Towards 2001–Minimalism Monarchism or Metamorphism?

AN ADDRESS BY
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INTRODUCTION

The 1891 Sydney Convention is one of the most significant events in the history of this country. Indeed, it has been suggested that, despite some fairly extensive cosmetic surgery, the draft bill prepared at that Convention *is* in fact the Constitution of 1900, rather than its proud progenitor.[1]

Perhaps the most important turn of events during the Convention occurred away from Sydney itself. During the Easter break, on the waters of the Hawkesbury estuary, Samuel Griffith and several other delegates made use of the Queensland government's paddlewheeler, the *Lucinda*. Griffith, together with Charles Kingston and Edmund Barton, spent 13 hours on Easter Saturday carefully re-examining the proposed draft Constitution. Crucially, this marathon effort, combined with a further re-drafting session with Andrew Inglis Clark on the following Monday, led to a draft that was acceptable to most delegates. In the light of the prevailing political climate, the 1891 Convention might well have been reduced to constitutional insignificance had this not been done.[2]

Although the re-written draft was widely embraced, it was not free from criticism. George Dibbs, a delegate at the Convention who went on to become Premier of New South Wales, criticized parts of the draft for being unworkable.[3] Dibbs is also noteworthy in that he was one of the few delegates to have raised the republican issue in the Convention Debates. Some 2½ weeks before the *Lucinda* meandered along the Hawkesbury River, Dibbs said:

> When [England] planted her colonies in this country she planted them with that germ and spirit of independence which must, as time rolls on, develop into the establishment of a great republic . . . . That is our future, and what we are doing here step by step to-day is laying the foundation of the inevitable which is to come.[4]

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1 J A La Nauze, *The Making of the Australian Constitution* (1972) 78.

2 A C Castles, 'The voyage of the "Lucinda" and the drafting of the Australian Constitution in 1891' (1991) 65 ALJ 277, 279.

3 J Quick and R G Garran, *The Annotated Constitution of the Australian Constitution* (1976) 155.

4 *Official Report of the National Australasian Convention Debates* (1986) Vol I, 186–7.

CULTIVATING THE 'GERM AND SPIRIT' OF INDEPENDENCE: THE 1850s TO THE PRESENT DAY

It is certainly true to say that the Australian colonies were planted with the 'germ and spirit' of independence. Popular and radical republican movements gathered momentum in the 1850s and 1880s, and, during that time, it was often said that the coming republic was as certain as the sun rising or fruit ripening.[5] And, with a similar metaphorical flourish, Thomas Walker, a New South Wales republican, said in 1888 that 'the good ship of republican thought' was inevitably sailing towards the Australian colonies and there was little that could be done to stop it.[6]

But that 'good ship' ran aground within a very short space of time. The republican issue was largely ignored in the lead-up to Federation. Perhaps the reason for this lies with the perception that London rule would give way to Australian rule after Federation so that arguably the major cause of dissatisfaction with Britain would disappear at that time. Whatever the precise explanation, however, it is patently clear that the Constitution of 1900 transformed the relationship between Britain and the Australian colonies: it brought into existence a new nation that became part of the British Empire. The form that nation took was that of a 'indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland,' and under the Constitution.[7] Such examples as there were of anti-monarchist sentiment immediately after Federation were isolated.[8]

At the turn of the century it was accepted that the Constitution did not enable Australia to enter into a treaty or make a declaration of war. Even in 1916 Isaacs J, later to become the first Australian Governor-General of Australia, stated that the 'supreme power of creating a state of war or of peace for the whole Empire resides in His Majesty in his right of his whole Empire',[9] And much later, in 1939, Prime Minister Menzies declared that Australia was at war simply because Britain was at war.

