A FEW FRAGMENTS OF STATE CONSTITUTIONAL LAW

G J CRAVEN*

One of the less admirable features of Australian constitutional scholarship is the extent to which it has ignored state constitutional law. While constitutional lawyers have been diligent in penetrating the labyrinthine maze which comprises the constitutional law of the Commonwealth, they have averted their faces - more or less consistently - from equally challenging questions which beset the States. The sad truth is that anyone wanting to know any but the more salient facts of state constitutional law needs to be prepared to undertake a good deal of primary research.[1]

The underlying causes of this comparative neglect of the constitutional law of the States are not difficult to identify. In the first place, since Federation, the fortunes of the Commonwealth have waxed, while those of the States have waned.[2] Constitutional scholars have

* BA LLM(Melb); Senior Lecturer in Law, University of Melbourne. This article is based on comments made on a series of papers presented at a seminar on state constitutional law held on 26 May 1990 at the University of Western Australia Law School.

1. This neglect is perhaps best illustrated by the fact that there exists only one current book dealing with the subject of Australian state constitutional law, a slim but useful volume which has not been revised since the mid-1970s: R D Lumb *The Constitutions of the Australian States* 4th edn (St Lucia: University of Queensland Press, 1977). See also J A Thomson "State Constitutional Law: Gathering the Fragments" (1985) 16 UWAL Rev 90.

2. It must be noted however that "state power" has prevailed in some recent High Court decisions. See *Re Tracey: Ex parte Ryan* (1989) 166 CLR 518 (*"Tracey"*) discussed in S Gageler "Gnawing At A File: An Analysis of *Re Tracey; Ex parte Ryan*" (1990) 20 UWAL Rev 47 and J A Thomson "Are State Courts Invulnerable?: Some Preliminary Notes" (1990) 20 UWAL Rev 61; and *New South Wales v The Commonwealth* (1990) 64 ALJR 157 (*"Corporations"*) to be discussed in R Simmonds "The Commonwealth Cannot Incorporate under the Corporations Power: *New South Wales v The Commonwealth*" (1990) 20 UWAL Rev (forthcoming).

been only too ready to turn their faces towards the rising, rather than the setting sun. Consequently, the literature concerning Commonwealth constitutional law has been plentiful, while that pertaining to the States has been undeniably sparse.

Secondly, it is a little appreciated fact that it is often much more difficult to write about State as opposed to Federal constitutional law. This follows inexorably from the fact that one is dealing with six different State Constitutions, rather than one comparatively "user-friendly" Commonwealth Constitution. While the State Constitutions resemble one another in broad outline, this degree of similarity can be and has been overstated. Once one moves from compendious terms such as "responsible government" and "extra-territoriallity" - and sometimes even within these hallowed precincts - broad themes tend quickly to break down into a myriad of single instances.[3]

The temptation, then, is to fly to the comforting singleness of the Commonwealth Constitution, and to find solace - if such needs to be found - in the thought that, after all, "it's only the States," and that the Constitution of the Federation must inevitably be of more interest than those of its units. There is not evidence in Australia, or at least not as yet, of the resurgence of interest in State Constitutions which has occurred in the United States.[4]

Why is state constitutional law worthy of more attention than it has received? First, the States are still responsible for the regulation of wide areas of Australian life, such as the criminal law, health, education, and much of the law pertaining to commerce and property. The States are not mere appendages of the Commonwealth. Accordingly, the constitutional mechanisms by which the States exercise their still broad powers are of critical importance as the objects of scrutiny by

3. For example, the provisions of the various State Constitutions concerning the office of Governor, money bills, the duration of Parliament, and the resolution of Parliamentary deadlocks are very different. And see generally (WA) Constitution Act 1889; (WA) Constitution Acts Amendment Act 1899; (SA) Constitution Act 1934; (Vic) Constitution Act 1975; (NSW) Constitution Act 1902; (Qld) Constitution Act 1867; (Qld) Constitution Act Amendment Act 1896; (Qld) Constitution Act Amendment Act 1971; (Tas) Constitution Act 1934.

4. As illustrated by recent works such as R Williams *State Constitutional Law: Cases and Materials* (Washington DC: Advisory Commission on Intergovernmental Relations, 1988) and *State Constitutions in the Federal System* (Washington DC: Advisory Commission on Intergovernmental Relations, 1989) See also J D Leshy "The State of Constitutional Law in the States of the United States: Are There Any Lessons for Australia?" (1990) 20 UWAL Rev 373.

legal academics. Secondly, the constitutional structures of the States - unlike that of the Commonwealth - are not fossilised by a restrictive amendment procedure. By and large, the State Constitutions are fairly easy to amend, although special procedures may apply in relation to particular features. In these circumstances, the States may well present far more fertile fields for constitutional development - for example, in the field of guarantees of individual rights[5] - than the Commonwealth. Finally, even if the Australian States currently are not widely appreciated as such, there is a perceptible and pervasive revival of interest in the concept of federalism, both in Australia and overseas. While in Europe that interest may centre around opportunities for the creation of supra-national bonds in the wake of the waning of the nation-state, in Australia, it tends to stress the virtues of federalism in promoting participative democracy, and as a means of safe-guarding liberty through the geographical separation of powers.[6] Either way, any rehabilitation of Australian federalism must inevitably focus increased attention upon the constitutional structures of the States.

