THE WESTERN AUSTRALIAN CONSTITUTION: ITS SOURCE OF AUTHORITY AND RELATIONSHIP WITH SECTION 106 OF THE AUSTRALIAN CONSTITUTION

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THE WESTERN AUSTRALIAN CONSTITUTION ACT 1889

Just over one hundred years ago, in April 1889, the Legislative Council of Western Australia passed a Bill for a Western Australian Constitution Act 1889 ("Constitution Act 1889") which was reserved for the Royal assent.[1] At that time, the Council was the sole legislative chamber of the Colony of Western Australia. It consisted of 18 members, six of whom were appointed and the remainder elected.[2]

The following year, the reserved Bill (in a slightly amended form) was scheduled to an Imperial Act, the United Kingdom Western Australian Constitution Act 1890 ("Constitution Act 1890"). It became law on the proclamation by Queen Victoria on 21 October 1890. Section 2 of the Constitution Act 1889 established a Legislative Council and a Legislative Assembly and provided, as it still provides, that:

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1. The reservation was required because the Bill exceeded the constitution-making powers conferred on the colonies by s 32 of the (UK) Australian Constitutions Act 1850.
2. See generally R D Lumb *The Constitutions of the Australian States* 3rd edn (St Lucia: University of Queensland Press, 1972) 37-40.

> [I]t shall be lawful for Her Majesty, by and with the advice and consent of the said Council and Assembly, to make laws for the peace, order, and good Government of the Colony of Western Australia and its Dependencies....

This grant of plenary power to make laws for the peace, order and good government of the colony may well have been sufficient to enable the Western Australian Parliament to amend its Constitution Act. However, the matter was put beyond doubt by section 5 of the Constitution Act 1890 which provided as follows:

> It shall be lawful for the legislature for the time being of Western Australia to make laws altering or repealing any of the provisions of the scheduled Bill in the same manner as any other laws for the good government of that colony, subject, however, to the conditions imposed by the scheduled Bill on the alteration of the provisions thereof in certain particulars until and unless those conditions are repealed or altered by the authority of that legislature.

Thus, the plenary legislative powers granted to the Western Australian Parliament included the power to amend the provisions of the Constitution Act 1889. Indeed, as Professor Lumb has observed, the Privy Council in *McCawley v The King*[3] "accepted a principle of interpretation which reduced the status of State Constitution Acts to that of ordinary legislation".[4] Hence, later inconsistent legislation prevailed over earlier legislation whether constitutional or otherwise. No express repeal of a provision of a State Constitution Act was necessary for it to be superseded by a later Act however humble the subject matter of the later Act might be.

In 1890, the Western Australian Constitution relied for its legal efficacy specifically on an Act passed by the United Kingdom Parliament and generally on the continuing supremacy of that Parliament. Although the Constitution Act 1890 repealed some earlier Imperial legislation inconsistent with the provisions of the Constitution Act 1889 (the reserved Bill), the latter remained subject to a number of important Imperial statutes including provisions relating to the reservation of Bills for the Royal assent[5] and, most significantly, to provisions of the United Kingdom Colonial Laws Validity Act 1865 ("Colonial Laws Validity Act").

3. [1920] AC 691.
4. R D Lumb "Fundamental Law and the Processes of Constitutional Change in Australia" (1978) 9 FL Rev 148, 169.
5. Constitution Act 1890 s 2.

The Colonial Laws Validity Act was designed to clarify the nature and extent of legislative power in the colonies. While it enlarged the sphere of legislative authority of the colonies, it also imposed two major restrictions on the powers of colonial parliaments. These restrictions, which continued until the commencement of the Australia Acts in 1986,[6] were that:

(i) colonial legislation repugnant to Imperial legislation extending to the colonies (by express enactment or necessary intendment) was void to the extent of the repugnancy (section 2); and

(ii) while a colonial legislature had power to pass laws with respect to the constitution, powers or procedure of the legislature, it could do so only in accordance with any manner and form provisions laid down by the existing law (section 5).

