

Washington University in St Louis
School of Law

Liberty and Law in Australia

Chief Justice Robert French
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Introduction

Australia, like the United States, has a written constitution and a federal structure. Unlike the United States and many other modern democracies it does not have a Bill of Rights in its Constitution nor a statutory Charter of Rights. Nevertheless, it is generally speaking one of the world's more durable and successful representative democracies. The object of this presentation is to say something about the history and features of the Australian Constitution, its similarities to and differences from the Constitution of the United States and how the rule of law and the protection of human rights works in Australia.

Australia's Constitution was inspired in part by the Constitution of the United States, in part by the model of responsible government in the United Kingdom, and in part by the provisions for popular amendment of the Constitution to be found in Switzerland at the turn of the 19th century. Australian nationhood is rooted in evolutionary rather than revolutionary events. This has a connection to the absence of a Bill of Rights in the Constitution and recent debate in Australia as to whether even a statutory provision for the national protection of human rights is necessary.

It is helpful to begin by looking briefly at Australia's history, particularly its constitutional history, and the constitutional framework.

Many histories

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

Australia's constitutional development

Australia's constitutional history, from the perspective of its colonisers, began with the taking of the possession of the eastern part of the continent by James Cook in 1770.² In 1786, New South Wales was designated as a place to which British

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

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

convicts might be transported.³ In 1788 Governor Philip arrived in that colony as the embodiment of the authority of the British Crown.⁴ In that year, 13 American colonies voted upon the Constitution of the United States. The year 1823 saw the first appointed local legislative body in New South Wales and the establishment in that colony of a Supreme Court.⁵ Tasmania was separated from New South Wales in 1825.⁶

In 1850 the British Parliament passed the *Australian Constitutions Act 1850* (Imp). That Act provided for the enactment and alteration by colonial legislatures of their own constitutions. It also provided for the creation of a separate colony of Victoria to be carved out of New South Wales. That separation took effect in January 1851. In 1854 the Legislative Council of Tasmania enacted a *Constitution Act* in terms authorised by the 1850 Act. It became effective upon receiving the Royal Assent. It established a bi-cameral legislature.⁷ In 1855, common form constitutions authorised by Imperial statutes were established in New South Wales and Victoria. Responsible government was adopted within the framework of those constitutions as a matter of convention. Queensland was created out of New South Wales as a separate colony in 1859. The separation was effected by Letters Patent and an Order in Council which established the Constitution of the Colony in terms similar to the 1855 New South Wales Constitution.⁸ South Australia was created as a province in 1834

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

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

⁵ Pursuant to the Imperial Statute Geo IV c 96.

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

⁷ 18 Vic No 17.

⁸ *Australian Constitutions Act of 1842 and 1850* had authorised the creation of Queensland as a separate colony subject to a partition of householders of the area above the 30 degree of south latitude.

by Imperial statute.⁹ A *South Australian Constitution Act 1855* was enacted by the South Australian Legislature.¹⁰

Western Australia was established as a colony by an Imperial statute in 1829. It achieved representative government in 1890 when the *Constitution Act 1889* was authorised by Imperial Statute. It established a bi-cameral legislature, including a nominated Legislative Council. That was replaced by an elective Council in 1893.¹¹ The *Constitution Act 1899* passed by the Western Australian Parliament consolidated its predecessor enactments.

The Constitutions of the Australian Colonies derived their legal authority directly or indirectly from Acts of the Imperial Parliament. They were the result of local initiatives by the colonists. Each of the Colonies at the close of the 19th century had well-established and well-respected judicial systems. At the apex of each judicial system was a Supreme Court. Those judicial systems were constituted as the judicial systems of the States after Federation. Importantly, their generally high standing and practical economic considerations led to a provision being included in the Australian Constitution whereby State courts could be invested with federal jurisdiction. They were so invested, and as appears later, that provision in the Australian Constitution, together with the role of the High Court as the final court of appeal on all matters within Australia, supported doctrines that the Supreme Courts cannot be abolished, and must maintain their supervisory jurisdiction within the States and further that the courts of the States cannot be required or authorised to do things which are repugnant to the judicial function and would render them unfit repositories for federal jurisdiction.

⁹ "An Act to empower his Majesty to erect South Australia into a British province or provinces, and to provide for the colonisation and government thereof" – 4 & 5 Will IV c95.

¹⁰ *South Australian Constitution Act (No 2) 1855-56.*

¹¹ *Constitution Amendment Act 1893 57 Vict No 14.*

The Conventions: the formation of the Australian Federation

Conventions of colonial representatives came together to discuss and draft an Australian Federal Constitution in the 1890s. The concerns that brought them together included foreign affairs, immigration, defence, trade and commerce and industrial relations. European powers were active in the region. The French had begun to colonise New Caledonia and Vanuatu. Germany colonised portions of New Guinea. The Premier of Queensland had tried to annex New Guinea to the Colony of Queensland but that attempt had been disclaimed by the United Kingdom Government. The Colonies wanted an Australian Defence Force. They wanted to keep Australia white. They did not want industrial action spreading from one Colony to another. There were also trade barriers between the Colonies to overcome, although there was much debate between free-traders and protectionists at the time. And, as the Australian Constitutional Commission, set up to review the Constitution said in 1987:

There was also a self-confidence in Australia which was probably a factor in the push for Australia to become a nation. This self-confidence was largely due to economic prosperity. It was reinforced by Australian cricketers who showed they could beat Great Britain at her own game, and by Australian artists, writers and poets and agricultural investors.¹²

A Constitution Bill was drafted by a convention of delegates in 1890 and 1891 but failed to gain acceptance because neither the colonial parliaments nor the people would accept the work of that Convention as final.¹³ The failure of the draft Constitution to gain popular acceptance was attributed by commentators of the time to "...a vague feeling of distrust of the Constitution, as the work of a body somewhat conservative in composition, only indirectly representative of the people, and

¹² *Australia's Constitution – Time to Update*, Summary of the Report of the Advisory Committees to the Constitutional Commission 1987 at 7-8.

¹³ Quick J and Garran RR, *The Annotated Constitution of the Australian Commonwealth* (Sydney, Angus & Robinson, 1901) at 144.

entrusted with no very definite or detailed mandate even by the parliaments which created it".¹⁴

In the event, a popular movement restored momentum to the drive towards federation. The 1891 Bill had opened the topic for discussion and raised issues for debate. Other facts came into play such as the apparent economic interdependence of the colonies, the benefit of a co-operative approach and "... the folly of interprovincial barriers".¹⁵

A conference of colonial premiers held in Hobart in 1895, considered resolutions passed by a popularly organised conference held in 1893. The Premiers decided that each colony would pass enabling acts to choose ten delegates to meet in a convention to draft a federal constitution for consideration by each colonial parliament. The Convention would reconvene to consider proposed amendments and the constitution would be put to the people at a referendum before being submitted to the Crown.¹⁶ The legitimacy of the proposed constitution was seen by those who devised the process for its adoption as critically dependent upon its acceptance by popular vote.

The new Convention first met in Adelaide in March 1897. A draft arising out of that session was considered by all colonial parliaments. The Convention reconvened in Sydney in September 1897 and again at Melbourne at January 1898. At the last session, which extended from 20 January to 17 March, the whole Bill was reconsidered, revised by the drafting committee, and adopted by the Convention.

¹⁴ Ibid at 144.

¹⁵ Ibid at 150.

¹⁶ Irving H, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1997) at 142.

The revised Constitution Bill was submitted to the electors of each of the colonies. Referenda were held in Victoria, Tasmania and South Australia where it was approved by majorities. But it did not obtain the minimum number of voters required in New South Wales. Amendments were agreed at a Premiers' conference held in Melbourne in January 1899 where all six colonies were represented. Further referenda were required. These were held and the Bill was approved by electors in New South Wales, Victoria, South Australia and Tasmania. Queensland approved it in September 1899. Western Australia did not proceed to referendum at that time largely for reasons to do with local politics. The five colonies which had approved the Bill then submitted it to the Imperial Parliament together with addresses from their respective Legislatures. Subject to changes relating to appeals to the Privy Council from the High Court, the Bill was passed by both the House of Commons and the House of Lords. On 9 July 1900, it received the Royal Assent.