Be that as it may, the Constitution brought the Commonwealth into existence as a potential member of the community of nations, with a capacity to conduct its relationships with other nations.[10] When it actually became a member of the community of nations and accepted as an international person is by no means clear. The grant of the external affairs power was a recognition that Australia was moving inexorably along the path towards nationhood. But it was not until the Balfour Declaration was made, when Australia attained the status of a Dominion, and the *Statute of Westminster* 1931 (UK) passed and adopted that Australia's international sovereignty was unequivocally

[5] McKenna, 'A History of the Inevitable Republic' in M A Stephenson and C Turner (eds), *Australia: Republic or Monarchy?* (1994) 54.
[6] Id 53
[7] Preamble to the *Commonwealth of Australia Constitution Act* 1900 (UK).
[8] Cunneen, *King's Men* (1938) 18–19.
[9] *Welsbach Light Co of Australasia Ltd* v *Commonwealth of Australia* (1916) 22 CLR 268, 278.
[10] *New South Wales* v *The Commonwealth* (*The Seas and Submerged Lands case*) (1975) 135 CLR 337, 469.

acknowledged. By the *Statute of Westminster (Adoption) Act* 1942 (Cth), the Commonwealth was freed from the limitations that generally applied to colonies, such as the inability to enact a law inconsistent with an Imperial statute and the perceived inability to enact a law having an extra-territorial operation.

The *Australia Acts* of 1986 — enacted by the states, the Commonwealth and the United Kingdom — finally recognized Australia's transition from dependent colony to fully sovereign state. This legislation terminated our residual links with the United Kingdom, which surrendered its authority to legislate for Australia. In addition, restraints on the legislative capacity of the States, similar to those from which the Commonwealth was freed by the *Statute of Westminster* 1931 (UK), were eliminated.

This steady march towards nationhood has been mirrored in changes to the method of appointment and role of the Governor-General. Initially it had been customary for the Prime Minister of the United Kingdom to consult informally with the Australian government before submitting the names of possible appointees to the reigning monarch. It is now accepted, after the 1930 Imperial Conference and the contemporaneous struggle between Prime Minister Scullin and King George V over the appointment of the first Australian-born Governor-General, Sir Isaac Isaacs,[11] that the British monarch now appoints the Governor-General on the advice of the Australian government even if he or she is personally opposed to the particular choice.

As for the role of the Governor-General under the Constitution, it may be said that it has been surrounded by a certain aura of ambiguity. In the early days of the Australian Federation, the Governor-General acted as an agent or a representative of the British government performing a quasi-ambassadorial role in the tradition of a colonial governor rather than as the repository of the executive power under the Australian Constitution.[12] That position gradually changed so that, in the course of time, the Governor-General was no longer regarded as the representative of the British government, but was the person who exercised the Commonwealth's executive power on the advice of the Australian government.[13]

Nevertheless, the Governor-General is still the representative of the Queen, who remains our head of state. This fact lies at the heart of the recent republican debate. This debate has demonstrated that, after a 100 year hiatus, the so-called good ship of republican thought is sailing again in Australian waters. As will be seen, however, the sailing conditions have not been smooth.

[11] For a detailed account, see Z Cowen, *Isaac Isaacs* (2nd ed, 1993) 191–206.
[12] Cunneen, op cit (fn 8) 25–7, 96–7.
[13] At the Imperial Conference of 1926 it was resolved that the Governor-General of a Dominion was 'no longer the representative of Her Majesty's government in Great Britain': Id 168.

THE REPUBLICAN DEBATE IN THE 1990s

Before launching into a summary of the competing arguments expressed in the recent republican debate, it is instructive to consider what is meant by the word 'republic'. According to the *Macquarie Dictionary*, a republic is a 'state in which the supreme power rests in the body of citizens entitled to vote and is exercised by representatives chosen directly or indirectly by them'.[14] The same dictionary offers an additional meaning:

> A state, especially a democratic state, in which the head of the government is an elected or nominated president, not a hereditary monarch.[15]

It is evident that all our governmental institutions bar one are 'republican' in the first sense of the word. This is because they are either directly elected by the people — as Parliament is — or because, like the judiciary, they are chosen by popularly-elected representatives. The single exception to the rule, which is reflected in the second dictionary definition, is our head of state. Having a Queen of Australia[16] is unequivocally inconsistent with a republic because she derives her position by hereditary right under British law. Understood in this light, it is hardly surprising that the republican debate has focused rather narrowly on the identity, role, powers and mode of appointment of our head of state. For example, the Republic Advisory Committee concluded that the only constitutional change required to transform Australia into a completely republican system of government is to remove the monarch.[17] Broadly speaking, republicans rely on three main arguments to justify this minimalist programme of constitutional change. These arguments, whilst by no means constituting an exhaustive list, tend to be found at the forefront of a minimalist republican's case.