FEDERATION AND THE AUSTRALIAN CONSTITUTION

The preamble to the Australian Constitution[7] states that the people of the then colonies "agreed to unite in one indissoluble Federal Commonwealth under the Crown ... and under the Constitution hereby established". Covering clause 5 provides that:

> This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State....

As a consequence, it has been said, the Constitution "is the supreme law of all the States...."[8]

Chapter V of the Constitution (comprising sections 106-120) is headed "The States". Section 106 provides as follows:

> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

6. The Australia Acts comprise the (UK) Australia Act 1986 and the (Cth) Australia Act 1986. The (Cth) Australia Act 1986 is subsequently referred to as the "Australia Act".
7. The Australian Constitution forms s 9 of the (UK) Commonwealth of Australia Constitution Act 1900.
8. *Duncan v The State of Queensland* (1916) 22 CLR 556 Barton J, 587.

SPECIAL PROTECTION FOR STATE CONSTITUTIONS

These provisions of the Australian Constitution, and section 106 in particular, have been relied upon to support the proposition that a "special protection" is accorded to State constitutions.[9] A significant element of this protection has been the High Court's enunciation of the doctrine that Commonwealth legislative powers are subject to an implied prohibition preventing interference with, or impairment of, the capacity of a State to function as a Government and as "an essential constituent element in the federal system".[10]

In the recent case of *Re Tracey; Ex parte Ryan*[11] *("Tracey")* the Full High Court relied on section 106 holding that certain provisions of the Commonwealth Defence Force Discipline Act 1982 ("Defence Force Discipline Act") were invalid. Sections 190(3) and (5) of that Act purported to deny to State courts jurisdiction otherwise vested in them by State laws to try cases brought under those laws. The provisions extended across the range of criminal conduct and applied whenever a person prosecuted for an offence in a civil court had been tried by court-martial for substantially the same offence.

The Court held that sections 190(3) and (5) exceeded the power of the Commonwealth to make laws with respect to the defence of the Commonwealth. Specifically, it was beyond the defence power and the incidental power of the Commonwealth Parliament to interfere in this manner with the exercise by State courts of their general criminal jurisdiction. Since the provisions could not be read down to apply only to federal courts, they were wholly invalid.

9. *The State of New South Wales v The Commonwealth [No.1]* (1932) 46 CLR 155 Evatt J, 201.
10. *The Commonwealth of Australia v The State of Tasmania* (1983) 158 CLR 1 Mason J, 139 (*"Franklin Dam"*); *The Lord Mayor, Councillors and Citizens of the City of Melbourne v The Commonwealth* (1947) 74 CLR 31 Dixon J, 82 (*"Melbourne Corporation"*); and generally N F Douglas "'Federal' Implications in the Construction of Commonwealth Legislative Power: A Legal Analysis of Their Use" (1985) 16 UWAL Rev 105, 108-114.
11. (1989) 166 CLR 518. For a general discussion of *Tracey* see S Gageler "Gnawing at a File: An Analysis of *Re Tracey; Ex parte Ryan"* (1990) 20 UWAL Rev 47; and for some preliminary comments on s 106 as discussed by the High Court in *Tracey* see J Thomson "Are State Courts Invulnerable?: Some Preliminary Notes" (1990) 20 UWAL Rev 61, 63-64 and 66-67.

