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## The Constitution — Major Overhaul or Simple Tune-up?

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*[Many authors, and indeed critics, when discussing the Australian Constitution and its capacity for change, refer exclusively to section 128 of the Constitution. The Honourable Sir Daryl Dawson, in this speech delivered at the University of Melbourne on Wednesday 19th October 1983, discusses the role of the High Court as an instrument of fundamental change and suggests that it may have altered the nature of the Federation in a manner which would have proved unacceptable if put to a referendum.]*

Perhaps I should begin by attempting to explain the title of this lecture. It refers, of course, to our Constitution: that document which in 1901 united the people of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia in a Federal Commonwealth under the name of the Commonwealth of Australia. It is to do with the change or reform of that Constitution.

In any discussion about this subject it seems to me that it is important to distinguish between those reforms which are fundamental and involve an alteration to the nature of the machinery by which this country is governed and those which accept the basic machinery and seek only to make it work better. I do not want to dwell upon the latter type of reform tonight. Doubtless any constitution may benefit from adjustment from time to time to keep it in tune with the needs of the society which it serves. And I do not want to suggest that reforms of this sort are unimportant. To those involved in current politics they must often seem the most pressing aspect of constitutional change. The power of the Senate to reject supply, the size of the Commonwealth Parliament, fixed term parliaments and the like — even the contentious High Court advisory opinion — are all matters which deserve the close attention of everyone but they do not involve any change in the very nature of the system — the federation — which unites us all.

I would add that some constitutional changes which may be acceptable in the future appear fundamental when in reality, depending on how the change is to be made, they can be regarded as a mere adjustment of the machinery of government. To my mind, the final, formal end to the role of the monarchy in Australia, if it occurs, need not mean a fundamental change in our constitutional structure or, at least, a fundamental change in the sense in which I am speaking, for I am speaking of the machinery of government and not of history or sentiment. If it were thought desirable to substitute the Governor-General, elected or appointed, as the head of State it would, I think, be possible to achieve that in a manner which would involve little disruption to the present constitutional set-up and may even serve to eliminate some of the difficulties which still remain in discerning the role of the Crown in our federation. Of course, if it were sought at the same time to change the present

powers of the Governor-General or to give to him powers that are now exercisable by the Crown so that they were different, or exercisable in a different way, then fundamental aspects of the federal compact might be involved. But the bare change from a monarchy to a republic could be quite simple.

However, as I have said, it is with fundamental matters that I want to concern myself tonight. In doing so it is necessary to look to a large extent to the past, albeit the more immediate past, rather than to the future, because the fundamental changes which have already taken place are unlikely to find any parallel in the future. The major overhaul, if you like, which the Constitution has undergone in the process of interpretation is now all but complete and what remains to be seen is the use to which it will be put in the practical workings of government in this country.

It is fashionable in speaking of the Constitution to refer to it in pejorative terms as archaic, horse and buggy, anachronistic, creaking and impractical, unworkable, inefficient, ill-suited to our present needs. Criticism of this sort is not only hackneyed but it is, as Professor Rufus Davis points out[1], myopic because it fails to recognize two things. The first is that the Australian Constitution works. We may not like the way it works, we may not think that it works as well as it could. But by any standard it has worked to provide the foundation upon which this country has prospered and grown to international stature over the past eighty-two years. The second thing is that the Constitution is not the same as it was in 1901. Its meaning and effect have changed and have changed radically. The changes may have been for better or worse but to speak of the Constitution as if it were rigid, inflexible or lifeless is entirely to misconceive the realities.

It is of these radical changes in the Constitution that I want to speak tonight because it seems to me that it is often implicit in talk of constitutional reform that there has since 1901 been no variation in our constitutional arrangements. That is, as I have said, far from the truth. But my concern is not merely to correct a misconception. It is also to point out that fundamental change, the overhaul of the Constitution, which has already taken place has occurred almost completely without use of the method provided by the Constitution for its own amendment: the referendum under s. 128. That method has been tried, for the most part, unsuccessfully, on a number of occasions, but the amendments which have been proposed have been directed to the working of the constitutional machinery — to its fine tuning. The changes of which I speak have been to the nature of the machinery itself and have taken place upon the initiative of the Commonwealth supported by the interpretation given to the Constitution by the High Court. Because these changes have not taken place in the form of any overt amendment of constitutional provisions, because their justification is expressed in lawyers' terms and because, for the most part, they have occurred gradually, step by step, their extent is not, I think, generally appreciated even now. Having regard to the history of such referendums as we have had, it is hardly controversial to suggest that the

[1] Davis, *The Living Constitution: A Critique of Federal Critiques*. Opening Paper given to Third Federalism Project Conference, A.N.U., 10 February 1983.

changes which have taken place in this way would, if they had been put to the Australian people in a referendum, have been rejected.

