THE COMMONWEALTH CANNOT INCORPORATE UNDER THE CORPORATIONS POWER: *NEW SOUTH WALES V THE COMMONWEALTH*

R L SIMMONDS*

In *New South Wales v The Commonwealth*[1] ("the *Incorporation* case") the High Court on 8 February 1990 upheld a challenge to the Commonwealth Parliament's just-passed package of legislation which attempted to make corporations and securities law uniform throughout Australia. In specific terms, the decision answered two questions presented to the Court concerning the validity of certain sections of the centrepiece of the "National Scheme", the Commonwealth Corporations Act 1989[2] ("Corporations Act"). One set of those sections provided for incorporation by registration with the Australian Securities Commission ("ASC")[3] of

* Professor of Law, Murdoch University. I gratefully acknowledge the advice of Dr Jim Thomson in the preparation of this comment: he should not be held accountable for the use I made of that advice.

1. (1990) 90 ALR 355 Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ; Deane J dissenting.
2. The "National Scheme" (so called to distinguish it from the scheme it replaces, the centrepiece of which is also federal legislation) comprises the Corporations Act; the (Cth) Australian Securities Commission Act 1989 ("Australian Securities Commission Act"); the (Cth) Close Corporations Act 1989 ("Close Corporations Act"); and no less than thirteen other ancillary Acts. The sections of the Corporations Act the Court found not to be sustainable under s 51(xx) of the Commonwealth Constitution infra n 6 were ss 114-125, 155(1), (3) and (4), and 156-158, "so far as they purport to apply to a company registered under Division 1 of Part 2.2 where the statement referred to in section 153(1)(e) states as mentioned in section 153(3) or (5) whether or not the statement also states as mentioned in section 153(2)....": supra n 1, 369.
3. Created under the Australian Securities Commission Act.

companies the whole or a substantial part of whose activities would be "trading activities", defined to include "financial activities".[4] Another set of provisions required the filing of statements of such companies' activities, and prohibited the formation of "outsize partnerships"[5] capable of being incorporated under the Corporations Act unless so incorporated, while also prohibiting the incorporation of such companies under the law of a State or Territory. The Court held by a majority, with only a single dissentient, that none of these provisions could be upheld as a valid exercise of the Commonwealth's power in section 51(xx) of the Australian Constitution.[6]

The High Court's decision led to an intensive round of negotiations between the Commonwealth and the States to determine the future of the National Scheme. The outcome of the negotiations was a set of Heads of Agreement which preserves exclusive Commonwealth control over, with a State voice in, the areas of takeovers, securities, public fundraising and futures, while giving the States a continuing vote over other aspects of the National Scheme, including incorporation and the rules of internal corporate management.[7]

While the political, administrative and revenue outcomes are thus fairly clear, and the point the Court resolved quite sharp, the implications of the *Incorporation* case for the Commonwealth Parliament's authority in an area the Commonwealth government considers to be one of national importance are most unclear. In fact, it is likely the case has resolved very little about the constitutional power of the Commonwealth under section 51(xx). The case also raises fundamental questions about the method of interpretation the High Court should be employing in analys-

4. See definition of "trading activities" Corporations Act s 9.
5. See definition of "outsize partnerships" Corporations Act s 112.
6. The Australian Constitution forms s 9 of the (UK) Commonwealth of Australia Constitution Act 1900. S 51(xx): "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:- ... (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth...." For a textual account of the law on this head of power, see C Howard *Australian Federal Constitutional Law* 3rd edn (Sydney: Law Book Co, 1985) 459-471.
7. The final agreement in principle was reached at a meeting of Attorneys-General of the Commonwealth, the States and the Northern Territory, meeting as the Ministerial Council on Companies in Alice Springs on 29 January 1990. The Heads of Agreement were subsequently tabled in the Western Australian Legislative Council by the Attorney-General Joseph Berinson, on 11 July 1990. Subsequent references are to the tabled document.

ing constitutional issues. These are questions which go to the character of constitutionalism in Australia, questions which are not simply of a political nature: rather, they go to the heart of how constitutional advocacy before the Court should proceed.

