

# THE CONSTITUTIONAL DECISIONS OF THE FOUNDING FATHERS

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During the 14th century, Chief Justice Hengham interrupted an argument about the meaning of certain legislation, saying: 'Do not gloss the Statute; we understand it better than you do, for we made it.'<sup>1</sup> This robust judicial attitude to statutory interpretation, from a time that knew little of the separation of powers, is now unfashionable. Indeed, it fell out of favour a long time ago. In 1902, the Lord Chancellor, Lord Halsbury, said that the worst person to construe a statute was the person who was responsible for its drafting. 'He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed.'<sup>2</sup> Whatever the nature of the document, be it contract, conveyance, will or Constitution, when there is doubt about its meaning the duty of the court is to construe the text, and it is the meaning of the text that controls the outcome. Drafting history, properly used, may be an aid to discovery of that meaning. Knowledge of facts and circumstances within the contemplation of those who drafted the text may throw light on its purpose and meaning. Law, custom or practice at the time of drafting might indicate the sense in which a word or phrase has been used. Context is vital to the discovery of textual meaning, and that concept itself should be understood in a broad sense.

In *Singh v The Commonwealth*,<sup>3</sup> I explained my views on meaning, intention and purpose as related to constitutional interpretation. I do not intend to repeat what I said there. Rather, I want to develop a particular topic discussed in that judgment. When a doubt is raised about the meaning of some part of the Constitution we may be curious to know what, if any, opinion on the point was held by people who were influential in framing the Constitution. If some such people held a certain opinion, the legal significance of that fact is a matter to be treated with some care.

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\* Chief Justice of Australia. I am grateful for the assistance of my Associates, James Hutton and David Hume. This paper was delivered on 27 March 2007 as the Inaugural Annual Lecture - the University of Notre Dame Australia, School of Law (Sydney).

1 A J Horwood (ed), *Year Books of the Reign of Edward the First: Years XXXIII to XXXV (1305-1307)*, (Longman, Green, Reader and Dyer: London, 1879), 82.

2 *Hilder v Dexter* [1902] AC 474, 477.

3 *Singh v The Commonwealth* (2004) 222 CLR 322, 331-338.

For reasons explained in *Singh*,<sup>4</sup> although a knowledge of what was said, in the Convention Debates or on other occasions, by people who participated in drafting the Constitution may throw light on a particular problem of meaning, to find the collective intention of everyone who contributed to its final form would usually be impossible, and the individual intention of any one of them would not be relevant because of itself it would not advance any legitimate process of reasoning about the meaning of the text.

This, I believe, is orthodox. Yet there seems to be an irresistible temptation, widely felt, to seek to test a proposition of constitutional interpretation by asking whether it would come as a surprise to the Founding Fathers.

Many people, not all of them in Australia, played a part in developing the text of the Constitution; and it was approved by the colonial parliaments, the voters in the referendum process, and, ultimately, the United Kingdom Parliament. If the meaning of the Constitution were to be determined by reference to somebody's contemporary understanding of that meaning, whose understanding would be decisive? What reason is there to believe that everybody that mattered, whoever they might be, had the same understanding? Sometimes it is implied that there was a sufficient consensus about certain topics to justify a comfortable assurance that there was a common belief or understanding held in 1900 with which a modern view may be compared; although the legal, as opposed to the rhetorical, purpose of that comparison is rarely explained.

There are difficulties about such comparisons. Doubts often exist about the meaning of any text, including a written Constitution, for the reason that those responsible for the form of the text did not foresee, and deal with, the issue that later arose. They may have had no common intention about a particular point simply because they did not advert to it. Sometimes, in the interest of achieving consensus, the drafters of a legal document, or some of them, although foreseeing a certain difficulty, may choose not to raise it. Questions of meaning may arise at different levels of generality. People who think they have a shared understanding of an agreement at one level may find that, when there later arises a question about a more particular issue, they have no agreement. The parties to a carefully expressed general agreement might disagree about the application of general words to particular problems. In the case of a Constitution, there is the added factor that it was intended to last for a long time, and to apply in a future which the framers understood they

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<sup>4</sup> *Singh* (2004) 222 CLR 322, 331-337.

could not foresee. It gives the founders of the Australian Federation little credit for wisdom, or even common sense, to imply that they believed that the future for which they were making provision was one which they could predict. We know that they believed no such thing. One of them, Alfred Deakin, said in 1902:<sup>5</sup>

[The] Constitution was drawn, and inevitably so, on large and simple lines, and its provisions were embodied in general language, because it was felt to be an instrument not to be altered lightly, and indeed incapable of being readily altered; and, at the same time, was designed to remain in force for more years than any of us can foretell, and to apply under circumstances probably differing most widely from the expectations now cherished by any of us.