I should make it quite clear at the outset that it is no part of my function to evaluate these changes in any political sense. There is more than one point of view about what has taken place and I shall touch upon that later. What I do want to do is try and demonstrate that our federation is a very different one from that envisaged by the founding fathers and that, if present trends continue, the differences are going to become even greater. It is important, I think, that this be realized, if only as a proper background to any discussion of constitutional reform. It is important to realize just what sort of federal system we really have and just where the balance of power really lies. Necessarily I must paint with a broad brush and, even then, I am able only to select some of the more recent developments to demonstrate my point.

That point is simply this. Notwithstanding the careful division of legislative, executive and judicial power between the States and the Commonwealth which the Constitution apparently makes, there are now few significant limits upon Commonwealth legislative and executive powers. Moreover, a substantial eclipse of the judicial power of the States by Commonwealth judicial power has already begun. The real nature of the federal balance in Australia is now largely a matter for political decision at the Commonwealth level rather than something to be derived from the terms of the Constitution. It is now appropriate to speak of the activities of the States — legislative, executive and judicial — as being carried on within areas which are traditional rather than guaranteed to them by anything the Constitution has to say.

To a large extent this position has been reached by an expansive interpretation of specific Commonwealth powers. Some would say that this is nothing more than the adaptation of the Constitution to meet the needs of changing times. And there are few who would deny that the connotations of constitutional provisions must vary with the different and increasingly complex situations to which they must apply. But the denotation of the words of the Constitution must first be determined before the changing connotations can be discerned and it is in interpretation at this basic level that the direction can, I think, be seen to be almost entirely one way. (In speaking of denotation and connotation in this manner I am aware that others transpose the words and use them quite differently[2] but I think that I am right. That, however, is an argument for another time.) The result is that, with few exceptions, the constitutional power can now be found to achieve whatever objectives the Commonwealth may have. To be sure, there are still exceptions. For example, the power to control prices and incomes is probably still one. Also the power may not be specific. Some matters much be approached in an indirect fashion. This is to be seen in methods such as the use of conditional grants to force the States to undertake particular programmes or to conduct their activities in a particular way or in the use of the power to prohibit imports or exports in order to

[2] See Thomson J.A., Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes (1982) 13 *Melbourne University Law Review* 597, 601 n.19.

exercise control over a particular industry or an environmental matter. But it would be unrealistic, having regard to the potential power which current constitutional interpretation affords to the Commonwealth, to imagine that the possibilities for successful challenge of Commonwealth legislation have not narrowed to a very marked extent in recent years.

I can start by putting on one side those steps which set us out in the direction in which we are now headed. The beginning must be the *Engineers' Case*[3] in 1920. Perhaps that case decided no more than that the legislative powers of the Commonwealth should not be construed with any preconception in mind of the residual powers of the States but I think that its effect has been greater than that. There is a notion to be found in the cases, for which the *Engineers' Case* is called in aid, that Commonwealth legislative powers are to be given the widest interpretation which the language bestowing them will bear, uninhibited by the context of the document in which they appear and the nature of the compact which it contains[4].

Then there were the *Uniform Tax Cases*[5] in 1942 and 1957. There can be little doubt that the most important single step in the increase in the effective powers of the Commonwealth at the expense of the powers of the States was the scheme of uniform taxation by which the Commonwealth gained, in addition to its exclusive power to impose taxes of customs and excise, the sole power, in practice, to impose income tax. The States became financially dependent upon the Commonwealth and, having regard to the power of the Commonwealth to impose conditions upon grants of financial assistance to the States under s. 96 of the Constitution[6], many areas thought to be the residual responsibility of the States became effectively the responsibility of the Commonwealth or, at least, a responsibility to be shared with the Commonwealth. If that be doubted it is only necessary to glance down the list of current Commonwealth ministries; many of them have no real explanation in constitutional terms other than financial predominance. I am speaking of ministries with responsibilities such as Education and Youth Affairs, Women's Affairs, Sport and Recreation, Environment, Community Development and Regional Affairs, or Housing and Construction.

