

THE IMPACT OF HIGH COURT DECISIONS ON THE GOVERNANCE OF AUSTRALIA

I regard it as a great honour to be asked to give the annual Hal Wootten Lecture. Hal Wootten has been one of the most significant figures in Australian legal history. He was a practising barrister who became a Queens Counsel and the leader of the Industrial Bar. He was an innovative Supreme Court judge for 10 years. As Royal Commissioner into Aboriginal Deaths in Custody, he brought home to the consciousness of the Australian people that the real issue was not why so many Aboriginals were dying in prison – whether by suicide or otherwise - but why so many Aboriginals were in prison. These were great achievements. Nevertheless, many knowledgeable lawyers would say that his greatest legal achievement was developing this Law School and the Aboriginal Legal Service which commenced shortly after its foundation. That is because the object for which this Law School was founded will continue to be achieved long after those of us present tonight have gone.

Lawyers and many others assume that he came to the Law School to achieve social justice for disadvantaged groups. No doubt that was one of the objects. But it would be more accurate to say that his purpose in coming to the Law School was to achieve justice for all. As he has been at pains to point out publicly, he saw a major object of a Law School as producing lawyers who would see the legal profession as having a duty to serve the whole of society. That meant

producing lawyers who had the ability to meet the needs of business, governments and ordinary citizens as well as disadvantaged groups like Aboriginals. No one who has studied or had contact with the graduates of this Law School could fail to notice that they are persons who fulfill the goal that Hal Wooten set himself when he founded this Faculty. I am proud to say that my first Associate as a High Court Justice was a graduate of this Law School and she was far from the last UNSW graduate that I employed as an Associate.

But Hal Wootton's public service has not been confined to the law. In addition to his many legal achievements, he was President of the Australian Conservation Foundation and Chairman of the Australian Press Council, positions I am sure he loved and but was forced to give up by circumstances beyond his control. He had to give up the presidency of the Australian Conservation Foundation because of his appointment as Royal Commissioner; he had to give up on his chairmanship of the Australian Press Council as a matter of principle because he believed it was wrong for the Press Council to fail to object to Mr Rupert Murdoch owning 70% of the Australian print media.

All his life, Hal Wootten has been interested – perhaps even obsessed – by the desire to see justice for all. I am proud to give the 2007 Lecture which is held in honour of this great man, a description that I am sure he would reject and that embarrasses him but which is nevertheless true.

The thesis of my Lecture is that decisions of the High Court of Australia have had an enormous impact on the way that Australia has been and is governed. In 2005, Justice Anthony Kennedy of the United States Supreme Court asserted that that Court “in any given year, made more important decisions than the legislative branch does – precluding foreign affairs, perhaps”. The Supreme Court’s decisions were important, he said, in the sense that they “control the direction of society.” It may be going too far to say that the decisions of the High Court of Australia are more important in that sense than those of the federal Parliament or the State legislatures. Unlike the United States Supreme Court, the High Court is not called on to interpret a Bill of Rights. Nevertheless, the decisions of the High Court shape the way that Australia is governed. High Court decisions lay down the boundaries and the conditions for the exercise of State and federal legislative and executive power. The Court’s decisions have produced a distribution of legislative power between the States and the Commonwealth that the Framers of the Constitution most probably did not intend and could not have envisaged. As a result, the governance of Australia today is probably far removed from that contemplated by the Framers of the Constitution and the electors of the six Colonies who approved, by referenda, the Bill that became the Commonwealth of Australia Constitution Act, 1900.

Inevitably, in laying down the boundaries of State and federal legislative power during the last 104 years, the High Court has frustrated the legislative policies of political parties of the Left, the Right and the Centre. Notable examples include the invalidation of

the Bank Nationalisation legislation of the Labor Party, the Communist Party Dissolution legislation of the Liberal and Country Parties and the fair and reasonable conditions of employment legislation enacted by the Liberal Protectionist party of the Centre in the early years of federation. High Court decisions on the common law have also often forced the federal and State legislatures to enact controversial and politically divisive legislation to overcome those decisions. The decisions in *Mabo* and *Wik* are recent examples.

If many High Court cases had been decided the other way – and many lawyers agree that they could reasonably have been decided the other way - Australia would be a very different country politically from what it is today. The States would be as important – perhaps more so – than the Commonwealth. State Premiers would vie with the Prime Minister for political importance. Federal laws could not bind the States and their employees. Nor, in most cases, could the operation of federal laws extend into internal State matters. As a general rule, for example, they could not affect trade or commerce within a State. Trade practices legislation would not be able to deal with commercial transactions taking place solely within a State. Interstate road hauliers could compete with State railways only to the extent that the States in their discretion permitted them to compete. The Work Choices legislation, so controversial today, could not exist in its present form. The Court of Conciliation and Arbitration could not have conducted National Wage Cases, as it did throughout the second half of the 20th century. Indeed, it could have regulated the terms and conditions of employees only in respect of those

employees who had been involved in strikes that extended beyond the limits of more than one State. Mere claims for improved wages and conditions - no matter how widespread - could not have been the subject of federal arbitral power, a power which could have been invoked only in consequence of industrial action. Television and radio might well be controlled by the States, not the Commonwealth. So would company law. Australians would be subjected to both State and federal income taxes, as they were until 1942. There would only be one bank – the Commonwealth Bank, the private banks having been nationalized – although, of course, more recent governments may have privatized it. The Communist Party would be banned. The Franklin River would not have been saved; anti-discrimination laws would have a narrow operation and could not regulate acts of discrimination, involving age, race, sex or disability, taking place solely within the borders of a State. The Commonwealth power to make grants of money to the States and other bodies subject to conditions would have been limited. It is very likely that the control over Universities now exercised by the Commonwealth would not have been possible if the High Court had accepted the argument of Robert Menzies appearing for the State of Victoria in a case decided in 1926¹.

Each of these results and others of a like nature may seem fantastic to Australians living in the first decade of the 21st century. Given the Prime Minister's speech on federalism on Monday, he for one would not have welcomed them. But, if the High Court's interpretation of the

¹ *Victoria v Commonwealth* (1926) 38 CLR 399.

Constitution had not changed dramatically in 1920, many of them probably would have ensued. What is more, they would have been results that probably, but not certainly, a majority of the Framers of the Constitution would have envisaged and of which they would have approved. Of course, such decisions may have led to referenda to change the Constitution or the States may have agreed to refer their powers to the Commonwealth. But absent such initiatives, the political landscape of Australia, resulting from different High Court decisions would be very different from what it is today.