While that conclusion was sufficient to determine the outcome of the case before the High Court, most of the judges went further in expressing their views of the protection accorded to the States by section 106 of the Constitution. In their joint judgment, Chief Justice Mason and Justices Wilson and Dawson stated:

> For our part we doubt whether provisions of that kind, which strike at the judicial power of the States, could ever be regarded as within the legislative capacity of the Commonwealth having regard to s. 106 of the Constitution, but it is sufficient to say that they clearly exceed the power to make laws with respect to the defence of the Commonwealth. No doubt if the imposition of criminal liability upon defence members or defence civilians in a particular instance or context were capable of interference with the defence of the Commonwealth, the Parliament would have power under s. 51(vi) to provide for the specific situation by enacting a law which did not involve the ouster of jurisdiction from the courts of the States. Such a law would prevail under s. 109 of the Constitution....[12]

Along similar lines, Justices Brennan and Toohey stated:

> [P]rovisions which purport to prohibit the exercise of the ordinary criminal jurisdiction vested in State courts by State law can find no support in the Constitution. State courts are an essential branch of the government of a State and the continuance of State Constitutions by s. 106 of the Constitution precludes a law of the Commonwealth from prohibiting State courts from exercising their functions. It is a function of State courts to exercise jurisdiction in matters arising under State law.[13]

A different view was expressed by Justice Gaudron.[14] The analysis adopted by Justice Deane did not require him to address this issue.

In earlier cases, the High Court had referred to the implied prohibition, gleaned largely from section 106 of the Constitution, that prohibits the Commonwealth in the exercise of its legislative powers from inhibiting or impairing the continued existence of a State or its capacity to function.[15] The traditional formulation of this doctrine has drawn a distinction between interference with the *powers* of a State and interference with the continued existence or *functioning* of a State. As Justice Dixon explained in *Melbourne Corporation*,

> [t]he foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities. Among them it

12. *Tracey* ibid, 547.
13. Ibid, 574-575.
14. Ibid, 598-601. Infra n 20 and accompanying text.
15. Supra n 10; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192, 205, 235 and 245-246.

> distributes powers of governing the country. The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them.[16]

In *Franklin Dam*, Justice Mason stated that:

> To fall foul of the prohibition, in so far as it relates to the capacity of a State to govern, it is not enough that Commonwealth law adversely affects the State in the exercise of some governmental function as, for instance, by affecting the State in the exercise of a prerogative. Instead, it must emerge that there is a substantial interference with the State's capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system.[17]

The doctrine protects not simply the legislative functions of a State but its executive and judicial functions as well.[18]

The legislation challenged in *Franklin Dam* was held not to infringe the *Melbourne Corporation* doctrine even though it had a significant impact on the State of Tasmania - in particular by precluding the Tasmanian Parliament from legislating (inconsistently with Commonwealth legislation) in respect of a large area of the State. The Court also rejected Tasmania's contention that the Commonwealth legislation affected the State in the exercise of its prerogative powers.

Returning to *Tracey*, it would appear that the ouster of jurisdiction from the courts of the States in the very limited circumstances referred to in sections 190(3) and (5) of the Defence Force Discipline Act would not, on the basis of such earlier authorities, be regarded as

> a substantial ... interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system.[19]

Alone of the judges in *Tracey*, Justice Gaudron took the view that

> if the jurisdiction in issue may validly be vested in service tribunals, the exclusion of the jurisdiction of the civil courts, at least to the extent specified in s. 190(5), must be viewed as reasonably incidental to the vesting of that jurisdiction in service tribunals".[20]

For Justice Gaudron, the validity of the Commonwealth legislation depended on the issue of characterisation, that is, whether the provision

16. Supra n 10, 82.
17. Supra n 10, 139.
18. Ibid Brennan J, 214.
19. Ibid Mason J, 139.
20. *Tracey* supra n 11, 599.

would be characterised as a law with respect to "the defence of the Commonwealth" within section 51(vi) amplified by section 51(xxxix).[21]

The wider views of Chief Justice Mason, Justices Wilson and Dawson and Justices Brennan and Toohey respectively appear to attribute a greater importance to section 106 - at least in relation to the protection of the jurisdiction of State courts against interference by laws of the Commonwealth - than has previously been the case.