I. BACKGROUND TO THE CASE

Since Federation, Australia has had legislation on the incorporation, internal management and financing of companies. These laws, based largely on United Kingdom precedents, have been State or Territorial Companies Acts. From the late 1950s the States, reacting to concerns in the business community about the burden of differential law, had made efforts to make their Companies Acts uniform, culminating in the Uniform Companies Acts of the 1960s. In the early 1970s, after it had been determined that the developing corporate primary market (the market for newly issued securities) and secondary market (the market for trading of previously issued securities) deserved substantial regulation, separate State or Territorial Securities Industry Acts were passed, dealing with such things as the stock exchanges, the licensing of securities dealers and misconduct like market rigging. Again, United Kingdom precedents were followed. Similar efforts were later made so as to ensure the uniformity of the Securities Industry Acts.[8]

The same concerns that had underpinned the uniform legislation approach led to a Co-operative Scheme for company and securities law in Australia, embodied in a formal agreement between the Federal Government and the six State Governments signed in late 1978.[9] A further element was the concern of the States to meet the Commonwealth's desire to have a national regulatory system that had led the previous federal Labor government in 1975 to introduce legislation for national securities regulation (patterned on United States' federal securities regulation), and to prepare draft national companies legislation.[10]

The Co-operative Scheme required the Commonwealth to introduce a Companies Act and a Securities Industry Act, based on prior uniform legislation, for the Australian Capital Territory. The States then made

8. The material in this paragraph is drawn mostly from HAJ Ford *Principles of Company Law* 5th edn (Sydney: Butterworths, 1990) 11.
9. Senate Standing Committee on Constitutional and Legal Affairs *The Role of Parliament in Relation to the National Companies Scheme* (Canberra: AGPS, 1987) 11 ("*The Role of Parliament*").
10. See supra n 8, 11-12.

that legislation locally applicable through their respective Companies (Application of Laws) Acts and Securities Industry (Application of Laws) Acts. Further changes could be made only with the approval of the Ministerial Council, which was the body set up under the Scheme to maintain an oversight of the areas of companies and securities law and to supervise their administration. The Council was made up of Commonwealth and State Ministers responsible for the administration of these areas of law. A further body, the National Companies and Securities Commission ("NCSC"), was established to administer the Scheme, deriving powers from the Commonwealth's and the States' laws. The NCSC could itself delegate administrative functions to state Corporate Affairs Commissions[11] ("CACs").

This complicated co-operative structure was criticised in a 1987 report of the Commonwealth Parliament Senate Standing Committee on Constitutional and Legal Affairs, *The Role of Parliament in Relation to the National Companies Scheme*.[12] The Report called for the Commonwealth to enact "comprehensive legislation covering the field currently regulated by the co-operative scheme".[13] The Report's conclusion was that the Co-operative Scheme's Ministerial Council rendered nugatory the doctrine of individual ministerial accountability for companies and securities regulation, while the existence of both the NCSC and the state CACs produced duplication and inefficiency. The whole edifice, it was concluded, gave rise to conditions favouring regulation according to the lowest common denominator. The Report's prescription was for Commonwealth legislation dealing with these issues which would respond to the national character of the Australian primary and secondary securities markets and the international challenge of globalised securities markets. The Report's vision was of one national regulator that could deal effectively with inter-state trading while also being able to represent Australia effectively in dealings with foreign authorities concerned with having a more harmonious world trading environment.

The Report embodies the essence of the argument for centralisation of the field as proposed by the Commonwealth Government. In the Corporations Act the Commonwealth provided for both companies and

11. On this structure, see supra n 9, 17, 18 and Ch 3.
12. Ibid, 23-24.
13. Ibid, 74.

securities law based largely on the Co-operative Scheme legislation.[14] In the Australian Securities Commission Act it established the ASC, which would have, in broad terms, much the same functions as the NCSC, including the power to delegate to other bodies.[15] The Minister responsible for the National Scheme was to have similar functions to the Ministerial Council of the Co-operative Scheme.[16] The Commonwealth also provided in the Close Corporations Act a new form of corporation for small business based largely on partnership law.