To understand why this would be so, it is necessary to say something about the nature of the Constitution of the Commonwealth of Australia which is the basis of government in this country, the role of the High Court in the federation of Australia and the changing approach to constitutional interpretation by the High Court. I hope the non-lawyers present will forgive this part of the discussion, but I think it is unavoidable if I am to make clear the basis of the thesis of this Lecture.

For the most part, the Constitution is a deceptively simple document distributing legislative power between the Commonwealth and the States. Its scheme is to list the subjects upon which the Commonwealth can legislate and to leave the residue of legislative power of the nation to the States. Moreover, with limited exceptions, the powers conferred on the Commonwealth are not exclusive. The States retain the power to legislate in respect of the same subject matters as well as the vast range of subjects over which the

Commonwealth has no legislative power. However, where a law of a State is inconsistent with a law of the Commonwealth, the Constitution provides that the Commonwealth law prevails and the State law to the extent of the inconsistency is invalid². In a few cases the Constitution withdraws legislative power from the Commonwealth or the States or both. In a few cases, it also provides guarantees for individuals, such as the guarantee that the Commonwealth cannot acquire a person's property except on just terms. One of the Constitution's notable omissions is a Bill of Rights. The Commonwealth Constitution has no counterpart to the Bill of Rights of the United States Constitution.

The Constitution consists of eight Chapters which now contain 129 sections. Chapter 1 is concerned with the Parliament of the Commonwealth. Section 51 and 52 confer legislative powers on the federal Parliament. Section 51 – the key legislative section - sets out 40 subjects upon which Federal Parliament may legislate. Speaking generally, they deal with subjects that a State legislature could not deal with as efficiently as the national legislature. They include matters such as trade and commerce with other countries and between the States, taxation, borrowing money on the public credit of the Commonwealth, the defence of the Commonwealth, census and statistics, currency, banking, insurance, foreign corporations and trading and financial corporations formed within the limits of the Commonwealth, bankruptcy and insolvency, copyrights, patents and trademarks, naturalisation and aliens, immigration and emigration,

² *Constitution*, s.109.

external affairs, marriage and divorce, the service and execution of civil and criminal process and judgments of the courts of the States, and conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

Section 52 gives the Parliament a small number of exclusive powers that are not relevant to this Lecture. But the scheme of the Constitution is that it is the States, and not the Commonwealth, that has legislative power over most subject matters. This is, and always has been, a source of frustration to Federal politicians of all political parties.

Chapter II of the Constitution is concerned with the Executive Government of the Commonwealth. Section 61 vests the executive power of the Commonwealth (simply another name for the administrative power of the Commonwealth) in the Queen and declares that it is exercisable by Governor General as her representative. In practice, it is exercised by the Ministers and their Departments.

Chapter III of the Constitution is concerned with the Judiciary. Section 71 vests the judicial power of the Commonwealth in the High Court and in such other federal courts as the Parliament of the Commonwealth creates or vests with federal jurisdiction. These courts are colloquially called Chapter III courts.

In distributing the legislative, executive and judicial power of the Commonwealth to three separate organs of government, Chapters 1,

II and III of the Constitution give effect to the political doctrine of the separation of powers. Without the separation of judicial power from legislative and executive power and the setting up of courts to exercise judicial power, a federal constitution can hardly work effectively. Vesting judicial power in an organ separate from the Parliament and the Executive, if not a necessity in a federation, is certainly desirable. It was to make the Constitution work and to ensure that the States and the federal Parliament stayed within the powers which the Constitution allots to them, that the Framers of the Constitution created a federal judiciary with the responsibility of exercising the judicial power of the Commonwealth. As the High Court has said³ upon the judiciary rests the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power is exercised and upon which the whole constitutional system was constructed.

What then is judicial power? Although the line between legislative and executive power is fairly clear, the line between legislative and executive power on the one hand and judicial power on the other is not so easy to draw. An exhaustive definition of judicial power has proved elusive. But the definition given by Chief Justice Griffith in an early case is often quoted and, for most purposes, is an accurate enough description. He said⁴ in effect that judicial power means the power of a tribunal or authority to give a binding and authoritative decision concerning disputes between individuals or disputes

³ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 272.

⁴ *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

between governments and individuals - whether the disputes relate to life, liberty or property.

Some of the delegates at the Constitutional Conventions were well aware of the enormous power that they were placing in the hands of the Justices of the High Court. Isaac Isaacs, a delegate to the Constitutional Conventions who was later appointed to the High Court, correctly told the other delegates that the Justices of that Court would have just as much to do in shaping the Constitution as the members of the Convention⁵. Sir John Downer, a South Australian delegate of the member of the Drafting Committee said⁶ that with the Justices of the High Court “rest the vast powers of judicial decision, in saying what are the relevant functions of the Commonwealth and of the States.” He went on to make the Delphic statement that “[w]ith them rest the interpretation of intentions which we may have in our minds, but which have not occurred to us at the present time.”

As long ago as 1915, the High Court held that investing the judicial power of the Commonwealth in the courts was a fundamental principle of the Constitution from which it followed that federal judicial power could be exercised only by Chapter III courts. In a case known as the *Wheat Case*⁷, Isaacs J, by then a member of the High Court, said⁸ “the distinct command of the Constitution is that whatever

⁵ *Convention Debates*, Melbourne, 1898, Vol IV at 283.

⁶ *Convention Debates*, Melbourne, 1898, Vol IV at 275.

⁷ *New South Wales v Commonwealth* (1915) 20 CLR 54.

⁸ *New South Wales v Commonwealth* (1915) 20 CLR 54 at 89-90. It

judicial power... is to be exerted in the name of the Commonwealth, must be exercised by these strictly so called judicial tribunals". By insisting that the Chapter III courts, and those courts alone, can exercise the judicial power of the Commonwealth, the High Court has withdrawn from the federal Parliament, the executive government of the Commonwealth and the States the power to determine the boundaries of their powers. Exclusively vesting the High Court and the courts exercising federal jurisdiction with the judicial power of the Commonwealth means therefore that the limits of legislative and executive power of governments in this country rests with the Chapter III courts. And, in practice, given the constitutional right of appeal to the High Court of Australia, it is that Court which must ultimately determine what the State and federal governments of Australia, their agencies and their officers and employees can do. By any standard, the Constitution has invested the Chapter III courts, particularly the High Court, with an awesome power.