In the same speech, he said that ‘the nation lives, grows and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces.’<sup>6</sup> The world changes. Consider, for example, the change that has occurred in a matter central to the way governmental power was viewed at the time of Federation: Australia’s relations with the United Kingdom. The Founding Fathers regarded themselves as British. For them, there were not merely two sources of power: State and Federal; Imperial authority was an important third source. To ignore that is to distort their vision of political and legal reality. A century ago, and for many years thereafter, Australia’s role in the British Empire was fundamental to its security. The Constitution took legal effect under an Act of the United Kingdom Parliament. In the provisions of the Constitution dealing with qualification for membership of the Australian Parliament there is a reference to persons who are subjects or citizens of a foreign power. In 1999, in a decision to which I was a party, the High Court decided that a citizen of the United Kingdom was a subject or citizen of a foreign power.<sup>7</sup> I am not aware that the decision generated much legal controversy. Yet, plainly, the same question would have been decided differently 90 years earlier. What follows from that? The meaning of the words ‘foreign power’ did not change over that time. What changed were the international circumstances relevant to the application of that meaning to Australia’s relations with the United Kingdom. Would Sir Edmund Barton have been surprised? What does it matter? What does that question mean? When one considers all the events over the 20th century that resulted in the United Kingdom’s coming to be, in relation to Australia, a foreign power, it is not useful to enquire whether those events were envisaged or imagined by our first Prime Minister. It is,

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5 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10965.

6 *Hansard* above n 5, 10967-10968.

7 *Sue v Hill* (1999) 199 CLR 462.

however, improbable that he believed he could foresee everything that might affect that matter.

There is a further problem about comparisons with the understandings of the framers of the Constitution. Such comparisons assume there was a common understanding. In truth, there were important respects in which their individual understandings of the Constitution were different. My purpose is to demonstrate that proposition by reference to a revealing, and impeccable, source of information: the Commonwealth Law Reports of the early years of Federation. Five of the most influential framers of the Constitution became members of the High Court. In that capacity, it was necessary for them to make decisions about the meaning of the instrument they had helped to create. They had the responsibility of judgment. Other participants in the drafting process left evidence of their beliefs and understandings in speeches, journals, books, or other commentary. These five, however, had to address, as judges, specific problems and uncertainties about the meaning of text they had helped to formulate, and give definitive answers. They did not enjoy the luxury of doubt, or equivocation. Their duty was to decide. Their performance should disturb any comfortable assumption that the founders all knew what the Constitution meant. Not only did they leave, in the words of Alfred Deakin, 'an immense field for exact definition and interpretation';<sup>8</sup> not only did they have different ideas about what the instrument meant; they were in disagreement even about basic principles of constitutional interpretation.

In order to set the scene for this analysis, some history should be recorded briefly. Most of the Constitution was the work of two Conventions, one in 1891 and the other in 1897 and 1898. Sir Samuel Griffith, who was at the time the Premier of Queensland, was active in the first, but not the second, Convention. After the first Convention, he was appointed Chief Justice of Queensland, a position he held until 1903, when he became the first Chief Justice of the High Court of Australia. As will appear, his connection with the drafting of the Constitution did not end completely with the first Convention, and continued even after the second. The other two of the first three members of the High Court, Edmund Barton and Richard O'Connor, were active at both Conventions, as were the next two appointees to the Court, Isaac Isaacs and Henry Bourne Higgins. All five are entitled to be regarded as founders of our Federation.

One of the sensitive issues between the colonial interests and the Imperial Government concerned appeals to the Privy Council from State Supreme Courts and from what the Constitution described as the Federal Supreme

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8 *Hansard* above n 5, 10965.

