100 YEARS OF THE *ENGINEERS CASE* – HOW AUSTRALIA CARVED A CONSTITUTIONAL PATH AWAY FROM BRITAIN

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It has been now 100 years since the Australian High Court decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, commonly known as the Engineers case. This 1920 case was a landmark decision where Australian High Court constitutional judgments broke free from British considerations when it passed the *Commonwealth of Australia Constitution Act 1900* (Imp.) giving its new dominion Australia its current constitution. In *Webb v Outrim* [1906] UKPC 75, the Privy Council was critical of the Australian High Court's interpretation of the Australian Constitution, arguing that its interpretation should be made using what the British Parliament had in mind when it passed the Constitution Act. However, did the wishes of the British Parliament and the views of the Privy Council really matter in the early High Court?

In 2020 a century had passed since the *Engineers' Case*[1] in Australia. This distinction has been celebrated by many in Australia, and rightly so. It is an impressive milestone in Australian constitutional law. This article looks at its import from a UK perspective, and whether *Engineers*' was beholden to Britain and its original position before 1920. I find myself in a position to do so both as a constitutional scholar taught in Australia, encouraged to love the discipline by the well-known scholar Professor Tony Blackshield,[2] but also because I now live in the UK and teach constitutional law here. Some 25 years later I love the subject still and share and pay forward that pleasure. I am prompted therefore to offer an antipodean perspective. What can I add that has not been said before? One theme I remember from my undergraduate studies was a theme where we as students tried to trace at what point Australian law was separated from any British influence, almost as a point of pride. Here I would like to emphasise where this national assertiveness in such a new country began. It was in the *Engineers' Case*.

Writing in 1971, Windeyer J made the following assessment of the *Engineers' Case*: "... in 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs." (*Payroll Tax Case*).[3] The *Engineers' Case* began this process of judicial independence allowing Australia to interpret its own constitution based on the new nation's own issues and direction independent of Britain. This article will document that development, and will focus particularly on the conservatism and adherence to the will of the British Parliament, or the lack thereof, before the Knox Court and the *Engineers Case* came to be.

I INTRODUCTION

As is well known, Australian law began with the reception of English common law from the date of settlement in 1788,[4] and English statute law to the various colonies throughout the nineteenth century.[5] After the Australian Courts Act, 1828 (Imp.) questions arose about the

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[3] *Victoria v Commonwealth* (1971) 122 CLR 353, 396-7.

[4] Australian Courts Act, 1828 (Imp.).

[5] New South Wales, Tasmania, Victoria and Queensland (1828), Western Australia (1829) and South Australia (1836).

capacity of the separate colonies to pass legislation for their own purposes, without British oversight. Such oversight has been the subject of much debate during most of the twentieth century.

The Australian[6] Constitution was brought into effect in 1901 following the passing of enabling legislation by the UK, by virtue of the *Commonwealth of Australia Constitution Act 1900* (Imp).[7] This followed a process of public consultation, constitutional conventions, and recommendations to the UK government, and finally incorporation of those ideas and ideals into a formal document, the states and their people to be "united in a Federal Commonwealth".[8]

Although considered at the time to be 'first and foremost a law declared by the Imperial Parliament to be "binding on the Courts, Judges and people of every State and of every part of the Commonwealth" ' Sir Owen Dixon also expressed the view that

> It is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.[9]

Accordingly, it would appear in the first instance that although Federation and the Australian Constitution would create independence from British judicial interference in the former colony, the fact that the Constitution is derived from an Act of the Imperial Parliament leaves the question open as to whether the *Constitution* could be amended like any other British statute. The date from which legal independence from the United Kingdom was established has not always clear. As Barwick CJ explained in *China Ocean Shipping Co v South Australia*,

> though the precise day of the acquisition of national independence may not be identifiable, it certainly was not the date of the inauguration of the Commonwealth in 1901. The historical, political and legal reality is that from1901 until some period of time subsequent to the passage and adoption of the Statute of Westminster, the Commonwealth was no more than a self-governing colony though latterly having dominion status.[10]

The first twenty years of Australian Federation was a period where the Australian government, and the Australian High Court, was feeling its way around in determining how the new Australian Constitution should be interpreted. Like any constitution, do we interpret it in an originalist vein, delving into what the 'Framers' intended, or is interpretation based on contemporary thinking removed from its origins?