How then has the High Court exercised its judicial power to interpret the Constitution? A judicial decision is, or should be, based on reasons that show the legal principles that were applied to decide the case. Until 1920, the Court approached the interpretation of the Constitution in accordance with two basic principles, each of which disadvantaged the Commonwealth and protected the States and their citizens from the encroachment of Commonwealth legislation. The first of these principles was that the Constitution gave the States and their agencies immunity from the operation of Commonwealth laws

and the Commonwealth and its agencies immunity from State laws. This principle was known as the doctrine of the immunity of instrumentalities. Under this doctrine, a federal law could not bind a State or its agencies and a State law could not bind the Commonwealth or its agencies. This meant of course that the States, their agencies and their public servants in their capacities as public servants were not bound by federal law. Early in its history, the High Court invoked the doctrine of immunity of instrumentalities to hold that a State union representing State employees could not be registered under the *Commonwealth Conciliation and Arbitration Act* and that, to the extent that the Federal Parliament had enacted such a law, it was invalid⁹. The Court held that State Railways were State instrumentalities and that the Commonwealth had no legislative power to fetter, control or interfere with the State and its railways – whether by setting wages or otherwise - unless the Constitution so provided. That meant that there could be no federal industrial awards in respect of State railways or any other State agency.

The second principle of constitutional interpretation was more far reaching. It was drawn from a perceived implication of the Constitution. The powers conferred on the Commonwealth by the Constitution are conferred "subject to this Constitution". And section 107 of the Constitution declares that every power of the Parliament of a Colony which became a State would, subject to two exceptions, continue as at the establishment of the Commonwealth. The first

⁹ *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees' Association* (1906) 4 CLR 488. and

Justices of the High Court said in effect: if Constitution says the powers of the States are to continue, and the Commonwealth powers are subject to the rest of the Constitution, it must follow that Commonwealth powers cannot interfere with matters that are subject to continuing State powers. If it were otherwise, the paramountcy of federal statutes would render impotent the State laws made in exercise of the powers – which the Constitution expressly saves. This would be a contradiction. Hence, the implication was drawn that s.107 reserved the powers of the States unless the Constitution had expressly taken them away. Consequently, the Commonwealth legislative powers in s.51, being conferred subject to the Constitution, had to be read subject to this continuing guarantee of State power. This became known as the reserved powers doctrine. Thus, because the Constitution gave the federal Parliament no express power over intra-State trade and commerce, for example, the High Court held it could not legislate so as to affect intra-State trade and commerce which was reserved to the States.

Listen to what the High Court's first Chief Justice, Sir Samuel Griffith, had to say about the reserved powers doctrine in one of the first constitutional cases to come before the High Court. Criticising the Supreme Court whose decision was the subject of the appeal, he said¹⁰:

“If the majority of the Supreme Court were right, the Constitution would have given to the Commonwealth, and withdrawn from the

¹⁰ *Peterswald v Bartley* (1904) 1 CLR 497 at 507.

States, the power to regulate their internal affairs in connection with nearly all trades and businesses carried on in the States. Such a construction is altogether contrary to the spirit of the Constitution, and will not be accepted by this Court unless the plain words of its provisions compel us to do so."

What Sir Samuel Griffith said represented the judgment of the High Court which consisted of himself, Justice Barton and Justice O'Connor. What is significant is that each of them had played a prominent part in the drafting of the Constitution. As is well-known, Sir Edmund Barton was one of the driving forces behind Federation and the enactment of the Constitution. At least, so far as these three Justices were concerned, the Constitution was not intended to give the Commonwealth power over acts, matters and things that occurred within a State unless the Constitution made it plain that that was what was intended. On their view, the Commonwealth was intended to be a government of very limited powers, indeed.

In the first 10 years of Federation, the doctrine of reserved powers was used to strike down sections of legislation that gave effect to major aspects of the policy of the Deakin Liberal Protectionists and the Labor Party. In *The King v Barger*¹¹, the High Court held invalid sections of the *Excise Tariff Act* 1906 which required the defendants to pay excise duties and penalties for not providing fair and reasonable conditions of employment entitling them to exemption from the excise. Griffith CJ, Barton and O'Connor JJ held¹² that the exclusive power of the Federal Parliament to impose duties of excise

¹¹ (1908) 6 CLR 41.

¹² (1908) 6 CLR 41 at 77.

could not be construed to deprive the States of the exclusive power to regulate the conditions of labour employed in manufacturing industries. In what is known as the *Union Label Case*¹³, the doctrine of reserved powers was one of the reasons why the Court held invalid Part VII of the *Trade Marks Act* 1905 which provided for the registration of labels as trade marks to indicate that the goods were made by union labour. In *Huddart, Parker & Co Pty Ltd v Moorehead*¹⁴, the High Court held invalid two sections of the *Australian Industries Preservation Act* 1906 which was a modified form of trade practices legislation. Griffith CJ, Barton and O'Connor JJ held that the relevant sections of the legislation were invalid because, in the words of Barton J, their object was to enter “the domestic or internal commerce of the States¹⁵.”

These two principles of interpretation – the immunity of instrumentalities and the reserved powers of the States - erected impenetrable barriers to Commonwealth legislation. Their application meant in most cases that federal legislation was invalid if it affected the workings of State governments or regulated matters internal to the individual States. If the High Court had adhered to these two principles of constitutional interpretation, Commonwealth legislative power would not have the reach that it has today.

Indeed, it is difficult to see how the Commonwealth could have enacted much of the legislation that it has in the last 100 years if the

¹³ *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469.

¹⁴ (1909) 8 CLR 330.

¹⁵ (1909) 8 CLR 330 at 361.

reserved powers doctrine had survived. Take for example the Federal legislation passed to save the Franklin River and which was the subject of the decision in the *Tasmanian Dams Case*¹⁶. If the reserved powers doctrine had survived, Mr Robin Gray, the Premier of Tasmania, could have said to the Commonwealth, the Constitution gives you power to legislate with respect to external affairs and you may use that power to enter into treaties to preserve World Heritage listed items. But laws with respect to rivers, dams and the environment are reserved to the States. If you wish to preserve the Franklin River as a World Heritage listed site, you can only do so if you can persuade Tasmania to pass legislation preserving it. Your external affairs power gives you no constitutional authority to pass federal laws to save the Franklin. Take also the *Racial Discrimination Act* which the High Court upheld in 1982 in *Koowarta v Bjelke-Petersen*¹⁷. Sir Joh Bjelke-Petersen could have said to the Commonwealth, your external affairs power gives you no authority to enact racial discrimination laws that operate on conduct within Queensland. Even if our laws discriminate against Aboriginal people, that is a matter for the Queensland legislature, not the federal Parliament.

