THE CONSTITUTION IN A CHANGING WORLD*

By the Rt. Hon. SIR JOHN LATHAM, P.C., G.C.M.G.†

The theme of this lecture is clearly indicated by the title. Following an historical survey of the events leading up to the Constitution and a commentary on the numerous changes in the social and economic way of life which have taken place in Australia during the sixty years since the Constitution came into operation, Sir John proceeded to discuss several provisions of the Constitution which in his view require the immediate attention of the legislature and of the Australian people. The Constitution has now to be applied in circumstances which did not exist and 'which, indeed, were never contemplated when it was first adopted.'

Only the most important recommendations of Sir John Latham are noted hereunder.

(1) Navigation

Section 98 of the Constitution lays down that 'the power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping.' But that power is limited to foreign and interstate trade (s. 51 (i)). Accordingly, the High Court of Australia has, quite rightly I think, held that the power to control navigation applies only to foreign and interstate navigation and not to internal navigation. As a result, there exist six separate State Marine Departments in addition to the Commonwealth Navigation Department. As all ships, whether interstate, foreign or intrastate, and their crews, use the same ports, harbours, wharves and the like, there seems to be no sense in having seven sets of law applying to those activities.

(2) Aviation

An aeroplane pays no attention whatsoever to state boundaries. Aviation is an activity which should be subject to a simple unified control. The Commonwealth Parliament can deal with aviation to some extent under the external affairs power when it concludes a treaty or convention with a foreign state (s. 51 (xxix))[1]; it can deal with aviation in connection with defence (s. 51 (vi)); and it can deal with aviation so far as it is an element in foreign or interstate trade—but not if it concerns intrastate trade. Although the States have agreed to the Commonwealth having certain powers within their borders, strictly speaking, the latter do not in general extend to matters of intrastate aviation.

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† Chief Justice of the High Court of Australia, 1935-1952.

1 *The King v. Burgess, ex parte Henry* (1936) 55 C.L.R. 608.

(3) Acquisition on Just Terms

Section 51 (xxxi) provides that the Commonwealth Parliament may make laws with respect to the acquisition of property for certain purposes from any state or person 'on just terms'. Let us take as an example the bankruptcy power (s. 51 (xvii)). The power to make laws in respect of bankruptcy should obviously include the right to acquire land on which to build a bankruptcy court. All those various powers—forty in number —embrace the right to acquire property for the purpose of carrying out the objects of the power. Section 51 (xxxi) has been held to require 'just terms' in the case of any acquisition of property by the Commonwealth. But the requirement of 'just terms' does not apply to the individual States. The latter can acquire property on terms which need not be 'just'. On the other hand, if the Commonwealth acquires property, its owner can challenge in the courts the terms which the Commonwealth has imposed upon him. This anomaly was well illustrated after the Second World War in connection with land settlement for soldiers. If the Commonwealth had acquired the land from private owners the courts would have seen to it that the market price was paid. What in fact happened was that the Commonwealth made an agreement with the States to provide money for the States to acquire the land. Thereupon the latter generously decreed that the land should be acquired at the prices obtaining in 1940. The value of the land had almost everywhere doubled since that time. It is suggested that a provision should be incorporated into the Constitution requiring the States likewise to provide 'just terms' when they acquire property for public purposes.

(4) Trial by Jury

Section 80 provides that 'the trial on indictment of any offence against any law of the Commonwealth shall be by jury . . .'. This is all very well if it were not that the Commonwealth Parliament decides whether the trial shall be by indictment or otherwise. If it does not wish for a trial by jury it simply provides that the offence may be tried summarily. Thus, in practice, this provision has become meaningless because the Parliament exercises an absolute discretion to determine whether or not the trial shall be by indictment.

It is clear that s. 80 has failed completely in its original purpose. If it is desirable to ensure that serious offences against Commonwealth law shall be tried by a jury the section might be amended so as to provide for such trial in the case of offences, say, punishable by a fine of over £100 or by imprisonment for more than one year.

(5) Television

Radio and television have both entered the scene since 1901 when the Constitution came into being. The Commonwealth Parliament purports to exercise control over them—but under what authority? Section 51 (v) confers upon the Parliament power to make laws in respect of postal, telegraphic, telephonic, and other like services. The High Court

has decided by a majority that broadcasting is a 'like service'.[2] But there is clearly room for difference of opinion in the matter, and the courts have yet to pronounce on the question of television. It is suggested that the position in regard to important subjects of this nature ought not to be left in doubt. Few would disagree that such activities should come under federal control, and, therefore, an express provision to that effect should be inserted into the Constitution.