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

On 17 September 1900, Queen Victoria signed a Proclamation establishing the Commonwealth of Australia as from 1 January 1901. Quick and Garran, the authors of the leading commentary on the Constitution published in 1901, wrote:

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

establishment of a Commonwealth of Australia with half the continent of Australia left, for a time outside.¹⁷

The shape of the Australian Constitution

The Australian Constitution has eight chapters which deal with the following topics:

Chapter I – The Parliament

Chapter II – The Executive Government

Chapter III - The Judicature

Chapter IV – Finance and Trade

Chapter V – The States

Chapter VI – New States

Chapter VII – Miscellaneous

Chapter VIII – Alteration of the Constitution

The law-making power of the Commonwealth is vested in the Commonwealth Parliament which consists of "... the Queen, a Senate, and a House of Representatives". Section 51 of the Constitution sets out the subjects upon which the Parliament of the Commonwealth is authorised to make laws. There are 39 heads of power in that section.

Chapter II of the Constitution deals with the Executive Government. The key provision of that chapter is s 61, which provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and

¹⁷ Ibid at 251.

extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

By convention the Governor-General acts upon the advice of the Australian Ministers of the Crown through the Federal Executive Council which is established under s 62 of the Constitution. The section locates the effective executive power in the Ministers of the Crown.

Chapter III of the Constitution deals with the federal judicature. Each colony which became a State already had in place a court system. Those court systems continued after Federation and continue today. The judicial power of the Commonwealth is vested in the High Court of Australia, such other federal courts as are created by the Parliament and such other courts (ie courts of the States) as are invested with federal jurisdiction. The High Court is the final appellate court for all Australian jurisdictions.¹⁸

The Constitution took effect in a society operating upon certain assumptions about the rule of law and basic freedoms reflected in the common law inherited from England. That common law which has over the years evolved and been modified still provides the setting in which the Commonwealth and State Constitutions, and constitutional institutions, operate and in which statutes are interpreted. It is part of the Constitution of Australia and of its States in a small “c” constitutional sense.

The United States Constitution reflects a separation of legislative executive and judicial powers in Articles I,II and III which may be seen as generally corresponding with Chapters I, II and III of the Australian Constitution. There are of course obvious and important differences. The United States Constitution vests legislative power in the Congress, comprising the Senate and the House of

¹⁸ Constitution, s 71.

Representatives. The Australian Constitution vests it in the Parliament which comprises the Queen, the House of Representatives and the Senate. This reflects Australia's constitutional monarchy. The Queen's representative in Australia is the Governor-General who is appointed on the advice of the Australian Government. One function of the Governor-General is to assent, to propose laws, passed by both Houses of Parliament. That assent is given under s 58 of the Constitution. There is a formal discretion to withhold assent. It would however be a remarkable event if the Governor-General were ever to do so. The Governor-General may also return a proposed law with recommended amendments. That has happened on 14 occasions, the last of which was in 1986. A Constitutional Commission set up in the 1980s recommended the abolition of s 58.

The separation of legislative and executive from judicial powers in Australia is sharp. In a leading decision, the *Boilermakers' Case*, which affirmed that separation, the High Court said that:

In a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive.¹⁹

The separation of legislative and executive power is qualified in Australia by the doctrine of responsible government under which Ministers of State are required to be Members of Parliament, are accountable to the Parliament and may effectively be removed from office by a vote of no confidence passed by the Parliament. Nevertheless, the general separation of powers subsists. The High Court said in 1996:

The Constitution reflects the broad principle that, subject to the Westminster system of responsible government, the powers in each category – whose character is determined according to traditional British conceptions – are vested in and are to be exercised by separate organs of

¹⁹ *Attorney-General for the Commonwealth v The Queen; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529 at 1040.

government. The functions of government are not separated because the powers of one branch could not be exercised effectively by the repository of the powers of another branch. To the contrary, the separation of functions is designed to provide checks and balances on the exercise of power by the respective organs of government in which the powers are reposed.²⁰

Sir Owen Dixon, in a speech to the American Bar Association in 1942, compared the two Constitutions and in relation to responsible government said:

The men who drew up the Australian Constitution had the American document before them; they studied it with care; they even read the standard books of the day which undertook to expound it. They all lived, however, under a system of responsible government. That is to say, they knew and believed in the British system by which the Ministers are responsible to the Parliament and must go out of office whenever they lose the confidence of the legislature. They felt therefore impelled to make one great change in adapting the American Constitution. Deeply as they respected your institutions, they found themselves unable to accept the principle by which the executive government is made independent of the legislature. Responsible government, that is, the system by which the executive is responsible to the legislature, was therefore introduced with all its necessary consequences.²¹

Another important difference between our Constitutions is in relation to the distribution of federal judicial power. Under s 71 of the Australian Constitution the judicial power of the Commonwealth, is vested in the High Court of Australia, in such other federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction. The reference to "such other courts" is a reference to the courts of the States and Territories of Australia. In the US on the other hand, under s 1 of art 3, the judicial power of the United States is vested in the Supreme Court and " ... in such inferior Courts as the Congress may from time to time ordain and establish". There is no express provision in the Constitution for conferring federal jurisdiction on State courts. State courts, however, do deal with federal questions

²⁰ *Wilson v Minister for Aboriginal and Torres Islander Affairs* (1996) 189 CLR 1 at 10-11.

²¹ Dixon O, "Two Constitutions Compared" in Woinarski (ed), *Jesting Pilate* (William S Hein & Co, 1997) 101.

under the terms of their own State Constitutions and a competency implied by the US Constitution which leaves it open to the Congress to create inferior federal courts or not.²²

The Australian provision had more to do with economy and practical considerations than with any constitutional principle. Joshua Symon, a leading delegate at the Constitutional Convention in 1898, explained the rationale for using State courts in these words:

The method adopted in the United States of having circuit courts, and so on, all over the country has been wiped out here, so that the Federal Parliament may save that expense, and the Parliament has been given power to vest the judicial control of matters not to be dealt with by the High Court in the State courts.²³

Another important difference is that the High Court has jurisdiction to hear appeals from all judgments, decrees, orders and sentences of any other federal court or court exercising federal jurisdiction or from the Supreme Court of any State. The judicial branch of government was rightly described by Quick and Garran as "more national, and less distinctively federal, in character, than either the legislative or the executive departments". The High Court is "... not only a federal, but a national court of appeal; it has appellate jurisdiction in matters of the most purely provincial character as well as in matters of federal concern".²⁴

²² See, eg, Rotunda RD and Nowak JE, *Treatise on Constitutional Law: Substance and Procedure* (Thomson/West, 4th ed, 2007) §1.6© at 81: "State courts may be called upon to review the constitutionality of either state or federal laws in the course of deciding issues in cases before them. When reviewing federal laws these courts must follow the rulings of the Supreme Court and enforce federal laws over inconsistent state acts."

²³ *Official Record of the Debate to the Australasian Federal Convention* (Government Printer, Melbourne, 31 January 1898) 298.

²⁴ Quick and Garran, above n 13, 804.

The evolution of Australian nationhood

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

Australia lacked executive independence in the conduct of its foreign relations at the time of Federation. These were carried on through the British government. Executive independence was recognised for all British Dominions at an Imperial conference held in 1926. The resolutions passed at that conference were sufficient "... to secure the independence of Dominion executives, in the conduct of both domestic and foreign affairs".²⁵

Legislative independence from Great Britain did not come to pass until the adoption by the Australian Parliament in 1942, retrospective to 1939, of the Statute of Westminster 1931 (UK). That was a British statute which gave effect to the wishes of Dominions to lift fetters on their legislative powers imposed by an Imperial Act known as the *Colonial Laws Validity Act 1865* (UK).²⁶ The Statute of Westminster also affirmed the powers of Dominion parliaments to make laws having extraterritorial effect. It repealed the *Colonial Laws Validity Act 1865* in relation to Dominion laws. That Act continued to apply to the States of Australia until 1986.

²⁵ Winterton G, "The Acquisition of Independence" in French R, Lindell G & Saunders C (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) at 84-85.

²⁶ Paradoxically, the *Colonial Laws Validity Act* was enacted to overcome objections taken by Justice Boothby in the Supreme Court of South Australia to local laws said to be merely inconsistent with Imperial law. Justice Boothby's persistent objections led to his removal from that Court.

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

State Governors continue to be appointed by the Queen on the advice of British (rather than State) Ministers. When State laws were reserved for the Queen's assent, it was British Ministers who advised her whether or not to assent. The *Colonial Laws Validity Act* still prevented the States from legislating in a manner that was "repugnant" to British laws of paramount force. British laws on such subjects as merchant shipping and the reservation of certain Bills for the sovereign's assent continued to apply by paramount force to the States. Despite forming part of an independent Federation, the Australian States were regarded by the British government as "colonial dependencies of the British Crown" and, when the Queen performed State functions (such as the appointment of a governor), she acted as the Queen of the United Kingdom rather than the Queen of Australia.²⁷

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

²⁷ Twomey A, "The Making of the Australia Acts 1986" in Winterton G (ed), *State Constitutional Landmarks* (Federation Press, 2006) at 267-268.