The States' substantial and long standing involvement in the area, as well as their revenue interest in it,[17] provided the impetus for several of the States to challenge the constitutionality of the legislation.[18] The challenges were initially to all components of the scheme.[19] However, by agreement of the parties, only those challenges going to the validity of the basic incorporation provisions of the Corporations Act were argued in the High Court, and the Commonwealth agreed not to bring the National Scheme into force until the challenges had been disposed of.

II. THE MAJORITY DECISION

The majority appears to have accepted the fundamental argument presented by the States, which rested on the meaning of the phrase "formed within the limits of the Commonwealth" in section 51(xx). These words, the majority said, were not used simply in apposition to "foreign" in "foreign corporations". Rather, the former words required

14. Australia, House of Representatives 1988 Corporations Bill 1988 (and other related laws) Explanatory Memorandum vols 1-4 identifying the sources of and explaining some of the differences from the laws of the Co-operative Scheme.
15. Supra n 8, 872. These bodies could be Commonwealth or State ones, and could include the CACs.
16. Ibid, 870.
17. The magnitude of the net revenue at stake may be gathered from the Heads of Agreement supra n 7, cl 24.1 (Commonwealth to reimburse States for "foregone revenue" at $51 million for six months from 1 January to 30 June 1991; and thereafter at $102 million annually).
18. New South Wales, Western Australia and South Australia were parties to the judgment. Queensland, an original party to the litigation, withdrew after agreeing with the Commonwealth on a reference of power under s 51(xxxvii) of the Constitution in exchange for a share of National Scheme revenue. Victoria had earlier agreed to a similar arrangement. See Butt Co L Bull no 21 of 1989 para 362.
19. See for example the Statement of Claim filed in *Western Australia v The Commonwealth* no P24 of 1989.

that before a domestic "trading or financial" corporation could be a subject of Commonwealth legislation under section 51(xx) (a "constitutional corporation" in the words of most of the commentary on the National Scheme), it must be a "formed" corporation. The majority found analysis according to the "plain meaning"[20] to be supported by judicial precedent and history, and to be preferable in the light of the difficulties created by the opposing view.

The precedent principally relied upon was, surprisingly, the 1909 High Court decision in *Huddart, Parker & Co. Pty Ltd v Moorehead*[21] ("*Huddart Parker*"), which had pronounced against the existence of Commonwealth power to incorporate under section 51(xx). This was surprising because the case, which had declared invalid early Commonwealth trade practices legislation under the influence of the doctrine of reserved state power, had seemingly been devalued as a precedent by the 1971 decision in *Strickland v Rocla Concrete Pipes Ltd*[22] ("*Rocla*") which initiated the line of modern authority on paragraph 51(xx). This line of authority has sustained the current generation of Commonwealth trade practices legislation against most constitutional attacks. In addition, it has recently culminated in a "generally expansive"[23] reading of the type of domestic corporation regulable and, through the decision in *The Commonwealth v Tasmania*[24] ("*Tasmanian Dam*"), the scope of Commonwealth legislative regulation allowable.

However, the majority in the *Incorporation* case concluded that the views expressed by the Court in *Huddart Parker* denying the Commonwealth Parliament power to incorporate under section 51(xx) were not tainted by the discredited[25] reserved powers doctrine, which in its *Huddart Parker* manifestation not only brought the Commonwealth short of regulating the States' "domestic trade",[26] but also drew the line short of Commonwealth control of corporations law. That, likewise, was held to be a State preserve. The Court noted that in *Huddart Parker* the view on incorporation was shared even by the dissentient, Justice Isaacs, whose

20. Supra n 1 Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ, 358.
21. (1909) 8 CLR 330.
22. (1971) 124 CLR 468.
23. P J Hanks *Australian Constitutional Law Materials and Commentary* 4th edn (Sydney: Butterworths, 1990) 685.
24. (1983) 158 CLR 1.
25. By the epochal *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ("*Engineers*").
26. Supra n 21 Griffith CJ, 350.