Commonwealth-State financial relations are something upon which I am unable to dwell although there could hardly be a subject of more relevance to the alteration of the federal balance of power. Amongst the industrialized federations of the world Australia has the most centralized revenue-raising system. The options which are open to the States for raising revenue have diminished with the years and now the question is being seriously raised whether the States have enough resources to discharge their responsibilities efficiently. It is sufficient for me to remark that current interpretation of the Constitution in this area is consistent with the trend to which I have referred. With the practical disappearance of income tax as a source of revenue for the States, any extended definition of what constitutes an

[3] *The Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129.

[4] See, *e.g.*, *Koowarta v. Bjelke-Petersen* (1982) 39 A.L.R. 417.

[5] *South Australia v. The Commonwealth* (1942) 65 C.L.R. 373; *Victoria v. The Commonwealth* (1957) 99 C.L.R. 575.

[6] *Victoria v. The Commonwealth* (1926) 38 C.L.R. 399.

excise duty results in a serious contraction of State revenue-raising capacity. This is because under s. 90 of the Constitution the Commonwealth has exclusive power to impose duties of excise. The recent decision of the High Court in *Hematite Petroleum Pty. Ltd. v. State of Victoria*[7] represents just such an extension, not necessitated by previous decisions of the court, which must throw some doubt upon whether other duties upon which the States are reliant, are not also duties of excise and hence invalidly imposed. But I do no more than remark that, although the decision is concerned with the contraction of the powers of the States rather than with the expansion of Commonwealth powers, it is of vital concern to the financial viability of the States and demonstrates that the position of fiscal federalism does not differ from the position of federalism generally, to which I want to direct my attention.

If the founding fathers had foresight, it was not in the area of finance. They thought that the Commonwealth would be a relatively cheap affair which could be established at no more than the cost per citizen of an annual dog licence and that its surplus revenues would be returned to the States[8]. In a sense, the surplus revenues of the Commonwealth are returned to the States but it is the Commonwealth which decides the amount of the surplus to be returned, the proportions in which it will be returned, and, to a very large extent, how it will be spent — something which was hardly envisaged by the founding fathers.

Nor do I want to pause to examine the enormous effect which the Second World War had upon the expansion of Commonwealth power. Of course, during the war the power to make laws with respect to defence provided an explicit constitutional foundation for what was done but it also enabled the Commonwealth to develop a taste for centralized control and after the war power was relinquished reluctantly and things never were the same again.

I should also mention the growth of Australia to nationhood in the international community. It would seem that the powers which the Commonwealth gained by coming of age in the eyes of other nations should have limited relevance to the division of power domestically, notwithstanding its immense importance externally. Originally, Australia, as part of the British Empire, had no role of its own upon the international stage. The events which marked the emergence of Australia to dominion status and finally as an independent international personality, were the result, not of any increase in the powers vested in the Commonwealth by the Constitution, but of the removal by the Statute of Westminster of any restrictions upon legislation having extra-territorial effect or repugnant to Imperial legislation and of the de facto recognition of a new status by other nations.

For domestic purposes, nationhood occurred in 1901 when federation took place and the division of power which determines what type of Federation Australia is, must be found in the Constitution itself. It is proper to mention the distinction because in the expansion of Commonwealth power, the growth to international status is often said to have had an effect upon the division of power

[7] (1984) 47 A.L.R. 641.
[8] Constitution, s. 94.

domestically. If that is so, then the legislative power which is not to be found in any specific provision of the Constitution but is said to arise by implication from nationhood, would seem to have a wide potential, unrestrained by any specific limits and finding its justification in history.

All of these subjects, and many more, I must pass over. They are important milestones along the road to the final destiny of the Federation but what I want to do, if I can, is to indicate the point we have reached and the direction in which we are heading. I can only do that by selecting a few of those areas of recent constitutional development which I think indicate this and by indulging in a little prediction along the way, if I may be permitted to do so.

I suppose that I must start with the *Dams Case*[9] although I do so with some apology. The case has been so overlaid with the environmental theme, which has little relevance to the decision and none to my observations tonight, that it seems almost futile and even tedious to attempt to confine the case to what it really decides. On any view of that decision, it must now be said that the potential scope of Commonwealth legislative power is coextensive with the potential scope of international agreement. Since there is no theoretical limit to what may be the subject-matter of international agreement, the external affairs power may, as a matter of constitutional theory, be regarded as open-ended. Of course, there are practical limits. International obligations are not assumed lightly. It is unlikely that an international obligation would be undertaken merely for the sake of acquiring domestic legislative power and, if it were, the exercise would run the risk of being held to lack good faith and hence ineffective to achieve its purpose.