Court, to be called the High Court. This topic was dealt with by clause 74 of the draft Constitution that resulted from the second Convention. That was the draft approved by the colonial parliaments and the people. The Imperial Government objected to the clause as drafted. The clause also had opponents in Australia. Sir Samuel Griffith, in his capacity as Lieutenant Governor of Queensland, communicated on the matter directly with the Imperial Government.<sup>9</sup> This cut across the work of the members of the Australian delegation who had been sent to London to support the Bill as approved in Australia, and who were instructed to resist any changes. The delegation included Edmund Barton. The details of the ultimate compromise between the Imperial Government and the Australian delegates, reflected in section 74 of the Constitution, are not presently material. However, the episode demonstrates the danger of seeking to identify an individual as responsible for the drafting of a text, and then seeking to construe the text according to the subjective intention of that person.

It is convenient at this point to mention a matter of judicial technique. It was the usual practice of each of the five Justices I have named to write separate, individual opinions. That was in contrast to the judgment-writing practice of the early members of the United States Supreme Court, in the time of Chief Justice Marshall. In the Marshall Court, single opinions of the Court were written without any indication of whether the opinion represented a unanimous or a majority view, and with any dissentient remaining silent.<sup>10</sup> In 1822, Thomas Jefferson complained that 'nobody knows what opinion any individual member gave in any case, nor even that he who delivered the opinion concurred in it himself.'<sup>11</sup> We have no such difficulty with the Founding Fathers who became members of the High Court. From their judgments, we know their personal opinions; we know that, in important respects, those opinions were different; and we know that sometimes individually they changed their minds.

## I THE INTER-STATE COMMISSION

One of the greatest obstacles to Federation lay in the conflicting interests of the States in relation to freedom of trade or protectionism. At the 1891 Convention, in which Sir Samuel Griffith participated, there was a general

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9 J A La Nauze, *The Making of the Australian Constitution*, (Carlton, Vic: Melbourne University Press, 1972) 248, 303; R B Joyce, *Samuel Walker Griffith*, (St Lucia, Qld: University of Queensland Press, 1984), 208-209.

10 G E White, 'The Marshall Court and Cultural Change 1815-1835' in *The History of the Supreme Court of the United States* (New York: Macmillan, 1988), Vols 3-4 at 186-189.

11 White, above n 10, 188.

proposal that the Parliament of the Commonwealth might annul any State law or regulation derogating from freedom of inter-State trade. At the second Convention, in which Sir Samuel Griffith did not participate, the Finance Committee put forward a proposal which included the creation of an Inter-State Commission 'to execute and maintain the provisions of this Constitution relating to trade and commerce upon railways within the Commonwealth and upon rivers flowing through, in, or between two or more States.'<sup>12</sup> Professor La Nauze said:

It was the most tangled and tedious debate of the Convention, a contest of motions and amendments. The legal ingenuity of Isaacs, Higgins and Barton and the obstinate political shrewdness of Turner and Reid had full scope in an atmosphere more appropriate to the negotiation of a trade treaty than to the framing of a Constitution for a new nation.<sup>13</sup>

What emerged included section 101 which provided and still provides:

There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

Without doubt, the Commission was intended to be an important feature of the federal landscape, exercising large powers and functions in respect of matters central to the agreement that led to Federation.<sup>14</sup> Its contemplated powers in relation to rivers might have been important today. An Inter-State Commission was established in 1912. In 1915, it intervened in a compulsory acquisition of wheat, destined for inter-state trade, by the State of New South Wales. Its intervention was invalidated by a majority decision of the High Court,<sup>15</sup> with Griffith CJ and Isaacs J going one way, and Barton J going the other. Its powers of adjudication were declared to be narrow and incidental only to its administrative functions, and its status was so diminished that section 101 became a dead letter. The Chief Justice, who had no part in the Convention debates about the proposal for the Commission, was dismissive, regarding its assigned powers of adjudication as merely ancillary, and Parliament's attempt to set it up as a court as spurious.<sup>16</sup> Barton J, on the other hand, referred to 'the extremely important functions which the framers of the Constitution declared that this Commission was to exercise,'<sup>17</sup> and Isaacs J said the

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12 La Nauze, above n 9, 155-157.

13 La Nauze, above n 9, 216.

14 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, (Sydney: Legal Books, 1901) 895-901.

15 *State of New South Wales v The Commonwealth (The Wheat Case)* (1915) 20 CLR 54.

16 *The Wheat Case* (1915) 20 CLR 54, 64.