attack on the reserved power doctrine was to be sustained in the *Engineers* case. That view in *Huddart Parker* was seen to have been reached "by reference to purely textual considerations".[27]

The majority in the *Incorporation* case found support for its view and that of the Court in *Huddart Parker* in the 1890s Convention Debates and drafting history of section 51(xx), as well as "contemporary opinion".[28] The record of the Debates and original draft displayed a concern with having the Commonwealth able to provide for the national recognition of corporate status for corporations from anywhere in the Commonwealth or overseas. This concern was illustrated by the decision to delete the reference to "status" in the draft Constitution bill and include the qualifiers "trading or financial" for domestic corporations. Along the way there is an exchange in the 1891 Debates, referred to by the majority,[29] in which Sir Samuel Griffith, later to be the Chief Justice in *Huddart Parker*, rejected a suggestion from the Convention floor that the earlier draft be widened to recognise a general Commonwealth power to incorporate companies of any description.

Finally, the majority in the *Incorporation* case raised the analytical difficulties created if the words "formed within the limits of the Commonwealth" were simply long hand for "not foreign". Those difficulties were how Commonwealth legislation was to deal with corporations who initially fulfilled the requirements for federal incorporation due to their intended trading or financial activities but who subsequently ceased to perform any such activities or lacked the intention to engage in them. The drafters of the Corporations Act itself had clearly seen these difficulties, as the majority noted, and had sought to deal with them by mandatory termination of the corporation.[30] In the majority's view the "complexity" of the resultant scheme

> demonstrates the problem which stems from construing s. 51(xx) so as to include a power to legislate for the creation of corporations within the confines otherwise imposed by that paragraph.[31]

27. Supra n 1, 359.
28. Supra n 1, 361. The majority located "contemporary opinion" in a passage from J Quick and R R Garran *The Annotated Constitution of the Commonwealth of Australia* (Sydney: Angus & Robertson, 1901) 607 which contained a reading of s 51(xx) in its application to domestic corporations as limited to companies "created under state laws".
29. Ibid.
30. Corporations Act ss 156-158.
31. Supra n 1, 362.

III. JUSTICE DEANE'S DISSENT

Justice Deane's judgment is both pungent and a powerful critique of the majority view. It begins with his view of the Constitution as "the compact made between the people of this country when, by referenda, they authorised [its terms]".[32] This led him to affirm the maxim of constitutional construction espoused by Justice Dixon in *Australian National Airways Pty Ltd v The Commonwealth*, to the effect that "it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances".[33] This approach led Justice Deane to conclude that the words in section 51(xx) - "formed within the limits of the Commonwealth" - had no temporal significance but simply an appositional one. Any "superficial appeal" of the other reading does not "survive close examination":

> One might as well say that a legislative power with respect to locally manufactured motor vehicles would not extend to laws governing the local manufactured motor vehicles....[34]

He concluded that the majority's reading fails to accord proper scope to the words "with respect to" in the opening words of section 51.

Having countered the "plain meaning" case for the majority position, Justice Deane turned to the argument of the majority based on *Huddart Parker* which, according to his Honour, those arguing for the majority position had "disinterred and selectively dissected for the occasion".[35] In Justice Deane's view the obiter findings of the majority in *Huddart Parker* on the power of the Commonwealth to incorporate under section 51(xx) simply could not be isolated from their conclusion that company law was reserved to the States.[36] Justice Isaac's judgment could not, of course, be similarly handled. However, Justice Isaac's reading of section 51(xx), which would have it apply only to the external aspects of companies - their dealing with outsiders - Justice Deane found a "strangely

32. Ibid. For this and other views of the nature of the Australian Constitution see J Thomson "The Australian Constitution: statute, fundamental document or compact?" (1985) 59 Law Inst J 1199.
33. (1945) 71 CLR 29 Dixon J, 81 quoted in the *Incorporation* case supra n 1, 369. The maxim is also Marshallian: see *McCulloch v The State of Maryland* 17 US (4 Wheat) 316 (1819).
34. Supra n 1, 364.
35. Ibid.
36. Deane J singled out for special treatment Higgins J's view in *Huddart Parker* supra n 21, 415-416.