But the point remains that even with existing treaties to which Australia is a party, the Commonwealth presently has the capacity to cut a swathe through the areas hitherto thought to be within the residual powers of the States.

The number of treaties or international agreements, bilateral or multilateral, to which Australia is a party, runs into the hundreds. But, notwithstanding the Convention for Protection of the World Cultural and Natural Heritage which was the subject of the *Dams Case*, the most significant so far as Commonwealth legislative power is concerned must surely be the Human Rights Covenants. To take some examples from the International Covenant on Economic, Social and Cultural Rights: Article 1 provides that all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. Article 4 recognizes that, in the enjoyment of those rights provided by the state in conformity with the Covenant, the state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. Article 7 recognizes the right of everyone to the enjoyment of just and favourable conditions of work. Article 10 recognizes that the widest possible protection should be accorded to the family and that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Article 11 recognizes the right of everyone to an adequate standard of living for

[9] *Commonwealth v. Tasmania* (1983) 46 A.L.R. 625.

himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. And so on. No one could deny the desirability of the standards laid down by the articles of the covenant but no one, at the same time, could deny that they provide a broad base for legislative activity.

The point is made by the minority in the *Dams Case* (and not really denied by the majority) that the interpretation of the external affairs power which has now found favour obliterates the line otherwise carefully drawn between specific Commonwealth legislative powers and the residual powers of the States. The justification for this is no part of my thesis tonight. It is enough for my purpose to note that it is so.

To be sure, a Commonwealth law purporting to implement an international treaty must be able to be seen to be doing so. But with treaties written in language more appropriate to the political slogan than the precise regulation of human behaviour, the scope offered to the legislator remains wide. It has been said that it is not possible for the Commonwealth, once Australia enters into a treaty, to legislate with respect to the subject-matter of the treaty as if that subject- matter were a new and independent head of Commonwealth legislative power[10]. But once it is accepted, as appears to be necessary, that it is not possible to implement a treaty by simply reproducing its terms in a domestic form, then any restraint suggested by that view is illusory. Clearly the Court will exercise its powers to ensure that Commonwealth legislation keeps to the treaty, but having regard to the views expressed in the *Dams Case*, the confines will not be narrowly drawn. In any event, it is patent that the construction of the external affairs power which has now found favour offers to the Commonwealth new and independent heads of power on a potentially limitless range of subjects, whatever restrictions are imposed or latitude allowed in the implementation of a particular treaty.

Although the *Dams Case* may in the end prove to have rewritten s. 51 of the Constitution, perhaps of more immediate importance is the clear view expressed in that case about the extent of the power of the Commonwealth to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth.

It is curious that the limits of a power such as this, which may now be seen to have such potential, have not been tested until so recently. In this respect it is not unlike the external affairs power. Perhaps the times were not previously propitious for an expansive view of these powers. They have certainly proved to be so of late. For I think it may fairly be said that, after the *Dams Case*, if the view of the majority is to be accepted without qualification, there are, apart from express constitutional prohibitions, no practical limits upon the laws which the Commonwealth Parliament can make with respect to trading and financial corporations. I do not deal with foreign corporations which are of relative unimportance. True it is that not all corporations are trading or financial corporations but a broad view is taken of those categories. It can only be said with certainty that a corporation is not a trading or financial corporation if trading or financial dealings do not and cannot under its charter form part of its activities[11]. What is quite clear is that most corporations of significance fall within one or other or both categories.

[10] *Commonwealth v. Tasmania* (1983) 46 A.L.R. 625, at pp.696-7.
[11] *Fencott v. Muller* (1983) 46 A.L.R. 41.

And once a corporation is so categorized, upon the majority view, it would seem that there is no law which the Commonwealth Parliament cannot pass with respect to it save for the few general prohibitions which the Constitution imposes. There can be erected, if the parliament so desires, a complete set of Commonwealth laws to govern entirely the behaviour of trading and financial corporations which is different from the laws which govern others in the community. And perhaps even others in the community, to the extent that they deal with or through corporations, may be bound by the same laws. Any law which, in effect, begins 'a trading or a financial corporation shall . . .' or 'a trading or financial corporation shall not . . .' is, as I understand the view, a law with respect to trading and financial corporations. It is important to realize the extent of this. Most of the other Commonwealth legislative powers deal with subject-matters, not persons. But the corporations power deals with persons, albeit corporate persons, and with respect to them, the current view appears to be that the Commonwealth may make a law upon any subject. There may be separate federal laws of contract, of tort or of property for the trading or financial corporation and those individuals who deal with them. The legal framework within which they operate may be devised entirely for them. This view, Professor Harrison Moore has said, represents 'the revival of a medieval system of personal laws.'[12] When you reflect upon the extent to which the organization of so much of our society is by means of, or in relation to, trading or financial corporations, the immense significance of the fact that Commonwealth power with respect to them is apparently virtually limitless, may be realized.