The Case for a Republic

The first argument is that maintaining the present ties with the British monarchy is geographically unsound and economically unrealistic. This argument reflects the fact that both our position on the world stage and our relationship with other countries have changed quite significantly in recent times. Republicans point to the apparent certainty, for example, that Britain's future lies with the European community rather than with a continuation of its links with its former dominions and colonies. And, on the other side of the globe, republicans insist that cutting ties with the monarchy is extremly important for guaranteeing the success of our future in Asia. The Prime Minister, for one, has stated that:

> Australia *will* be taken more seriously as a player in regional affairs if we are clear about our identity and demonstrate that we really mean to stand on our own feet practically and psychologically.[18]

[14] (2nd ed, 1991) 1492–3.
[15] Id 1493.
[16] *Royal Styles and Titles Act* 1973 (Cth), s 2.
[17] *An Australian Republic: The Options* (1993) Vol I 1 and 39.
[18] P Keating, *The Prime Minister's HV Evatt Lecture* 28 April 1993.

Thus, in order to maximize our export market in the Asian region, so the argument goes, we must be perceived as a fully-fledged independent country rather than as a colonial outpost of Britain.[19]

The second argument is that maintaining the present ties with the British monarchy is no longer culturally or politically appropriate. Our demographical situation has changed. Until the Second World War we were predominantly of English, Scottish or Irish descent, whereas today, as a multicultural society, there are many Australians who have little, if any, connection with Britain or Ireland. Moreover, republicans highlight the almost paradoxical phenomenon of having a head of state who does not live here and who is not seen by anybody outside the Commonwealth of Nations to represent us. Surely, so the argument runs, it would make perfect political sense to have a local head of state whose legitimacy and authority were both derived from the consent of the Australian people. If that were the case, our head of state would be perfectly placed to play a useful role in promoting our interests both here and abroad.

The third argument in favour of a republic is that it is symbolically important to cut our present ties with the British monarchy. Republicans often use colourful language when making this argument. They may insist, for example, that it is time to 'assume our full maturity', to 'take our destiny into our own hands', or to 'cut our umbilical cord'. Taking such a step is, they say, an essential expression of our national dignity.[20] And, by declaring itself a republic, Australia will cap its long evolution from colony to nationhood so that, symbolically as well as practically, it will finally be completely independent.

The Case for the Monarchy

Those who advocate retaining our links with the British monarchy usually — but by no means exclusively — rely on four principal arguments to reject this republican stance. The first such argument concerns the utility and proven 'track record' of our current constitutional set-up. We have a stable democracy in which certain principles are simply not questioned — such as fair elections, a broad franchise and peaceful, automatic transfer of power to an incoming government.[21] Put simply, monarchists suggest, our system works. This, of course, has inevitably led to the now-familiar monarchist catch-cry: 'If it ain't broke, don't fix it.'[22]

The second argument goes further than stating that our system works; it flatly denies that any material benefit could flow from becoming a republic.[23]

[19] Schacht, 'The Case for a Republic' (1992) *Executive Action* 10, 11.
[20] A Fraser, 'Strong Republicanism and a Citizen's Constitution' in W Hudson and D Carter (eds), *The Republicanism Debate* (1993) 36, 37–8.
[21] C Saunders, 'Making Best Use of the Constitutional Decade' (1992) 1 *Constitutional Centenary* 12.
[22] For example M Kirby, 'Reflections on Constitutional Monarchy' in Hudson and Carter, op cit (fn 20) 61, 76.
[23] For example, Gibbs, 'The Australian Cosntitution and Australian Constitutional Monarchy' in Stephens and Turner, op cit (fn 5) 1.