THE PERSONALITY OF STATE PARLIAMENTS

The question here is basically whether "Parliament" has a sum which is greater than the total of its constituent parts: whether our concept of Parliament is such that it may be accorded a personality or existence essentially independent of its membership convened from time to time, a personality which potentially might be exercised in a variety of directions by appropriately representative persons.[7]

This question is one which is of immediate relevance in a number of important practical contexts. Perhaps the most taxing relates to the employment of State parliamentary officers.[8] For example, who employs such officers? To whom are they answerable? In the event that

5. See, for example, in relation to Victoria, Parliament 1985 *Legal and Constitutional Committee Report to Parliament on the Desirability or Otherwise of Legislation to Defining and Protecting Human Rights*; Leshy supra n 4, 381.
6. B Galligan "Federal Theory and Australian Federalism: A Political Science Perspective" in G Craven (ed) *Australian Federalism: Towards the Second Century* (Melbourne: Melbourne University Press, 1991) (forthcoming).
7. See P W Johnston "The Legal Personality of the Western Australian Parliament" (1990) 20 UWAL Rev 323.
8. A matter considered in some detail in ibid, 334-338.

they wish to maintain an action in respect of their employment, against whom is that action to be brought? In the absence of express statutory provision, the answers to such questions are far from clear.

Our instinctive response tends to be that such persons are employed by "Parliament", yet the very use of the term betrays a duality in our understanding of that concept. For "Parliament", ordinarily comprehended, is simply the totality of the members of the Parliament presently existing. That body has, on the face of it, no reality beyond the sum of its members, and is in any event regularly dissolved or partially dissolved, and thus regularly ceases (or partially ceases) to exist. How can a parliamentary officer be said to be in a contractual and responsible relationship with the entire amorphous body of the legislature from time to time, particularly when the group comprising that body is in a state of more or less continual flux? Thus, to say that someone is employed by "Parliament" seems to involve an almost instinctive positing of the existence of Parliament as a distinct entity, above and beyond the sum of its members from time to time.

Nor are such assumptions relevant only in what might be regarded as the somewhat mechanistic context of the employment of parliamentary officers. At a time when the legislature, and particularly the lower house, is increasingly coming to be seen as a mere "cat's paw" of the executive, any idea of the perpetual personality of Parliament is potentially one of considerable constitutional potency, even if only in some symbolic sense. So much may be glimpsed in the opaquely threatening comments of the High Court concerning the prerogatives of Parliament in *Brown v West*,[9] where the Court is clearly being moved by forces far more profound than a dispute over postal allowances. In a system where even the courts are beginning to express an increasingly overt appreciation of the collapse of meaningful responsible government, the attractions of a concept with the potential to reinforce the capacity of Parliament to effectively manage its own affairs cannot be overlooked.

However, on a more immediately practical and less speculative level, it may be noted that the present confusion over the exact nature of the personality of Parliament does cause real confusion. In Victoria, for example, the exact legal basis of the employment of the staff of parliamentary committees pursuant to section 4K of the Victorian Parliamentary Committees Act 1968 is most unclear. That section

9. (1990) 64 ALJR 204, 205-206.

provides merely that a Joint Investigatory Committee of the Victorian Parliament may commission persons to undertake research and investigations. The practice has been for the relevant Presiding Officer[10] simply to make out a warrant authorizing the expenditure represented by the salary of the person appointed over a designated period, usually one year. Some Committees have "employed" up to six persons at a time under this system.

But by whom are they actually employed? This question has occasionally arisen - although it has never got to the courts, and a variety of equally unsatisfactory answers have been offered.[11] These have included: both the Presiding Officers (implausible, when the warrant issues only from one); the Presiding Officer who issues the warrant (but the warrant is a mere authorization of expenditure containing no terms, while the person appointed is in fact recommended by the Committee concerned, and has little or nothing to do with the Presiding Officer); the relevant Committee as an entity (which has no existence in law, other than for the purpose of discharging very limited statutory functions); the Chairman and/or the members for the time being of the Committee (who do at least control the activities of the person appointed but, on the other hand, neither pay that person, nor have the legal power to withdraw the warrant authorizing such payment); and finally, the Crown in the right of the State of Victoria, which was put forward as having engaged the person in question and then having loaned them to the Parliament (an extraordinary view, given that the unfortunate Crown, conventionally conceived, had absolutely no control over the person employed, and received no direct benefit from their employment!). Of course, all these postulates were only put forward after the position that everyone had instinctively believed to apply - namely, that the relevant persons were evidently employed by "Parliament" - was discarded in the face of the difficulties outlined above in attributing a legal personality to that body capable of supporting a contract of employment.