Fortunately, for the development of this nation, both the doctrine of the immunity of instrumentalities and the doctrine of reserve powers were overruled in 1920 in what has come to be regarded as the

¹⁶ (1983) 158 CLR 1.

¹⁷ (1982) 153 CLR 168.

greatest of Australian constitutional cases - the *Engineers Case*¹⁸. The case was brought by the Amalgamated Society of Engineers to determine whether the Commonwealth Court of Conciliation and Arbitration had jurisdiction over an industrial dispute extending beyond the limits of any one State in a case where a number of employers were State instrumentalities. Ironically, the union was represented by the brilliant 25-year-old Melbourne barrister, RG Menzies. He persuaded the Court - although a majority of its members did not need much persuasion - that the doctrine of immunity of instrumentalities should be overruled. That had the result that the States could be bound by federal industrial awards. But the High Court went further. It also overruled the reserved powers doctrine.

I have said that the Court did not need much persuasion to overrule these two doctrines. That was because by 1920 the composition of the High Court had changed dramatically. The three original members of the court - Griffith CJ, Barton and O'Connor JJ - had gone. Adrian Knox, a leading New South Wales barrister, had been appointed Chief Justice in 1919. Sitting with him were Isaacs and Higgins JJ who had been appointed to the Court as additional Justices in 1906 and who had frequently dissented from the rulings of Griffith CJ, Barton and O'Connor JJ in constitutional cases over the previous 13 years. Isaacs and Higgins had been at the Constitutional Conventions which had resulted in the framing of the Commonwealth Constitution. But their vision of the Constitution was different from

¹⁸ *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129..

that of Griffith, Barton and O'Connor. They were decidedly pro-Commonwealth, especially Isaacs. Also on the Court in 1920 were three other Justices, Rich, Gavan Duffy and Starke, none of whom had played any part in drafting the Constitution.

In the result, the High Court by a six to one majority held that the Court of Conciliation and Arbitration had jurisdiction to make Federal industrial awards binding on State governments and their instrumentalities. The Chief Justice and Justices Isaacs, Rich and Starke gave a joint judgment which was delivered by Justice Isaacs and the greater part of which he undoubtedly wrote. Higgins J gave a separate judgment and Gavan Duffy J. dissented. I will refer to the joint judgment as the Court's judgment because that is how it has been treated ever since.

The Court declared that the correct approach to constitutional interpretation is to construe the words of the Constitution in accordance with the ordinary and traditional principles of statutory construction. That is, the Court has to look at the natural and ordinary meaning of the words without any preconceptions, whether as to the reserved powers of the States or otherwise. In rejecting the reserved powers doctrine, the Court said¹⁹ it was "an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact" and which was not the result of interpreting any specific language of the Constitution.

¹⁹ *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 145.

Applying these principles of interpretation to the Commonwealth's power to make laws with respect to industrial disputes extending beyond the limits of any one state, the Court said it was "in terms so general that it extends to all industrial disputes in fact extending beyond the limits of any one State, no exception being expressed as to industrial disputes in which States are concerned". The Court went on to declare²⁰:

"We therefore hold that States, and persons natural or artificial representing States, when parties to industrial disputes in fact, are subject to Commonwealth legislation... if such legislation on its true construction applies to them."

Commentators have been almost in unanimous in criticising the joint judgment as poorly constructed and containing unsatisfactory reasoning. Although I think the decision was correct, I agree with these criticisms. But *Engineers'* has been accepted by the High Court and followed for nearly 90 years, and its statements of constitutional principles underpin the valid operation of most Commonwealth legislation.

It is not open to doubt that the *Engineers'* Case principles changed the governance of Australia from a nation principally regulated by State governments to a nation that would be principally regulated by the Commonwealth. The basic message of *Engineers'* is that constitutional interpretation must begin and end with the text and

²⁰ *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 155.

structure of the Constitution and the text must be given its natural and ordinary meaning. Hence, once Commonwealth legislation can be regarded as falling within a subject of Commonwealth power, the legislation is valid unless there is some other provision in the Constitution that prevents the subject matter of Commonwealth power being given its natural and ordinary meaning.

Since the *Engineers' Case*, the High Court has also given an expansive meaning as to what activities fall within a subject of Commonwealth power. That has had the effect of extending the operation of *Engineers'* principles. A Commonwealth power is not limited to acts, matters or things that form the basis of the subject. Laws with respect to trade and commerce, for example, are not limited to the transactions that constitute trade or commerce. The High Court has said that "every legislative power [of the Commonwealth] carries with it the authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it the power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter." As history has proved, this principle has extended Commonwealth power into areas that would otherwise be matters for the States to control. In addition, the Commonwealth's legislative position has been strengthened by the fact that its laws are valid if they are made in the constitutional phrase "with respect to" a subject of Commonwealth power. The High Court has said²¹ that the phrase "with respect to" "ought never be neglected in considering the

²¹ *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

extent of the legislative power conferred” on the Commonwealth and that a law is a law "with respect to" a subject of Commonwealth power if it has a relevance to or connection with that power.

The effect of these principles on the governance of Australia can be seen in the Commonwealth’s power to legislate with respect to trade or commerce which is expressly limited to interstate or overseas trade or commerce. The High Court has held that this power is not limited to transactions that are directly involved in interstate or overseas trade or commerce. *O’Sullivan v Noarlunga Meat Ltd*²² is the leading decision of the High Court on this matter. There the Court said²³ that "all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia must be the legitimate concern of Commonwealth.” That is because the Commonwealth’s power extends to all things the control of which is necessary to effectuate the commerce power. As a result of this interpretation of the trade and commerce power by the High Court, although the Commonwealth has no express constitutional powers over abattoirs, factories, mines or land used for agriculture, if those places produce goods for export – whether interstate or overseas, the Commonwealth may make laws licensing those places and laying down conditions concerning the grade and quality of the goods, their packing, description, labeling, handling and similar matters. Indeed, the High Court has said that the Commonwealth may make laws concerning “anything at all that may

²² *O’Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565.

²³ *O’Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 598.

reasonably be considered likely to affect an export market by developing it or impairing it."

*O'Sullivan v Noarlunga Meat Ltd*²⁴ and the principles upon which it is based has given the Commonwealth control or potential control over large areas of production, a subject over which the Commonwealth has no express constitutional power. Most businesses of any size seek to export their goods interstate if not overseas. But once a business decides to do so, it comes within the scope of any relevant Commonwealth legislation. In this way, the activities of businesses - whether conducted by corporations or individuals - pass out of the control of the State and come under the control of the Commonwealth.