Australia would not, for example, become more democratic or independent. Nor would Australian citizens enjoy greater personal freedoms or privileges. Nor can it be said that a republican form of government is inherently far superior to a constitutional monarchy, when most constitutional monarchies are free societies which respect basic human rights whilst many republics are not.[24] Nor, monarchists stress, would substituting an Australian head of state for the Queen make our governmental system more effective. In fact, they argue that the only possible benefit from such a change lies in the realm of symbolism.

This conclusion leads to the third argument for retaining the monarchy: namely, that the advantages that would flow from becoming a republic are necessarily outweighed by the countervailing disadvantages. The primary disadvantage of such a change, according to monarchists, is that the constitutional amendments required must inevitably be numerous and complex.[25] Two particular problems are identified. First, there is the question: what powers should be conferred upon a president? And, second, if we became a republic at the Commonwealth level, the position of the states would fall to be considered. If a 'recalcitrant' state remained firm in its conviction to retain the Queen as its head of state, the dilemma is whether to accede to that desire and allow Australia to be only a partial republic, or whether to force that state to abandon the monarchy against its will.

The final pro-monarchy argument is that the entire debate is simply an attempt to divert attention away from more pressing fundamental problems. Monarchists bemoan the fact that much time and money have already been wasted on the issue. They suggest that these resources could more profitably have been spent on confronting more far-reaching problems. And some monarchists even suggest that more significant constitutional reforms would be more beneficial.[26]

I shall return to this question of constitutional reform. For present purposes, I wish to emphasize that I do not seek to align myself with the views of either the minimalist republicans or the monarchists. Nothing I have said or am about to say should be construed as being inconsistent with that position. But, from this entirely neutral perspective, it may be said that the debate has had the unfortunate effect of excluding from consideration, as the centenary of Federation approaches, other constitutional issues that deserve attention, not that I suggest for one moment that Monarchy versus Republic is not an issue of fundamental importance. My point simply is that the lead-up to the Centenary provides an opportunity when we should be looking at how our Constitution is working.

As we approach the centenary of Federation, it is appropriate that we, as a people, take stock of our existing Constitution, examine how it has worked and consider whether it could be improved. In saying this, I am by no means

[24] Id 2.
[25] Id 3.
[26] H Gibbs, 'Multiple Voices' in Hudson and Carter, op cit (fn 20) 216, 221.

suggesting that there is a fundamental connection between becoming a republic and broad constitutional reform. Many commentators highlight the fact that becoming a republic is an entirely separate issue from, say, the question of reshaping and redefining the federal-state balance.[27]

However, the forthcoming Centenary offers an occasion for promoting better understanding of the Constitution and how it works. The Australian electorate has been very conservative in its attitude towards constitutional reform. This is not in itself a bad thing, though advocates of change do not share that view. But it may very well be that community ignorance of the Constitution, now a well-documented fact, has been a contributing factor to the failure of so many proposals for amendment. Ignorance of the Constitution and how it is working may well induce the individual to regard proposals for reform with suspicion and vote for maintaining the status quo. So there is much to be said for taking the opportunity of promoting wider understanding of our political system so that the electorate is better placed to consider possibilities for reform. The Centenary offers that very opportunity, indeed the best and perhaps the only opportunity we shall have in the near future. And it will come at a time when Australia is re-positioning itself in the world, confronting its historic destiny in the Asia-Pacific region.

THE QUESTION OF CONSTITUTIONAL REFORM

In a number of respects, the Convention Debates are disappointing and are not to be compared with the brilliance of the discussions which brought the United States Constitution into existence. It may be, as Sir Owen Dixon said, that the framers of our Constitution could not escape from the fascination of the American model and that 'its contemplation damped the smouldering fires of their originality'.[28]

Some of the founders, at least, were aware that they could not foresee all the significant changes that would occur in the 20th century and beyond and that the Constitution they were shaping was to meet not only the conditions and circumstances with which they were familiar, but also such conditions and circumstances as would unfold with the passage of time and might not in their day be foreseen.[29] Accordingly, the Constitution may be seen as a broad instrument or framework for national government rather than as a detailed blueprint or rigid statement of limited federal powers.