10. Each Committee is assigned to the Legislative Assembly or Legislative Council for administrative purposes, and is thus, in a very broad sense, answerable to the Presiding Officer of the relevant House.

11. The Committee employees are not employed under the (Vic) Parliamentary Officers Act 1975: compare s 7 of this Act which prescribes a detailed statutory regime for such appointments.

Johnston's suggestion is that certain aspects of the personality of Parliament could, where necessary, be exercised representatively by the "Governor in Parliament", in a manner very loosely analogous to that in which the executive powers of the State are exercised by the Governor in Council. Such a position would recognize the constituent quality of the Crown within the concept of Parliament, and provide a convenient medium for the expression of the personality of Parliament in relation to such matters as contracts of employment and so forth.[12] Questions would naturally remain as to the identity of those who would advise the Governor in the exercise of such powers, although the Presiding Officers are immediately obvious as possible choices.

There is much to be said for the proposition that this suggestion should be given appropriate and detailed legislative form. At least in general terms, it is reflective of the composition of Parliament itself, and it would have the virtue of providing a clear means by which that body was to express its will in relation to such matters as contracts and other agreements. On the other hand, the proposal is undoubtedly attended by its own difficulties.

One of the more obvious of these relates to the source of "Parliamentary advice" to the Governor. In general terms,[13] the function of advising the Governor belongs to the Ministry, and in view of its constitutional importance, is not one lightly to be shared. The notion that Presiding Officers should be free to formally advise the Governor, even in such comparatively small matters as those relating to the internal organisation of Parliament, entirely free of interference by the Ministry, is one unlikely to endear itself to any modern executive. It is true that there are already exceptions to the general rule: in Victoria, an all-party Parliamentary Committee presently has the power effectively to propose to the Governor in Council the suspension of the operation of a statutory rule.[14] But that power is effectively subject to ministerial veto, and upon the one occasion that it has been exercised, the officers of the Committee had difficulty in persuading the staff of the Executive Council even to put the relevant documentation before His Excellency without Ministerial approval.

12. Johnston supra n 7, 327-329. Compare (Vic) Parliamentary Officers Act 1975 s 7.
13. See, for example, (Cth) Australia Act s 7(5).
14. (Vic) Subordinate Legislation Act 1962 s 6(2C); and see supra n 12.

Nor should it be thought that any benefits involved in a recognition of "the personality of Parliament" would thereby usher the legislature from the shadow of executive domination into a new dawn of Parliamentary supremacy. Many other important questions would remain to be faced, not least of which would be the creation of a system for the adequate, independent and recurrent funding of Parliament, one which did not leave that body and its committees the indigent clients of an unsympathetic executive.

THE AUSTRALIA ACTS AND STATE CONSTITUTIONAL LAW

The issues raised by Thomson's article on the enigmatic Australia Acts are daunting both in their number and in their complexity.[15] I only deal here very briefly with a few of these.

The first point to make in relation to the effect of the Australia Acts on Australian constitutional law generally, and the constitutional law of the States in particular, is that they have produced a previously unparalleled degree of legal complexity. Today, in relation to truly basic constitutional issues - such as the conversion of Australia into a republic,[16] the abolition of the federal system,[17] or the secession of a state[18] - one must potentially consult and reconcile no less than five separate sets of constitutional documentation: the relevant State Constitution Acts; the United Kingdom Commonwealth of Australia Constitution Act 1900 (including both Constitution proper and the covering clauses); the United Kingdom Statute of Westminster 1931; the United Kingdom Australia Act 1986; and the constitutionally distinct Commonwealth Australia Act 1986. The potential for contradiction, confusion and dislocation between these five sets of constituent documents - particularly as they come to be amended in different directions and by different procedures over the years - is such as to make it a brave commentator indeed who would venture a concluded legal opinion

15. J A Thomson "The Australia Acts 1986: A State Constitutional Law Perspective" (1990) 20 UWAL Rev 409.
16. G Winterton *Monarchy to Republic: Australian Republican Government* (Melbourne: Oxford University Press, 1986).
17. G Craven "Would the Abolition of the Australian States be an Alteration of the Constitution Under Section 128" (1988) 18 FL Rev 85.
18. G Craven *Secession, The Ultimate States Right* (Melbourne: Melbourne University Press, 1986) For a review of this book see J A Thomson "Cutting Loose: Secession and Australian Constitutional Law" (1987) 17 UWAL Rev 160.

upon any of the more fundamental constitutional issues which might face the Australian Commonwealth in an inherently uncertain future.