Distribution of powers under the Australian Constitution

The *Commonwealth of Australia Constitution Act 1900* created the Commonwealth of Australia as a federation. It conferred on the Commonwealth Parliament law-making powers with respect to particular topics. The Constitutions of the former Australian colonies, which became States in the Federation, were continued in force subject to the Commonwealth Constitution. So too were their law-making powers, save for those vested exclusively in the Commonwealth Parliament or withdrawn from the Parliaments of the States.²⁸ The legislative powers of the Commonwealth are mostly concurrent with those of the States. In the areas of concurrent legislative competency Commonwealth law is paramount. If a law of a State is inconsistent with a law of the Commonwealth, the Commonwealth law shall prevail and the State law shall, to the extent of the inconsistency, be invalid.²⁹

In the first two decades of the Federation, the relationship between Commonwealth and State legislative powers was dominated by a reserve powers doctrine developed in a series of decisions of the High Court. That doctrine required that Commonwealth legislative powers be construed narrowly where they impinged upon areas of legislative competency left to the States. For example, the power of the Commonwealth to make laws with respect to trade and commerce conferred by s 51(i) of the Constitution related to trade and commerce with other countries and among the States. Sections 100 and 107 continued the constitutions and powers of the State parliaments. By implication, the States retained to themselves the power to legislate with respect to trade and commerce within their own boundaries. According to the reserve powers doctrine the Commonwealth legislative power was to be construed narrowly so as to minimise the intrusion of Commonwealth law into the area of intra-

²⁸ Constitution, ss 106 and 107.

²⁹ Constitution, s 109.

State trade.³⁰ That approach also supported a narrow construction of the power of the Commonwealth Parliament to make laws with respect to corporations.³¹

Under another related doctrine the Commonwealth could not make legislation affecting governmental functions of the States and the States could not pass legislation affecting the functions of the Commonwealth. This was the doctrine of 'implied immunity of instrumentalities'. Both doctrines were disposed of by the decision of the Court in the *Engineer's Case* in 1920.³² The principle emerging from that case required a broad interpretation of Commonwealth legislative power unconstrained by the continuing legislative powers of the States. It also allowed for the application to the States and their agencies of Commonwealth legislation. The case represented a major widening of Commonwealth power.

One particular result of the overthrow of the doctrine of implied immunity of instrumentalities was that the States had no general immunity from the taxation power of the Commonwealth. The imposition of income tax on the salaries of members of Parliament, State Ministers and judges did not infringe any implied prohibition. Similarly, the States themselves could pass laws which might affect Commonwealth officials. For example, a Commonwealth official driving in the course of his or her duties would be subject to State road traffic laws. An implied limitation was developed in subsequent litigation.³³ It provided that the Commonwealth could not pass a law which had the effect of destroying or weakening the capacity or functions of the States. That doctrine has been applied in recent years to set aside the imposition by Commonwealth law of surcharges payable on the pensions or

³⁰ *R v Barger* (1908) 6 CLR 41 at 54 per Griffiths CJ.

³¹ *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

³² *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

³³ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

superannuation entitlements, provided by State law, of State judges and parliamentarians.³⁴

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

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

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

³⁴ *Austin v Commonwealth* (2003) 215 CLR 185; *Clarke v Commissioner of Taxation* (2009) 258 CLR 623.

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

The interpretation given by the High Court to the power of the Commonwealth to make laws with respect to external affairs has enabled a number of laws to be supported which give effect to treaties entered into by the Executive Government of the Commonwealth with other countries.³⁵ The subject of those treaties could not otherwise have fallen within the scope of Commonwealth legislative power. An example is the *Racial Discrimination Act 1975* (Cth) which gave effect to the Convention for the Elimination of all Forms of Racial Discrimination. Other examples in the field of rights protection include legislation relating to sex, age and disability discrimination.

Another area in which the legislative competence of the Commonwealth has been given an expansive interpretation by the High Court is that covered by the power

³⁵ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

under s 51(xx) to make laws with respect to 'foreign corporations and trading or financial corporations formed within the limits of the Commonwealth'.³⁶ The expansive interpretation became possible after the overthrow of the reserve powers doctrine. The application of the corporations power has extended beyond mere regulation to such areas as competition law, unfair trading practices and industrial relations law.

Section 61, which provides for the executive power of the Commonwealth, supports government entry into intergovernmental agreements and may be supplemented by the use of the incidental power under s 51(xxxix).

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

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

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

A constitution that contains a section 96 contains within itself a mechanism of Commonwealth supremacy.³⁷

³⁶ Constitution, s 51(xx).

³⁷ Bailey K, "The Uniform Tax Plan" (1942-1944) 20 *Econ Record* 170 at 185.

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

The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

There are also, of course, restrictions on the legislative powers of the Commonwealth. These include the requirement in s 92 (also applicable to the States) that trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. There is a further restriction under s 99 which prevents the Commonwealth by any law or regulation of trade, commerce or revenue from giving preference to one State or any part thereof over another State or any part thereof. Section 100 protects States or their residents from "a law or regulation of commerce" abridging their right to the reasonable use of the waters of rivers for conservation or irrigation. It has been little litigated but has come before the Court recently in connection with Commonwealth funding of States engaged in restricting water access rights in the context of a diminishing resource. Section 116 places restrictions on the Commonwealth's ability to legislate in respect of religion.

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

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

The spending power of the Commonwealth

Under s 81 of the Commonwealth Constitution all revenues or monies raised or received by the executive government shall form one Consolidated Revenue Fund. Money must be appropriated from that fund for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by the Constitution. Under s 83 of the Constitution no money can be drawn by the Treasury of the Commonwealth except under an appropriation made by law.

Contrary to some long-standing views, the High Court held in a decision delivered in 2009, *Pape v Federal Commissioner of Taxation*,³⁸ that ss 81 and 83 do not confer a substantive spending power on the Parliament. Rather they impose controls and necessary conditions for expenditure. The power to spend appropriated monies must be found elsewhere in the Constitution or in statutes made under it. The particular case involved a challenge to the validity of the *Tax Bonus for Working Australians Act (No 2) 2009*, which authorised payments to Australian taxpayers ranging from \$200 to \$900. This was in pursuit of a policy of "fiscal stimulus" as a response to the global financial crisis. One of the prospective recipients of the payments, a law academic, challenged their validity on the basis that they were not authorised and that they undercut the federal structure of the Constitution. The Court held, by majority, that the determination by the Executive Government that there was a need for an immediate fiscal stimulus to the national economy enlivened the executive power of the Commonwealth under s 61 and attracted the incidental legislative power under s 51(xxxix) which supported the *Tax Bonus Act*. The appropriation and expenditure thus had the support of a substantive legislative power.

Reference has also been made already to s 96. Conditional grants under that section may be made pursuant to inter-governmental agreements. The use of s 96 was

³⁸ (2009) 238 CLR 1.

considered by the Court in 2009 in relation to Commonwealth funding to the States to support rationalisation of water-use rights including water licences which are issued under State laws. While the challenge failed, a majority of the Court held that the legislative power of the Commonwealth conferred by s 96 did not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property other than on just terms. The "just terms" referred to s 51(xxxi) of the Constitution which requires that if the Commonwealth legislate for the acquisition of property from any State or person, it must be on just terms.

Cooperative federalism

Notwithstanding the enhancement of Commonwealth power by interpretation of the Constitution since 1901, there has been a significant increase in recent years in the phenomenon of cooperative federalism. This may be seen to some extent as a departure from the coordinate federalism which was no doubt envisaged by the colonists. There are an increasing number of cooperative arrangements between the Commonwealth and the States covering areas which neither Commonwealth nor State legislatures could comprehensively cover within the ambit of their own legislative powers. Because such agreements often involve the creation of national agencies they have, although cooperatively based, a natural centralising tendency. Much of the development of cooperative agreements between the Commonwealth and the States occurs through the mechanism of the Council of Australian Governments, which is a council comprising the Prime Minister and the Premiers of the various States and the Chief Ministers of the Northern Territory and the Australian Capital Territory. Since it was established the Council of Australian Governments has set up programs for cooperative development in many areas of regulatory interest. One of those currently under consideration is the establishment of a national regulatory scheme for the legal profession. Currently the regulation of the legal profession is done on a State-by-State and Territory basis.

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

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

Of all these techniques, the referral power offers the possibility of achieving on a cooperative basis one law from one source of legislative power, namely the Commonwealth Parliament, provided that it is subject to mechanisms to protect the referring States from abuse of the power by the Commonwealth. The enthusiasm of the States for referrals of power ebbs and flows. At present there seems to be a preference for intergovernmental agreements involving the adoption by various States of model legislation passed in a lead State. There are now in Australia a number of cooperative schemes which cover, inter alia, corporations law, competition law, and gas, electricity and water regulation. Other areas under consideration include national transport arrangements and infrastructure development. There is also a cooperatively based legislative arrangement providing for access regimes to essential facilities constituting natural monopolies, specifically gas pipelines and railways.