The distinction between a power to make laws for a particular category of persons rather than with respect to a particular subject-matter also has an application, although far less clearly, in relation to the power of the Commonwealth Parliament to make laws with respect to marriage.

One might have thought that the limits of the marriage power were indicated by the presence of the power which follows immediately in the Constitution: the power to make laws with respect to divorce and matrimonial causes: and in relation thereto, parental rights, and the custody and guardianship of infants. This latter power would seem to have indicated distinct limits upon the power of the Commonwealth to legislate with respect to family matters, at least so far as parental rights and the welfare of children are concerned, but that has not proved to be so. The interpretation given to the marriage power has resulted in that power swallowing up the power with respect to divorce and matrimonial causes and I hope I am not being too sweeping in saying that, upon the cases, the latter power may now be regarded as superfluous — whatever damage that may do to the accepted canons of statutory interpretation[13].

But the important point is that the wide view of the power to make laws with respect to marriage extends it beyond laws dealing with the formation and dissolution of the marriage contract to laws dealing with the rights and duties of the marriage partners, not only between themselves, but in relation to third parties.

[12] *The Constitution of The Commonwealth of Australia*, (2nd ed., 1910) 470.
[13] *Russell v. Russell* (1976) 134 C.L.R. 495.

That means that the Commonwealth has power, provided there is sufficient connexion with marriage, to make laws under the marriage power which define the rights and obligations of persons who themselves are not partners in any relevant marriage towards the partners of a marriage. The most significant aspects of marriage from a legal point of view are the matrimonial property and children and it is not difficult to see that a power to define rights and duties with respect to matrimonial property and children (which according to some need not be children of the marriage so long as they have the necessary connexion with it) is a wide power indeed if it extends beyond the marriage partners to third parties. The exploration of the marriage power has only just begun. It is true that some take the view that for a law which affects third parties to be a law with respect to marriage, the connexion with the marriage must be close[14]. But this is an imprecise restriction and given the expansive attitude to Commonwealth power which the High Court is exhibiting, it may prove to be no real constraint upon the marriage power.

Given the widest possible interpretation, the marriage power would provide the vehicle for far-reaching Commonwealth innovation in relation to proprietary rights and social welfare. It is going too far to suggest that the power has become a power to make laws with respect to married persons and children but its scope under the interpretation currently given to it is very much wider than would have been imagined ten years ago. Of course, I must repeat that I am not, for present purposes, concerned with the desirability or undesirability of this but merely with the effect upon the federal division of legislative power. For trading and financial corporations and married persons and their children form a large part of our society and the extent to which the Commonwealth is able to fashion the legal framework within which they operate must be a good indication of the real measure of its power.

These legislative powers of the Commonwealth — the external affairs power, the corporations power and the marriage power — are but three in the armoury of thirty-nine specific legislative powers which the Commonwealth is given by the Constitution. There is no time to turn to the others, but the three which I have touched upon serve well enough to illustrate the point that current modes of interpretation of the Constitution ensure a wide scope for all Commonwealth powers, uninhibited by the federal context in which they are to be found. Indeed, references to the part which the federal balance might play in the process of interpretation have been disdainfully dubbed as 'ritual invocations'[15]. This may be thought to be turning the *Engineers' Case* on its head: instead of the forbidden preconception of the States' residual powers there is a required preconception that the widest meaning, regardless of context, must be given to Commonwealth's powers. But my purpose tonight is not to debate that issue; it is merely to remark the fact.

Then, of course, it is not necessary for the Commonwealth to rely upon a single source of legislative power to support a particular piece of legislation. To take an example, the *National Parks and Wildlife Conservation Act* 1975, which was the

[14] *Gazzo v. Comptroller of Stamps* (1981) 38 A.L.R. 25.
[15] *Commonwealth v. Tasmania* (1983) 46 A.L.R. 625, at pp.694-5.

subject of examination in the *Dams Case*, has an objects clause[16] making explicit reliance upon the power arising from nationhood, the external affairs power and the trade and commerce power, amongst others.