Perhaps the most profound issue to arise in the wake of the Australia Acts relates to the present legal basis of the Australian Constitution.[19] Traditionally, that basis was thought to lie in the quality of the Constitution as an enactment of the United Kingdom Parliament. However, since the apparent disappearance of the power of that Parliament to legislate for Australia via section 1 of the Australia Acts, the triumphant suggestion is increasingly made that the true basis of the Constitution now lies simply in its acceptance by the people.[20] Such a view, which fits well both with understandable feelings of Australian nationalism and, not coincidentally, with a certain vainglory on the part of the Commonwealth Parliament and Executive (which obviously have a degree of proprietorial interest in their own Australia Act) sees these Acts as effecting a final shift of constitutional legitimacy from imperial derivation to popular acceptance.

However, the theorists of popular acceptance have not, perhaps, sufficiently refined their thesis, or appreciated its full potential implications. The problem with any theory of popular acceptance, as has long been realized, lies in the concept of the people: "Which people, and in what units?", the perennial question rings out.[21] The sorry truth is that to say that the Australian Constitution rests on popular acceptance could mean that it derives its validity from any of at least three quite different sources, the selection of any one of which might have profound implications for Australian constitutional law.

First, the Australian Constitution might draw its validity from its acceptance by the whole people considered as a single national unit. This seems to be the assumption made by most of the theorists of popular acceptance. Secondly, the Constitution might be based upon acceptance by both this national population *and* the populations of each of the States individually. Such a position would be in a sense broadly reflective of the amendment procedure in section 128, although it would possess overtones of State unanimity not necessarily present in that provision. Finally, the Constitution could be accepted by the

19. See G Lindell "Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 FL Rev 29.
20. A view anticipated by Murphy J in *Bistricic v Rokov* (1976) 135 CLR 552, 566; and see Lindell supra n 19, 40.
21. Compare *Attorney-General of the Commonwealth; ex rel McKinlay v The Commonwealthy* (1975) 135 CLR 1.

people not as a single nationally organized unit, but as six distinct and separate State populaces.

The implications which would flow from the acceptance of any of these positions are fascinating, profound, and far from being of purely academic interest. Broadly speaking, as one moves from the first to the third position one moves from what might be termed an "organic" federation towards a polity based upon something very like Calhoun's "compact" theory of federation.[22] At this point, extremely interesting questions are raised, not only as to what implications might be drawn from the "contractual" nature of the federation for the general purposes of constitutional interpretation, but also as to the enduring nature of the federation itself in the face of dissatisfaction in one or more of its constituent states.[23] Can a contract, once breached, be rescinded? Regrettably, once one rends the veil of imperial supremacy, one is forced to face a great many issues which might better have been left unexposed.

Lest it be thought that a theory of State acceptance would have no plausibility, the following matters should at least be considered: that as a matter of factual (not legal) history, no State entered the Australian Federation other than in response to a decision of its people and its people alone, and so much is reflected in the preamble to the Constitution Act;[24] that the effect of section 128 is, to a significant extent, that constitutional matters of basic individual importance to a State may not be affected against its will;[25] that section 106 - on the conventional view at least - reserves the amendment of a State Constitution to the particular State concerned;[26] that the Australia Acts themselves, the supposed mainspring of popular acceptance, were (again as a matter of factual history) applied to the States only by virtue of their individual consent,[27] and that the Commonwealth Australia Act, to the extent that it relies upon section 51(xxxviii) of the Constitution, is entirely derivative of individual State consent; and finally, that section 15 of the

22. J C Calhoun "A Disquisition on Government" in R K Cralle (ed) *The Works of John C Calhoun* vol 1 (New York: Russell & Russell, 1968).
23. Craven supra n 18, 62-81.
24. Ibid, 74-77.
25. By virtue of its penultimate paragraph, which requires special state majorities for some, rather imprecise categories of alteration.
26. Infra.
27. See, for example, the preamble to the (Cth) Australia Act 1986.

Australia Acts requires individual State consent for their amendment. Thus, a compact theory of federation is, if anything, rather more plausible in Australia after the final collapse of Imperial supremacy than it was before that event.