Constitutional interpretation and judicial review of legislation

Political scientists and constitutional lawyers may debate whether economic and political factors have been of greater significance to federal/State relations in

Australia than decisions of the High Court. However, the power of the High Court on judicial review to determine whether laws enacted by the Commonwealth Parliament or by State Parliaments are valid under the Commonwealth Constitution has been of major significance.

The judicial power of the Commonwealth is vested, by s 71 of the Constitution, in the High Court of Australia and in such other federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction. Through the *Judiciary Act 1903* (Cth) the Parliament has invested the High Court and the Federal Court and the courts of the various States with jurisdiction in matters arising under the Constitution, or involving its interpretation.³⁹ The use of the State Supreme Courts in particular to exercise jurisdiction in federal matters reflected the standing which they had at the time of federation.

There is no provision of the Constitution which expressly confers upon the courts the power to declare legislation of the Commonwealth or of the States unconstitutional. Nevertheless, the Australian Constitutional Convention Debates and Records indicate that most, if not all, of the delegates assumed that the courts would be able to declare Commonwealth and State legislation unconstitutional.⁴⁰

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

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

³⁹ *Judiciary Act 1903* (Cth) s 39B.

⁴⁰ Thomson JA, *Judicial Review in Australia: The Courts and the Constitution* (1988) at 166-167.

jurisdiction in matters arising under the Constitution or involving its interpretation (s 76).⁴¹

The High Court asserted, early in its existence and without elaborate exposition, its power to declare legislation invalid.⁴² In the exercise of that power and its necessary premise, the power to interpret the Constitution, it has had a significant influence upon the relationship between the Commonwealth and the States under the Constitution.

Human rights in the drafting of the Australian Constitution

A leading figure at the Constitutional Conventions was Andrew Inglis Clark. He was Attorney-General for Tasmania. He was familiar with the Constitution of the United States and with key decisions of the US Supreme Court. He was a great admirer of American democracy, had visited the United States on a number of occasions and had developed a friendship with Oliver Wendell Holmes, with whom he exchanged correspondence.

Clark prepared a preliminary draft of an Australian Constitution which drew extensively from that of the United States.⁴³ It formed the basis for much of what was to appear in the Constitution as finally adopted. In his draft Clark included four rights derived from American influences. They were:

1. The right to trial by jury.
2. The right to the privileges and immunities of State citizenship.
3. The right to equal protection under the law.

⁴¹ Sawyer G, *Australian Federalism in the Courts* (Melbourne University Press, 1967) at 76.

⁴² *D'Emden v Pedder* (1904) 1 CLR 91; *Commonwealth v State of New South Wales* (1906) 3 CLR 807.

⁴³ A copy of Clark's draft is available in Williams JM, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) at 63-112.

4. The right to freedom and non-establishment of religion.

Clark sought to expand the equal protection guarantee at the 1898 Convention.⁴⁴ He proposed that a State not be able to "... 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".⁴⁵ He quoted the American jurist, Justice Cooley of Michigan:

A popular form of Government does not necessarily assure to the people an exemption from tyrannical legislation. On the contrary, the more popular the form, if there be no checks or guards, the greater perhaps may be the danger that excitement and passion will sway the public counsels, and arbitrary and unreasonable laws be enacted.⁴⁶

Clark's rights provisions were debated at the 1898 Convention in Melbourne. There was opposition to the proposed guarantees particularly those relating to equal protection and due process. The concern was that they would affect the legislative powers of the States. The authors of a recent text on Bills of Rights in Australian history have observed:

These proposals were attacked both on the basis that such guarantees were unnecessary for the protection of the rights of citizens in a polity based on representative and responsible government, and because they were seen as having the potential to restrict colonial laws that limited the employment of Asian workers.⁴⁷

⁴⁴ Clark did not attend the 1897-1898 Adelaide Convention and he sent written amendments to the 1898 Melbourne Convention. See La Nauze JA, *The Making of the Australian Constitution* (1972) at 67; Reynolds H, "Clark, Andrew Inglis (1848-1907)" *Australian Dictionary of Biography: Online Edition*, <<http://adbonline.anu.edu.au/biogs/A030378b.htm>>.

⁴⁵ *Mercury*, 19 August 1897. The amendment also appears in "Proposed Amendments to the Draft of a Bill to Constitute the Commonwealth of Australia", Australian Archives Mitchell, Series R216, Item 310 at 4 and cited in Williams JM, "With Eyes Open: Andrew Inglis Clark and Our Republican Tradition" (1995) 23(2) *Federal Law Review* 149 at 176.

⁴⁶ Proposed amendments to the draft of a Bill to constitute the Commonwealth of Australia, Australian Archives Mitchell, Series R216, Item 310 at 4-5. See also Williams, above n 45 at 177.

⁴⁷ Byrnes A, Charlesworth H and McKinnon G, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) at 25; see also Williams G, *Human Rights under the Australian Constitution* (Oxford University Press, 1999) at 37-42.

In the event, limited rights provisions were adopted based on those proposed by Clark. They comprised the right to trial by jury in cases of offences against the Commonwealth⁴⁸ tried by indictment, a prohibition on the Commonwealth establishing any religion or preventing the free exercise of any religion⁴⁹ and the protection of the residents of one State from discrimination by another State on the basis of residence.⁵⁰ The anti-discrimination guarantee was the relic of Clark's equal protection proposal. It is important, however, to acknowledge that these are not the only sources of rights protection in the Commonwealth Constitution.

Human rights and the Australian Constitution today

It is not surprising, having regard to the history of the federation movement, that the Constitution has little to say about the relationship between government and governed. Australian legal academic Professor George Williams has suggested that many of the drafters of the Constitution were influenced by the 19th century English constitutional commentators, Bryce and Dicey.⁵¹ Neither of those writers saw a need to expressly guarantee rights in written constitutions. Professor Helen Irving, an Australian constitutional historian, has referred to colonial liberals and conservatives among the drafters of the Constitution. The conservatives for the most part were primarily concerned with States' rights. The liberals represented liberal utilitarianism associated with the ideas of John Stuart Mill. Professor Irving wrote:

⁴⁸ Constitution, s 80.

⁴⁹ Constitution, s 116.

⁵⁰ Constitution, s 117.

⁵¹ See Williams G, above n 47 at 39. See also Bryce J, *The American Commonwealth* (Macmillan, 3rd ed, 1912); Dicey AV, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959).

In the area of human rights, the majority, including most conservatives, took the Millsian approach, seeking the restriction of belief and action only in so far as their free expression harmed others.⁵²

The tendency, as she described it, was to respect rights and freedoms, to protect them negatively from interference but not to declare them positively.

Sir Owen Dixon, a former Chief Justice of Australia, in comparing the United States and Australian Constitutions, attributed the omission of a Bill of Rights to a readiness on the part of the framers of the Constitution to leave the protection of rights to the legislature and the processes of responsible government. He said:

The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself.⁵³

In holding that there was no basis in the Constitution for implying general guarantees of fundamental rights and freedoms, another Chief Justice of Australia, Sir Anthony Mason, said in 1992:

To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.⁵⁴

It is sufficient to say that there was probably a variety of reasons behind the absence in Australia's Constitution of a Bill of Rights, some related to the desire to maintain

⁵² Irving, above n 16 at 168.

⁵³ Dixon O, "Two Constitutions Compared" reprinted in Woinarski *Jesting Pilate* (Melbourne: Law Book, 1965) at 102 cited in Lee HP, "The Implied Freedom of Political Communication" in Lee HP and Winterton G (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) at 386.

⁵⁴ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 136.

the capacity to discriminate against particular racial groups and others reflecting a loftier vision of the nascent Australian constitutionalism. Hypotheses, however plausible, more than 100 years after the event, are unlikely to yield a single reliable explanation.

