonwealth**" it cannot therefore exclude some but not others from its legislation. Meaning that at all times the legislation must be to provide all companies the same regime.

.

* What happened about your objection to the GST when you wrote to the ATO?

.

As I stated the ***O'Meara*** decision by the Federal Court of Australia was ill conceived because the Framers of the Constitution made clear that no Taxation legislation in its final format can be applied to raise taxes from more then one item and they specifically referred to the "**rail**" and the "**post**" (on farmers land). Now the **GST** might be deemed to be a supply tax but still it applies then to both the "rail" and the "post" and therefore is unconstitutional. You can pretend it applies to service or whatever but in the end the end result is the same it applies to more then one article and therefore unconstitutional.

Hansard *14-4-1897* Constitution Convention Debates (**Official Record of the Debates of the National Australasian Convention**) (Chapter 33 of the CD)

QUOTE

Mr. HIGGINS:

What is meant by one subject of taxation? Suppose a land tax is imposed, you tax **posts** and **rails**. That may be argued not to be a law dealing with one subject.

END QUOTE

.

QUOTE

So far as the expression "laws" or "Acts" is concerned, that deals with the law when it is passed, and such an expression to my mind clearly means that even after that which is a Bill has become law. if it deals with anything more than the imposition of taxation, it will be unconstitutional, and the Federal High Court can decide that it is unconstitutional and void; so when an Act affecting to deal with more than taxation, and yet is a Tax Bill, happens to be carried through both Houses and assented to in contravention of this provision, that would be an unconstitutional and therefore a void Act.

END QUOTE

.

While the ATO in its correspondence to me claimed that the GST is a tax on businesses, the truth is that the Senate inquiry to investigate the application of a GST dealt with a tax on consumers. There is no constitutional power for the commonwealth (for the Crown) to give taxation powers to traders and neither to impose to their likings the GST or not. As the Framers of the Constitution made clear Commonwealth law could only be enforced through State Courts by Judicial decision and hence no Municipal City Council either has a constitutional position to charge GST in regard of ratepayers because it is not a judicial decision, as no municipal council had judicial powers. As I explained previously also to the ATO all unconstitutionally collected GST must be refunded to the people against whom it was charged.

.

The following applies as much to Federal laws of the Commonwealth of Australia as it does to federal laws in the USA;
http://familyguardian.tax-tactics.com/Subjects/LawAndGovt/ChallJurisdiction/AuthoritiesArticle/AuthOnJurisdiction.htm

QUOTE

- The general misconception is that any statute passed by legislators bearing the appearance of law constitutes the law of the land. The U.S. Constitution is the supreme law of the land, and any statute, to be valid, must be in agreement. It is impossible for both the Constitution and a law violating it to be valid; one must prevail. This is succinctly stated as follows:

  The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it. An unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.

  Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. . .

  A void act cannot be legally consistent with a valid one. An unconstitutional law cannot operate to supersede any existing valid law. Indeed, insofar as a statute runs counter to the fundamental law of the land, it is superseded thereby.

  No one is bound to obey an unconstitutional law and no courts are bound to enforce it.

END QUOTE

Sixteenth American Jurisprudence
Second Edition, 1998 version, Section 203 (formerly Section 256)
.

Quick & Garran's "***Annotated Constitution of the Commonwealth of Australia***" more accurately and more meaningfully says that;

"A law in excess of the authority conferred by the Constitution is no law; it is wholly void and inoperative; it confers no rights, it imposes no duties; it affords no protection.".

.

Hansard *1-3-1898* Constitution Convention Debates

QUOTE **Mr. GORDON.-**

Once a law is passed anybody can say that it is being improperly administered, and it leaves open the whole judicial power once the question of *ultra vires* is raised.

END QUOTE

.

Again;

and it leaves open the whole judicial power once the question of *ultra vires* is raised

.

Actually "**Chapter 607-ATO & GST-TELSTRA**" of my previous published book set this out in more details as well as other matters.

.

Hansard 8-2-1898 **Constitutional Convention Debates**

QUOTE

Mr. O'CONNOR.-I do not think so. **We are making a Constitution which is to endure, practically speaking, for all time. We do not know when some wave of popular feeling may lead a majority in the Parliament of a state to commit an injustice by passing a law that would deprive citizens of life, liberty, or property without due process of law.**

END QUOTE

.