Significant changes have in fact occurred in our conditions and circumstances. Our social, cultural, economic and demographic structures are very different from what they were one hundred years ago. Our federal constitutional and political system has been forced to adapt to vast changes. Such changes include the development of Australian national identity and unity,

[27] For example, C Saunders, 'A Republican Model: Would More be Better Than Less?' in J Beaumont *Where To Now? Australia's Identity in the Nineties* (1993) 89.
[28] Z Cowen and L Zines, *Federal Jurisdiction in Australia* (2nd ed 1978) v.
[29] L Zines, 'The Federal Balance and the Position of the States' in *The Convention Debates 1891–1898, Commentaries, Indices and Guide* Vol VI 75, 87.

the marked changes in our relationship with the United Kingdom, revolutionary developments in transport and communications, the emergence of a truly Australian economy, the vast expansion in international trade leading to the internationalization of the world economy, and the increase in the shaping of the rules of international law by means of international conventions.

Perhaps the most significant from the perspective of Australian constitutional law is the great expansion of international action and co-operation which has taken place since 1900, particularly since the Second World War. At the turn of the century international discussion, negotiation, co-operation and agreement took place on a limited scale in relation to limited subjects, mainly affecting the relationships between nation states. Today there is virtually no limit to the topics which may become the subject of international co-operation and agreement.[30] The increasing interdependence of nations and the concomitant willingness of nations to confer upon international bodies the power to shape and influence matters which were previously considered to be of solely domestic concern[31] focuses attention on the external affairs power.

The External Affairs Power

At common law, a treaty or international convention to which Australia is a party is not part of the law of the land unless made so by statute. The external affairs power enables the Commonwealth Parliament to give legislative effect to such a treaty or convention. It appears that the delegates to the Conventions did not envisage the expansion which has taken place in the scope of international affairs. During the Debates there seems to have been no direct discussion of the scope of the legislative power under s 51(xxix) with respect to external affairs. The delegates appear to have thought that the Imperial government would make treaties binding Australia, though some delegates considered that Australia itself might make commercial or trade agreements with other countries. The outlook of the delegates reflected their understanding that Great Britain, not Australia, was the relevant member of the community of nations with power to bind Australia to an international treaty. The possibility that the external affairs power would enable the Parliament to carry into effect an international convention which seeks to regulate conduct as between citizens within national boundaries may not have been foreseen by the framers of the Constitution. That of course, is not an adequate reason for holding that implementation of such a convention stands outside the legislative power. But it does indicate that the expansion in the scope of international affairs has had a very significant impact on the exercise of legislative power by the Commonwealth Parliament.

I am not advocating an amendment of the external affairs power which would deprive the Parliament of its power to carry into effect an international

[30] *Commonwealth* v *Tasmania* (the *Tasmanian Dam* case) (1983) 158 CLR 1, 124 per Mason J.

[31] Ibid. See also N Stephen, 'The Expansion of International Law — Sovereignty and External Affairs' (1995) *Quadrant* 20.

convention or treaty. But whether any, and if so what, procedures should be prescribed for legislative authority or other consultation before the federal executive government commits Australia to an international convention which obliges the Australian government to regulate conduct as between citizens within national boundaries, thus attracting the legislative power to carry that convention into effect, is a matter worthy of discussion. That this is so becomes clearer when it is recalled that it has been suggested that Australian courts should fill any gap in the common law by adopting rules or principles of law embodied in international conventions to which Australia has acceded.[32] The level of consultation which is requisite or desirable before the federal government may enter into a treaty is a relevant matter for consideration. Some have argued that the federal parliament must give its approval before the federal government can enter into a treaty. Others suggest that the state governments and Parliaments must consent to such action as well. Of course, it does not follow that such steps, even if they should be thought to be desirable, should be incorporated in some constitutional provision. It may be that a procedure stipulated by statute would be sufficient.

The growing body of federal legislation based on the external affairs power is but one of a number of elements which have transformed the relationship between the Commonwealth and the states under the Constitution. The 94 years since Federation have witnessed a continuing expansion in the part played by the Commonwealth in Australian affairs and a corresponding diminution in the part played by the states.