17 *The Wheat Case* (1915) 20 CLR 54, 71.

case raised 'questions of vast importance'.<sup>18</sup> Those two framers disagreed on a basic point. Barton J said that the Constitution gave Parliament power to set up a body exercising both administrative and judicial functions.<sup>19</sup> Isaacs J said that was impossible, because of 'the fundamental principle of the separation of powers marked out in the Australian Constitution'.<sup>20</sup> His view is in line with current doctrine, but what is interesting is that Barton J did not accept, or recognise, an aspect of the Constitution that Isaacs J described as 'fundamental'.

## II UNION LABELS

In the fifth year of its existence, there was a sharp, and politically charged, division of opinion within the Court, between Griffith CJ, Barton and O'Connor JJ in the majority and the recently appointed Isaacs and Higgins JJ in the minority. It concerned the validity of Commonwealth legislation providing for marks on goods to indicate that they were produced by trade union members.<sup>21</sup> The Commonwealth argued, and the minority agreed, that these were trade marks and the law fell within the power to make laws with respect to trade marks (section 51(xviii)). The majority held that they were not, and the Commonwealth legislation was invalid. Griffith CJ said that in 1900 trade marks did not have a signification that embraced union labels.<sup>22</sup> Barton J<sup>23</sup> and O'Connor J<sup>24</sup> agreed. Isaacs J<sup>25</sup> and Higgins J<sup>26</sup> strongly disagreed. Higgins J also contended, among other things, that the signification of trade marks, as a result of developments in Great Britain, had expanded between 1900 and 1908, and that the Court was not obliged to treat the boundaries of the subjects referred to in the Constitution as 'finally settled and stereotyped' in 1900.<sup>27</sup>

## III THE ENGINEERS' CASE

The most celebrated division of opinion among the five founders with whom this paper is concerned related to a basic principle of constitutional interpretation. The issue was finally resolved only in 1920,

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18 *The Wheat Case* (1915) 20 CLR 54, 82.

19 *The Wheat Case* (1915) 20 CLR 54, 73-74.

20 *The Wheat Case* (1915) 20 CLR 54, 88.

21 *Attorney-General for NSW v Brewery Employees Union of NSW (The Union Label Case)* (1908) 6 CLR 469.

22 *The Union Label Case* (1908) 6 CLR 469, 501.

23 *The Union Label Case* (1908) 6 CLR 469, 521.

24 *The Union Label Case* (1908) 6 CLR 469, 531-533.

25 *The Union Label Case* (1908) 6 CLR 469, 589.

26 *The Union Label Case* (1908) 6 CLR 469, 610.

27 *The Union Label Case* (1908) 6 CLR 469, 603.

after Griffith CJ, Barton J and O'Connor J had gone, and Isaacs J and Higgins J were joined by others of like mind. The decision in the *Engineers' Case*<sup>28</sup> represented a major shift in interpretation that favoured an expansive understanding of Commonwealth legislative power, and an abandonment of the doctrine of reserved State powers that had been influential in early decisions of the High Court. From the beginning, Sir Samuel Griffith applied to the interpretation of the Australian Constitution a doctrine taken from some United States decisions:

[I]t should be regarded as a fundamental rule in the construction of the Constitution that when the intention to reserve any subject matter to the States to the exclusion of the Commonwealth clearly appears, no exception from that reservation can be admitted which is not expressed in clear and unequivocal words.<sup>29</sup>

Thus, for example, where section 51(i) gave the Commonwealth Parliament power to make laws with respect to trade and commerce among the States, that is, inter-State trade, other powers had to be construed so as not to permit the Commonwealth to enact laws that would affect intra-State trade, an area reserved for State power. An example of the practical application of that approach to construction was the narrow operation given in 1909 to the corporations power in *Huddart Parker & Co Pty Ltd v Moorehead*.<sup>30</sup>

In the *Engineers' Case* a Court including Isaacs J and Higgins J emphatically rejected the earlier decisions based on this principle. In a judgment written by Isaacs J, four members of the Court said of those decisions:<sup>31</sup>

The more the decisions are examined, and compared with each other and with the Constitution itself, the more evident it becomes that no clear principle can account for them. They are sometimes a variance with the natural meaning of the text of the Constitution; some are irreconcilable with others, and some are individually rested on reasons not founded on the words of the Constitution or on any recognized principle of the common law underlying the expressed terms of the Constitution, but on implication drawn from what is called the principle of 'necessity', that being itself referable to no more definite standard than the personal opinion of the Judge who declares it.