And

QUOTE

Mr. O'CONNOR.-No, it would not; and, as an honorable member reminds me, there is a decision on the point. **All that is intended is that there shall be some process of law by which the parties accused must be heard.**

END QUOTE

And

QUOTE

Mr. O'CONNOR.-With reference to the meaning of the term due process of law, there is in Baker's *Annotated Notes on the Constitution of the United States*, page 215, this statement-

Due process of law does not imply that all trials in the state courts affecting the property of persons must be by jury. **The requirement is met if the trial be in accordance with the settled course of judicial proceedings, and this is regulated by the law of the state.**

If the state law provides that there shall be a due hearing given to the rights of the parties-

Mr. BARTON.-**And a judicial determination.**

Mr. O'CONNOR.-**Yes, and a judicial determination-that is all that is necessary.**

END QUOTE

.

Hansard *2-3-1898* Constitution Convention Debates

QUOTE

Mr. BARTON.-Yes; and here we have a totally different position, **because the actual right which a person has as a British subject-the right of personal liberty and protection under the laws-is secured by being a citizen of the States.** It must be recollected that the ordinary rights of liberty and protection by the laws **are not among the subjects confided to the Commonwealth**.

END QUOTE

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The Commonwealth of Australia has no constitutional powers of the liberty of a person, as this lies with the States.

.

Hansard *1-3-1898* Constitution Convention Debates

QUOTE

Mr. HIGGINS.-**But suppose they go beyond their power?**

Mr. GORDON.-It is still the expression of Parliament. Directly a Ministry seeks to enforce improperly any law the citizen has his right.

END QUOTE

.

I take the position that therefore **Banyule City Council** has no legal position to apply **GST** without first having obtained a Court order to do so. To allow otherwise would mean the Commonwealth would place itself above the Constitution and disregard the judiciary specifically established to determine any conflict of laws.

.

It may be odd for a city council having to pursue legalities of matters but then if **Banyule City Council** seeks to enforce GST legislation contrary to my objection then it cannot do anything unless it first obtains a Court order by way of **JUDICIAL DETERMINATION**,

.

Let's try to use an example.

If the Commonwealth were to legislate that I can remove any funds **Banyule City Council** collected and hand it over to the Federal treasury, would not then **Banyule City Council** in the first place argue that the Commonwealth lack such constitutional powers and therefore it isn't relevant if the legislation authorize me to remove their funds (monies) as unless there is a court order to provide for it the legislation enacted by the Commonwealth has no legal force?

And likewise if **Banyule City Council** is extorting monies from me under the purported GST provisions I am equally entitled to demand it provide me with a copy of the relevant court order to prove it is duly and properly authorized to do so. Indeed, where it squanders my rates also on items I deem unconstitutional it even further is an issue I hold the **Banyule City Council** as any other city council should do is to prove their judicial order to be entitled to act as such.

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If a police officer attends to my residence without WARRANT issue and attempts to enter my property I have my common law rights to prevent this.

.

If a police officer attends to my property and seek to remove from my property under all kinds of threats my motor vehicle without a WARRANT issue again I have my common law rights to oppose this.

.

I do not need to go to Court to obtain a prohibition order against the police as by common law not even the queen can enter my property without my consent.

.

Banyule City Council as such, while not entering my property as to the land I owe, by charging GST are equally removing from me under their demands "property" (monies) by inducing me to pay rates that include GST.

.

As like the police officer I do not have to go to Court to oppose this unconstitutional conduct rather **Banyule City Council** has to prove it acts lawful by way of Court determination against me, that it can charge GST.

.

As I corresponded to **Prime Minister Kevin Rudd** where is the constitutional powers to legislate as to environment and cause **Banyule City Council** to incur about 1.2 million dollars to change light globes for special light globes?

In my view there simply is not such legislative powers and I view that **Banyule City Council** before considering any of this kind of legislation to be enforceable should have had matters appropriately researched.