This interpretation of Commonwealth powers by the High Court therefore permits Commonwealth legislation to intrude into many areas of social and business activity that at first sight appear to be purely State matters. Moreover, if there are State laws on the subject and they conflict with the Commonwealth law, the State law becomes inoperative. And the application of this extended interpretation of Commonwealth powers is not confined to the trade and commerce power. It applies to all Commonwealth powers. For example, the Commonwealth has power to make laws with respect to immigration and emigration but its power goes beyond regulating the acts of immigrating or emigrating. The High Court has held²⁵ that the

²⁴ *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565.

²⁵ *Cunliffe v Commonwealth* (1994) 182 CLR 272.

principles to which I have referred permit the Commonwealth to prohibit persons giving advice on the subject of immigration or emigration unless they are licensed by the Commonwealth to do so.

However, the expansive nature of the trade and commerce power and many other Commonwealth powers has become of less significance in recent years, if indeed it has not become redundant, because of the High Court's interpretation of the corporations' power. The Constitution gives the Commonwealth power to make laws with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". Early attempts by the Commonwealth to rely on this power fell foul of the reserve powers doctrine. As a result, the corporations' power was moribund for 60 years.

In *Huddart, Parker & Co Pty Ltd v Moorehead*²⁶, which was decided in 1909, all members of the High Court except Isaacs J. held invalid sections of the *Australian Industries Preservation Act* 1906 which was a modified version of trade practices legislation and relied at least in part on the corporations power. In the words of Barton J, their object was to enter "the domestic or internal commerce of the States"²⁷. I need hardly add that the controversial *Work Choices* legislation of the present federal government, which relies almost wholly on the corporations' power, could not have been enacted if *Huddart Parker* had remained the law.

²⁶ (1909) 8 CLR 330.

²⁷ (1909) 8 CLR 330 at 361.

In 1971, however, the High Court overruled *Huddart Parker* in *Strickland v Rocla Concrete Pipes Ltd*²⁸ and upheld the validity of the *Trade Practices Act* 1965. Since the decision in *Strickland*, it has been no bar to legislation relying on the corporations' power that it enters the domestic or internal commerce of the States. The only question has been what aspects or activities of a corporation fall within the corporations' power? Since *Strickland*, it has not been doubted that the power extends to the regulation and the protection of the trading activities of trading corporations²⁹. Nor has it been doubted that Commonwealth laws that regulate the activities, functions, relationships or business of corporations is within the power³⁰. Given that corporations are at least on one side of most business, employment and many other relationships, the interpretation that the High Court has given to the corporations' power since 1971 effectively enables the Commonwealth to regulate every aspect of the Australian economy and no doubt much more. And as the *Work Choices* legislation shows, it is highly likely that the Commonwealth will increasingly utilise this power to do so. For the first time, by invoking the corporations' power in that case, the Commonwealth was able to legislate for industrial matters without relying on its expressly conferred power to make laws for industrial disputes extending beyond the limits of any one State. Only intra-state business or employment relationships between individuals now lie outside the scope of Commonwealth legislative power. And, of

²⁸ (1971) 124 CLR 468.

²⁹ *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1 at 148.

³⁰ *Re Dinjan: Ex parte Wagner* (1995) 183 CLR 323 at 368.

course, there are other subjects of Commonwealth power that can be used to regulate many individual business, employment or social relationships. The interpretation of the corporations' power is a dramatic illustration of how High Court decisions and reasoning can change the way that Australia is governed.

It is ironic that the High Court's interpretation of the corporations' power has now made the industrial disputes power basically redundant because the High Court's interpretation of the industrial disputes power was itself highly creative. As Professor Wooten will recall, for the first 80 years of Federation, that power was at the centre of much political and constitutional controversy. Indeed, the policy speech of the Prime Minister, Mr Stanley Bruce, made industrial arbitration the sole issue in the 1929 federal election at which he lost his seat. Bruce is the only Prime Minister so far to have lost his seat at a federal election.

The industrial power was put into the Constitution because the great maritime and shearing strikes of the 1890s had shown it was very difficult for a colony to effectively settle an industrial strike when the dispute spread across its borders to another colony. It seems probable that the Framers of the Constitution thought that the industrial disputes power would principally be used for the purpose of settling strikes that spread over State borders. But the ingenuity of lawyers and the trade unions took advantage of Commonwealth legislation enacted to settle interstate disputes by bringing into existence industrial disputes that were created by paper

communications. The legislation had authorised the registration of unions and associations of employers on the ground that to do so would facilitate the settlement of industrial disputes. The unions and their lawyers hit upon the device of the union sending a log of claims to employers in two or more States. Despite the early opposition of Griffith CJ, the High Court held that these logs of claim, often making outrageous claims for wages and other conditions of employment, created industrial disputes that extended beyond the limits of any one State. As Dixon J. pointed out in the *Metal Trades Case*³¹, this had the "curious consequence" that unions "existing under a law upheld on the ground that their formation and registration conduced to the easier and more permanent settlement by conciliation and arbitration of disputes independently arising, have come to be the instruments for propounding the claims by which industrial disputes are created". In the course of time, High Court decisions held that there could be a dispute between a union and interstate employers even if no members of the union were employed by those employers³². The Court extended the scope of the industrial disputes power further by holding that an industrial award bound the successors and assigns of a business as well as the original employer³³. Then the High Court extended the industrial disputes power further still by holding in the *Burwood Cinemas* case that a union could create an industrial dispute with employers in an industry even though all of the employees of certain employers were satisfied with their employment conditions and even though some of the employers did not employ

³¹ *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387 at 428.

³² *Australian Timber Workers Union v on John Sharp & Sons Ltd* (1919) 26 CLR 302.

³³ *George Hudson Ltd v Australian Timber Workers Union* (1923) 32 CLR 413.

any of the union's members³⁴. The final extension of the power came in the *Metal Trades Case*³⁵ where the High Court held that it was open to the Court of Conciliation and Arbitration to make an award binding on employers - who did not employ union members - as to the terms of employment of all employees including non-unionists. Ultimately, this creative interpretation of the industrial disputes power by the High Court led to the annual National Wage Case which for many years played an important part in the operation of the Australian economy. It also had the effect that more and more unions moved into the federal sphere eventually leaving the industrial tribunals of the States with little jurisdiction in industrial matters. No doubt this centralisation of industrial matters was good for the economy, good for employers and good for union members because it tended to create uniformity of industrial conditions. But that said, the creative interpretation by the High Court of the industrial disputes power gave it a reach and significance that the Framers of the Constitution could not have envisaged or intended and reduced the power of the States to control industrial matters to insignificant levels.