Specifically, as to the interpretive method of Sir Samuel Griffith, the joint judgment said that 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'.<sup>32</sup> They accused Sir Samuel Griffith of

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28 *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd & Ors (The Engineers' Case)* (1920) 28 CLR 129.

29 *The Union Label Case* (1908) 6 CLR 469, 503.

30 *Huddart Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330.

31 *The Engineers' Case* (1920) 28 CLR 129, 141-142.

32 *The Engineers' Case* (1920) 28 CLR 129, 145.



interpreting the Constitution, not according to its terms, but according to his own vague and individualistic idea of the spirit of the federal agreement which he had helped to make. These were strong words. Writing separately, Higgins J said that the meaning of the constitutional grants of power to the Commonwealth is to be discovered by considering the ordinary meaning of the language and it is the duty of the Court to give effect to that meaning 'even if we think the result to be inconvenient or impolitic'.<sup>33</sup>

What had changed between 1903 and 1920? Much had changed. As Sir Victor Windeyer wrote, Australia's nationhood was consolidated over the course of time 'in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations'.<sup>34</sup> That process was far from complete in 1920, but it was under way. Of present relevance is the fact that two of the parties to the decision in the *Engineers' Case* were framers of the Constitution, and they rejected emphatically the approach that had been adopted by three other framers. From the beginning, there were major differences in the approach of the Founding Fathers to their understanding of the Constitution. There are numerous further examples of specific differences. It is sufficient to refer to only some of them.

#### IV SECTION 92

One of the provisions of the Constitution that gave rise to notorious difficulties of interpretation throughout most of the 20th century is section 92, that 'plain English' declaration that trade, commerce and intercourse among the States shall be absolutely free. It is not surprising that five of the Founding Fathers disagreed about what they meant; the words seem clear, until it becomes necessary to apply them to the variety of issues that might cause them to be invoked. What is interesting is the vehemence with which the framers expressed their disagreement.

In *Duncan v State of Queensland*,<sup>35</sup> decided in 1916, the issue concerned the validity of Queensland wartime legislation for the compulsory government acquisition of meat. Did the legislation offend section 92 in the case of meat intended for sale to buyers in South Australia? This was the kind of problem that recurred for almost 100 years. The majority, who included Griffith CJ and Higgins J, held that the legislation did not infringe

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33 *The Engineers' Case* (1920) 28 CLR 129, 162.

34 *Victoria v The Commonwealth* (1971) 122 CLR 353, 396.

35 *Duncan v State of Queensland* (1916) 22 CLR 556.

section 92. O'Connor J was no longer on the Court. Barton J and Isaacs J dissented. Barton J, at the end of an uncharacteristically lengthy judgment, said:<sup>36</sup>

The decision of the present case, if followed hereafter, will be of grievous effect upon the future of the Commonwealth, for it tends to keep up the separation of its people upon State lines by imputing to the Constitution a meaning which I venture to say was never dreamed of by its framers; a meaning which will probably result in the very dangers and dislocations which its provisions are intended, and, in my judgment, aptly framed, to prevent. If sec. 92 is not adequate to forbid the conduct complained of, it is difficult indeed to frame a provision which would have that effect.

To say that one regrets to differ from one's learned brethren is a formula that often begins a judgment. I end mine by expressing heavy sorrow that their decision is as it is.

The denunciatory style of judgment writing appeals to some commentators, and entertains law students, but it sometimes leads to excess. Here is a statesman, and a sagacious judge, describing a meaning that had just been given to the Constitution by two of its framers as one that was never dreamed of by the framers. The other dissenting framer, Isaacs J, concluded his reasons by saying: 'I also cannot add the traditional judicial regret at inability to concur in the decision.'<sup>37</sup> He had opened his reasons by declaring that this was perhaps the most important case that had ever come before the High Court.<sup>38</sup> Those were passionate men that could feel so strongly about section 92.