There are a number of provisions in the Commonwealth Constitution, including the survivors of the Clark proposals, which answer to some degree the description of human rights guarantees. Each of them may be summarised briefly:

1. Section 51(xxiiiA) of the Constitution authorises the Commonwealth Parliament to make provision, among other things, for medical and dental services but is subject to the limitation that it does not authorise any form of civil conscription. The section was introduced into the Constitution in 1946 after the High Court had struck down a law providing for the supply of pharmaceutical benefits paid for by the Commonwealth. The limitation on the constitutional power which would exclude any form of civil conscription was proposed by Robert Menzies to avoid the power being used to nationalise the medical and dental professions.
2. Section 51(xxxi) of the Constitution authorises the Commonwealth Parliament to make laws with respect to:

the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

This has been taken as imposing a just terms requirement in respect of any compulsory acquisition by the Commonwealth of property belonging to the State or to a person. There is complicated case law which attaches to this provision. It extends to a very wide range of property interests described by Sir Owen Dixon in the *Bank Nationalisation Case* as "innominate and

anomalous interests ...".⁵⁵ A law which extinguishes a property right may bear the character of a law with respect to the acquisition of property.⁵⁶ In February last year, the Court held by majority that the just terms guarantee extended beyond the States into the Territories and, in particular, the Northern Territory of Australia. In so doing it overturned the 1969 decision *Teori Tau v Commonwealth*.⁵⁷ As a result, the just terms guarantee applied to the acquisition of property rights conferred upon indigenous people under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). This was a finding of some significance although public reporting of the decision focussed upon the Court's rejection of a challenge to the validity of statutes supporting the Northern Territory intervention.⁵⁸

3. Section 75(v) of the Constitution confers on the High Court jurisdiction in any matter in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Under that provision the High Court can prevent a public official, including a Minister of the Crown, from exceeding his or her lawful power and may require a Minister or official to discharge a duty imposed upon him or her by law. The Court can also quash a decision which is made in excess of power. Chief Justice Gleeson described s 75(v) as providing in the Constitution "... a basic guarantee of the rule of law".⁵⁹ The section was inserted in the Constitution at the suggestion of the delegate, Andrew Inglis Clark, to avoid the deficiency in original jurisdiction identified by Marshall CJ in *Marbury v Madison*⁶⁰. Because it is a

⁵⁵ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349.

⁵⁶ *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.
⁵⁷ (1969) 119 CLR 564.

⁵⁸ *Wurridjal v Commonwealth* (2009) 237 CLR 309.

⁵⁹ Gleeson AM, *The Rule of Law and the Constitution* (ABC Books, 2000) at 67.

⁶⁰ (1803) 5 US 137.

constitutional provision, the original jurisdiction it confers on the Court cannot be removed by statute.

4. Section 80 of the Constitution provides that:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

The guarantee of trial by jury is contingent upon the offence being tried by indictment. There have been a number of cases in which the scope of this guarantee has been explored. Where it applies it has been held to require a unanimous verdict of the jurors before a conviction can stand.⁶¹ The Court recently heard a case in which it was argued that, consistently with s 80, there could be no appeal against a verdict of acquittal directed by the trial judge. The Court has reserved judgment in that case.

5. Section 92 of the Constitution provides:

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

There are two elements to this guarantee. One is freedom of trade and commerce and the other is freedom of intercourse. That latter freedom was relied upon to strike down national security regulations in 1945 which were found to prohibit interstate movement⁶². This aspect of s 92 has been said to be related to the freedom of movement guaranteed in Art 12 of the International Covenant on Civil and Political Rights (ICCPR).

6. Section 116 of the Constitution, which is another of the Clark rights, provides:

⁶¹ *Cheatle v The Queen* (1993) 177 CLR 541.

⁶² *Gratwick v Johnson* (1945) 70 CLR 1.

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.

This guarantee does not apply to the States but only to the Commonwealth. It has been litigated from time to time. In *Attorney-General (Vic); Ex rel Black v Commonwealth*⁶³ a challenge was brought to laws providing for grants to the States to be distributed to religious schools. The laws were said to establish a religion contrary to s 116. The challenge was rejected. In 1997 the High Court rejected an action brought by Aboriginal people claiming that policies of the Northern Territory designed to place Aboriginal children in foster care in church and State operated homes, had interfered with their freedom to practice their own religion. The majority held that the *Aboriginal Protection Ordinance 1918* (NT) was not a law which could be characterised as a law "for prohibiting the free exercise of any religion".⁶⁴

7. Section 117 of the Constitution prohibits discrimination between residents of States. It provides:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

In an important decision in 1989 the Court struck down Queensland laws which required any legal practitioner wishing to practice in Queensland to have his or her principal practice there. Although on the face of it the law, which was a rule made by the Queensland Bar Association, applied to all legal practitioners, it operated to discriminate against out-of-State practitioners.⁶⁵

⁶³ (1981) 146 CLR 559.

⁶⁴ *Kruger v Commonwealth* (1997) 190 CLR 1.

⁶⁵ *Street v Queensland Bar Association* (1989) 168 CLR 461.

The specific guarantees to which I have referred may be seen as falling within the categories of civil and legal process rights and economic and equality rights. Australian constitutional law academic, Professor Peter Bailey has made a persuasive case for their similarity to, if not identity with, a number of human rights and freedoms guaranteed under the ICCPR, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶⁶

Judicial power and the rule of law

As previously noted Chapter III of the Constitution provides for the federal judicial power to be exercised by the High Court, by federal courts created by the Parliament and also by State courts which are invested with federal jurisdiction. The High Court has resisted legislative or executive intrusions upon the judicial power. As one of the Justices of the High Court, Justice Gummow, said in a case decided in 1998:

The legislative powers of the Commonwealth do not extend to the making of a law which authorises or requires a court exercising the judicial power to do so in a manner which is inconsistent with its nature.⁶⁷

The Court has not gone so far as to import a "due process" requirement from the text and structure of Ch III.⁶⁸ However the constitutional scheme under which State courts may be invested with federal jurisdiction brings them within the protection of that Chapter. State Parliaments cannot confer upon State courts functions which would so distort their institutional integrity as to make them unfit repositories for federal jurisdiction. It has been said that legislation which requires a court exercising federal jurisdiction to depart to a significant degree from methods and standards which have

⁶⁶ See Bailey P, *Human Rights: Australia in an International Context* (Butterworths, 1990); Bailey P, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis, 2009).

⁶⁷ *Nicholas v The Queen* (1998) 193 CLR 173 at [232].

⁶⁸ *Thomas v Mowbray* (2007) 233 CLR 307 at [355].

characterised judicial activities in the past may be repugnant to Ch III.⁶⁹ In November 2009 the Court struck down a provision of a civil assets forfeiture statute in New South Wales which required the Supreme Court in that State to hear and determine, on an *ex parte* basis, an application by the New South Wales Crime Commission for an interim freezing order in relation to assets suspected of being the proceeds of crime. Under the legislation an application to set aside the restraining order could not succeed unless the applicant proved that it was more probable than not that the interest in the property was not "illegally acquired property". That in turn required the negating of a very widely drawn range of possibilities of contravention of the criminal law found in the common law and State and Federal statute law. In the joint judgment of Gummow and Bell JJ their Honours characterised the process thus:

[97] The Supreme Court is conscripted for a process which requires in substance the mandatory *ex parte* sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on *ex parte* applications. In addition the possibility of release from that sequestration is conditioned upon proof of a negative proposition of considerable legal and factual complexity.⁷⁰

[98] Section 10 engages the Supreme Court in activity which is repugnant in a fundamental degree to the judicial processes as understood and conducted throughout Australia.

In November 2010, the Court also held invalid a provision of a South Australian law on the same basis. The *Serious and Organised Crime (Control) Act 2008* (SA) provided for the Attorney-General of that State to make a declaration about an organisation where the Attorney-General was satisfied that members of the organisation associated for purposes related to serious criminal activity. The declaration was a purely administrative process. Once a declaration had been made,

⁶⁹ (2007) 233 CLR 307 at [355] per Gummow and Crennan JJ.

⁷⁰ *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319 at 366-367.

the Commissioner of Police could apply to the Magistrates Court of South Australia for a control order against any member of the organisation and the Court, if satisfied that the defendant was a member of a declared organisation, was required to make the order sought. The control order provision was held invalid on the basis that it authorised the executive to enlist the Magistrates Court to implement its decisions in a manner incompatible with that Court's institutional integrity. That was because the exercise of judicial power by the Magistrates Court was so confined as so dependent on the executive's determination in the declaration that it departed impermissibly from the ordinary judicial processes of an independent and impartial tribunal.⁷¹

Chapter III of the Constitution was held to have another important consequence for the status of State Supreme Courts in a decision delivered in 2010 concerning, inter alia, a privative or ouster clause limiting review by the Supreme Court of New South Wales of decisions made by the Industrial Court of that State. The High Court held that State legislation which would take from a State Supreme Court power to grant relief for jurisdictional error on the part of inferior courts and tribunals was beyond State legislative power. Chapter III of the Constitution required that there be a body fitting the description of "the Supreme Court of a State". Its supervisory jurisdiction enforcing limits on the exercise of State executive and judicial power was a defining characteristic of such a body.⁷²

There are other provisions of the Constitution which have potential connections to human rights. These include the electoral and franchise provisions. They were the subject of an important decision of the High Court published in December 2010 which held invalid an amendment to the *Commonwealth Electoral Act 1918* (Cth) removing a long-standing period of grace for people to register on the

⁷¹ *South Australia v Totani* [2010] HCA 39.