The High Court's interpretation of those provisions of the Constitution dealing with financial matters has also had a dramatic effect on the way that Australia is governed. Section 96 of the Constitution in particular has proved influential. It declares: "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant

³⁴ (1925) 35 CLR 528.

³⁵ *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387.

financial assistance to any State on such terms and conditions as the Parliament thinks fit." As the opening words of the section indicate, it was intended to be "(1) a transitional provision, (2) confined to supplementing the resources of the Treasury of a State by particular subventions when some special or particular need or occasion arose, and (3) imposing terms or conditions relevant to the situation which call for special relief of assistance from the Commonwealth³⁶." But, aided by a liberal High Court interpretation, it has long been the medium by which the Commonwealth can regulate activities within the States that its legislative powers - even on the broadest interpretation - can not regulate.

In 1926, the Commonwealth passed the *Federal Aid Roads Act* empowering the making of agreements with the States to make or remake roads with Commonwealth financial support. Victoria and South Australia challenged the validity of the legislation³⁷. Mr R. G. Menzies appeared for Victoria. He argued³⁸ that the legislation was invalid because in substance it was legislation dealing with the construction and reconstruction of roads over which the Commonwealth had no power. He also argued that the terms and conditions referred to in section 96 "must be terms and conditions imposed by the Parliament itself and not terms and conditions fixed by executive authority." The Court dismissed his arguments peremptorily in a judgment of six lines, which must be the shortest constitutional judgment in the history of the High Court. Since this

³⁶ *Victoria v Commonwealth (Second Uniform Tax Case)* (1957) 99 CLR 575 at 609.

³⁷ *Victoria v The Commonwealth* (1926) 38 CLR 399.

³⁸ *Victoria v The Commonwealth* (1926) 38 CLR 399 at 405.

case, Justices of the High Court have taken the view that the validity of the grants made under section 96 are not reviewable by the courts and permit the Commonwealth to make such grants and to impose such conditions as it thinks proper.

The Commonwealth has used the grants power on numerous occasions to give financial assistance to the States. Invariably, attached to these “special purpose grants” is a condition that the State must legislate or act to carry out some policy that the Commonwealth desires but it is unable itself to achieve directly by its own legislative powers. Although the better view³⁹ of s.96 is that the Commonwealth cannot impose legislative sanctions for failing to carry out or refusing to accept the conditions, the financial assistance acts as a carrot that induces the States, hungry for revenue, to do what the Commonwealth wants.

Section 96 was the means by which the Commonwealth originally implemented its policies in relation to university education, education being a subject over which the Commonwealth has no legislative power. As one critic of the grants process has pointed out when grants “have depended on unilateral decisions by federal governments which have broken the link between spending and taxation decisions for both granting and recipient governments, there has been a loss of accountability and a weakening of democratic control over all the governments concerned⁴⁰.” In recent years,

³⁹ *Victoria v Commonwealth (Second Uniform Tax Case)* (1957) 99 CLR 575 at 609.

⁴⁰ *Mathews, Revenue Sharing in Federal Systems* (1980) at 11.

however, the Commonwealth has become bolder in funding education and other subjects. It no longer appears to rely on section 96 but simply grants money directly to various institutions and organisations, presumably under section 81 of the Constitution which enables the Commonwealth to appropriate moneys from the Consolidated Revenue Fund "for the purposes of the Commonwealth". Whether this is constitutionally valid remains to be decided.

The s.96 grants' power played an important part in the establishment of the uniform income tax system imposed by the Commonwealth. Before 1942, there was both a Commonwealth and a State income tax with the States collecting the Commonwealth income tax on behalf of the Commonwealth. In 1942, however, the Commonwealth introduced four pieces of legislation as a scheme. One Act imposed Commonwealth income tax at high rates. The second Act, relying on the grants power, provided that, if the Treasurer was satisfied that a State had not imposed an income tax, the State should receive financial assistance from the Commonwealth. The third Act provided that no taxpayer should pay State income tax until that person first paid Commonwealth income tax. The fourth Act provided for State public servants involved in income tax administration to transfer to the Commonwealth. The effect of the legislation was to make it impossible, as a practical matter, for a State to impose income tax. Four States challenged the validity of the legislation, but the High

Court dismissed the challenge. In 1957, Victoria again challenged⁴¹ similar legislation which had been substituted for the wartime legislation. But, apart from holding that the Commonwealth could not give priority to the payment of its income tax over State income tax, the High Court upheld the validity of the legislation.

However, one may be dubious as to whether the States really wanted to take the responsibility and the opprobrium for imposing their own income taxes. In 1976, the Fraser government enacted legislation that would have enabled a State to impose personal income tax. Significantly, no State took up the offer, and the legislation giving the States the opportunity to do so was repealed in 1989.

The High Court's interpretation of the excise power was the final step in fulfilling Alfred Deakin's prophecy that, under the Constitution, the States would find themselves "legally free, but financially bound to the chariot wheels of the Central Government". Under the Constitution, the Commonwealth has the exclusive legislative power to impose an excise tax. In an early case - *Peterswald v Bartley*⁴² - Griffith CJ said an excise was "a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of the direct tax or personal tax." Accordingly, the High Court held that the licence fee which was the subject of debate in that case was not a tax on goods although it related to the production of manufacture of goods. This

⁴¹ *Victoria v Commonwealth (Second Uniform Tax Case)* (1957) 99 CLR 575.

⁴² (1904) 1 CLR 497 at 509.

was because it imposed a flat rate irrespective of the gallonage produced and was part of a licensing system.

Commencing in the 1970s, the States began to rely heavily on this decision and its reasoning and similar decisions to charge licensing fees on alcohol, tobacco and petrol that were calculated – in the end monthly - by reference to a percentage of the sales of these products. At first, in a series of cases, the High Court upheld the validity of the State legislation on the ground that they were licensing fees despite the ever increasing percentage of the fee and the fact that in substance the legislation was a tax on the products. The licence fee in New South Wales for the sale of tobacco, for example, had increased from 30% in 1989 to 100% of sales in 1995. These licence fees became an increasingly large part of State revenues.

Against this background, in *Ha v New South Wales*⁴³, a majority of the High Court held that "a tax on a step in the production *or distribution* of goods to the point of receipt by the consumer is a duty of excise." (my emphasis) After examining the legislation in that case, which was concerned with a licence fee for the sale of tobacco, the majority said⁴⁴ that the "licence fee is manifestly a revenue-raising tax imposed on the sale of tobacco during the relevant period." The financial result of this decision for the States was disastrous. The States not only lost an estimated \$5 billion a year in revenue but were liable to repay fees unlawfully imposed. However, the Commonwealth

⁴³ (1997) 189 CLR 465 at 490.