distorted construction" for which "no acceptable reason" was advanced.[37] Nor was Justice Deane persuaded by Justice Isaacs' reliance on the wording of the banking power (section 51(xiii)), which Justice Isaacs saw as indicating how a power to incorporate was to be recognised as having been conferred by the Constitution. Justice Isaacs' view was, in Justice Deane's analysis

> little different from the fallacious view that the plenary grants of legislative power contained in s 51 should be read down so as to prevent overlapping and produce complete consistency between them.[38]

Justice Deane met the argument which was based on references in the Convention Debates by pointing to their brevity and lack of compellingness. The reference to "contemporary opinion" failed to take account of opinion counter to Quick and Garran's views.[39] A "more fundamental" answer was that this was an attempt to

> constrict the effect of the words which were adopted by the people as the compact of a nation by reference to the intentions or understanding of those who participated in or observed the convention Debates.[40]

Justice Deane met the argument against his position from convenience first by indicating that the possibility of a company ceasing to be a "trading or financial" company is one which should not be overstated. That phrase should not be "narrowly or technically construed",[41] while reference to writing "current at the time of Federation" supported the view that what were excluded were "not-for-profit corporations".[42] A "more complete answer" to the inconvenience argument, however, was that while it

> might well be seen by the Parliament as calling for restraint in the exercise of the legislative power, it does not provide any legal justification for denying the

37. Supra n 1, 366. It is not, however, analytically incoherent. For attempts to work out just such an analysis of corporate law see E Latty and G Frampton *Basic Business Associations Cases Text and Problems* (Boston, Toronto: Little, Brown, 1963) and R L Simmonds and P P Mercer *Introduction to Business Associations in Canada: Cases, Notes and Materials* (Toronto: Carswell, 1984).
38. Supra n 1, 367.
39. Ibid, 368 referring to W H Moore *The Constitution of the Commonwealth of Australia* (London: Sweet & Maxwell, 1902) 148.
40. Supra n 1, 368.
41. Ibid, citing *Fencott v Muller* (1983) 152 CLR 570, 601-602 ("*Fencott*"): in argument for the States' position it had been suggested that this case should be overruled. See the report of that argument in Butt Co Law Bull supra n 18. *Fencott* clearly supported a broad reading of the phrase "trading or financial corporation".
42. Supra n 1, 368, referring to N L Lindley *A Treatise on the Law of Companies* 5th edn (London: Sweet & Maxwell, 1889) 10.

> generality of a plenary grant of legislative power with respect to the designated class of corporation.[43]

Justice Deane went on to say that "[i]f even further answer to [the] argument" was required,

> it is plain enough. It is that the advantages of such national companies legislation with respect to such corporations seem to me overwhelmingly to outweigh the alleged inconvenience.[44]

IV. THE PROBLEM WITH PLAIN MEANING ANALYSIS

Justice Deane's judgment has been quoted from and considered at length because it is both rhetorically powerful and analytically impressive. It has already impressed other readers of his reasons.[45] Unlike the majority opinion, it deploys a compelling metaphor for the Constitution to guide its construction - the notion of the people's compact. Justice Deane accurately diagnoses the principal weakness in the majority judgment, its reliance on *Huddart Parker*. It is hard to extract any analysis from the majority in that case that is not driven either by the reserved powers doctrine, or by an apparent keenness not to recognise Commonwealth power over what was an apparently local state affair, namely, the incorporation of companies. It is also hard to take *Huddart Parker* as capable of being raised other than for dismissal in a line of authority whose direction from *Rocla* had been one of almost uninterrupted expansion of the scope of section 51(xx). Although not all lawyers interested in the area would have been surprised at the result in the *Incorporation* case,[46] it is probably fair to say that most were.