⁷² *Kirk v Industrial Relations Commission* (NSW) (2010) 239 CLR 531.

electoral roll, or change their enrolments after an election had been called. The provisions of the Constitution in issue were ss 7 and 24. Section 7 requires that the Senators for each State "directly chosen by the people of the State". Section 24 requires that the Members of the House of Representatives be "directly chosen by the people of the Commonwealth".⁷³

There are other provisions of the Constitution which it may be argued have potential connections to human rights. These include provisions relating to non-discrimination in taxing laws and in trade, commerce or revenue.

In addition to the particular guarantees to which reference has been made, the High Court has also held that there exists an implied freedom of political communication, which will be discussed next.

The implied constitutional freedom of political communication in Australia

In two decisions delivered on 30 September 1992, the High Court recognised an implied constitutional freedom of communication on political matters in Australia. The first case, *Nationwide News Pty Ltd v Wills*⁷⁴ involved a prosecution of *The Australian* newspaper which had published an article highly critical of the Australian Industrial Relations Commission. The article said, inter alia:

The right to work has been taken away from ordinary Australian workers. Their work is regulated by a mass of official controls, imposed by a vast bureaucracy in the Ministry of Labour and *enforced by a corrupt and compliant 'judiciary' in the official Soviet-style Arbitration Commission.*⁷⁵
[Emphasis in original]

⁷³ *Rowe v Electoral Commissioner* [2010] HCA 46.

⁷⁴ (1992) 177 CLR 1.

⁷⁵ (1992) 177 CLR 1 at 96.

The newspaper was prosecuted under s 299 of the *Industrial Relations Act 1988* (Cth) which provided that:

A person shall not

...

(d) by writing or speech use words calculated:

...

(ii) to bring a member of the [Industrial Relations] Commission or the Commission into disrepute.

The High Court held the section invalid. A majority of the Court (Brennan, Deane, Toohey and Gaudron JJ) held it was invalid as infringing an implied freedom of political discussion. The minority (Mason CJ, Dawson and McHugh JJ) held it invalid on the basis it was not within the scope of a relevant head of power in the Constitution. Deane and Toohey JJ in their joint judgment, based the implication upon the system of representative government for which the Constitution provides. They said:⁷⁶

The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person. The actual discharge of the very function of voting in an election or referendum involves communication.

They discerned in the doctrine of representative government "... an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealth".⁷⁷ The implication operated at the level of communication and discussion between the people of the Commonwealth and their

⁷⁶ (1992) 177 CLR 1 at 72.

⁷⁷ (1992) 177 CLR 1 at 73.

members of Parliament and other Commonwealth authorities. It also operated at the level of communication between the people of the Commonwealth themselves.

The other case in which judgment was delivered on 30 September 1992, *Australian Capital Television Pty Ltd v The Commonwealth*,⁷⁸ involved a challenge to new Commonwealth legislation proposing to impose a blanket prohibition on political advertisements on radio or television during federal election periods. The majority (Mason CJ, Deane, Toohey and Gaudron JJ) held that the new provisions were invalid because they infringed the constitutionally guaranteed freedom of political discussion. Mason CJ acknowledged the historical fact that the framers of the Constitution had not adopted the United States model of a Bill of Rights. He accepted that it was difficult if not impossible to imply general guarantees of fundamental rights and freedoms in the Australian Constitution. He went on to say, however:

... the existence of that sentiment when the Constitution was adopted and the influence which it had on the shaping of the Constitution are no answer to the case which the plaintiffs now present. Their case is that a guarantee of freedom of expression in relation to public and political affairs must necessarily be implied from the provision which the Constitution makes for a system of representative government. The plaintiffs say that, because such a freedom is an essential concomitant of representative government, it is necessarily implied in the prescription of that system.⁷⁹

It is important to note that the implied freedom of political communication did not confer enforceable rights on individuals. Rather, it operated to limit the law-making power of the parliament to prevent it from encroaching upon that freedom.

The scope of the implied freedom has been considered in a number of cases involving defamation actions brought by politicians against media outlets.⁸⁰ As

⁷⁸ (1992) 177 CLR 106.

⁷⁹ (1992) 177 CLR 106 at 136.

⁸⁰ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Roberts v Bass* (2002) 212 CLR 1.

expounded in those cases, the implied constitutional freedom of political communication does not confer rights on individuals. Rather, it invalidates any statutory rule which is inconsistent with that freedom. In the context of defamation law, it also requires that the rules of the common law conform with the Constitution. This affects, inter alia, the scope of the defences of qualified privilege that might be raised by media publishers. It does not extend to invalidate laws which are reasonably appropriated and adapted to serve legitimate public ends particularly relating to criminal conduct.

There is a question about the range of "political matters" which fall within the implied freedom of communication. In *Australian Capital Television* they were referred to as "the wide range of matters that may call for, or are relevant to, political action or decision".⁸¹ In the *Theophanous* decision they were said, by Mason CJ, Toohey and Gaudron JJ, to extend to "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about".⁸²

The freedom does not extend to matters traditionally controlled by the criminal law. Deane and Toohey JJ said in *Nationwide News* that:

... a law prohibiting conduct that has traditionally been seen as criminal (eg conspiring to commit, or inciting or procuring the commission of, a serious crime) will readily be seen not to infringe an implication of freedom of political discussion notwithstanding that its effect may be to prohibit a class of communications regardless of whether they do or do not relate to political matters.⁸³

⁸¹ (1992) 177 CLR 106 at 138.

⁸² (1994) 182 CLR 104 at 124, citing Barendt EM, *Freedom of Speech* (Clarendon Press, 1985) at 152.

⁸³ (1992) 177 CLR 1 at 77.

The most recent High Court decision to consider the implied freedom of political communication was *APLA Ltd v Legal Services Commissioner (NSW)*.⁸⁴ There it was held by majority that the implied freedom did not interfere with regulations restricting the advertising of legal services. The communication prohibited was not political.

The implied freedom of political communication is not limited to citizens or individuals. On the other hand it offers no greater protection to the press or the media than it does for individuals. As one commentator has observed, "the beneficiaries of the freedom are consistently described as 'citizens' or 'electors' or 'the community', without the media being accorded favourable, or indeed unfavourable treatment by virtue of any claimed role as watchdog."⁸⁵ There is ongoing uncertainty about the scope of the "political communication" protected by the freedom.⁸⁶

In areas relating to sedition, anti-terrorism and anti-vilification laws, censorship and obscene publications questions may be raised in future cases about the interaction of restrictions imposed by such laws with the implied freedom of political communication. Their resolution may depend in part upon the scope of the concept of "political communication" and which restrictions are reasonably appropriate and adapted to serve legitimate ends compatible with the system of government provided by the Constitution.

⁸⁴ (2005) 224 CLR 322.

⁸⁵ Chesterman M, *Freedom of Speech in Australian Law: a delicate plant* (Dartmouth, 2000) at 44.

⁸⁶ Stone A, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication" (1999) 23 *Melbourne University Law Review* 668; and Stone A, "The Limits of Constitutional Text and Structure Revisited" (2005) 28 (3) *University of New South Wales Law Journal* 842.

Australian debates about constitutional and statutory protection of human rights

Debate about the desirability of both constitutional and statutory Bills of Rights has been going on in Australia for many years. Attempts to introduce statutory Bills of Rights as Commonwealth law were made in 1973 and 1985. The 1973 Bill was strongly opposed and was not enacted. It lapsed in 1974 when Parliament was prorogued. The 1985 Bill was passed by the House of Representatives, but did not secure a majority in the Senate.

In 1985 the Attorney-General, Lionel Bowen, established a Constitutional Commission. That Commission recommended the inclusion in the Constitution of a new Chapter VIA guaranteeing specified rights and freedoms against legislative, executive or judicial action. A proposed new section 124E specified a number of rights.

A constitutional alteration referendum was conducted in September 1988. It did not involve the full suite of rights proposed by the Commission. Rather it would have extended existing rights relating to religious freedom, compensation for the acquisition of property and trial by jury. It also proposed a one vote, one value, principle. It was overwhelmingly defeated. The reasons for its defeat had to do with an associated proposal for four year parliamentary terms and a perception that somehow the changes were going to enhance the powers of the Commonwealth Parliament to the disadvantage of the States. No further attempt has been made to incorporate guaranteed rights and freedoms into the Australian Constitution.