I am well aware that more then likely no councillor ever considered the fact that he/she must act appropriately and cannot merely demand monies from ratepayers irrespective if the purpose for

which the monies or part thereof is being use is unconstitutional/unlawful but where they are councillors they better realize they do have obligations towards ratepayers.

The same is with **Banyule City Council** as like other councils and organizations such as **WATER** corporations, etc, having somehow been authorized by the State government to apply overdue interest and other charges. Well the Framers of the Constitution provided corporations powers to the Commonwealth and also provided for

Constitution. Subsection 51

QUOTE

> (xiii) banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;

END QUOTE

.

Therefore, it would be **UNCONSTITUTIONAL** for State Parliaments to legislate for municipal councils, water boards, and others to be able to charge interest rates as they are governed under the term of "**trading companies**" (as was applicable at the time of federation – and therefore still applicable) as to being deemed to be businesses that are not banking companies but are nevertheless lending monies, etc.

.

Yet we find scrupulous municipal councils, water boards and others relentlessly pursuing people even to use debt collectors to enforce also interest even so no constitutional position as such exist.

Unless such companies are within commonwealth law registered to be allowed to operate as "trading companies" I view they have no power to enforce such interest and other charges.

.

Indeed it circumvent the **DUE PROCESS** that is applicable within the constitution because it allows a form of terrorism upon the citizen.

To give an example.

Telstra engaged a few years back a debt collector as to try to collect about $700.00 plus from me even so the bill was not in my name and neither authorized for this. Indeed, I had never visited the location where the bill was created.

Telstra had nevertheless disregard privacy laws and disclosed my identity and the Debt Collector Agency then began its campaign of terrorist to try to get me to pay the outstanding account. Finally getting fed up with it I wrote to them that I would pursue a court order against them if they did not stop. They did.

.

Then I have this current matter with a **WATER** board that delivered **WATER** to one of my properties on request of the person who occupies the property and engaged in a contract with the **WATER** board for this. I was provided with accounts and it was made clear that under legislative provisions I was obligated, as owner of the property, to pay. Not wanting to have a bad credit rating I ended up paying. Only later to discover that because I was paying the same bill as the occupier had also done the occupier simply stopped to pay the bill. This then became more complicated. The **WATER** board then making clear it would charge interest against me and place the matter in hands of a Debt Collection Agency.

While to keep the **STATUS QUO** I made further transfer of funding, actually in excess to what the bills were, indicating it was not to be seen I accepted liability I did however request a copy of the legislation they relied upon.

They provided by facsimile a copy and it turns out the legislation didn't at all provide the powers the **WATER** board had claimed but in fact stipulates that the **WATER** board is to deal with the account holder. Neither did it provide any provision that a **WATER** board can fraudulently obtain payment from the occupier who was the account holder as well as from the property owner.

As such what we have is a form of **TERRORISM** deployed by a local **WATER** authority seeking to manipulate its powers and generally getting away with it.

.

It is this kind of criminal conduct that is going on where we as a society have lost the plot and forget about the so called **TERRORIST** walking about with weapons as we find that **TERRORISM** is rife by those who are supposed to provide public service.

.

We have had incidents of a municipal council selling wrongly the property of a resident, etc, and this should come to an end. We must return to a law and order and consider that Federal, State/Territorial and so also municipal councils can only act within the provisions of "**peace, order and good government**". Meaning that no municipal council can enforce its own laws against a citizen without a Court's judicial order.

It is a fundamental principle of constitutions that Court provide a judicial decision and no one has the right to take the law into their own hands, not even municipal councils.

.

A stark welcoming conduct was when **Cr Dean Sheriff** on 14 July 2008 as I understood it made clear to fellow councillors to show some common decency to struggling ratepayers and that re should be no issue not to seek appropriate powers from the State government to perform this service to ratepayers. This is the kind of spirit one can find among the Framers of the Constitution that it is not every one look after himself but that there is a understanding that by looking after your fellow man you look after yourself.

Indeed **Mr Howe** in 1891, 1897 and again in 1898 pursued this principle to get finally the majority of the delegates at the Constitution Convention to accept that "(xxiii) **invalid and old-age pensions**" was to be part of the federation by having it in the constitution. Unbeknown to many this in fact included the poor, homeless, lunatics, paupers, etc actually all are also falling within this provision but unless you are a constitutionalist who has extensive researched these matters it would be unknown to a person, including constitutional law professors.