⁴⁴ (1997) 189 CLR 465 at 502.

came to the rescue by legislation that increased Commonwealth excise duties on tobacco and alcohol and sales taxes on petrol and paid it to the States as "revenue replacement grants" under section 96 of the Constitution. Here was another example of how a High Court decision changed the governance of Australia.

The problems posed for the States by the High Court's decision in *Ha* has now been overcome by the introduction of the Goods and Services Tax which the Commonwealth collects and distributes to the States.

A number of other important decisions on the part of the High Court have also been in favour of the Commonwealth at the expense of State legislative power and State affairs. None more so than the Commonwealth's power to make laws with respect to "External affairs". This power extends not only to the making of treaties and conventions to which Australia is a party but to matters that are not consensual in character such as conduct on the part of Australia or its nationals which affect other countries and its relations with them⁴⁵. Indeed the Court has said that any event external to Australia is an external affair which may be the subject of Commonwealth legislation⁴⁶. However, it is the extent to which the Commonwealth can implement treaties and conventions by legislation that is the most controversial issue concerning the external affairs power. The now accepted view is that it can do so for the purpose of carrying out or

⁴⁵ *New South Wales v Commonwealth (The Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 450.

⁴⁶ *Victoria v Commonwealth* (1996) 187 CLR 416 at 485.

giving effect to such treaties or conventions⁴⁷. If the law is reasonably capable of being considered appropriate and adapted to implementing a treaty or convention, it will be valid notwithstanding that the law deals with subjects over which the Commonwealth otherwise has no constitutional power⁴⁸. Because the Commonwealth legislation involved in the *Tasmanian Dams Case* gave effect to an international treaty, it was valid although the Commonwealth had no express legislative power over rivers, dams or the environment. Similarly, Commonwealth legislation enacting discrimination legislation in respect of age, sex, race and disability is valid because it gives effect to international treaties and conventions.

The High Court has also given the defence power a wide interpretation especially during wartime. Isaacs J. went too far in *Farey v Burvett*⁴⁹ when he said that the reach of defence power was virtually unlimited in wartime and that it overrides all constitutional restraints on the exercise of power. Nonetheless, at least in time of war, it authorises legislation on any subject that might reasonably be regarded as assisting the prosecution of the war. It is however subject to constitutional guarantees such as freedom of trade and intercourse between the states and the prohibition of acquiring property except on just terms.

⁴⁷ *McKelvey v Meagher* (1906) 4 CLR 265 at 286; *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 658, 669, 674, 687; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 218, 241; *Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 259; *Victoria v Commonwealth* (1996) 187 CLR 416 at 486 - 488.

⁴⁸ *Victoria v Commonwealth* (1996) 187 CLR 416 at 486 - 488.

⁴⁹ (1916) 21 CLR 433 at 452 - 456.

The various decisions to which I have referred indicate a centralist tendency on the part of the High Court in interpreting the Constitution. This is not surprising. With the increasing integration of the social, economic and political life of Australia, social, economic and political problems are increasingly national, rather than local, in origin. National problems need national solutions, and the Commonwealth, rather than the States, is the constitutional authority best equipped to deal with them. For the most part, the language of the Constitution is sufficiently flexible to allow the High Court to adapt it so that the Commonwealth can deal with the changing problems of the nation. Long ago, Judge Cardozo, one of the greatest judges of all time, pointed out that judges cannot escape the currents of their times.

"All their lives", he said, "forces which they do not recognise and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall."⁵⁰

But it would be a serious mistake to think that, since 1920, the High Court has always found for the Commonwealth when there have been constitutional challenges to its legislation or that, where the States are involved, they always lose. Over the years, the Commonwealth has had some spectacular losses in the High Court. Despite the decision in the *Engineers case*, Commonwealth laws affecting the States or their functions have been held invalid on a

⁵⁰ *The Nature Of the Judicial Process* (1921), Lecture I at 12.

number of occasions. A number of High Court decisions show that Commonwealth legislation affecting the States and their instrumentalities is invalid if it involves either discrimination that places special burdens or disabilities on the States or if it would operate to destroy or curtail the continued existence of the States or their capacity to function as governments⁵¹. Thus, the High Court held that the *Banking Act* 1945 was invalid in so far as it compelled the States and their agencies including local government authorities to bank with the Commonwealth Bank. Similarly, the High Court held invalid Commonwealth legislation that imposed special burdens and disabilities on the Queensland Electricity Commission and Queensland Electricity Boards in proceedings in the Conciliation and Arbitration Commission⁵². Recently, the High Court held invalid Commonwealth legislation in so far as it placed a significant burden on a State respecting the remuneration of the judges of the courts of the State⁵³.

But without doubt, the most spectacular losses of the Commonwealth in constitutional cases have been the *Bank Nationalisation Case*⁵⁴ and the *Australian Communist Party Case*⁵⁵. The *Banking Act* 1947 nationalised the private banks who then challenged the validity of that legislation on many grounds. By a 4 - 2 majority, the High Court held that the legislation was invalid on a number of grounds, one of which was that the Act infringed the guarantee of freedom of interstate

⁵¹ *Queensland Electricity Commissioner v Commonwealth* (1985) 159 CLR 192.

⁵² *Queensland Electricity Commissioner v Commonwealth* (1985) 159 CLR 192.

⁵³ *Austin v Commonwealth* (2003) 215 CLR 185.

⁵⁴ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.

⁵⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

trade, commerce and intercourse guaranteed by section 92 of the Constitution. This was a devastating blow to the policy of the Labour Party government, and the enactment of the *Banking Act* together with petrol rationing and child endowment was a contributing cause to the government's loss in the 1949 election⁵⁶.

The *Communist Party Dissolution Act* 1950 gave effect to a central plank of the Liberal Party - Country Party coalition government led by Mr R. G. Menzies. It declared the Communist Party to be an unlawful association, provided for its dissolution on the appointment of a receiver of its property and imprisonment for certain acts that included being a member of the Party. It also enabled the Governor-General to declare other organisations unlawful or a person to be Communist or member of the party. The legislation contained nine recitals which included recitals asserting that the Communist Party engaged in activities designed to bring about the overthrow of the government of Australia and that it was necessary for the security and defence of Australia to dissolve the Party and to disqualify its members from holding office in an industrial organization. One of the critical questions in the case was whether these recitals by Parliament of the Commonwealth constituted a factual basis sufficient to bring the legislation within the scope of the defence power. The reasons of the majority Justices varied, but none of the majority Justices was prepared to find that a direct legislative enactment in respect of specific persons and organisations could be supported under the defence power given the state of international hostilities in

⁵⁶ Sawer, *Australian Federal Politics and Law* (1929 - 1949) at 220.