I wish to turn from legislative powers and mention very briefly the executive power of the Commonwealth. The reference can be brief because the outer limits of this power have not been marked and it is perhaps sufficient for my present purpose to remark that there can be no question that Commonwealth executive power expands correspondingly with any expansion of legislative power. But if the executive power is, despite s. 2 of the Constitution, construed to embrace all the prerogatives of the Crown[17] and if, as some would hold, it extends to the expenditure of moneys appropriated by Parliament without any legislative sanction or without any limitation derived from the scope of Commonwealth legislative power[18], then it is power of wide dimension. This would not be of such significance if it were not for the fact that a wide executive power would, itself, appear to increase the legislative power of the Commonwealth, for under s. 51(xxxix) of the Constitution the Commonwealth has power to legislate with respect to matters incidental to the execution of any power vested by the Constitution in the Government of the Commonwealth, and that would extend to the executive power. The future of the executive power must be largely a matter of speculation, but experience so far would not suggest that it will be narrowly confined.

There is less occasion for speculation in relation to the judicial power of the Commonwealth. Here recent decisions of the High Court have established a capacity for expansion which, although the development has hardly begun, points to a considerable diminution of State judicial power. The establishment of the Family Court in 1976 and the Federal Court in 1977, each with an exclusive jurisdiction, marked a departure from the previous practice of using State courts to administer Commonwealth laws. The new Commonwealth courts had jurisdiction conferred upon them in certain matters with respect to which the Commonwealth has power to make laws. The Family Court deals with matters under the marriage power and, to the extent that it any longer has an effective operation, the divorce and matrimonial causes power. The Federal Court deals with a variety of matters, one of the most significant being, probably, trade practices under the trade and commerce power and the corporations power, amongst others. As is inevitable with any court of limited jurisdiction, cases began to come before the Federal Court in which the dispute involved not only claims within its jurisdiction but also claims within the jurisdiction of the State courts. The State courts could not determine the matters confided to the Federal Court because the Federal Court's jurisdiction had been made exclusive and, so it seemed, the Federal Court lacked the power to determine matters outside the legislative competence of the Commonwealth. But, by a majority, the High Court found a solution[19]. There is, so it was

[16] Section 6.
[17] See *Barton v. The Commonwealth* (1974) 131 C.L.R. 477.
[18] See *Victoria v. The Commonwealth* (A.A.P. Case) (1975) 134 C.L.R. 338.
[19] *Adam P. Brown Male Fashions Pty. Ltd. v. Philip Morris Inc.* (1981) 35 A.L.R. 625. *Fencott v. Muller* (1983) 46 A.L.R. 41.

said, a jurisdiction which could be given and has been given to the Federal Court to hear not only claims which arise under laws which the Commonwealth Parliament has power to make, but also claims arising under State laws and the common law, provided the latter claims can be said to be attached to the claim arising under Commonwealth law so as to form part of the one controversy.

A justification for this was said to be the convenience of the litigant. Whether or not the convenience of the litigant will really be served, at any rate in the short term, may be doubted[20], but the long term effects of the decision that federal courts (and the principle may be made to apply to all federal courts, including the Family Court) may hear claims arising under State law and the common law in an attached jurisdiction may well be far-reaching.

Whilst the attached jurisdiction of federal courts may not yet be exclusive of the jurisdiction of State courts, as is the jurisdiction conferred upon them specifically by Commonwealth law, nevertheless it may be made exclusive by Commonwealth legislation[21] and this places in the hands of the Commonwealth Parliament an enormous power to affect the whole judicial structure within Australia. For the attached jurisdiction must arise, not when a claim is brought in a federal court, but at the time at which the claim emerges. If that jurisdiction were made exclusive of the State courts it would appear to mean that where a controversy contained a federal claim, claims under State law and the common law could not be pursued in the State courts even if the parties wished to pursue them there and did not wish to pursue the federal claim.

The federal courts are in their beginnings yet and the jurisdiction specifically conferred upon them is confined. But even the present position is indicative of what is to come. Under the *Trade Practices Act*[22] there is a cause of action created to seek remedies for misleading or deceptive conduct in trade or commerce. Already this has led to a claim in defamation in the Federal Court in its attached jurisdiction[23] and an application for a jury.