The views of the early High Court, relative to that of newer members up until the installation of the Knox court in 1920 were not a fixed position, but rather an evolution of thought in concert with that of the general Australian population. As Windeyer J observed many years later:

> In 1901 many men and women in Australia felt strong ties with the Colony to which they belonged. They had not begun to think of themselves as belonging to the Commonwealth. But by 1920 a new generation had arisen who thought of themselves as Australians and of Australia, not a State, as the country to which they belonged.

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[6] Also 'Commonwealth'.
[7] 43 & 64 Vict., c 12.
[8] Proclamation Uniting The People Of New South Wales, Victoria, South Australia, Queensland, Tasmania, And Western Australia In A Federal Commonwealth. (Imperial Statutory Rules and Orders, revised 1948, Vol. II., Australia, p. 1027.)
1900 No. 722.
[9] Sir Owen Dixon, 'The Law and the Constitution' (1935) 51 *LQR* 590, 597.
[10] (1979) 145 CLR 172, 183.

> That public law, whether given by courts or by legislators, should be responsive to public sentiment is not surprising. And since an entrenched constitution is not easily altered as other statutes are, it is not surprising that developing case law puts an ever growing body on its bones which may come to be seen in unexpected new dimensions.[11]

The creation of the Commonwealth of Australia on 1 January 1901 may well be seen as independence from the UK, but that 'independence' was as a result of an Imperial statute. More specifically the Australian constitution was created as a result of s.9 of the *Commonwealth of Australia Constitution Act*. Yet few are familiar with the fact that the *Colonial Laws Validity Act* continued to apply, through the application of the concept of repugnancy,[12] limiting Australian legislative power.[13] This doctrine argues that a law is repugnant, and is rendered invalid, if it is inconsistent with a similar law passed by the Imperial Parliament.

Certainly, British law was not received by virtue of the *Australian Courts Act 1828* (Imp.), and thereby it could be argued that the later Act creating the Constitution could impliedly repeal the former including the notion of repugnancy. Shortly after the *Engineers' Case* however the High Court two cases are illustrative of the confusion of the application of the doctrine, and thereby the sensitivity of Australian law to the reach of its Imperial counterpart.

In *Commonwealth v Limerick Steamship Co Ltd*[14] the Australian High Court had held that s39(2) of the *Judiciary Act 1903* (Cth) was valid (relating to appeals to the Privy Council) to analogous provisions in the *Australian Courts Act* (Imp). In *Union Steamship Co of New Zealand Ltd v Commonwealth*,[15] repugnancy was held to continue to apply through the *Navigation 1912* (Cth) to the *Merchant Shipping Act 1894* (Imp.). This confusion as to whether the doctrine of repugnancy still applied was addressed in *Commonwealth v Kreglinger & Fernau Ltd*[16] (known as the *Skin Wool Case*, which also dealt with s39(2) of the *Judiciary Act 1903* (Cth)) which made a distinction between purely Australian affairs and those that that were not. Williams et al argue that these confusions relating to when and how Australian constitutional provisions would not have arisen had the High Court been firm from the beginning that the Australian constitution overrode any remaining applications of the *Colonial Laws Validity Act*.[17] Another issue that should have been addressed at the time of Federation was the matter of appeals to Privy Council. The draft of the Australian constitution had sought to limit appeals of a constitutional nature to the High Court. The British government with some Australian Constitutional Convention assistance, which included that of Sir Samuel Griffith, worked to ensure the possibility of appeals to the Privy Council remained.

However since 1900 there also has been the view that the Commonwealth of Australia was capable of legislating for itself. As the Privy Council in *Attorney-General for the Commonwealth v Colonial Sugar Refining* (the Royal Commissions case) observed, "No doubt the Act of 1900 contains large powers of moulding the Constitution. Those who framed

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[11] Sir Victor Windeyer, 'Some Aspects of Australian Constitutional Law' (Speech delivered at the J A Weir Memorial Lecture, Edmonton, 13–14 March 1972) 36-7.
[12] s 2, *Colonial Laws Validity Act 1865* (Imp).
[13] George Williams, Sean Brennan, and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary & Materials* (Federation Press, 4th ed., 2018), 109.
[14] (1924) 35 CLR 69.
[15] (1925) 36 CLR 130.
[16] (1926) 37 CLR 393.
[17] George Williams, Sean Brennan, and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary & Materials* (Federation Press, 4th ed., 2018), 110.

it intended to give Australia the largest capacity of dealing with her own affairs without coming to the mother Parliament."[18]

Yet how the Constitution was to be interpreted was open to debate from the beginnings of the High Court. Although the Court described the Constitution shortly after its establishment as "framed in Australia by Australians, and for the use of the Australian people",[19] the Privy Council in *Webb v Outtrim*[20] argued that the correct means of interpretation was not the intention of its framers but rather the intention of the British Parliament at the time of the passage of the *Commonwealth of Australia Constitution Act 1900* (Imp.). The High Court, despite this critique maintained the former approach.