Anyone who heard **Cr Dean Sheriff** talking (14-7-2008) and read what **Mr Howe** stated would beyond doubt hold that they appear to be molded from the same material, that is truly desiring to look after their fellow mean and not just only their own personal benefits.

This was the spirit of federation but regretfully councillors these days do not appear to show this exemplary kind of attitude.

.

Councillors are to represent the ratepayers and not to terrorize them and ignore their wellbeing.

.

Let say for example some street fire breaks out that people have to be evacuated. Now you might be hard pressed to find any municipal council having a disaster plan in place that would enable an immediate disaster plan to be available to remove the old and the infirm and the disabled from residential places that need to be evacuated. There simply appears to be system in place to address such an issue. As such what are municipal councils for if the basic needs of residence are ignored?

.

Municipal councils are there in the first place to promote the residents health and wellbeing and what is best in general for the community but when it comes to the crunch more then likely a person needing help in an emergency will have next to no assistance.

.

People who lack the funds to live ordinary may have to cut cost for the ever increasing rates and by this may even have to do without telephone connection and then lack any ability to be in contact with emergency services when the need arises.

.

Indeed why have municipal councils if they basically try to operate as some additional level of government while the very purpose for which they were created is slowly ignored more and more?

.

Hansard *8-2-1898* Constitution Convention Debates

QUOTE **Mr. CARRUTHERS**.-

> The **citizens** of each state, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be **citizens** of the Commonwealth, and shall be entitled to all the privileges and immunities of **citizens** of the Commonwealth in the several states, and a state shall not make or enforce any law abridging any privilege or immunity of **citizens** of the Commonwealth, nor shall a state deprive any person of life, liberty, or property without **due process of law**, or deny to any person within its jurisdiction the equal protection of its laws.

END QUOTE

.

Even this seems to be lacking where a municipal council is more concerned of raising rates no matter what hardship there might be and apply, albeit unconstitutionally, interest, while spending on their kind of pet-projects no matter how unconstitutionally or otherwise unlawful this might be.

In my view in general they have lost the plot.

* Wasn't there a book distributor making clear that if you didn't provide an ABN number it was bound to deduct 48.5% of the invoice in regard of **GST** because the legislation provides for this?

.

Yes, and I then made clear they would not be able to get a single copy from me because this legislation is unconstitutional and no one is going to force me to comply with unconstitutional legislation as only a State court can determine these matters.

.

* And?

.

They have indicated they will pay the full invoice price.

.

* Did they?

.

For so far I have decided not to have any dealing with them because I do not like it that they tried to go against my constitutional rights. So, no need to forward any invoice because I refused to provide them with that they requested to be supplied with.

.

* But would this not be financial harmful to you having such large distributor not being provided with books to sell?

.

In life one has either principles or not. As an Attorney I assisted many over the decades in their litigation but never charged for this as I do not prostitute myself in that regard. I have no obligations therefore towards anyone to deceive the courts or otherwise act against any persons interest, not even to that of the opponent.

.

* So, you view lawyers prostitute themselves?

.

My view is that in general they do as they take the side of a party regardless if this provides **JUSTICE** to the other party. I have no such limitations or inappropriate considerations

as one party may call me in and I might end up assisting both parties or assist the opponent party instead. That is the condition I have always stipulated for me to assist anyone in the litigation, they take it or leave it.

.

* I just was wondering. If a **NOT FOR PROFIT** organization made a donation to a denomination (religious organization) in regard of religious matters would that be a problem?

.

It would be an abuse of the **NOT FOR PROFIT** status as it would be a backdoor approach to fund religious services. As such the **NOT FOR PROFIT** status has been abandoned and should be stripped.

.

* Would you say your wife is religious?

.

Yes.

.

* And does she share your views about excluding religious organization in regard of tax deductions?

.