As a footnote, it may be mentioned that, in *Duncan*, Griffith CJ accepted that his decision was inconsistent with his earlier, but relatively recent, decision in *Foggitt James & Co v New South Wales*.<sup>39</sup> That case, he said, had been badly argued by counsel and the arguments which he later found conclusive 'did not then find entrance to my mind.'<sup>40</sup> Judges can change their minds, and, if they think an earlier decision is wrong then that may be the right thing to do. It seems clear, however, that the issue that arose in *Duncan* was not one that people were thinking carefully about during the Convention debates. The reason the framers, or some of them, never dreamed of the result might simply be that they never thought of the problem. Griffith CJ was not the only framer to change a judicial opinion about the meaning of the Constitution. In *The Tramways Case [No 1]*,<sup>41</sup> Isaacs J, having 'carefully examined the question anew,' held

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36 *Duncan* (1916) 22 CLR 556, 605.

37 *Duncan* (1916) 22 CLR 556, 627.

38 *Duncan* (1916) 22 CLR 556, 605.

39 *Foggitt James & Co v New South Wales* (1916) 21 CLR 357.

40 *Duncan* (1916) 22 CLR 556, 582.

41 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd* (1913) 18 CLR 54.

that his earlier decision in *Whybrow's Case*,<sup>42</sup> concerning section 75(v) of the Constitution, was wrong.

According to one version of the quotation, John Maynard Keynes said to a person who accused him of inconsistency: 'When I find I am wrong, I change my mind. What do you do?'<sup>43</sup> Sir Samuel Griffith and Sir Isaac Isaacs were two of the most powerful thinkers ever to sit on the High Court. Their constitutional opinions were still developing and changing years after they participated in the creation of the Constitution. That is not surprising. Those who drafted the Constitution necessarily wrote on broad and general lines, and they probably thought in broad and general terms. Subsequent litigation resulted from more specific problems, about which they may never have thought in detail, or from facts and circumstances they may not have foreseen. It is in the nature of a Constitution that it is bound to give rise, over time, to questions the framers did not have present in their minds. The striking thing is how soon the Australian Constitution gave rise to such questions.

## V THE CORPORATIONS POWER

Section 51(xx) empowers the Commonwealth Parliament to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. The scope of this power was the subject of a recent decision of the High Court in the *Work Choices Case*.<sup>44</sup>

The first time the High Court had to consider the meaning of section 51(xx) was in *Huddart Parker & Co Pty Ltd v Moorehead*<sup>45</sup> decided in 1909. That decision was later overruled by the High Court in 1970 in *Strickland v Rocla Concrete Pipes Ltd*.<sup>46</sup> If the decision had stood, the present Trade Practices Act would have been invalid. The Commonwealth's capacity to use the corporations power to prohibit restrictive trade practices depends upon a view of constitutional interpretation radically different from that taken in *Huddart Parker v Moorehead*.

The Court in *Huddart Parker v Moorehead* consisted of the five judicial Founding Fathers. Their individual opinions on the scope of the corporations power were all different. Indeed, if one accepts that the report of the case accurately records a view expressed by O'Connor J in

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42 *Australian Boot Trade Employees' Federation v Whybrow & Co and Ors* (1910) 11 CLR 1.

43 Source: <<http://nickelkid.net/quotes/keynes.html>> at 15 November, 2007.

44 *New South Wales v Commonwealth (Work Choices Case)* (2006) 81 ALJR 34.

45 *Huddart Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330.

46 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

the course of argument, between the five of them they held six different opinions about the power. Those differences are analysed in the majority judgment in the *Work Choices Case*,<sup>47</sup> which pointed out that it is obvious that there was no settled understanding, accepted by these five framers of the Constitution, of the meaning or effect to be given to section 51(xx). This, again, should come as no surprise. The meaning of the provision is not self-evident; and the discussions that occurred during the Convention Debates did not include any exhaustive examination of the potential issues that might arise for consideration in the future. Here was an example of a future need for what Alfred Deakin described as 'exact definition and interpretation'. When the need arose, the five framers on the High Court applied themselves to the task and provided different solutions. Years later, their opinions were overruled when the problem was considered afresh. That fresh consideration was itself influenced by the new approach to constitutional interpretation required by the *Engineers' Case*. Views about the new approach may differ, but one thing is clear: no one who took the trouble to read *Huddart Parker v Moorehead* could be under the illusion that the framers of the Constitution had a common understanding of the corporations power.