Curiously, however, for all of its rhetorical power and analytic intensity, Justice Deane's judgment at its heart is precisely of the same order as that of the majority. This is because His Honour undermines the supports for the majority's reasoning, but does not make clear the supports for his own conclusions. The argument between the members of

43. Supra n 1, 368.
44. Ibid.
45. See R Austin "Corporate Confusion; Commonwealth Companies and Securities Regulation after the Constitutional Challenge" Aust Corp L Bull no 3 of 1990 (Special Issue), 27; J Crawford "The High Court and the Corporations Power: Incorporations "Reserved" to the States" ibid, 32.
46. See for example Howard supra n 6, 471.

the Court is thus reduced to one about the "plain meaning" of the phrase "formed within the limits of the Commonwealth". This argument is unsatisfying.[47] Neither side has a compelling reading to proffer. Nor should this be surprising: "plain meaning" analysis, whether of statutes or of constitutions, will often be indeterminate.[48] The analysis in such cases of constitutional interpretation needs something more than an exchange of plausible or common usages or understandings.

Ultimately, what makes the majority opinion and that of Justice Deane unsatisfying is the lack of an indication of the additional weight in the argument to pin down the plain meaning analysis. This lack is also at odds with the growing body of encouragement, from members of the High Court itself, to practitioners, to participate in a process of developing legal analysis that is both recognisably *legal* analysis while also accounting for and responding to the indeterminacies that result from

> the philosophy of legalism or legal formalism which, so it is said, the High Court followed in past years.[49]

Approached from this perspective, Justice Deane's judgment emerges as powerful, not because it delivers a fatal blow to the majority's analysis - it does not[50] - but rather because it can be read as articulating a constitutional vision in which his position can be housed. That vision is of national companies legislation, a possibility foreseen at Federation and argued for in the 1987 document *The Role of Parliament*. The vision is a "constitutional" one because it suggests a logic to this ascription of

47. See Crawford supra note 45, 39.
48. The literature here is very rich. For a representative recent example, see Note "Figuring the Law: Holism and Tropological Inference in Legal Interpretation" (1988) 97 Yale L J 823. For a recognition of the point in the context of construing a statute directed against insider trading, see *Attorney General's Reference (No. 1 of 1988)* [1989] 2 All ER 1 (on (UK) Company Securities (Insider Dealing) Act 1985), especially Lowry LJ, 5 quoting Lord Reid's observation in *DPP v Otwell* [1970] AC 642, 649 that "[t]he impression of the English language (and, so far as I am aware, of any other language) is such that it is extremely difficult to draft any provision which is not ambiguous in that sense [of being capable of receiving two meanings]".
49. A Mason "Future Directions in Australian Law" (1987) 13 Mon L Rev 149, 154-155, quoted in B Horrigan "Taking the High Court's Jurisprudence Seriously" [1990] Qd L Soc J 143, 146. See also Mason "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 F L Rev 1. Horrigan ibid, 143 n 5 also refers to statements of Brennan and McHugh JJ.
50. Contrast Crawford supra n 45, 33.

power to the Commonwealth, which Justice Deane asserts, in his reference to the "advantages" of "national companies legislation", but unfortunately does not demonstrate. Perhaps the best argument is the basically instrumentalist one in *The Role of Parliament*, that efficient regulation is advanced, at least given the nature of today's markets, by having a single national scheme and regulator replacing regionalism.

This is not, of course, the only possible vision. In its argument before the High Court, the State of Western Australia apparently sought to meet the compelling character of a national companies law, as a needed response to national and international markets and their problems, by invoking the compatibility of local incorporation regimes with such phenomena. The State pointed out United States examples[51] of not obviously unsuccessful localised company law regimes. There are also instrumentalist arguments for regionalised systems, from the desirability of something like a competitive market for company law, which American legal scholars with a taste for economics have advanced to some effect.[52] However, these arguments were not put forward by Western Australia.

