Current Challenges and 2003 Cases

Introduction to morning session at the 2004 Constitutional Law Conference, Sydney, 20 February 2004.

The topic of this session is current challenges and 2003 cases. One of those challenges has been a recurrent theme in constitutional cases since the earliest days of the High Court – the federal nature of the constitution. Federalism is a hot topic internationally. Its renewed vigour has been described as representing "a paradigm shift of major proportions from a world of states modelled after the ideal of the nation – state … to a world of diminished state sovereignty and increased interstate linkages of a constitutionalized federal character".[1] In the modern era, all the world's geographically large countries, with the exception of China, have federal structures. It is the proposed method for constitution making in the rebuilding of Iraq, with its diverse population groups. The European Union has taken faltering steps towards having a federal constitution for its constituent states.

The second major challenge in the High Court in 2003 has been in the area of administrative law. It is no surprise that many of the current challenges in administrative law concern immigration, another topic of international political and legal concern.[2] What is the effect of the Constitution on those laws? In particular, to what extent is Parliament free to reduce an individual's access to judicial review by privative clauses. Australia has international obligations as a signatory to the Convention on Refugees and the Convention on the Rights of the Child – but does this mean that those international obligations can create a legitimate expectation in an individual who is subject to Australian laws?

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1 Elazar D, "*Introduction*" in *Federal Systems of the World*: A Handbook of Federal, *Confederal and Autonomy Arrangements* (1994) Jerusalem Centre for Public Affairs available from *http:www.jcpa.org/djr/index-fs.htm* at 3.

2 The US Supreme Court recently granted an application to hear the appeals of an immigrant recently deported to Haiti and another facing imminent deportation to Somalia.

This issue was dealt with in *Teoh*[3] but, as Wendy Lacey will tell you, controversial issues can always be revisited.

Our first speaker, **Wendy Lacey,** a lecturer at the University of Adelaide, is well qualified to speak on whether the expanded doctrine of legitimate expectation found in the majority decisions in *Teoh* has been narrowed or nullified by observations made in the recent case of *ex parte Lam*.[4] Ms Lacey's research and teaching interests include Constitutional and Administrative Law, Public International Law and Human Rights. In 2001, the Federal Law Review published her influential article, "*In the Wake of Teoh: Finding an Appropriate Government Response*".

Whether or not international obligations may give rise to legitimate expectations, an individual who is subject to Australian laws can expect that they will be given a fair opportunity to present their case. The polemic of the individual and national government is structured around the extent to which parliament can limit the operation of procedural fairness, or the types of matters to which administrative law may apply. This is the topic of our second speaker, **John Basten**, a Queens Counsel since 1992 with extensive experience of appearing as lead counsel in many important cases in the High Court. Mr Basten has also been a Commissioner of the Australian and New South Wales Law Reform Commissions and was a Hearing Commissioner of the Human Rights and Equal Opportunity Commission.

He will be discussing the High Court's power of judicial review under Section 75(v) of the Constitution. He has published articles on this topic in the Federal Law Review and most recently in the Alternative Law Journal entitled "Revival of Procedural Fairness for Asylum Seekers". The cartoon illustrating the article has the litigant saying to his lawyer, "I naturally assumed that 'kangaroo court' referred to your fauna, not to your principles of administrative law".

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3 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
4 *Re: Minister for Immigration and Multicultural Affairs; Ex-parte Lam* [2003] HCA 6.

I feel comfortable in assuring you that Mr Basten's discussion of the privative clause found in s 474(1) of the *Migration Act* will be erudite and entertaining.

Migration is an area entirely within the power of the national government. But, as between the national government and the States, what power does the national parliament have to interfere with the States' legislative powers? This is the topic to be addressed by the third speaker, **Amelia Simpson,** a lecturer at the Australian National University. Ms Simpson has a Master of Laws from Columbia University and her research and teaching interests include Australian Public Law, Commonwealth Constitutional Law, Foundations of Australian Law and Comparative Constitutional Law Theory.

Ms Simpson will be discussing State Immunity from Commonwealth Laws in the case of *Austin v Commonwealth* – the case about State judge's pensions which considered the federal compact in Australia and refined the Melbourne corporation doctrine. This case is not of course simply about maintaining the balance in a federal system and states' rights; it is, at its very heart, about the independence of the judiciary – one of the fundamental elements of rule of law.

Conclusion

The challenges in 2003 have been canvassed in this morning's talks: what an individual can expect from a nation's international obligations, how human rights and rule of law are protected by the judiciary as intermediary between government and individual and how, although there are increasing developments towards centralised, national government, states' independence from national government interference is still a key question in our constitution.