However, it is important to note that the treaty-making aspect of the external affairs power not only raised a question of federal/state balance, it also raises questions about the relationship of the executive to Parliament and the role of the courts in developing the common law by reference to international law and international conventions.

Federal Financial Powers

The continuing expansion in the part played by the Commonwealth has been based in large measure on the exercise by the Commonwealth of its financial powers and the grants power. Indeed, it has been suggested that the Commonwealth's financial position in the Australian federation is so dominant that the Australian federation is no longer a true federation. However, as I shall explain later, that comment, assuming it to be correct, may not be as significant as it seems.

There are, broadly speaking, four main reasons for the increased dominance of the Commonwealth in this area. First, s 90 of the Constitution, which gives the federal Parliament exclusive power to impose duties of customs and excise, has been broadly interpreted so that duties of excise include, subject to the anomalous exceptions relating to duties on tobacco, alcohol and

[32] Kirby, 'Human Rights — The International Dimension', (17 February 1995), *Senate Department Occasional Lecture*, 13. This view was not endorsed by the High Court in its very recent decision in *Minister of State for Immigration and Ethnic Affairs* v *Teoh* (1995) 128 ARL 353.

petroleum products, duties on the distribution and sale of goods. Section 90 was included in the Constitution as part of a package that was designed to create and maintain a 'free trade area throughout the Commonwealth and uniformity in duties of customs and excise and in bounties'.[33] Unfortunately, however, the critical words of the section had no clearly established meaning when the Constitution was brought into existence.[34] That has led to a continuing controversy about the scope of its operation which is still reflected in the decisions of the High Court.

Secondly, the High Court decisions in the *Uniform Tax cases*[35] have, effectively, excluded the states from imposing income tax, this being a lucrative area of revenue for the states before 1942. Although these decisions acknowledge the right of the states to impose income tax, the states have refused to reimpose such a tax for a variety of political and practical reasons.[36]

Thirdly, s 105A of the Constitution, inserted after a successful referendum in 1928, enables the Commonwealth to make agreements with the states with respect to their public debts and the borrowing of money by the Commonwealth for the states. This has had the effect of further entrenching the Commonwealth's financial control.

And, finally, the federal government has made extensive use of s 96 of the Constitution, which enables the federal Parliament to grant financial assistance to any state on such terms and conditions as it thinks fit. The High Court has interpreted this power in such a way as to enable the federal Parliament to attach detailed conditions to the grant so that it may be tied to particular purposes.[37] And, more importantly, these conditions may legitimately require the state to apply the money for a purpose in relation to which the Commonwealth has no power to legislate directly. For example, the federal government had invoked s 96 to require expenditure according to conditions which it has prescribed in the areas of education, housing, roads and health.

The effect of these developments is that there is an imbalance between financial responsibility and financial resources. The Commonwealth raises much more than 50 per cent of all taxes levied in Australia; and yet its expenditure only represents about one-half of all governmental expenditure. This raises a problem of accountability. The Commonwealth raises money but is not responsible for the manner in which all of it is spent, whilst the states spend money without being wholly responsible for the way in which it is raised. That statement is an over-simplification in that state expenditure pursuant to grants under s 96 is often expenditure for purposes determined by the Commonwealth. Nonetheless, if we are to remain in a federal system, we

[33] *Capital Duplicators Pty Ltd* v *Australian Capital Territory (No 1)*, (1992) 177 CLR 248 277–278.

[34] *Capital Duplicators Pty Ltd* v *Australian Capital Territory (No 2)* (1993) 178 CLR 561, 584.

[35] *South Australia* v *The Commonwealth* (1942) 65 CLR 373; *Victoria* v *The Commonwealth* (1957) 99 CLR 575.

[36] Australia Constitutional Commission, *Australia's Constitution: Time to Update* (1987), 10.

[37] *Victoria* v *The Commonwealth*, (1926) 28 CLR 399; *Victoria* v *The Commonwealth* (1957) 99 CLR 575, 606–607; *Attorney-General (Vic) Ex rel Black* v *The Commonwealth* (1981) 146 CLR 559.

might consider whether there are more effective ways of conferring revenue-raising capacity on the states.