II THE GRIFFITH COURT

The period of the Griffith Court was a time of great change. This Court was in place from the establishment of the High Court in 1903 to shortly before the *Engineers' Case*. Membership increased to five in 1906 and seven in 1913, with nine members over the period in which Griffith CJ presided. The appointment of Sir Edmund Barton and Richard O'Connor joined the High Court as the inaugural justices in 1903 forming a conservative voting bloc, with O'Connor J usually joining Griffith and Barton.[21] Barton remained until 1920 and was part of the inaugural court with Griffith CJ and a delegate to the constitutional conventions, and immediately before appointment was the first Australian Prime Minister, having created the court that he joined. The initial members of the Court had contributed directly to the framing of the Australian constitution and its political context, and hence had a common understanding of its interpretation.

With the appointment of Isaacs and Higgins JJ in 1906 there was a second bloc of views which persisted up until the *Engineers Case* in 1920. Although they too had been involved in the framing of the Constitution, theirs was a more nationalistic perspective.[22]

Regarding constitutional development Griffith, prior to his appointment to the High Court, had been actively engaged in the constitutional conventions which determined how the Federation was to be formed. In the 1891 National Convention he was Chair of Constitutional Machinery and the Drafting Committees. Although taking on the role of Chief Justice of Queensland from 1893 until appointment to the High Court, Sir Samuel Griffith remained involved with the federation process. His maintenance of appeals to the Privy Council from the High Court were seen as counterproductive to the work of the London delegation in 1900.[23]

Additionally, of the nine present in the Court over this period, most of the Court had been politicians prior to appointment to the High Court, and more than half had helped draft the Constitution.[24] The appointments of Frank Gavan Duffy, Charles Powers and George Rich in 1913 brought in new justices not involved in the initial drafting of the constitution. By this time Griffith and Barton on constitutional matters were often in the minority, often seeking to maintain the views of the framers of the constitution. The new justices, however, were

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[18] (1913) 17 CLR 644, 656.
[19] *Peterswald v Bartley* [1904] HCA 21, (1904) 1 CLR 497.
[20] *Webb v Outtrim* [1906] UKPC 75.
[21] Geoffrey Bolton *Edmund Barton* (Allen & Unwin, 2000) 306.
[22] John M. Williams, 'The Griffith Court', in R. Dixon & G. Williams (Eds.), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 80.
[23] John M. Williams, 'The Griffith Court', in R. Dixon & G. Williams (eds.), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015), 79. However, much later in his term Griffith received some credit for the compromise in s74 of the Constitution that limited appeals to the Privy Council to only those that the High Court considered hade "special reason" (*Deakin v Webb* (1904) 1 CLR 585, 604-611.
[24] Ibid, 78.

unfamiliar with the drafting of the constitution and the precedents derived from the US that the early court had relied upon. Isaacs was quite clear that the model of a federal system to be adopted during the conventions should not follow that of the United States Constitution and should stray very far from known British structures.[25]

Notable cases early in the life of the new High Court were therefore coloured by the views of the first three judges who had political experience, contributions to the development of the constitution, conservative views supporting the role of the Privy Council and a tendency to rely on American precedents. The structure and nature of the first High Court was subject to a great deal of speculation regarding how it would interpret the constitution in the new Federation.[26] *The Bulletin* magazine for example speculated on the current and possible future members of that court suggesting "Griffith, Barton and O'Connor are Tory, and pro-English; Clark and Higgins are democratic and pro-Australian; Wise democratic and pro-English; Symon Tory and pro-Australian."[27] The early court therefore formulated judgements in this context that were maintained only for the life of the Griffith Court, and due to the changing face of the court over the years, led to a gradual shift in judicial thinking that culminated in the Engineers' Case, creating a paradigm shift that broke away from American precedent and Privy Council intervention.