There have been initiatives at State and Territory level in Australia to provide statutory protection for human rights. In 2004, the Australian Capital Territory enacted the *Human Rights Act 2004* (ACT). The Act was broadly modelled on similar legislation in the United Kingdom. It declares a number of rights. All of the rights declared are said to be "subject only to reasonable limits set by Territory laws that can

be demonstrably justified in a free and democratic society".⁸⁷ The State of Victoria in 2006 enacted a *Charter of Human Rights and Responsibilities Act 2006* (Vic) similar in its operation to the *Human Rights Act 2004* (ACT).

Neither statute can affect the validity of any other law of the Territory or the State of Victoria. Nor of course can they affect Commonwealth laws which apply in the Territory or the State. Each statute requires legislation to be interpreted, so far as possible, consistently with the human rights which it declares. When a law is held by the Supreme Court of the Territory or State to be inconsistent with a human right protected by the Act, the Court may make a Declaration of Incompatibility.⁸⁸ Such a declaration does not affect the validity, operation or enforcement of the law or the rights or obligations of anyone. However, the relevant Minister must prepare a response to the Declaration and present it to the Parliament.

The State of Victoria in 2006 enacted a Charter of Human Rights and Responsibilities. The Charter is similar in its impact on legislation to the *Human Rights Act 2004* (ACT). The rights which it protects apply only to "persons".⁸⁹ The High Court in February of this year will hear argument about the operation of the Victorian Charter, and in particular, the interpretive rule which it specifies. Section 32 of the Charter provides:

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

A central question to be debated is the way in which that interpretative provision is to be applied. I will say no more about it as the matter is pending.

⁸⁷ *Human Rights Act 2004* (ACT), s 28.

⁸⁸ *Human Rights Act 2004* (ACT), s 32.

⁸⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 6.

The topic of constitutional and statutory protection of human rights in Australia has frequently been a matter of controversy. A prominent element of the arguments advanced against the introduction of such rights protection in Australia is that it shifts power on important matters of social policy from elected politicians to unelected judges. There is no doubt that human rights and freedoms guaranteed in constitutions and statutes around the world are broadly expressed. The definition of their limits in particular cases by reference to public interest considerations necessarily requires normative judgments which may be seen to have a legislative character.

The phenomenon of judges interpreting broad legal language and making normative decisions in that interpretation is not new. Such concepts as "reasonableness", "good faith" and "unconscionable conduct" found in the common law and in many statutes involve that kind of decision-making. The particular sensitivity of judgments about the scope of human rights guarantees is their impact on legislation. If a right is constitutionally guaranteed, then legislation held by a court to be incompatible may be invalid. If the human right is guaranteed by a statute, then a subsequent inconsistent statute will not thereby be invalid. But the Declaration of Incompatibility mechanism for which the Australian Capital Territory and Victorian legislation provides, is intended to impact on the parliamentary process by requiring the Attorney-General to present the Declaration to the parliament and respond to it.

Significant controversy or lack of bipartisan political support will generally defeat any attempt to change the Constitution in Australia. For the foreseeable future there are unlikely to be any express provisions introduced into the Australian Constitution which protect or guarantee fundamental rights and freedoms of the kind set out in the ICCPR or the economic and social rights set out in the ICESCR.

Australia is a party to the ICCPR and the ICESCR and many other treaties and conventions which are designed to protect and advance fundamental human rights and

freedoms. The Commonwealth Parliament, by virtue of its power to make laws with respect to "external affairs"⁹⁰, has legislated to give domestic legal effect to certain human rights treaties but not the ICCPR or the ICESCR. Laws giving effect to such conventions, being laws passed by the Commonwealth, would override inconsistent State laws and thus could be seen as providing a quasi-constitutional guarantee of human rights and freedoms against State laws impinging on them. However, at the Commonwealth level, human rights statutes would not affect the validity of a subsequent inconsistent Commonwealth law. Human rights statutes in Australia, giving effect to international conventions, include anti-discrimination laws in relation to race, sex, disability and age.⁹¹ The *Migration Act 1958* (Cth) provides for the issue of protection visas for persons who fall within the definition of "refugee" in the *Refugees Convention 1954*. The Human Rights and Equal Opportunity Commission is a federal body, set up by statute to deal with complaints of infringements of the various anti-discrimination Acts and to promote and educate in relation to human rights. It also has an intervention role in judicial proceedings. Mention should also be made of the *Privacy Act 1988* (Cth), which has recently been the subject of a comprehensive review by the Australian Law Reform Commission which has recommended, inter alia, the creation of the statutory equivalent of a privacy tort.

Consideration of the Constitution and statutes made under it does not cover the whole field of discourse relevant to protection of rights and freedoms in Australia. The common law of Australia, inherited from England and developed by our own courts, has a constitutional dimension and an impact on the protection of those freedoms. It is useful to consider aspects of that common law heritage.

⁹⁰ Constitution, s 51(xxix).

⁹¹ *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

The common law rights and freedoms

The phrase "common law" refers to a body of principles or rules of law worked out on a case-by-case basis by courts in England and latterly in this country. That judicial law-making process is incremental. It has been described as being like "the sluggish movement of the glacier rather than the catastrophic charge of the avalanche".⁹²

The common law has a constitutional dimension because, amongst other things, as Sir John Latham wrote in 1960:

... in the interpretation of the Constitution, as of all statutes, common law rules are applied.⁹³

That constitutional dimension is also reflected in the institutional arrangements which the common law brings with it. At its core are public courts which adjudicate between parties and which are the authorised interpreters of the law which they administer.⁹⁴ As Professor Goodhart said, the most striking feature of the common law is its public law, it being "... primarily a method of administering justice".⁹⁵

In a lecture delivered in 2008, Chief Justice Spigelman of the Supreme Court of New South Wales recounted the role of "natural rights" in Blackstone's formulation of the common law. Bentham attacked the idea of such rights as "nonsense on stilts".⁹⁶ Blackstone's language of natural rights does not have the same force today, but the role of the common law as a repository of rights and freedoms is of

⁹² Rogers WVH, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 14th ed, 1994) at 17.

⁹³ Latham J, "Australia" (1960) 76 *Law Quarterly Review* 54 at 57.

⁹⁴ Pollock F, *The Expansion of the Common Law* (London Stevens, 1904) at 51.

⁹⁵ Goodhart AL, "What is the Common Law" (1960) 76 *Law Quarterly Review* 45 at 46.

⁹⁶ Spigelman CJ, "The Common Law Bill of Rights", 10 March 2008, University of Queensland, Brisbane.

considerable significance. A recent, non-exhaustive list of what might be called rights said to exist at common law, include:⁹⁷

- the right of access to the courts;
- immunity from deprivation of property without compensation;
- legal professional privilege;
- privilege against self-incrimination;
- immunity from the extension of the scope of a penal statute by a court;
- freedom from extension of governmental immunity by a court;
- immunity from interference with vested property rights;
- immunity from interference with equality of religion; and
- the right to access legal counsel when accused of a serious crime.

⁹⁷ Corrin J, "Australia: Country Report on Human Rights" (2009) 40(1) *Victoria University of Wellington Law Review* 37 at 41-42.

To that list might be added:

- no deprivation of liberty, except by law;

- the right to procedural fairness when affected by the exercise of public power;
and

- freedom of speech and of movement.

These rights are of course of a limited nature and are contingent in the sense that, subject to the Constitution, they can be modified or extinguished by Parliament.

It is also important to recognise, as Professor Bailey pointed out in his recent book on human rights in Australia, that common law "rights" have varied meanings. In their application to interpersonal relationships, expressed in the law of tort or contract or in respect of property rights, they are justiciable and may be said to have "a binding effect". But "rights", to movement, assembly or religion, for example, are more in the nature of "freedoms". They cannot be enforced, save to the extent that their infringement may constitute an actionable wrong such as an interference with property rights or a tort.⁹⁸

The common law method, in contrast with that involved in the implementation of a Bill of Rights, is a case-by-case approach which develops the relevant principles incrementally. Professor Daryl Lumb, wrote in 1983, of judges in a common law system without a constitutional Bill of Rights:

The creativity of the judges is ... restricted by the ground rules of the system which does not have its source in a fundamental constitutional

⁹⁸ See Bailey P, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis, 2009).

document which is subject to final review by a constitutional court. As a corollary of this, the doctrine of parliamentary sovereignty enables the rules to be changed and even abrogated. Judicial decisions even of the most basic nature (whatever may be the conventions which restrict the legislative power) are subject to being superseded by legislation which, although open to interpretation, is not open to invalidation by a constitutional court.⁹⁹

He went on to suggest that rights and freedoms at common law might be regarded as "residual in nature". In my opinion, however, the word "residual" is too weak, having regard to the way in which the courts have approached the interpretation of statutes by reference to those rights and freedoms.