Whether the financial developments just outlined mean that Australia is no longer a true federation may now be beside the point. Federations come in various shapes and sizes. It is not possible to say that one form of federation is inherently superior to all others. The question must be: what form of constitution, be it a federation or something else, best meets the needs and requirements of Australia now and in the future?

The Trade and Commerce Power

The trade and commerce power is very much the forgotten provision of the Australian Constitution. The recognition of the wide scope of the corporations power has relegated the trade and commerce power into a postion of insignificance. The scope of the corporations power, as it is presently understood, enables the Commonwealth to regulate the conduct of trading and financial corporations without recourse to the trade and commerce power. So the Commonwealth can regulate the conduct of such corporations in intra-state trade and commerce and as such that regulation would go beyond the reach of the trade and commerce power, confined as it is to inter-state and overseas trade and commerce. However, there are signs that the corporations power may have travelled as far as it will go.[38]

So the suitability of the trade and commerce power in its present form merits consideration. Under this power as it currently stands, the Commonwealth cannot regulate purely intra-state trade and commerce. Only the states can do that. That result made sense at the time of Federation, when the states were separate communities with their own economies and when inter-state trade did not loom large and might have been regarded as discrete.

Today, however, the economic picture is very different. With the advent of rapid transportation and communication, and the development of modern technology, trade within each state has become intricately connected with inter-state and overseas trade. And the nationalization of the economy has necessarily expanded the concept of inter-state trade to embrace activities and transactions that formerly had local significance only. These developments might conceivably justify a re-interpretation of the trade and commerce power, the existing interpretation of which may be anchored in the artifices of legal formalism.[39] But that point is by the way and not relevant to the wider point which I am making here.

A number of difficulties have resulted from the present set-up, including a costly lack of uniformity of business regulation at the state level, and the problem of co-ordinating trade policies between the different levels of government. The elimination or alleviation of these problems is a matter for consideration. The Constitutional Commission, for example, recommended the federal parliament be invested with sufficient macro-economic powers to

[38] *Re Dingjan; ex parte Wagner* (unreported, High Court, 16 March 1995).
[39] See *W & A McArthur Ltd* v *Queensland* (1920) 28 CLR 530; *Australian Coarse Grains Pool Pty Ltd* v *Barley Marketing Board* (1985) 157 CLR 605.

manage the national economy, including the power to respond decisively in times of national emergency.[40] Whether this recommendation should be accepted is a question that merits attention.

The resolution of this question, and of similar questions which involve consideration of the desirability of enlarging Commonwealth power, is necessarily affected by the fact that the concern that existed, in states other than New South Wales and Victoria, about the exercise of federal power still does exist, notably in Queensland and Western Australia. It must be recognized that this fact is an obstacle to the conferment of additional or larger powers on the Commonwealth Parliament. It may therefore be necessary to consider the introduction of mechanisms which will ensure that the exercise of federal power is responsive to the needs of regional communities in Australia.

The Industrial Relations Power

The Commonwealth's power under s 51(xxxv) of the Constitution — and hence its ability to mould a cohesive system of industrial relations — is quite limited in its scope. There are three major constitutional limitations.[41] First, the Commonwealth Parliament has no legislative power with respect to industrial relations generally. Secondly, the jurisdiction of the Federal Commission is not activated unless the dispute is actual or threatened, and is industrial and inter-state in character. And, thirdly, once the federal jurisdiction has been invoked, the award made in settlement of the dispute binds only the parties to the dispute, and the remedy granted must have been within the ambit of the dispute.

Of these limitations, the first is the most significant. It ties the Parliament's legislative power to a system of conciliation and arbitration. It precludes the Parliament from resorting to other means of regulating industrial relations, unless they can be brought within the purview of other Commonwealth powers. In practice, this limitation on the power tends to entrench industrial arbitration as the means of dealing with industrial relations simply because the Parliament has no other specific power directed to the subject-matter.