By 1918 even Griffith CJ was acknowledging that times had changed. Reflecting upon the aftermath on society of the end of the First World War, he noted that "[t]he task before the nation involves the recasting of conditions and the revision of doctrines that have long been regarded by multitudes as axiomatic and fundamental. … I know that a radical change of mental attitude, not in part only of the community, is essential to a wise performance of this task—but I do not despair of the result."[28] The Griffith Court ended with the retirement of Sir Samuel Griffith in 1919 after his tenure as the first Chief Justice of the Australian High Court. This caused his Court to bridge the gap between Federation, the creation of that Court in 1903, and the judgement in the Engineers' case in 1920.[29] Sir Robert Garran remarked, regarding the change in the judges of the High Court was notable that

> Its personnel had changed greatly since the first decisions were given, and it was not satisfied with all the applications of the reciprocal doctrine of non-interference, nor with the doctrine itself. Accordingly, it swept away the conception of implied prohibitions upon the Commonwealth and the States, and raised the slogan; "back to the Constitution".[30]

In 1920, the Australian High Court had only been sitting as the ultimate court in Australia for only 17 years. It was still finding its own voice and stance with a very new constitution. Ideas and concepts needed fleshing out and defining. The High Court from the outset considered that the language and structure of the Constitution kept the Commonwealth government confined to its enumerated responsibilities, leaving aside anything deemed by default the responsibility of the various states. The Court took its early guidance from the United States Supreme Court case of *McCulloch v Maryland* (1819),[31] which explored the powers of the federal government as against those of state legislatures in the early years of their nation where the limits of the federal government were until then unclear.

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[25] Geoffrey Bolton *Edmund Barton*. (2000, Allen & Unwin), 314.
[26] John M. Williams, 'The Griffith Court', in R. Dixon & G. Williams (Eds.), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015), 87.
[27] *The Bulletin* (Sydney), 1 October 1903, 9.
[28] Samuel Griffith, "The Armistice" (1918) 25 CLR v, vi.
[29] John M. Williams, 'The Griffith Court', in R. Dixon & G. Williams (Eds.), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015).
[30] 'The Development of the Australian Constitution' (1924) 40 *Law Quarterly Review* 215.
[31] 17 U.S. (4 Wheat.) 316.

Alfred Deakin, the Commonwealth Attorney-General at the turn of the twentieth century, explained the complex role of the High Court in its new role. He noted that

> It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.[32]

Deakin considered that the High Court when engaging in constitutional interpretation would use the methodology used by common law courts going back to at least the late seventeenth century.[33] The early years of the High Court prior to the *Engineers'* case were seen as a struggle for constitutional standards.[34] In developing an Australian practice of constitutional interpretation the High Court sought to import two doctrines commonly held in the United States. These principles were relied upon by the courts, the first which expressed the view that the states had no power to control the Commonwealth in what became known as the 'implied doctrine of immunity of instrumentalities'. Cases such as *D 'Emden v Pedder* (1904)[35] and the *Federal Amalgamated Government Railway & Tramway Service Association v NSW Railway Traffic Employees Association* (the *Railway Servants* case) (1906)[36] were the first skirmishes. Inversely the 'implied doctrine of state reserved powers' considered the limits on the Commonwealth in *Peterswald v Bartley* (1904)[37], *Attorney-General for NSW v Brewery Employees Union of NSW* (the *Union Label* case) (1908)[38] and *Huddart Parker & Co Pty Ltd v Moorehead* (1909).[39]

III THE ENGINEERS' DECISION

The *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, commonly known as the *Engineers' Case*, was 100 years old last year. *Engineers'* is remarkable in Australian constitutional law in that it overturned the doctrines of implied prohibition and reserved powers. The issue in this case regarded whether the Commonwealth could make laws respecting conciliation and arbitration of union disputes and have such decisions binding on all the states, and in particular whether these Commonwealth powers applied to state government owned enterprises. However, as Patapan has observed, one must remember that the Australian Constitution was a novel construct creating a federal union of states, each with separate sovereign authorities, based on an American model with a judiciary able to overrule laws passed by the states or Commonwealth should they need to. On that basis there was little in Australia's early years for the courts to use as precedents.[40]

The *Engineers'* case was a result of external developments, and not as GJ Lindell suggested 'as the correction of antecedent errors or as the uprooting of heresy'.[41] Remarking on this, Sir Victor Windeyer said that