1950 when the legislation was enacted. Almost immediately after the decision, Mr Menzies called an election with communism the main issue. On his re-election, Mr Menzies sought to amend the Constitution to give the Commonwealth power to ban the Communist Party. The referendum to do so was defeated.

A major constitutional defeat for Commonwealth occurred in *Australian Capital Television Pty Ltd v Commonwealth*⁵⁷ where the High Court declared that the Constitution contained an implied freedom to communicate on political and governmental matters. As a result, the Court held that Part IIID into the *Broadcasting Act* 1942 was invalid. Subject to certain exceptions, that Part prohibited the broadcasting of news and current affairs items and talkback radio programs of political material in relation to a Commonwealth election during an election period, as defined, and imposed on broadcasters an obligation to make available free time for election broadcasts to certain persons. In the events that happened, invalidating the legislation probably assisted the re-election of the Keating government in 1993, given that advertisements, designed by Mr John Singleton, effectively ridiculed the Opposition's election policy of introducing a goods and service tax.

The implied right of freedom of communication on political and government matters recognized in *Australian Capital Television Pty Ltd v Commonwealth*⁵⁸ was confirmed by the High Court in *Lange v*

⁵⁷ (1992) 177 CLR 106.

⁵⁸ (1992) 177 CLR 106.

*Australian Broadcasting Corporation*⁵⁹ where the Court unanimously held that the Constitution contained an implication of this freedom and that the law of defamation could not be inconsistent with that freedom. These decisions on the implied right of freedom of communication mean that no government, State or Commonwealth, can legislate in a way that would effectively impair this freedom of the people to discuss political and governmental matters. The decisions are another illustration of how decisions of the High Court shape the governments of Australia and, for that matter, Australian society.

It would be remiss of me to leave the question of constitutional interpretation without saying something further on section 92 of the Constitution which provides that "trade, commerce, and intercourse among the States... shall be absolutely free." I have already noted that section 92 was one of the reasons that resulted in the invalidation of the bank nationalisation legislation. For many years before 1987, it was also responsible for the invalidation of much State and Commonwealth legislation. For example, it struck down legislation creating Boards to fix maximum prices or quotas for dried fruits⁶⁰ and Boards created to compulsorily acquire agricultural products for marketing⁶¹. It struck down legislation that prohibited the interstate carriage of goods by road without a licence, the issuing of which was the discretion of a government official⁶². It struck down legislation that attempted to give T.A.A. a monopoly in respect of the

⁵⁹ (1997) 189 CLR 520.

⁶⁰ *James v South Australia* (1927) 40 CLR 1.

⁶¹ *The Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266

⁶² *Hughes & Vale Pty Ltd v New South Wales* [1955] AC 241.

interstate transport by air of passengers and goods⁶³. It struck down legislation prohibiting the sale or purchase of fish except through a State Board in so far as the legislation operated to prevent a purchaser of fish in the course of interstate trade from dealing with fish on delivery to him⁶⁴.

These decisions of the High Court on section 92 including the *Bank Nationalisation Case* were based on the constitutional theory that section 92 guaranteed the right of the individual trader to engage in trade, commerce or intercourse between the States. During this time, the High Court saw the section as a free enterprise guarantee. This interpretation of section 92 was rejected in *Cole v Whitfield*⁶⁵, one of the most radical decisions ever given by the High Court. In that case, the Court effectively overruled about 127 cases decided on s 92 including cases such as the *Bank Nationalisation Case* and held that s 92 applied only to measures that discriminate against interstate trade and commerce in a protectionist sense, which was the intention of the Framers of the Constitution. Thus, paradoxically, although the decision in *Cole v Whitfield* was radical, its reasoning was conservative and is perhaps as close as you can get to a High Court decision decided on the original intent of the Framers of the Constitution.

Since the decision in *Cole v Whitfield*, very few constitutional challenges to State or Commonwealth legislation, based on s.92,

⁶³ *Australian National Airways Pty Ltd v the Commonwealth* (1945) 71 CLR 29.

⁶⁴ *Fish Board v Paradiso* (1956) 95 CLR 443.

⁶⁵ (1988) 165 CLR 360.

have come before the courts, a position that is in sharp contrast to the position that existed before 1987. It does, however, demonstrate how decisions of the High Court can change the way in which Australia is governed.

High Court decisions on the common law and statutes also affect the governance of Australia because until these decisions are overruled or amended by the Parliament of the Commonwealth or the legislatures of the States, as the case may be, they represent the law of Australia. Time does not permit me to explore the effect of these common law and statutory decisions on the governance of Australia. But they represent a large part of the law of Australia. They define many of the rights, privileges and obligations of the Australian people.

As is apparent from this brief and general summary of the work of the High Court, its methods of constitutional interpretation have changed over the decades, as in fact has its approach to common law questions. The change in approach in 1920 was dramatic. But it does not necessarily mean that the approach of the first High Court to constitutional interpretation was necessarily wrong.

Let me conclude by quoting what Justice Windeyer, one of our greatest judges, has said about that change. In *Victoria v The Commonwealth*, he said⁶⁶:

⁶⁶ (1971) 122 CLR 353 at 396-397.

"I have never thought it right to regard the discarding of the doctrine of implied immunity of the States and other results of the *Engineers'* Case as the correction of antecedent errors or as the uprooting of heresy. To return today to the discarded theories would indeed be an error and the adoption of a heresy. But that is because in 1920 the Constitution was read in a new light, a light reflected from events that had, over 20 years, led to a growing realisation that Australians were now one people and Australia one country and that national laws might meet national needs. For lawyers, the abandonment of old interpretations of the limits of constitutional powers was readily acceptable. It meant only insistence on rules of statutory interpretation to which they were well accustomed. But reading the instrument in this light does not to my mind mean that the original judges of the High Court were wrong in their understanding of what at the time of Federation was believed to be the effect of the Constitution and in reading it accordingly. As I see it the *Engineers'* Case, looked at as an event in legal and constitutional history, was a consequence of developments that had occurred outside the law courts as well as a cause of further developments there. That is not surprising for the Constitution is not an ordinary statute: it is a fundamental law."