Actually, she find it sickening politicians going to large church organizations prior to and during an election trying to score their votes as she holds that religion is a persons personal choice and should not be use in politics. Also, she views that large companies operating under the shield of being a denomination and so gain tax exclusion is to undermine what religion is about. Essentially nothing less then when reportedly Jesus overturned the tables of the money makers. Religious belief is a mental status of a person and if you turn this in a money spinning enterprise it is no longer for purpose of religious beliefs.

.

In my view the late Mother Teresa was a clear example where she showed her religious belief to assist the poor regardless of their known religious status and not for trying to make money out of it all.

.

* I understand there are council elections coming up and I wonder if you are going to stand for council again?

.

to tell you the truth I do not know because I have reservations about the ever escalating fee for candidates to nominate both in the municipal elections, State elections and Federal elections. In fact for this I boycotted the last State and Federal election because it is unconstitutional to raise any fee as the Framers of the Constitution made clear that even the poor should be able to stand as a candidate. Now, if you are , such as in federal elections, going to demand some $500.00 payment for a candidate to stand for election then effectively many of the poor would be excluded to stand as a candidate. As the Framers of the Constitution made clear the fact that a person might be poor doesn't mean the person is less competent. As they explained a person could end up poor by no fault of his own and then still could be competent in representing electors as his unfortunate loss of wealth should not alter his ability.

.

* But don't candidates get if back if they get more then a certain percentage?

.

well, you could register as a candidate and to your knowledge you will be the only challenger to a sitting candidate and then just before closing of nominations something occurs that inspire others to stand as candidates also. Now you lacking the huge finances to campaign end up with, say, 2% of the votes while the rich can afford a huge advertise campaign as they know they will get it back in the unconstitutional "payment per primary vote". As such, the lection process is unconstitutionally stacked for political party candidates as they know they get

at least a certain amount of votes and so can pre-spend on advertising and the poor candidate, no matter his ability to provide appropriate representation is basically railroaded of having any opportunity to be elected.

I for one would know that not s single member of any State/Territorial or Federal Parliament would be able to comprehend what is constitutionally applicable as I do. This is not bragging but reality, as if they did we would not have this utter legal mess we are in now. Yet, in elections I have basically no hope in the world to get elected on basis of competence because I am not willing to spend huge amount of monies on an election campaign. As such, raising the allowances/salaries for councillors/Members of Parliament and/or Ministers of the Crown only ensure you get more likely the rot rather then the competent to represent the electors.

Prior to federation it was an issue of "**HONOUR**" to represent electors but this now is more about how they can abuse and misuse their position as much as possible for their own personal gain, etc.

.

* You realize of course some people may not like your statements?

.

In life you never can please everyone and in particularly not those who are offended by being exposed. You find people have acted in a certain manner because others have done so before them and they simply are like **ZOMBIES** and the **Banyule City Council** is a clear example of this where they were voting on something like a "special charge" without anyone of them bothering to first ascertain what was legally appropriate despite that I had given the effort to set it out in my written submission and complicated by a SUPPLEMENT as well as oral submission. And the same is happening also in State/Territorial and Federal Parliaments.

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Re: AUSTRALIAN CAPITAL EQUITY PTY. LTD. And: ROGER DAVID BARNARD BEALE, SECRETARY TO THE DEPARTMENT OF TRANSPORT AND COMMUNICATIONS; ROBERT LINDSAY COLLINS, MINISTER OF STATE FOR TRANSPORT AND COMMUNICATIONS and THE COMMONWEALTH OF AUSTRALIA No. WA G14 of 1993 FED No. 141 Legislation (1993) 114 ALR 50 (1993) 41 FCR 242 (1993) 30 ALD 849 (extract)

QUOTE

> **His Honour concluded that in the case before him the publication of the instrument was essential to the valid exercise of the power and that no distinction could be drawn between the publication of the notice and the exercise of the power.**

END QUOTE

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Therefore, where **Banyule City Council** published incorrectly details of the ***Rosanna Shopping Village*** in regard of the "**special charge**" then for this also it was not a valid publication as required un the provisions of the ***Local Government Act 1989***.