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[32] Commonwealth, Parliamentary Debates, House of Representatives, 18 March 1902, 5 (Alfred Deakin).
[33] Justice Stephen Gageler, 'Small steps and giant leaps: Patterns in Australian Constitutional Adjudication' (2019) *Macquarie Law Journal* 15, 18.
[34] James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) ch 1.
[35] 1 CLR 91.
[36] 4 CLR 488.
[37] 1 CLR 497.
[38] 6 CLR 469.
[39] 8 CLR 330
[40] Haig Patapan, 'Politics of Interpretation', [2000] 22 *Sydney Law Review* 247, 250.
[41] GJ Lindell, 'Why is Australia's Constitution Binding?' [1986] 16 *Federal Law Review* 28, 39.

> In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries: or that they may do so.[42]

What changed with the *Engineers' Case* was that prior to the decision related cases had provided no clear principle upon which the High Court could depend. As it noted:[43]

> They are sometimes at variance with the natural meaning of the text of the Constitution; some are irreconcilable with others, and some are individually rested on reasons not founded on the words of the Constitution or any recognized principle of the common law underlying the expressed terms of the Constitution but on implication drawn from what is called the principle of 'necessity', that being itself referable to no more definite standard than the personal opinion of the Judge who declares it.

The Court in *Engineers'* observed that "An interpretation that relies on 'an implication which is formed on a vague, individual conception of the spirit of compact' can only lead to divergences and inconsistencies" [44] and therefore it would return to "settled rules of construction" giving words their "natural" meaning.[45] Such natural reading, adopting Lord Haldane's remarks regarding the 'golden rule' of statutory interpretation, was to reach a result of consistent and clear decisions requiring the Constitution to "be interpreted as any other act of Imperial parliament."[46]

The decision clearly identified that there was a clear choice between a UK and an Australian perspective. The Court observed in reviewing the Griffith Court that

> The more the decisions are examined, and compared with each other and with the Constitution itself, the more evident it becomes that no clear principle can account for them. They are sometimes at variance with the natural meaning of the text of the Constitution; some are irreconcilable with others, and some are individually rested on reasons not founded on the words of the Constitution or on any recognized principle of the common law underlying the expressed terms of the Constitution, but on implication drawn from what is called the principle of 'necessity', that being itself referable to no more definite standard than the personal opinion of the Judge who declares it. The attempt to deduce any consistent rule from them has not only failed, but has disclosed an increasing entanglement and uncertainty, and a conflict both with the text of the Constitution and with distinct and clear declarations of law by the Privy Council.[47]

The *Engineers'* case has been lauded for many years, so much so that Sir Garfield Barwick, for High Court Chief Justice warned us "to be very wary that the triumph of the *Engineers Case* is never tarnished".[48] We must remember however that although the *Engineers' Case* gave the illusion of independence from Imperial law, the break was not entirely clean. It was only in 1931 that the Imperial Dominions gained any substantial freedom from the ability of the UK government to legislate on behalf of them through the passage of the *Statute of Westminster 1931* (Imp). Its purpose was to remove the continued operation of the Colonial Laws Validity Act, and the associated repugnancy doctrine which prevented a Dominion from passing laws inconsistent with similar Imperial laws. The *Statute of Westminster* was the first major shift

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[42] *Victoria v Commonwealth* (1971) 122 CLR 353, 397.
[43] At 141-142.
[44] At 145.
[45] At 152.
[46] Haig Patapan, 'Politics of Interpretation', [2000] 22 *Sydney Law Review* 247, 250.
[47] (1920) 28 CLR 129, 141.
[48] 148 CLR, x.

from a concept of a British empire to a more collegiate British Commonwealth of Nations and a more independent national status.