Common law rights and freedoms and the principle of legality

The common law has been referred to in the High Court as "... the ultimate constitutional foundation in Australia".¹⁰⁰ It has a pervasive influence upon constitutional and statutory interpretation. As McHugh J said in *Theophanous*:

The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture.¹⁰¹

The exercise of legislative power in Australia takes place in the constitutional setting of a "liberal democracy founded on the principles and traditions of the common law".¹⁰² The importance of the principles and traditions of the common law in Australia is reflected in the long-established proposition that statute law is to be interpreted consistently with the common law where the words of the statute permit. In a passage still frequently quoted, O'Connor J in the 1908 decision *Potter v*

⁹⁹ Lumb RD, *Australian Constitutionalism* (Butterworths, 1983) at 103.

¹⁰⁰ *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182.

¹⁰¹ (1994) 182 CLR 104 at 196.

¹⁰² *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587.

*Minahan*¹⁰³ said, referring to the 4th edition of Maxwell on *The Interpretation of Statutes*:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.¹⁰⁴ [Footnote omitted]

That statement was based upon a passage in the judgment of Marshall CJ in *United States v Fisher*.¹⁰⁵

The principle enunciated in *Potter v Minahan* has evolved into an approach to interpretation which is protective of fundamental rights and freedoms. It has the form of a strong presumption that broadly expressed official discretions are to be subject to rights and freedoms recognised by the common law. It has been explained in the House of Lords as requiring that Parliament "squarely confront what it is doing and accept the political cost".¹⁰⁶ Parliament cannot override fundamental rights by general or ambiguous words. The underlying rationale is the risk that, absent clear words, the full implications of a proposed statute law may pass unnoticed:

In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.¹⁰⁷

¹⁰³ (1908) 7 CLR 277 at 304.

¹⁰⁴ Maxwell PB, (*Maxwell*) *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) at 122.

¹⁰⁵ (1805) 2 Cranch 358 at 390.

¹⁰⁶ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131. See also *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 and Dyzenhaus D, Hunt M and Taggart M, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 *Oxford University Commonwealth Law Journal* 5.

¹⁰⁷ [2000] 2 AC 115 at 131.

Although Commonwealth statutes in Australia are made under a written constitution, the Constitution does not in terms guarantee common law rights and freedoms against legislative incursion. Nevertheless, the interpretive rule can be regarded as "constitutional" in character even if the rights and freedoms which it protects are not. There have been many applications of the general rule which, in Australia, had its origin in *Potter v Minahan*. It has been expressed in quite emphatic terms. Common law rights and freedoms are not to be invaded except by "plain words"¹⁰⁸ or necessary implication.¹⁰⁹

The presumption, however, has not been limited to only those rights and freedoms historically recognised by the common law. Native title was not recognised by the common law of Australia until 1992. It is nevertheless the beneficiary of the general presumption against interference with property rights. For native title is taken not to have been extinguished by legislation unless the legislation reveals a plain and clear intent to have that effect. This presumption applies to legislation which may have predated the decision in *Mabo (No 2)* by many decades and in some cases by more than 100 years. It is a requirement which was said, in the *Mabo* decision, to flow from "the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land".¹¹⁰

In the quotation from Professor Lumb's text on Australian constitutionalism mentioned earlier, the suggestion was made that common law rights and freedoms could be regarded as "residual". And indeed the common law has always adhered to the proposition that "... everybody is free to do anything, subject only to the

¹⁰⁸ *Re Cuno* (1889) 43 Ch D 12 at 17 per Bowen LJ.

¹⁰⁹ *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206 per Higgins J.

¹¹⁰ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 64.

provisions of the law".¹¹¹ That may suggest that freedom is what is left over when the law is exhausted. But the interpretive principle in Australia and its equivalent in England, suggest that it is more than that. TRS Allan put it thus:

The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.¹¹²

By way of example, there has long been a particular recognition at common law that freedom of speech and the press serves the public interest. Blackstone said that freedom of the press is "essential to the nature of a free State".¹¹³ Lord Coleridge in 1891 characterised the right of free speech as "one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done".¹¹⁴

Despite its limits and vulnerability to statutory change, the common law gives a high value to freedom of expression, particularly the freedom to criticise public bodies.¹¹⁵ Courts applying the common law may be expected to proceed on an assumption that freedom of expression is not to be limited save by clear words or necessary implication.

¹¹¹ *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283 (Lord Gough); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564.

¹¹² Allan TRS, "The Common Law as Constitution: Fundamental Rights and First Principles" in Saunders C (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) at 148.

¹¹³ Blackstone W, *Commentaries on the Laws of England* (first published 1769), Vol 4, at 151-152.

¹¹⁴ *Bonnard v Perryman* [1891] 2 Ch 269 at 284 and see *R v Commissioner of Police of the Metropolis; Ex parte Blackburn (No 2)* [1968] 2 QB 150 at 155; *Wheeler v Leicester City Council* [1985] AC 1054; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 220.

¹¹⁵ *Halsbury's Laws of England* (4th ed, 1989) Vol 8(2) par 107.

The application of the principle in support of freedom of expression was seen at the level of constitutional characterisation of powers in the decision of the High Court in *Davis v Commonwealth*.¹¹⁶ 1988 was the bicentenary of European settlement of Australia. A company was established called the Australian Bicentennial Authority to plan and implement celebrations of the bicentenary. The *Australian Bicentennial Authority Act 1980* (Cth) was enacted to, inter alia, reserve to the Authority the right to use or licence the use of words such as "bicentenary", "bicentennial", "200 years", "Australia", "Sydney", "Melbourne", "Founding", "First Settlement" and others in conjunction with the figures 1788, 1988 or 88. Articles or goods bearing any of these combinations without the consent of the Authority would be forfeited to the Commonwealth. In their joint judgment striking down some aspects of these protections, Mason CJ, Deane and Gaudron JJ (Wilson, Dawson and Toohy JJ agreeing) said:

Here the framework of regulation ... reaches far beyond the legitimate objects sought to be achieved and impinges on freedom of expression by enabling the Authority to regulate the use of common expressions and by making unauthorized use a criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.¹¹⁷

The common law can of course only go so far. It does not provide the support for freedom of expression that would accord it the status of a "right". It cannot withstand plainly inconsistent statute law.

The common law interpretive principle protective of rights and freedoms against statutory incursion retains its vitality, although it has evolved from its origins in a rather anti-democratic, judicial antagonism to change wrought by statute. It has a

¹¹⁶ (1988) 166 CLR 79.

¹¹⁷ (1988) 166 CLR 79 at 100; see at 116 per Brennan J.

significant role to play in the protection of rights and freedoms in contemporary society, while operating in a way that is entirely consistent with the principle of parliamentary supremacy. Whether it goes far enough, or whether we need a Human Rights Act to enhance that protection with judicial and/or administrative consideration of statutory consistency with human rights and freedoms, is a matter for ongoing debate.

Conclusion

The role of constitutions and constitutional law can be of great significance in the protection of fundamental human rights and freedoms. So too can statutory provisions and the common law. Ultimately however, these things will only have the importance that people who are served by the Constitution and the laws and those who exercise power under the Constitution and the laws attach to those freedoms. It is useful to finish with two cautionary observations. One was made by a great American judge and the other by the drafters of the Indian Constitution.

In a short but celebrated speech entitled "The Spirit of Liberty" delivered in 1944, Judge Learned Hand of the United States said:

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court, can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.¹¹⁸

I do not adopt that in its full generality but it underlines the importance of a culture of respect for human rights and freedoms within society. The debate is to what extent such a culture may be supported, nurtured and protected by law.

¹¹⁸ Speech given at an "I Am An American" celebration in Central Park, New York on 21 May 1944 entitled "The Spirit of Liberty" which he later turned into a book of the same name. See Dillard I (ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (1952) at 144.

The other remark which I think is worth quoting was made by Dr BK Ambedkar who was Chairman of the Drafting Committee of the Constituent Assembly, which drafted the Indian Constitution. On 25 November 1949, the day before that Constitution was accepted, he said:

I feel however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.¹¹⁹

Both of these observations should be treated as worthy of continuing consideration. They may help place existing debates about constitutional interpretation, and human rights and freedoms, in a larger perspective.

¹¹⁹ Address by the Prime Minister of India, Shri Atal Bihari Vajpayee on the occasion of the 50th anniversary of the Republic of India (27 January 2000) citing Dr BK Ambedkar participating in the Constituent Assembly Debates: <<http://parliamentofindia.nic.in/jpi/MARCH2000/CHAP1.htm>>.