One of the most interesting points raised by Thomson relates to the possible amendment of the Australia Acts and the Statute of Westminster by the Commonwealth Parliament without the consent of the States.[28] On the face of it, this possibility is ruled out by section 15 of the Australia Acts, but Thomson is right to query the efficacy of that provision.[29]

Section 15(1) of the Australian Acts seems to confer upon (or possibly to recognize in) the Commonwealth Parliament a power to amend those Acts and the Statute of Westminster, but only with the consent of the states. The difficulty here arises initially in relation to section 15(1) of the Commonwealth Australia Act, for it is far from clear whether the Commonwealth Parliament may - primarily in light of section 1 of the Constitution, which vests the legislative power of the Commonwealth in a Parliament composed of the Queen, the Senate and the House of Representatives - effectively enact "manner and form" provisions,[30] a description which clearly may be applied to section 15 (1). Accordingly, it may be that section 15(1) of the Commonwealth Australia Act, at least in so far as it purports to restrict the exercise of the legislative power of the Commonwealth, is invalid. What then would be the position with regard to the amendment of the Australia Acts and the Statute of Westminster?

One deceptively simple answer might be that, on the assumption that the condition of State consent is not severable from any purported conferral of power in section 15(1), then the whole of the section is bad. But what follows from this? On one view, it might follow that the whole of the Commonwealth Australia Act is bad, on the basis that section 15(1) is not severable from the remainder of its provisions. Another line of reasoning, however, no less dramatic, might go like this. Section 15(1) does not confer a power upon the Commonwealth Parliament to amend the Australia Acts and the Statute of Westminster - it merely recognizes the existence of an independent power, and

28. Thomson supra n 15, 415.
29. Ibid.
30. See generally G Winterton "Can the Commonwealth Parliament Enact "Manner and Form" Legislation" (1980) 11 FL Rev 167.

subjects it to a manner and form requirement, namely, that it not be exercised without the consent of the States. If section 15(1) is invalid, so be it, but this cannot affect the head-power to amend the legislation in question. Accordingly, the only difference that the invalidation of section 15(1) would make is that the requirement of State consent would disappear from the equation, and the Australia Acts and the Statute of Westminster would be amendable by the unilateral action of the Commonwealth Parliament.

Two potential difficulties immediately confront this view. The first is that it presupposes a legislative power in the Commonwealth Parliament unilaterally to amend both the Statute of Westminster and its own Australia Act. While real, however, this difficulty is not necessarily insuperable. On the reasoning of some of the justices in *Kirmani v Captain Cook Cruises* ("*Kirmani*")[31] the external affairs power might well support an amendment of the Statute of Westminster. As to the power of the Commonwealth Parliament to amend its own Australia Act, this would depend upon such obscure questions as the method of amending laws made under the enigmatic section 51(xxxviii) of the Commonwealth Constitution.[32]

The second difficulty here, is that it might be argued that any capacity in the Commonwealth Parliament to amend the Statute of Westminster and its own version of the Australia Act would be academic in view of the fact that any such amendment, were it to conflict with the still subsisting United Kingdom Australia Act, would be nonetheless invalid. But this assumes that the United Kingdom Australia Act would necessarily prevail over an otherwise valid enactment of the Commonwealth Parliament according to some sort of perpetual residual repugnancy doctrine, even though the United Kingdom Parliament has (presumably) entirely lost its power to legislate for Australia. Surely the same type of arguments that have been advanced to suggest that an otherwise valid amendment to the Australian Constitution would take effect notwithstanding an inconsistency with the covering clauses of the Constitution Act, at least since the cessation of the power of the United Kingdom Parliament to legislate for Australia, could be

31. (1985) 159 CLR 351; and see G Craven "The Kirmani Case - Could the Commonwealth Parliament Amend the Constitution Without a Referendum" (1986) 11 Syd L Rev 64.

32. See Craven supra n 18.

called in aid here? Indeed, is it so abundantly clear that the United Kingdom Australia Act is not itself subject to amendment by the Commonwealth Parliament as an external affair pursuant to the reasoning in *Kirmani*?[33]

Unhappily, there are no clear, or even reasonably clear answers to questions such as these. What may certainly be observed, however, is that if the Statute of Westminster and the Australia Acts are subject in their totality to the legislative power of the Commonwealth Parliament, then this is a matter of grave concern to the States. Taken together, these pieces of legislation touch upon many vital aspects of state constitutional law, and the States may yet come to rue the day when they agreed to walk in the deceptively balmy fields of constitutional patriation.

One further matter may be noticed from Thomson's article, and this concerns the problematic relationship between amendments to the Commonwealth and State Constitutions and the Australia Acts.[34] If one assumes that section 15 of each or either of the Australia Acts is - for whatever reason - effective in ensuring that those Acts will not be amended save by an Act of the Commonwealth Parliament accompanied by unanimous State consent, what will be the position of purported amendments to Australian Constitutions which are inconsistent with provisions of the Australia Acts? Will they, too, need to comply with the requirements of section 15(1)?