IV ACADEMIC AND JUDICIAL CRITIQUE OF ENGINEERS'

Many significant commentators and jurists have been both supportive and critical of the case, such as former Chief Justice of Australia Sir Anthony Mason, and Windeyer J in the *Payroll Tax case*,[49] and Sir Owen Dixon in the *Airlines Nationalisation case*.[50] Dixon CJ endorsed the influence of the decision in *Engineers'* noting that 'It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.'[51]

Windeyer J in the *Payroll Tax case* did not see the decision in *Engineers'* by the original judges of the High Court were wrong in their understanding of what at the time of federation was believed to be the effect of the *Constitution* and in reading it accordingly.' He went on to argue that the Constitution in 1920 was to be read 'in a new light', with the realisation that there was a growing realisation that Australians were 'now one people, and that national laws would need to reflect national needs, varying and developing in response to changing circumstances.[52] More recently Justice Heydon of the HCA has reflected on the thoughts of Windeyer J on this matter; although considered contrary to many of his other judgements affirming constitutional orthodoxy, he had progressive theories at a time when originalist theories prevailed.[53]

George Williams in 1995 argued that the end of the reign of the *Engineers' Case* was marked by the High Court's recognition of constitutionally implied freedom of political discussion, and that the themes in these cases goes back to the *Engineers' Case*.[54] The decisions in these political discussion rights cases discussed what was intended by the framers of the constitution. The plaintiff in *Theophanus* argued that fundamental freedoms in the Australian Constitution "were best left to the protection of the common law in association with the doctrine of parliamentary supremacy"[55] but this view was rejected by the court considering this view was "hardly a sure guide in the very different circumstances which prevail today."[56]

Williams considered that these freedom of political discussion cases changed the way the HCA considered constitutional cases by "cutting across inconsistent common law principles, thereby overriding carefully constructed common law doctrines."[57] The High Court in considering rights implied in the Australian Constitution in these cases was in part a redefinition of its role, a position inconsistent with *Engineers'*.[58]

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[49] *Victoria v Commonwealth* (1971) 122 CLR 353, 396-7.
[50] *Australian National Airways Pty Ltd v Commonwealth (*No 1) (1945) 71 CLR 29.
[51] Dixon C.J., upon becoming Chief Justice: (1952) 85 C.L.R. xiv.
[52] *Victoria v Commonwealth* (1971) 122 CLR 353, 396.
[53] Jeffrey Goldsworthy, Justice Windeyer on the *Engineers' Case'* (2009) 37 *Federal Law Review* 363, 374.
[54] George Williams, 'Engineers is Dead, Long Live the Engineers' (1995) 17 *Sydney Law Review* 62-63, referring to the decisions by the High Court in *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46*, Stephens v West Australian Newspapers Ltd* [1994] HCA 45 and *Cunliffe v Commonwealth* [1994] HCA 44. These cases built upon decisions in *Nationwide News Pty Ltd v Wills and Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 which established that the Australian constitution contains an implied freedom of political discussion.
[55] *Theophanus*, 719.
[56] *Theophanus*, 720.
[57] George Williams, 'Engineers is Dead, Long Live the Engineers' (1995) 17 *Sydney Law Review* 62, 86.
[58] Ibid, 63.

Galligan has argued that "the court needs to jettison the legalistic methodology of *Engineers'*, which is antithetical to Australia's federal Constitution. It is quite inappropriate to interpret the Commonwealth's enumerated heads of power in a literal way irrespective of the broader federal architecture of the Constitution and regardless of the centralising effect that such a method produces."[59]

V CONCLUSION

Reflections on the impact of the *Engineers' Case* have not always been glowing endorsements. Sir Owen Dixon observed that following the First World War that the dynamics of the States and Commonwealth had changed. The Commonwealth was gaining in authority to the detriment of the States. He commented that

> The substance of the decision has been hardly impugned, but its result was to reduce still further the power of the State and its importance in the eyes of the community. At the same time the authority of the Court suffered. A tendency grew among the States to look to the Judicial Committee of the Privy Council. Moreover the legal profession for a time appeared to feel that a more stable development of our constitutional law might come from that body. It was a vain hope.[60]

Australia had a foretaste of what the *Engineers' Case* was likely to be like when a junior Barrister, Robert Menzies (later Prime Minister of Australia, then the representative of the Engineers) at a Melbourne hearing argued that the subject of the case, the government sawmills in Western Australia, were not government enterprises but trading enterprises. On putting this to Stark J, the response he received was

> I, in what I later realized to be an inspired moment, replied: 'Sir, I quite agree.' 'Well', intervened the Chief Justice, Chief Justice Knox, never the most genial of interrogators, 'why are you putting an argument which you admit is nonsense?' 'Because' ... 'I am compelled by the earlier decisions of this Court. If your Honours will permit me to question all or any of these earlier decisions, I will undertake to advance a sensible argument.' I waited for the heavens to fall. Instead, the Chief Justice said: 'The Court will retire for a few minutes.' And when they came back, he said, 'This case will be adjourned for argument at Sydney. Each government will be notified so that it may apply to intervene. Counsel will be at liberty to challenge any earlier decision of this Court!'