(6) The C.S.I.R.O. (Commonwealth Scientific and Industrial Research Organisation)

The Commonwealth Parliament has no power whatsoever to make laws on such matters as farming and animal husbandry, physics and biochemistry, food preservation and general nutrition, forestry, land research, radio-physics, electro-technology, entomology, oceanography, the chemistry of soil and the like. Nevertheless, Parliament is yearly spending large sums of money in helping to further and promote the work of organisations such as the C.S.I.R.O., whose activities greatly contribute to the public welfare. This it does by invoking section 81 which provides that 'all revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution'. But there is a division of opinion among the judges of the High Court as to the meaning of the phrase 'purposes of the Commonwealth'. Some judges would restrict its meaning to legislative matters within the ambit particularly of sections 51 and 52, while others take the view that the Commonwealth may adopt as a purpose anything that it thinks proper.[3] It should be noted that the legislation connected with those diverse activities does not impose duties or confer rights upon anybody. It merely operates to establish a particular organisation and to allocate a certain amount of money for it to spend. That is perhaps why the validity of such expenditure has not yet been challenged in the courts. But, again, there should be no room for doubt—especially in view of the immense value to Australia in general of this investment in scientific and industrial research.

(7) Customs and Excise

The Commonwealth Parliament has exclusive power under section 90 to impose duties of customs and excise. It was originally held that an excise meant a tax on goods produced or manufactured in this country. But it has now been decided that a sales tax is to be regarded as an excise duty whether or not the goods are produced or manufactured by the taxpayer. However, on February 26, 1960, the High Court of Australia held, by a majority of four judges to three, that certain licence fees relating to the sale of intoxicating liquor imposed by Acts of the

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2 *The King* v. *Bristow, ex parte Williams* (1935) 54 C.L.R. 262.

3 See generally in this regard, *Att.-Gen. for Victoria* v. *The Commonwealth* (1945-6) 71 C.L.R. 237.

States of Victoria and Queensland did not constitute duties of excise within the terms of section 90. On the other hand, the High Court held, also by the same majority, that charges imposed on the granting of a temporary liquor licence, for race meetings or agricultural shows, is in fact an excise duty. Such an indecisive state of affairs is unsatisfactory to everyone. Surely, the individual States should have the right to levy and collect licence fees of this kind. At any rate, the law in the matter should be placed beyond doubt one way or the other.[4]

(8) The Peacetime Use of Atomic Energy

The development of nuclear power is of great importance not only because of its military significance, but by reason of the many peaceful uses to which it may be put. Isotopes, for example, have already made a substantial contribution to the treatment of disease. But although stringent control has to be exercised in order to prevent the diffusion of dangerous radio-active material, the Commonwealth Parliament has no say in the matter. Each State can act at its discretion. Secondly, the development of nuclear physics requires expenditure far in excess of that which any one State can afford. At the present time the Commonwealth is spending large sums of money—at Lucas Heights in New South Wales—in connection with nuclear physics. Although its actions could probably be justified on the ground of defence, the position is uncertain —and so an affirmative power in the matter should be written into the Constitution.

(9) The Industrial Power

This is a very controversial subject. The position at the present time is that the Commonwealth Parliament has no power to legislate with regard to the terms and conditions of employment, wages and the like, in industry. But it has power to set up authorities to deal with certain industrial matters. For example, the Commonwealth Industrial Commission — formerly the Commonwealth Arbitration Court — can make awards in connection with wages and hours of employment in industries involved in interstate disputes. Such awards prevail over any inconsistent State legislation. But only the State Parliaments can actually make laws concerning industrial matters—although such laws must not be inconsistent with awards made by the Industrial Commission. In addition, each State has its own industrial tribunals which can make awards applying in their own States so far as federal awards do not apply.

In the industrial sphere, therefore, one finds operating the following separate authorities—the Commonwealth Industrial Commission, six State Parliaments and six State tribunals. The Commonwealth power is derived from section 51 (xxxv), which enables it to make laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. That provision of the Constitution does not empower the Common-

[4] An appeal to the Privy Council has since failed upon procedural grounds.