These limitations on federal power mean that we have a dual (federal and state) system of arbitration that is unduly complex, giving rise to jurisdictional problems which are the bane of any legal system. A dual system of courts or tribunals is awkward enough. As lawyers we are enured to complexity and technicality. But there is little justification for them in the world of industrial relations where speed and simplicity of dispute resolution are, or should be, of the essence. If the Commonwealth Parliament had power over industrial relations generally, it would not be driven to rely on various heads of power — such as the external affairs power and the corporations power — to attempt to construct a mosaic of reforms to accommodate today's indus-

[40] Compare, Australia Constitutional Commission, *Australia's Constitution: Time to Update* (1987), 32.
[41] Id 27.

trial relations needs.[42] The appropriateness of constitutional reform in this area is another question that might be thrown open to debate.

Defamation Law

Defamation law has been a graveyard for law reformers in recent times. Nevertheless, the cry for reform, usually voiced by the media, remains audible. At the time of Federation, the news media were confined to newspapers and periodicals circulating within each colony. Documents that reached other colonies, as with books and periodicals from overseas, were subjected to local defamation laws.

This position was appropriate at the beginning of the century. Today, however, with the growth of national newspapers and periodicals, and the development of television, radio and transmissions by satellite, the desirability of having a uniform law of defamation has become apparent. Quite clearly, the founders did not foresee the emergence of national broadcasting networks and national newspapers, nor did they foresee that those networks and newspapers would be confronted with several different defamation laws in respect of a single broadcast or publication. The lack of uniformity has the potential to produce anomalous and inequitable results. The recent decisions in *Theophanous* v *Herald and Weekly Times Ltd*[43] and *Stephens* v *Western Australian Newspapers Ltd*[44] may provide a spur to uniformity, if not to constitutional or legislative reform.

A Bill of Rights

I mention a Bill of Rights only in order to make a particular point. If Australia were to embrace a Bill of Rights, the Canadian and the New Zealand experience would suggest that we should begin with a statutory Bill of Rights rather than one which is constitutionally entrenched. Indeed, it has been suggested that the enactment of such a statute would inhibit the implication of rights in the Constitution by the High Court. I do not follow the logic of that argument. A statutory Bill would not prevail over the Constitution; it would be subject to the express and implied provisions of the Constitution.

Other Matters

Other matters may merit attention. The decision in *Sykes* v *Cleary (No 2)*[45] suggests that the prescription of qualifications for members of Parliament might be updated to accord with contemporary circumstances. A national intermediate court of appeal, if not a unified court structure, might have some advantages. And, although it may be that the power conferred by s 51(xxvi) to make laws with respect to 'the people of any race for whom it is deemed

[42] Company *Industrial Relations Reform Act* 1993 (Cth).
[43] (1994) 124 ALR 1; 68 ALJR 713.
[44] (1994) 124 ALR 80; 68 ALJR 765.
[45] (1992) 176 CLR 77.

necessary to make special laws' is sufficient to deal with all matters concerning the Aboriginal and Torres Strait Islander Peoples, it seems strange that our Constitution, at the time of its centenary, contains no provision referring specifically to the indigenous people of this continent or their relationship with other Australians.

CONCLUSION

In 1991, a conference was held to commemorate the centenary of the 1891 Sydney Convention. It drew together a group of people with a variety of interests and experience from all parts of Australasia. The participants identified a dozen issues that they felt ought to be brought into sharp focus in this decade leading up to the year 2001.

As things have turned out, the decade of review has concentrated on the republican debate. The importance of that debate cannot be overemphasized. Unfortunately, it has obsured from view other fundamental issues concerning our constitutional arrangements.

Our ultimate goal must be to ensure that our system of government embraces the realities of today and the likely needs of tommorrow. The attainment of that goal calls for a more than superficial understanding of our constitutional framework and suggests that we, the people, should be better equipped to comprehend and discuss the possibility of constitutional reform.

It remains for me to say that it is unrealistic to expect the High Court, through the process of judicial interpretation, to reach solutions which are ideal for the present and the future. The point is that judicial methods has its limitations. Judicial method does not allow the Court to re-write the qualifications of members of Parliament, just as it does not enable the Court to confer new powers on the Commonwealth Parliament.