It should be kept in mind that the *Melbourne Corporation* principle is an overriding prohibition that may be used to strike down an otherwise valid Commonwealth law: one that is characterised as falling within a head of Commonwealth legislative power within, for example, section 51 of the Constitution. Such powers (including in the context of *Tracey*, sections 51(vi) and (xxxix)) are expressed to be "subject to the Constitution" and therefore subject to section 106. However, the prescription in section 106 that a State Constitution "shall ... continue ... until altered" is also expressed to be "subject to this Constitution" and hence to the Commonwealth's legislative powers including those set out in section 51. In *Tracey* this conflict was resolved (by the majority) in favour of section 106.

More recently in *Port MacDonnell Professional Fishermen's Association Inc v The State of South Australia*[22] (*"Port MacDonnell"*), the High Court referred to the dilemma posed by the inclusion of the words "subject to this Constitution" in sections 106 and 51(xxxviii). In that case, the dilemma was resolved in favour of the grant of power in paragraph (xxxviii).

> The result is that the continuance of the Constitution of a State pursuant to s. 106 is subject to any Commonwealth law enacted pursuant to the grant of legislative power in par. (xxxviii).[23]

Thus, while in *Tracey* the majority considered that the protection accorded by section 106 should override the Commonwealth's legislative power under section 51(vi), in *Port MacDonnell* section 106 was held to be subject to the grant of power under section 51.

21. Ibid, 600-604.
22. (1989) 168 CLR 340.
23. Ibid, 381.

In the latter case, however, the Court was concerned with a Commonwealth law confirming and conferring legislative power upon the Parliament of a State pursuant to a provision of the Constitution, the purpose of which

> is to ensure that a plenitude of residual legislative power is vested in and exercisable in co-operation by the Parliaments of the Commonwealth and the States....[24]

The combination, in *Port MacDonnell*, of Commonwealth-State co-operation and the exceptional nature of section 51(xxxviii), insofar as it is properly seen "as representing both actual and potential enhancement of State legislative powers",[25] would not appear to diminish significantly the ramifications of the *Tracey* case. It is now apparent that section 106 of the Constitution, to which the Commonwealth's express grants of legislative power is subject, may have a wider ambit - and hence a greater protection for the States and their constitutions - than earlier authorities have indicated.

SECTION 106 AS A SOURCE OF AUTHORITY FOR STATE CONSTITUTIONS

The effect of the commencement of the Australian Constitution on the Australian colonies was described by Chief Justice Barwick in *The State of Victoria v The Commonwealth of Australia* as follows:

> The constitutional arrangements of the colonies were retained by, and subject to, the Constitution as the constitutional arrangements for the government of those portions of the Commonwealth to be known as States. These, though coterminous in geographical area with the former colonies, derived their existence as States from the Constitution itself: and being parts of the Commonwealth became constituent States.[26]

Later, in *The State of New South Wales v The Commonwealth*, Chief Justice Barwick expanded on this theme:

> On the passage of the Imperial Act [the Commonwealth of Australia Constitution Act], those colonies ceased to be such and became States forming part of the new Commonwealth. As States, they owe their existence to the Constitution which, by ss. 106 and 107, provides their constitutions and powers referentially to the constitutions and powers which the former colonies enjoyed, including the power of alteration of those constitutions.[27]

24. Ibid.
25. Ibid, 379.
26. (1971) 122 CLR 353, 371.
27. (1975) 135 CLR 337, 372.

In a similar vein, Justice Murphy expressed the view that the Australian Constitution (and, in particular, sections 106 and 107) is the authority for the constitutions of the States and the powers of State parliaments.[28]

These views were considered by Chief Justice Burt in *State of Western Australia v Wilsmore* ("*Wilsmore*") to constitute "strong judicial support" for the proposition that section 106 created a new source of legislative authority for State constitutions as then existing.[29] However, Chief Justice Burt rejected that proposition as inconsistent with the decisions of the High Court in *Southern Centre of Theosophy Incorporated v The State of South Australia*[30] ("*Southern Centre of Theosophy*") and *China Ocean Shipping Co. v The State of South Australia*[31] ("*China Ocean Shipping*"). In relation to the former case the Chief Justice stated:

> I would understand the reasoning of the majority in that case to deny and to reject the view that upon federation and by the operation of ss 106 and 107 of the Constitution the States ceased to be colonies and that thereafter they owed their existence to and that the source of the authority for their constitutions was the Commonwealth of Australia Constitution Act.[32]

Chief Justice Burt also considered that the reasoning of the High Court in *Clayton v Heffron*[33] supported the proposition that

> the full legislative power of a State is continued by ss 106 and 107 of the Constitution but the source of that power remains as before. Its source remains the Imperial legislation.
>
> In my opinion the present state of authority in the High Court requires one to say that the States as they now are were colonies before Federation and remained colonies thereafter and that the sole source of authority for their Constitutions is the Imperial Act or Acts which created them.[34]

It followed that a matter arising under a State Constitution was not for that reason alone a matter arising under the Australian Constitution within the meaning of section 30(2)(a) of the Commonwealth Judiciary

28. *The Commonwealth of Australia v The State of Queensland* (1975) 134 CLR 298, 337 and *Bistricic v Rokov* (1976) 135 CLR 552, 566.
29. [1981] WAR 179, 182; Lavan SPJ and Jones J agreed with the reasons and conclusions of Burt CJ.
30. (1979) 145 CLR 246.
31. (1979) 145 CLR 172.
32. Supra n 29, 182-183.
33. (1960) 105 CLR 214.
34. Supra n 29, 183.

Act 1903 ("Judiciary Act"). However, where a State Constitution is altered otherwise than with a manner and form provision found in or applying to that State Constitution, then that purported alteration would offend against section 106 of the Australian Constitution. Where such an issue is raised, it is a matter "arising under the Constitution" for the purposes of section 30(2)(a) of the Judiciary Act. In other words,

> s 106 of the Commonwealth Constitution by its own force and for its own purposes is a law which requires that such manner and form provisions as are to be found in the State Constitution conditioning the power to amend the Constitution be observed.[35]

It may be argued that Chief Justice Burt's analysis of the reasoning and conclusion of the High Court in *Southern Centre of Theosophy* and *China Ocean Shipping* is open to question. These cases support the view that upon Federation the States continued to be, although they were no longer referred to as, colonies. The Commonwealth itself had the characteristics of a colony. So much can be conceded consistently with a view that upon Federation the source of authority, or at least one of the sources of authority, for State Constitutions was transferred from the earlier empowering Imperial statutes to the Australian Constitution - itself the product of an Imperial Act. Such a view would not, as I understand it, be inconsistent with the reasoning or conclusions of the High Court in *Southern Centre of Theosophy* or *China Ocean Shipping*.

Let it be assumed, however, that the Australian Constitution, by virtue of section 106 in particular, did not upon Federation constitute a new source of authority for the Western Australian Constitution. Thus, its "sole source of authority" as the Full Court of the Supreme Court of Western Australia in *Wilsmore* concluded, remained as before the Imperial Act or Acts which created it.

The question that then arises is whether, following the passage by the Parliaments of both the Commonwealth and the United Kingdom of the Australia Acts in 1986, the sole source of authority for the Western Australian Constitution is still the Imperial Acts of the nineteenth century. For present purposes, the significant provisions of the Australia Act include the following:

(i) the United Kingdom Parliament's power to legislate for an Australian State is terminated (section 1);

35. Ibid, 184.

(ii) the legislative power of a State Parliament includes all legislative powers (with the exception of external affairs) that the United Kingdom Parliament might have exercised for the peace, order and good government of a State (section 2);
(iii) the Colonial Laws Validity Act no longer applies to a State law (section 3(1)); and
(iv) the power of a State Parliament includes the power to repeal or amend any United Kingdom laws applying to the State (section 3(2)).

If section 106 of the Constitution did not become at Federation and has not since become the (or a) source of authority for the Western Australian Constitution, there are now at least two other possibilities.