Many years later Chief Justice Sir Gerard Brennan had the opportunity to observe that "It seems quite clear that Menzies lit the fuse in Melbourne…", although he considered that the greater influence on the Court was that of Leverrier KC's advocacy.[61] Thus, began a wish for a clean break from British views on Australian constitutional interpretation.

The influence of United Kingdom jurisprudence on Australian constitutional interpretation was at its peak in the first twenty years of the new nation. Understandably the Australian High Court, created only in 1903, had little to fall upon for constitutional interpretation. Australia began to diverge from the influence of the old country in 1920 with the *Engineers' Case*. The *Engineers' Case* overturned the initial principles relied upon the High Court for constitutional interpretation of the doctrines of implied immunities and reserved state powers considered by the Griffith Court to be fundamental principles implied by the structure of the new Australian Constitution.

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[59] Galligan, A Federal Republic (1995), 188.
[60] *Jesting Pilate*, "Aspects of Australian Federalism",116-117
[61] The Hon. Sir Gerard Brennan (1995). "Three cheers for Engineers: 75th Anniversary of the Engineers Case" < https://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_engineer.htm> accessed 5 June 2021.

This article has, unlike many studies lauding the *Engineers' Case*, sought to find why and when that case became inevitable. It could have been when the Federation began and the Constitution with it in 1901, or the beginning of of the Australian High Court in 1903 and with it the ability of Australia to think judicially forward. Was it simply that the High Court was mired in the past for 17 years, only to break free in 1920 suddenly so that we have the one case to illustrate that milestone? I would suggest that this process was gradual, not sudden. The first three justices appear to have straddled both worlds, having been politicians and contributors to the constitutional conventions before joining the court yet attempted to find a path forward using the meagre resources they had for precedents. They were labelled as conservatives and Tories and in the case of Griffith more likely tied to Imperial values. Those Imperial values certainly began to erode after the expansion of the High Court in 1905, and certainly in the period up to 1920.

The *Engineers' Case* has always appeared to be in Australian constitutional law as a sudden break from the Imperial past, a strict departure from what had gone before, so that constitutional law was gauged as being 'before' or 'after'. Yet the change was less a line in the sand, and more of a smudge, with the confusion in the *Union Steamship* and *Limerick Steamship* cases illustrate. The repugnancy to Imperial law concept was put to bed with great difficulty together with other issues such as appeals to the Privy Council. The opportunities for a clean break from Britain's legislative reach were squandered through political meddling and judicial indecision. A clean break from Britain at the time of Federation would have prevented the High Court decisions for the next three decades that involved inconsistency in application, conservatism of the early court, and inability to limit appeals to the High Court without further appeal to the Privy Council.

The *Engineers' Case* was remarkable in dismissing to long held doctrines of constitutional interpretation of implied prohibition and reserved powers. However, these were not the only closely held principles and doctrines that were dislodged with difficulty. One could argue that while *Engineers'* has the limelight for the clean break from British limitations of independence, the patchwork of inconsistent High Court decisions in this regard really ended with the much less lauded adoption by both counties of the *Statute of Westminster 1931*.

Williams has remarked that any narrowing of freedoms interpreted by the HCA would be consistent with the literalism of the interpretive framework created by the *Engineers' Case*. Accordingly, its influence was waned over time.[62] Mason CJ in *Australian Capital Television v Commonwealth* made it quite clear that the Australia Acts "marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people."[63]

Therefore, one must see the Engineers' case, whilst a milestone 100 years ago, was remarkable for its time. The Court was on a new path from the British as early as 1905, and there is a clear progression of decisions, new justices and views that created a footpath towards it. However, the decision was inevitable, the foothold of the empire began eroding judicially as soon as the first court took on new blood. Australia began to carve a new path from Britain within the first hew years of the new High Court, and new chisels were at it constantly from then. It was the work of many carvers over 15 years to dislodge the last of the hangers-on to "mother Parliament". Whittling done, the first show of the new thinking was the *Engineers' Case*.

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[62] George Williams, 'Engineers is Dead, Long Live the Engineers' (1995) 17 *Sydney Law Review* 62, 87.
[63] *Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106*, 138.