This is the kind of representation we end up with where they seem to be in the position because they have a cozy income from it rather then wanting to do the right thing to those they represent. I challenge any lawyer (being a so called constitutional expert or not) they have ever pursued as many constitutional issues as I have, even so I have done it without being paid for it! Basically any donkey can be elected to a council/parliament and his only disqualification might be to be an animal rather then his intelligent as a donkey by not saying anything but just barking would provide the same as the infamous Australian Democrats advertisement during the 2001 Federal election of having barking dogs. At least a donkey would not vote for nonsense as it doesn't now how to vote.

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The same actually is with lawyers and those so called law professors. One judge after having been appointed to the High Court of Australia refused to hand down a decision as he made

known he didn't know the constitutional issues involved. This is the kind of competence the judge portrayed that being appointed to the High Court of Australia doesn't mean he comprehended what the Constitution stands for.

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What is so terrible in regard of this all is that we had the Framers of the Constitution working their guts out over many years to provide us with a democratic system and we had many a soldier losing his life in seeking to protect the interest of this Australian democratic system and yet it all is jeopardized by people who are more interested in what they can get out of it for themselves then to be truly proper representatives for the people they represent.

That is why we need an **OFFICE OF THE GUARDIAN**, a constitutional council, that Advises the Government, the People, the parliament and the courts as to what are the constitutional powers and limitations so finally we can even have the **ZOMBIES** representing us becoming aware what is constitutionally appropriate

.

Parliament never should have an issue about breast feeding babies in it as that underlines how low we have sunk. It is after all the parliament to legislate for the good of the general community within constitutional powers and not that elected representatives are side tracked because some woman may desire to flash her breast in the Parliament to feed some baby. Anyone who fails to understand this simply doesn't belong in the Parliament. People at times can loose a court case pending where a comma may be stated in the legislation that is considered by the court and as such it is essential that those who are in the Parliament have ample and sufficient concentration about legislation and not be side tracked by a crying baby, etc.

.

We do not see police women standing on a corner directing traffic while breast feeding a baby or holding a baby because simply this got nothing to do with equality but with the issue of that you must be able to perform a function for which you are being employed or otherwise being paid for.

.

I recall some 20 years ago while sitting at a lake talking to a woman holding a baby she suddenly without warning exposed her breast and started to feed the baby. It didn't worry me as I simply continued to talk to her as if nothing was happening. If the mother held the baby needed to be fed then so be it. In the circumstances I held there was no issue with this, however I do not accept that the parliament is the place to do the same because the purpose of the Parliament is to legislate as to very serious issues and every letter and comma is of vital importance and can make the difference to a person being defeated in court or not. Hence, any detraction that is not relevant to the proceedings itself must be avoided, so the feeding of babies in the House.

.

* I think we got a bit of track about the **NOT FOR PROFIT** issue, don't you think?

.

Perhaps to some extend but then if we have parliamentarians voting on Bills being side tracked by non parliamentarian matters then no wonder we are ending up in this huge legal mess. Perhaps the time comes we are going to have female councillors flashing their boobs in the council chamber to feed some baby? Are we going to have female lawyers of the **ATO** standing in court while breast feeding their babies? Perhaps the female judge dealing with cases while feeding a baby?

.

No one really may understand let alone what is appropriate with this whole **NOT FOR PORFIT** registration because they are all too busy considering how to accommodate for breastfeeding mothers instead of addressing themselves to what is constitutionally or otherwise legally appropriate.

.

* Now that you attended to the council meeting of **Banyule City Council** after years of not having done so are you eager to visit again as I understood you used to go fortnightly some decades ago?

.

That was decades ago and this involved another city council where prior to council meeting there was an opportunity to get together and have coffee, cake and sandwiches for consumption. I was then secretary of the local progress association and had great respect for the kind of councilors we then had!

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* And now?

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See my previous answer!

END QUOTE **Chapter NOT FOR PROFIT-MUNICIPAL COUNCILS-ETC**

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Just don't complain that this Submission is not presenting sufficient information because rest assured I can easily dramatically increase the volume of submissions and you be all for eternity trying to work through it all, that is if not the People in the meantime take over to stop the rot!

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MAY JUSTICE ALWAYS PREVAIL®

.

(***Our name is our motto!***)

Awaiting your response, **G. H. Schorel-Hlavka**