It is worth noting here that, given the scope of the Australia Acts, there is an enormous potential for such inconsistency. Drawing only upon section 7, by way of example, the Acts arguably mandate the existence of the Monarchy, the States, the office of State Governor, the position of State Premier, and the continuation of the institution of responsible government within the States. Does it follow from this that an amendment to a State Constitution which is inconsistent with any of these positions is invalid unless it has been passed in accordance with section 15(1) - that is, by Act of the Commonwealth Parliament with the consent of all the States? Indeed, could the same be said even of an amendment made to the Australian Constitution under section 128?

33. J Crawford "Amendment of the Australian Constitution" in G Craven (ed) supra n 6.

34. Thomson supra n 15, 417 and 420-422.

Given that an amendment to the Commonwealth Australia Act is defined in section 15(2) as being a law which is repugnant to a provision of that Act, these questions are genuinely perplexing. Nor is the general position of amendments pursuant to section 128 of the Australia Constitution much assisted by section 15(3), which applies only to amendments conferring power upon the Commonwealth Parliament: many amendments which would be potentially inconsistent with the Australia Acts would do no such thing.

Accordingly, from the point of view of a state constitutional lawyer, the ultimate effect of the Australia Acts could range anywhere from the subjection of state constitutional institutions to the legislative power of the Commonwealth, to their entrenchment beyond the power of the State Parliament concerned. If this thought is not particularly comforting, it is even less agreeable to reflect that such truly basic questions of constitutional law usually arise in the context of political crisis, when there is little scope for scholarly exegesis.

THE SIGNIFICANCE OF THE WESTERNAUSTRALIAN SECESSION MOVEMENT

Besant[35] has served to reinforce strongly my general impression that there is more to our determined ignorance of the secession movement than the passing of a distracting half-century. While the concept of a conspiracy of silence is grandiose in the present context, the inclination to dismiss the movement as an irrelevant and even boring chapter of Australian history is, I suspect, more of a conscious choice on the part of historians and other scholars than they would care to admit.

The difficulty with the secession movement from an Australian point of view is that it challenges dearly held beliefs about Australian nationalism, unity and destiny. It sits extremely ill with the dominant line of intellectual thought in Australia - from Henry Parkes to Manning Clark - that there is to be one nation for a continent and one continent for a nation. It disputes one of the central propositions of our national myth, that we are all one people, essentially undifferentiated by increasingly irrelevant and fading State borders, moving towards a

35. C W Besant "Two Nations, Two Destinies: A Reflection on the Significance of the Western Australian Secession Movement to Australia, Canada and the British Empire" (1990) 20 UWAL Rev 209.

common and glorious antipodean destiny. The secession movement, with its unequivocal statements of difference and division, and its obvious threat to our continental destiny, must necessarily be reduced to the rank of an easily dismissed and transient eccentricity if it is to fit comfortably with the legendary Australian history that is in the process of being manufactured. Better still, it can be forgotten. Perhaps a country profoundly unsure of its own nationalism and destiny is more interested than any other in suppressing evidence contradictory to its self-vision.

In fact, Western Australian secession movement may not be dismissed as a passing constitutional glitch. It is thus of continuing historical and legal significance.[36] The secession crisis was not "caused" solely by the Depression. Its roots went back to the unpropitious circumstances in which Western Australia was virtually forced to join the Australian Federation. Secession movements occurred both before and after the Depression: that event simply provided an extremely powerful fillip to a pre-existing resentment. It is, in any event, hardly a denial of the importance of the movement to say that it was economically driven. In the first place, many movements of profound constitutional significance (including the Federation movement) have been fuelled to a significant extent by economic considerations. Secondly, the economic crisis in Western Australia during the Depression was greatly exacerbated by the direct results of Federation - free trade and the tariff. Finally, if the movement by Western Australia for secession is to be dismissed as having been inextricably linked to a severe economic crisis, this is cold comfort in an increasingly troubled world economy.

Another reason why the Western Australian secession movement is worthy of further study is the intriguing question of the extent to which Western Australia's move towards secession threatened to detach other Australian States, notably Tasmania and South Australia, from the Federation. A related issue is whether the arrangements of the Commonwealth for revenue redistribution among the States were significantly affected by its fear of secession movements during the 1930s.[37] It is apparent that the significance of the Western Australian secession

36. The basis for my view is fully set out in Craven supra n 18, ch 3. It is conveniently summarised in this article.

37. Ibid, 56-57.

movement in Australian constitutional history is more considerable than has previously been acknowledged. Indeed, as Besant points out, the opinion of the Select Committee which rejected Western Australia's petition for secession, virtually forgotten in Australia, only recently played a significant part in determining the exact process by which the Constitution of Canada was patriated.[38]

As it happens, recent Canadian experience stands as a stark reminder that the progress of a federation is not inevitably towards an increasing degree of unification. No-one would suggest that there is any situation in Australia comparable to that arising in Canada by virtue of its bilingual society, but it should be remembered that Quebec is not the only Canadian province that has in the past threatened secession. Similar rumblings have been made from time to time by the Western Provinces, whose circumstances are far more closely analogous to those of Western Australia. In Australia, we are far too inclined to see our past history as projecting itself in an inevitable and unalterable pattern into the future. It is simply not true that it is inconceivable that the Australian Federation will never face another bid for secession by one of its constituent units and for this reason, if for no other, Western Australia's attempt at independence in the 1930s is of considerable interest.