However, if one has regard to the broader and broader view that is being taken of the corporations power or the marriage power, or even the external affairs power (to take the examples I have chosen), it is plain that the jurisdiction of the federal courts may be considerably enlarged and the number of cases in which there lurks a possible federal claim considerably increased. If the attached jurisdiction were to be made exclusive to federal courts, it requires little imagination to appreciate the dramatic expansion of the work of federal courts and reduction in the work of State courts.

Lest my reference to the external affairs power in this context should be puzzling, may I offer this example. Is it fanciful to conceive of a federal bill of rights, enacted pursuant to the external affairs power, requiring something in the nature of due process, and giving a general supervisory jurisdiction to a federal

[20] *Coast Securities v. Stack; Bargal v. Force* (1983) 49 A.L.R. 193.
[21] Constitution, s. 77(ii).
[22] *Trade Practices Act* 1974, s. 52.
[23] *Insurance Commissioner v. Australian Associated Motor Insurers Ltd.* (1982) 45 A.L.R. 391.

court over other courts, including State courts, and particularly over courts exercising a criminal jurisdiction? And if, once seised of a case, the federal court had, by way of attached jurisdiction, the power to hear the whole of the matter, then the way would be open for the exercise of a general federal jurisdiction in crime, a jurisdiction hitherto thought to be reserved to the State courts.

There are those who welcome the present trends. From the beginning the federation has had its critics. Indeed, there is a body of opinion[24] which views a federation as being at best a stage on the road to unification. It may be necessary, so it is said, where there are separate communities, as there were separate colonies in Australia, to federate in order to achieve some form of national government, but a federation is, in reality, but an incomplete form of national government. It is a natural progression, so the critics of federalism say, for a sense of nationalism to arise out of a federation which will lead eventually to central control. This, the argument continues, is a good thing. The boundaries which are a necessary feature of a federation are artificial in modern times, particularly when they are defined without reference to the fact that economic unification has taken place, as it has in Australia. A unified economic system rests side by side with political divisions of power which make economic regulation impossible. With the collectivist outlook which now prevails, strong government is needed which has a national rather than a parochial approach. Federalism, so it is said, is weak government.

Those who hold views such as these ought to concede the adaptability of the Australian Constitution and its demonstrated capacity to develop in a way which goes a long way towards the achievement of the ends which they consider desirable. For, as I have said, the practical limits upon Commonwealth power are growing less and less significant. Curiously, the critics of a federal form of government are generally loathe to concede these attributes of our Constitution. They are the ones who speak of it as being archaic, horse and buggy and irrelevant to the modern age. They are the ones who approach the matter of constitutional reform as if the Constitution had stood still since 1901. What they often fail to appreciate is that what they are asking for is not so much an overhaul of our constitutional arrangements but the completion of a job which has largely been done.

But there are those in Australia, almost certainly a majority, who do not regard a federal form of government as ill-adapted to our present needs and conditions. They would take the view that, given our geographic and demographic conditions, centralized government is inappropriate in Australia. State boundaries are neither artificial nor a coincidence having regard to our history and our natural affinities. To speak of federal government as weak government is, in the view of many, to confuse weakness with responsiveness to local needs. Moreover, they would say that it is highly debatable whether central government, at all events in a country the size of Australia, is the most efficient form of government. It is not self-evident that uniformity of law in all matters is desirable and if in certain areas it is, then it has been shown to be achievable, as with the Companies and Securities Codes and

[24] See Greenwood, *The Future of Australian Federalism*, (2nd ed.) ch. 1.

then without sacrificing the benefits which flow from localized control. Federalism gives some assurance that everything cannot go wrong everywhere at the same time. It provides a constant source of governmental rivalry and stimulus. Federalism has not, its defenders would say, proved to be any real impediment to economic efficiency in this country; comparison with other countries with unitary government would demonstrate that.

It can be said, I think, that much of the criticism of federal government, including the Australian federation, reflects the philosophy of Dicey and his followers who tend to view the Westminster system as close to perfection. Bedazzled by the light of this shining model, a federation is to some at best irrational and at worst unworkable.

Of course, the facts speak differently. The great federations of the world, including Australia, have developed as federations without any demonstrable lack of vigour or vitality. If their federal character is merely a phase in their ultimate progression to unitary government, then their adolescence has been prolonged. Nor can it, I think, be said that the tipping of the federal balance in Australia towards central power is an inevitable or natural progression.