First, the Australia Act itself may be seen as such a source of power. For example:

(i) it declares and enacts that each State Parliament shall have plenary legislative power to make laws for the peace, order and good government of that State (section 2);
(ii) it removes existing restrictions on State legislative powers (for example, sections 3, 8 and 9);
(iii) it entrenches the power of a State Parliament to enact manner and form requirements (section 6); and
(iv) as with many other "fundamental" laws of countries having written or partly written constitutions, the Australia Act itself can be amended only in accordance with a special procedure (section 15).

Secondly, and alternatively, with the demise or potential demise of Imperial statutes having paramount status as the sole source of authority for State Constitutions, it may be that the Constitution Act 1889 and, in particular, the power to make laws for the peace, order and good government of the State, is itself a constituent power.[36] It is apparent from the majority judgment of the High Court in *Clayton v Heffron*[37] that such a constituent power would then form the basis for the exercise of legislative power in relation to the structure of the legislature, the executive and the judiciary and in relation to the specific matters that

36. See for example *The Bribery Commissioner v Pederick Ranasinghe* [1965] AC 172, 197.
37. Supra n 33, 252.

are dealt with in the Constitution Act 1889 and the Western Australian Constitution Acts Amendment Act 1899[38] (together with other provisions such as those included in the Western Australian Electoral Act 1907 and the Western Australian Supreme Court Act 1935).

While these Acts of the Western Australian Parliament have for some time constituted the indigenous source of the State's "constitution",[39] they have not been regarded as "self-supporting" because of the existence of the Colonial Laws Validity Act and other United Kingdom legislation of paramount status.[40] In this context at least, the Australia Acts (either the Commonwealth or the United Kingdom version or both) may have replaced the Colonial Laws Validity Act as a law of paramount status. In addition, at least to the extent that a State Constitution is "subject to the [Australian] Constitution", the latter may also be regarded as a law of paramount status.

However, while both the Australian Constitution and the Australia Act may have a paramount status at least insofar as the amendment of each is outside the scope of the Western Australian legislature or the Western Australian electorate, the Australia Act has only a limited operation with respect to the Constitution of Western Australia and the powers of its legislature. Whether the Australian Constitution could be amended so as to affect further a State Constitution as could have been achieved in the past by the United Kingdom Parliament, is a matter that depends on the scope of section 128 and particularly its relationship with section 106.[41]

The argument, first put by Quick and Garran, is as follows:

> By the force of the legislative mandate that "the Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth" it may be argued that the Constitution of the States are incorporated into the new Constitution, and should be read as if they formed parts or chapters of the new Constitution. The whole of the details of State Government and Federal Government may be considered as constitut-

38. R D Lumb "Methods of Alteration of State Constitutions in the United States and Australia" (1982) 13 FL Rev 1, 11.
39. As to the meaning of that term, see *McCawley v The King* (1918) 26 CLR 9, 52 and *Stuart-Robertson v Lloyd* (1932) 47 CLR 482, 491.
40. See for example Lumb supra n 38, 10.
41. See G Winterton *Monarchy to Republic: Australian Republican Government* (Melbourne: Oxford University Press, 1986) 140-142 and J Thomson "Altering the Constitution: Some Aspects of Section 128" (1983) 13 FL Rev 323, 337-338.

> ing one grand scheme provided by and elaborated in the Federal Constitution; a scheme in which the new national elements are blended harmoniously with the old provincial elements, thus producing a national plan of government having a Federal structure.[42]

On this view, since the State Constitutions are incorporated in the Australian Constitution, the power in section 128 to amend "this Constitution" extends to the amendment of State Constitutions. In other words, as Quick and Garran concluded, "the scope of the amending power [of section 128] ... extends to the structure and functions of the Governments of the States" as well as "to the structure and functions of the Federal Government".[43]

42. J Quick and R R Garran *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus & Robertson, 1901) 930.
43. Ibid, 990.