This last argument, for competition between states to incorporate, seems false to the Australian experience where a market for corporate charters does not seem to have developed. However, this need not defeat the competitive market case. Superior legislative outcomes may be the product of the possibility of competition, and the best model may be the

51. See *Incorporation* case Transcript of Argument, 199 (referring to *CTS Corporation v Dynamics Corporation of America* 481 US 69, 89-91 (1987) ("*CTS*")). I am grateful for this material to K Pettit of the Western Australian Crown Law Department. *CTS* was concerned with whether state legislation, requiring a shareholder vote before a take-over bid (for locally incorporated entities satisfying certain criteria) could be effective to pass control, was in violation of the commerce clause in the US Constitution or pre-empted by take-over bid regulation in the federal securities laws. As the case shows, in the United States, company law is state-based and securities regulation is both federal and state. On this structure, see L Loss *Fundamentals of Securities Regulation* 2nd edn (Boston, Toronto: Little, Brown, 1988) ch 1. This is not to say the system is optimal: see L Lowenstein *What's Wrong with Wall Street: Short-term Gain and the Absentee Shareholder* (Reading, Mass: Addison-Wesley, 1988) 10-12 (inseparability of regulation of corporations and regulation of securities markets). But see the argument infra.

52. Perhaps the best single source is B Baysinger and H Butler "The Role of Corporate Law in the Theory of the Firm" (1985) 28 J Law & Econ 179. For a readable reprise of the debate aroused, see W Klein and J Coffee *Business Organization and Finance* 4th edn (Mineola: Foundation, 1990) 134-136.

one on which all of the States have converged. Alternatively, local legislation may be better because it allows for experimentation, and for clearer reflections of local preferences that would otherwise be lost or distorted in national interest aggregations.[53]

It could be also that the efficiency concerns such as those expressed in *The Role of Parliament* or Justice Deane's judgment are not the whole story either. An important role of company law is the legitimation of private enterprise on a bureaucratic scale,[54] and of provision of the shield of limited liability for what may be in substance a partnership or even a sole proprietorship.[55] Legitimation may require localised legislative control of the kind State-based company law provides.[56] Localised law may be required because of the importance of local access to law-making as well as law-administration where the creation of a corporation is concerned. On the other hand, the conduct of the corporation once formed, particularly in the securities markets, raises different concerns, particularly where a national market is concerned whose international reputation may be at stake. This would then make sense of a local vote in corporate law without corresponding provision for securities law matters, which is a feature of the new agreement on companies and securities law between the States and the Commonwealth that followed the *Incorporation* case.[57]

53. For an argument for conceding the authority to produce local diversity as a way of producing better legislative outcomes, see R Daniels "Federalism and Regulation of Canadian Financial Institutions: A Prescription for an Ailing Patient" (1990) Can Bus L J (forthcoming). This argument is of course in substantial measure Brandeisian: see *New State Ice Company v Liebmann* 285 US 262 (1931) Brandeis J, 311; and see J Thomson "State Constitutional Law: American Lessons for Australian Adventures" (1985) 63 Tex L Rev 1225, 1247.
54. On the importance of company law as legitimating large business see G Mark "The Personification of the Business Corporation in American Law" (1987) 54 U Chi L Rev 1441, 1470, 1482.
55. See the classic case *Salomon v Salomon* [1897] AC 22 discussed from this perspective in R Tomasic J Jackson B Pentony and R Woellner *Corporation Law: Principles, Policy and Process* (Sydney: Butterworths, 1990) para 2.1.
56. Even although business may prefer the prestige of federal incorporation, which is said to account for much of the popularity of such incorporation in Canada.
57. See Heads of Agreement supra n 7, cl 21.7 (Ministerial Council to have "consultative function only" on legislative proposals relating to provisions in Corporations Act on takeovers, securities, public fundraising and futures) and cl. 21.8 (Council to have a "deliberative function" in respect of other legislative proposals; weighted voting scheme for majority approval set up).