SECTION 106 AND THE STATE CONSTITUTIONS

Section 106 of the Commonwealth Constitution has always raised a number of difficult questions concerning the relationship between it and the State Constitutions which it sought to protect, and between those Constitutions and the Commonwealth Constitution as a whole. The provision was one of those relied upon by the first High Court (along with section 107) in adopting an interpretation of the Constitution which favoured State powers, but in the years since *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited*[39] ("*Engineers*") section 106 has hardly been one of the Constitu-

38. Besant supra n 35, 220-223. As the Canadian Federation teeters on the brink of disintegration over the issue of Meech Lake and the dissatisfaction of Quebec, anxious eyes will undoubtedly scan the relevant precedents. It is sad to think that Canadian scholars may already be more knowledgeable about Western Australian separatism than their Australian colleagues.

39. (1920) 28 CLR 125.

tion's superstars. It has languished, along with section 107, as one of the less potent constitutional bulwarks of the States. Somewhat ironically, the main interest in section 106 in recent years seems to have come from those eager to rely on it for the purpose of subjecting the State Constitutions to alteration by the method set out in section 128, that is, without necessarily obtaining the consent of the State concerned.[40] From state constitutional shield to state constitutional noose can be a short step for a provision in the Australian Constitution.[41]

Lately, however, the High Court appears to have very cautiously embarked upon a limited course of "born-again federalism", and in these happy circumstances, the exact significance of section 106 and the role that it may have to play in the protection of the States becomes a question of some immediate importance. This tentative resurgence of federalism in the Court, while far from impressive in absolute terms, is compelling when compared with decisions like that in *The Commonwealth v Tasmania*[42] (*"Franklin Dam"*) and *Hematite Petroleum Pty Ltd v Victoria*[43] (*"Hematite"*). In *Queensland Electricity Commission v The Commonwealth*[44] the doctrine originally expounded in *The Lord Mayor, Councillors and Citizens of the City of Melbourne v Commonwealth*[45] (*"Melbourne Corporation"*) was applied for only the second time in its history. In *Tracey*[46] the Court specifically referred to section 106 in invalidating Commonwealth legislation which interfered with the jurisdiction of State courts. Perhaps most spectacularly of all, in the *Corporations* case,[47] the High Court defied the Commonwealth and pundits alike to deny to the Commonwealth - in the face of delighted but frank disbelief on the part of most of the States - the power to regulate incorporation.

In these circumstances, the question which naturally arises is whether section 106 - together with other appropriate sections of the Commonwealth Constitution - might not be relied upon for the purpose of

40. J Quick and R R Garran *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus & Robertson, 1901) 930.
41. For example, s 96.
42. (1983) 158 CLR 1.
43. (1983) 151 CLR 599.
44. (1985) 159 CLR 192.
45. (1947) 74 CLR 31.
46. Supra n 2.
47. Ibid.

grounding some general approach to constitutional interpretation which would be more congenial to the States than that which has beset them in varying degrees of intensity ever since the decision in *Engineers*. Certainly, generations of State legal advisers have looked longingly upon sections 106 and 107, and devoutly wished that they could be accorded the exalted super-constitutional status of the placita of section 51.

It is undoubtedly true that the most compelling specifically textual basis for a federalist interpretation of the Constitution lies in section 106 (and allied sections, like section 107), but whether a protagonist of the States would be wise to rely too heavily upon that provision is another question. The difficulty is that once one ties oneself to the words of section 106 within the literalist hegemony involved in acceptance of *Engineers* it becomes all too easy for the import of that section to be whittled away in such word games as deciding which "subject to this Constitution", that in section 106 or section 51, will endow its parent provision with constitutional inferiority to the other. One has only to recall the extraordinary "residuary legatee" example of Justice Isaacs in *R v Barger*[48] to realise that the constitutional protection of the states within an exclusively textual context is a matter fraught with difficulty.