In Canada, one of the world's great federations, the provinces have a far greater autonomy and power than the Australian States, despite the apparent predominance which the Canadian Constitution gives to the central government. In the Australian Constitution there is much which is lacking in its Canadian counterpart to give to the States an appearance of sovereignty. Nevertheless the Canadian provinces have attained a significant degree of financial autonomy whereas the tendency in Australia has been the other way. The Canadian provinces continue to administer their own governmental programmes in areas which in Australia have attracted centralized control — areas such as health and education. The reasons for this may be various. The Canadian population is, of course, less homogeneous than the Australian population. But the most interesting reason probably lies in the form of the Canadian Constitution in which specific legislative powers are given to the provinces and residual powers are given to the federal government. There is, as we are learning in Australia, greater facility in expanding specific constitutional powers than in containing them and whilst specific powers may give the impression of the imposition of precise limits, the truth may be that the real constraints are to be found upon residuary powers which, because of lack of definition, can be contracted more easily and without any apparent transgression of dividing lines. Whether or not this is so, the Canandian experience is hardly consistent with the thesis that centripetal forces will inevitably predominate in the eventual development of a federal constitution.

Those Australians who favour a federal system of government have, I think, the real point to make that it is the system of government which Australians chose for themselves. If the system is to be changed in any fundamental way, then they may say with some justification that that is a choice which should be made by Australians generally, and not by the government or governments of the day or by an oligarchy of seven High Court judges.

The difficulty is, of course, to perceive what constitutes fundamental change and what is merely the dynamism of a living Constitution adapting as it must and does to changing times and changing needs. What I have been suggesting tonight is that the practical division of powers in Australia — legislative, executive and judicial — is becoming more and more a matter for political decision at the federal level and that the division which the Constitution apparently effects by way of legal guarantee tends to be illusory. To many this result is a natural development and not a fundamental change. If it is, however, a fundamental change, the point can be made that the change has been imposed without recourse to the method provided by the Constitution itself for its own modification.

Section 128 of the Constitution provides for the the alteration of its terms by referendum passed by a majority of electors and a majority of States. There is a curious elitism amongst constitutional reformers towards constitutional change by referendum. The attitude is that it is an inappropriate method of change because the voters do not understand the issues, are unduly conservative in their attitudes and, as a consequence, generally vote against proposals put to them by way of referendum. It is really an attitude that the voters do not understand what is good for them and that those who propose the various changes do. The possibility that the voters do express a real preference, albeit a preference not shared by the politicians putting the proposal, is something which is not, upon this view, to be given credence. It might be said, of course, that the voters who adopted the Australian Constitution knew well enough what they were doing when they chose the system which they did and the Constitution which they adopted provided the method by which alteration should be made to the constitutional arrangement which they were endorsing.

True it is that of thirty-six proposals put by way of referendum, all but eight have failed to gain approval by the majorities required by s. 128. But of the thirty-six questions put to the popular vote, only four have failed because of the requirement that there be a majority of States as well as a majority of voters, and in two of these the nation-wide majority in favour was only half of one per cent or less. The remaining twenty-four proposals were rejected by a majority of electors nationally and sometimes by a margin of sixty per cent or more. This led Sir Ninian Stephen to remark recently[25] that it has been fashionable to deride s. 128 as spelling out a clumsy and largely unworkable means of changing our Constitution. He suggested that it may be appropriate to ask whether the fault may not lie less in the section than in those who, over the years, have sought to put it to work.

It is, however, interesting that rumblings are now to be heard in some political circles about the restoration of the traditional balance between the States and the Commonwealth. Perhaps the *Dams Case* was the catalyst which finally demonstrated the extent to which current judicial interpretation of the Constitution takes the widest view of Commonwealth powers. The view of the external affairs power which, until recently, was thought to be extreme is now the law. But there is every reason to think that the expansive interpretation which was applied to the external

[25] See Current Topics (1984) 57 *Australian Law Journal*, 373, 374.

affairs power is being and will be applied to the other powers given by the Constitution to the Commonwealth. Reference to the restoration of traditional State powers and functions has a quaint sound. It might be thought that the preservation of the traditional balance was something which the Constitution itself was supposed to do. The obvious intent which lay behind the Australian Constitution was that the respective positions of the Commonwealth and the States should be defined legally rather than politically. The Constitution did not set up a system of co-operative federalism or organic federalism. If that is the sort of federalism which we now have, it may or may not be the sort of federalism which we want. However, I should be surprised if the current suggestions envisaged the use of a referendum to find out.