The competitive market argument and the "legitimation" argument do not, however, lead to the same results. The latter, unlike the former, would tend to suggest that the Commonwealth should have no power under section 51(xx) to compel a State to recognise corporations from other states, at least in the sense of permitting them to do business without further qualification.[58] The denial of such power runs counter to one reading of suggestions in *Rocla* and is not easy (although not impossible) to square with the historical material on section 51(xx) that the majority used in the *Incorporation* case.[59]

An argument for the majority view like any of the kind just rehearsed attempts to work out where the corporations power fits in a *federal* constitution. It doubtless tends to move in the same way, if not to the same effect, as the older doctrines of federalism embodied in cases like *Huddart Parker*. However, such an argument potentially offers more of a guide than the majority opinion does to the implications of its holding for the balance of the Commonwealth's National Scheme. Thus, consider whether Commonwealth control over capital raising by the corporation is unsustainable under the corporations power because it is too much a part of the process of giving life to the corporation.[60] As it stands, the majority opinion tells us nothing about this, although if we are to follow Justice Isaacs judgment in *Huddart Parker*, the Commonwealth does lack this power. The arguments rehearsed here however, would tend to sustain the Commonwealth's position in the Corporations Act, a result which appears likely on the other authorities under section 51(xx) with their

58. See C Howard *Australian Federal Constitutional Law* 2nd edn (Sydney: Law Book Co, 1972) 415-416 (this discussion does not re-appear in Howard's 3rd edn supra n 6). However, the Commonwealth would have some authority in this respect under its trade and commerce power, s 51(i); see also (Cth) Constitution s 92. The recognition point is also different from the question whether or not the law of the state in which a company is incorporated regulates corporate law issues arising in respect of an admitted out-of-state corporation. In fact, in the US all states take the position that they can require other states' corporations to "qualify" to do business locally; and some states apply part of their own incorporations regime to out-of-state corporations with a substantial local presence ("pseudo-foreign" corporations): see Klein and Coffee supra n 52, 134.

59. See Howard supra n 58, 415-416, discussing *Rocla*.

60. A concern Canadians have felt is whether the control of new capital raising in provincial securities regulation can reach federal corporations: see T Hadden R E Forbes and R L Simmonds *Canadian Business Organizations Law* (Toronto: Butterworths, 1984) 487.

expansive notion of what can be regulated by Commonwealth law, and their concomitant relatively undemanding tests for characterisation.[61] Of course, the precise point is settled by the new agreement between the Commonwealth and the States: the system of Commonwealth legislation for the Australian Capital Territory applied by State law locally, from the Co-operative Scheme, will be continued with some modifications.[62]

V. CONSTITUTIONALISM IN AUSTRALIA

The last line of analysis raises questions about the sort of contribution the High Court could be making to the debates about constitutionalism in Australia, questions which the Federal Government is keen to put back on the political agenda.[63] Members of the High Court appear to have allowed for it a greater role in providing material that would be useful in such debates.[64] However, simply at the level of advocacy in constitutional cases, it is unfortunate that lawyers, anxious to respond to the challenge that those members of the Court have issued, to go beyond the "legalism" of prior styles of argument, get little guidance on this account from the justices' opinions. What sort of analysis is to be deployed when "plain meaning" is not enough?[65] The *Incorporation* case has resolved a precise point of constitutional law, but contributed no illumination beyond that.

61. The principal authority here on both points is *Tasmanian Dam* supra n 24. See also supra n 23, 685-686.
62. See the Heads of Agreement supra n 7, cl 26 ("Applied Laws Scheme").
63. See the address by the Prime Minister R J Hawke to the National Press Club, Canberra, 19 July 1990.
64. See supra n 49.
65. See Horrigan supra n 49, who introduces the issues raised, but does not attempt to resolve them. For more elaborate discussions, see M Coper "Interpreting the Constitution: A Handbook for Justices and Commentators" in A Blackshields (ed) *Legal Change: Essays in Honour of Julius Stone* (Sydney: Butterworths, 1983) 52; M Coper "The Place of History" in G Craven (ed) *Constitutional Interpretation in the Convention Debates 1891 - 1898: Commentaries, Indices and Guide* (Sydney: Legal Books, 1986) 5; H Burmester "The Convention Debates and the Interpretation of the Constitution" in Craven ibid, 25; L Zines *The High Court and the Constitution* 2nd edn (Sydney: Butterworths, 1987) 341-386; J Thomson "Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes" (1982) 13 MULR 597; and J Thomson "Constitutional Interpretation: History and the High Court: A Bibliographical Survey" (1982) 5 UNSW LJ 309.