wealth to make laws dealing with conditions of employment and the like, nor is it a power to legislate about industrial disputes as such. The power extends only to the making of laws with respect to conciliation and arbitration for a particular purpose, namely, for the prevention and settlement of industrial disputes. But what kind of industrial disputes? Only those industrial disputes which extend beyond the limits of any one State. This provides a good example of constitutional interpretation. For the federal power to operate there must first of all be an industrial dispute. A dispute about the wages of State school teachers, for example, would not be classified as an 'industrial' dispute. There must be a dispute. But surely it is psychologically vicious to say that you cannot approach an industrial tribunal without first having a dispute which must extend beyond the limits of a single State. This power was originally designed to cover extensive disputes with which no single State could deal. But it was soon discovered that a dispute could be extended beyond State limits by the process of merely serving a log. That is to say, when a trade union wishes to get a federal award it prepares a log (a set of demands) which it then serves on employers residing in more than one State. By doing so, the dispute is made to extend beyond any one State and is thus brought within the federal jurisdiction. Secondly, the only means of dealing with such disputes is by way of conciliation and arbitration; every federal law on this subject has to be a law about conciliation and arbitration. Conciliation, as we all know, is making people friends, and no particular difficulties arise about that. But what is arbitration? Arbitration is a proceeding between parties who are bound by an award made by the tribunal in question. However, before the parties can be bound by an award one has to know who they are. In other words, between whom is the dispute? Let us take as an example the metal trade. As I understand it, when the union wants a new award it has to serve at least two thousand employers with a log, which involves a considerable amount of clerical work. Further, the federal tribunal has to find out what the dispute is about and, then, all it can do is to settle that dispute. This brings into operation what is known as the doctrine of 'ambit', under which a federal tribunal can deal only with the particular matters which are in dispute. If there is something which the parties regard as important but which was not included in the log then there must be a new dispute about that before the tribunal can deal with it. There seems to be no merit in these complexities and it is suggested that consideration should earnestly be given to amending the Constitution so as to allow the Federal Parliament to make laws with respect to the terms and conditions of industrial employment. Of course, an objection to this is that it would bring wages, etc., into the political arena and that for political purposes statutes would be passed giving impossibly high wages and the like. But it would be the responsibility of the Parliament concerned, and the electors could correct any such abuse of power. At the present time the electors have no means of correcting what they might believe to be an unfair or unwise award given by the federal tribunal.

(10) Free Trade within the Commonwealth

Section 92 of the Constitution provides that 'on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free'.

It would appear to be obvious enough that the intention was that, after State tariffs had disappeared and there was one federal tariff, there should be no more State tariffs. That is, the intention was to establish free trade between the States. The courts, however, for no clearly stated reasons, rejected this interpretation out of hand. If it had been adopted, the Commonwealth Parliament could, under the trade and commerce power, have dealt, as it thought proper, with any obstacles, other than tariffs, to interstate trade. But another course was taken.

It was recognised that the section could not mean that no laws were to apply to interstate trade. The simplest transaction of buying and selling can be effective only if some law provides for a transfer of ownership. At one time it was held[5] that section 92 meant that interstate trade and commerce was free from State law, but was subject to federal law. (It is hardly going too far to say that there was no applicable federal law). This decision of the High Court was overruled by the Privy Council.[6] It was held that regulation, but not prohibition, of interstate trade was permissible. (Sir John has never believed in the distinction between regulation and prohibition. Nearly all effective regulation involves prohibition of something). It was also held that only the direct, and not the indirect, effect of a law was relevant in considering whether it infringed section 92. It would be useless to discuss the varying interpretations of section 92 from time to time because it is now settled (at least for the present) that 'absolutely free' means 'reasonably free' and that a court decides what is reasonable and what is unreasonable.

Section 92 is regarded by many as an absolute safeguard against the nationalization of any interstate business or enterprise. Reference to the judgment of the Privy Council in *Commonwealth of Australia* v. *Bank of New South Wales*[7] will show that the safeguard is not quite absolute.

It is unlikely, however, that the people would ever agree to the repeal of section 92. But it might be possible to obtain constitutional amendments providing, for example, that taxes could be imposed by parliaments upon interstate road transport, and that price fixing and 'orderly marketing' laws were permissible.

Parliaments today are more and more concerned with economic problems. Powers over our economy are awkwardly divided between the Commonwealth and the States. The Commonwealth Parliament may control imports and exports, banking (except State banking), foreign exchange so far as controlled by banks, and bank interest, and it has

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5 *McArthur* v. *Queensland* (1920) 28 C.L.R. 530.
6 *James* v. *Commonwealth* [1936] A.C. 578.
7 [1950] A.C. 235, 311.

full taxing powers. It can do nothing about wages, hours, etc., in industry generally. The Federal Conciliation and Arbitration Commission can make awards in respect of industrial conditions which no parliament can alter or set aside. The States can control wages, etc. (subject to federal awards), general interest rates, rents, hire purchase, capital issues and investment, and dividends of companies.

This separation of powers makes any co-ordination of measures to deal with our general economy very difficult indeed. The parliamentary committee on the Constitution has made recommendations upon this subject which deserve careful consideration.

Another problem which confronts us at the present time is that of the financial relations between the Commonwealth and the States. Sir John said that he would not deal with this subject because it did not necessarily, or even probably, require any amendment of the Constitution.

Sir John hoped—though past experience was not encouraging—that proposals for amendment of the Constitution would be considered on their merits. Australia could not afford to handicap itself by artificial and self-created obstacles in the highly competitive world of the present day.