It may well be that the future of State constitutional protection lies not (or not primarily) in the technical interpretation of the words of provisions such as section 106, but in the development and application of a general and principled theory for the interpretation of the whole Australian Constitution, which theory would be based on the historically and intrinsically federal character of that compact. Of that character, section 106 - and any other provision - can ultimately be only indicative, rather than exhaustive. There is a strong argument, born of a bitter experience of *Engineers* literalism, that the only means by which a theory of constitutional interpretation might ultimately protect the Australian States would be if it proceeded from fundamental assumptions about the intentions of the Founding Fathers and their ratifying populations concerning the polity which they had determined to create: put loosely, that this polity was to be strongly federal. To seek to found this vision primarily upon the text would be, as the Confucians might remark, to try to use a torch to see the sun. Section

48. (1908) 6 CLR 41, 84.

106, in such a vision of the Australian Constitution, can be nothing more than expressive. In a sense, the development of such a theory would superficially resemble the present process by which the High Court makes implications into the Constitution by reference to the concept of federalism, but clearly would be on a far grander scale, more reminiscent of the old reserved powers doctrine than that espoused in the *Melbourne Corporation* case.

Douglas is right when he draws a link between section 106 and the present practice of drawing implications from federalism, for this link is explicitly acknowledged in a number of the cases.[49] However, the exact nature of the process whereby implications from federalism are expounded into the Constitution has been very inexactly described by the High Court. It would appear that to some judges, no implication may be made into the Constitution unless it is directly supported by some part of the text of that document - notably section 106 - and (logically) no implication would be permitted which ran directly counter to an explicit term of the Constitution.[50] To such judges, even constitutional implications are ultimately textually based. To others, however, the process of implication is a much looser one, and need not proceed directly from a textual origin. These judges feel free to draw implications from themes which underlay the Constitution, or from the historic understanding upon which it is based.[51] Section 106 and similar provisions, while clearly important to such judges, will be of less critical significance than they will be to those judges who confine themselves to what might be termed "textual implication". It is thus a somewhat sobering thought that when we blithely talk of "making implications into the Constitution", we are far from being clear as to exactly what process we are describing.[52]

49. N Douglas "The Western Australian Constitution - Its Source of Authority and Relationships with Section 106 of the Commonwealth Constitution" (1990) 20 UWAL Rev 340, and see the cases cited ibid, 343.
50. For example, supra n 44 Brennan J, 235.
51. For example, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 Stephen J, 216-217.
52. G Sawer "Implication and the Constitution" (1948-1950) 4 Res Judicata 15.

Section 106 has also been much analysed as the potential source for the authority of State Constitutions after Federation.[53] This is a well-travelled subject, which I do not propose to cover in detail. Suffice to say that I have always regarded the language of section 106 as being more apt to express the recognition of the continuance of State Constitutions, rather than to effect that continuance itself. Of course, it may be that after the Australia Acts, the State Constitutions should be regarded as deriving force from their acceptance by the State populations in much the same way as the Commonwealth Constitution suggestedly derives its force from acceptance by the people of the Commonwealth as a whole.

Of course, at least one of the main purposes in arguing that section 106 incorporates the State Constitutions and makes them part of the Commonwealth Constitution is so that the further argument may be made that those Constitutions can therefore be amended in defiance of the wishes of the people of the State directly concerned pursuant to the section 128 procedure. So far as this argument goes, it would seem to be correct that if the effect of section 106 is that the State Constitutions are incorporated into and given force by the Commonwealth Constitution - which, as I have said, I do not think they are - they could be amended under section 128.

My personal concern is that I am not at all sure that section 128 could not be used against the State Constitutions even if they are not incorporated in the Commonwealth Constitution by virtue of section 106. The starting point here must be that section 106 is expressed as being subject to the remainder of the Constitution, which includes section 128. Section 128 allows the Commonwealth Constitution to be "altered". What limitation could be put forward as preventing that document from being "altered" in a manner which produced an inconsistency between it and the Constitution of a State? Were this eventuality to occur, would not the Commonwealth Constitution as amended

53. *Victoria v The Commonwealth* (1971) 122 CLR 353 Barwick CJ, 371.

take priority over the State Constitution? Indeed, upon every occasion that the Commonwealth Constitution is amended so as to confer added powers upon the Commonwealth Parliament, and certainly were that Constitution to be amended so as to confer an additional exclusive power upon that Parliament, would not the constitutions of all the States stand amended to the extent of the diminution of their power to deal legislatively with their own affairs? Thus, without holding out any enthusiasm for the prospect, I am not sure that section 128 does not already extend to the effective amendment of the State Constitutions, quite independently of any argument that they are incorporated into the Constitution of the Commonwealth by virtue of section 106.[54]

CONCLUSION

There can be no real conclusion to a piece so disparate as this, beyond returning to my starting point, and noting that the field of state constitutional law is far from being without its challenges and interests. It is a matter for regret that those challenges are all too rarely met by Australian constitutional scholars. Perhaps centenaries of responsible government should come more frequently.

54. See generally J A Thomson "Altering the Constitution: Some Aspects of Section 128" (1983) 13 FL Rev 323, 337-338.