## VI THE CONCILIATION AND ARBITRATION POWER

From the earliest days of Federation, the Commonwealth Parliament's power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State - a power that inevitably raised tensions between federal and State powers of industrial regulation - caused divisions of opinion. Usually, but not always, Griffith CJ, Barton J and O'Connor J were on one side of the division and Isaacs J and Higgins J were on the other. The former three were defensive of States' rights (or States' interests), and the other two displayed a centralist tendency; but such labels involve oversimplification. Two important disagreements were as follows.

Reflecting the division of opinion that later led to the reversal, in the *Engineers' Case*, of a line of earlier authority, in *R v Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild*<sup>48</sup> Griffith CJ and Barton J treated the scope of the conciliation and arbitration power as narrowed by the implied reservation to the states of power to control domestic, as opposed to inter-state trade, while Isaacs J emphatically rejected that view. He said, foreshadowing what was to come in the

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47 *Work Choices Case* (2006) 81 ALJR 34, 65-68.

48 *R v Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (1912) 15 CLR 586.

*Engineers' Case*: 'The words of the Constitution ... stand in all their simplicity and fullness, in an instrument of government, intended to operate as long as the instrument itself shall live, with unabridged force, whatever changing incidents time may bring to the industries of the Commonwealth.'<sup>49</sup>

In the *Sawmills Case*<sup>50</sup> in 1909, Barton J did not sit because of illness.<sup>51</sup> A Court made up of Griffith CJ, O'Connor J, Isaacs J and Higgins J was evenly divided. There was a question whether the Commonwealth Court of Conciliation and Arbitration had power to make an enforceable award inconsistent with a determination of a State Wages Board that had power to fix minimum wages. Griffith CJ and O'Connor J said no. Isaacs J and Higgins J said yes. Higgins J rebuked those who saw the matter differently:<sup>52</sup>

It is not for this Court to twist the expressions of the [British and Federal] Parliaments to suit our own notions of economic or social expediency. The legislatures, not this Court, are responsible for the wisdom of the legislation. Our attitude should not be that of either approval or disapproval. Great social experiments are being tried; and they should get a fair trial - whatever we may think of their merits. It is just as bad to be influenced in our decisions by fear of the powers given to the Federal Parliament ... as it is to be influenced by a desire to see these powers magnified.

After Barton J recovered his health the same issue arose in another case, and Barton J sided with Griffith CJ and O'Connor J.<sup>53</sup> Judicial asperity never persuades colleagues to change their minds.

These are instances of the framers of the Constitution revealing different, and irreconcilable, understandings of the Commonwealth's conciliation and arbitration power and its capacity to affect what is sometimes described as the federal balance. Their differences were not limited to matters of detail. They went to issues at the centre, not only of the interpretation of the conciliation and arbitration power, but also of the interpretation of the entire Constitution as an instrument of federal distribution of powers.

## VII THE INCIDENTAL POWER

In 1912, in *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth*,<sup>54</sup> Griffith CJ and Barton J, on the one side, and Isaacs J

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49 *The Engineers' Case* (1912) 15 CLR 586, 607-608.

50 *Sawmills Case* (1909) 8 CLR 465.

51 See *R v Court of Conciliation and Arbitration, Ex parte, Whybrow* (1910) 10 CLR 266, 298.

52 *Sawmills Case* (1909) 8 CLR 465, 539.

53 *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 10 CLR 266.

54 *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth* (1912) 15 CLR 182.

and Higgins J, on the other, disagreed about what at first sight looks like a minor issue. The question was whether the Commonwealth Parliament's power (given by section 51(xxxix)) to make laws with respect to matters incidental to the execution of powers vested by the Constitution covered a power to make laws for the collection of information about matters that might be the subject of a referendum. Griffith CJ, answering the question no, said of the argument accepted by two of his co-framers: 'It implicitly denies the whole doctrine of distribution of powers between the Commonwealth and the States, which is the fundamental basis of the federal compact'.<sup>55</sup> If the framers of the Constitution were in disagreement about the fundamental basis of the federal compact, what hope is there for the rest of us? The answer is that we do the best we can, applying accepted legal techniques of constitutional interpretation. We disagree among ourselves. But we do not suffer from the delusion that all would be made clear if only we could discover the beliefs and understandings of the Founding Fathers. They themselves were in dispute about many topics. They did not assume the impossible burden of infallibility. Ultimately, they resolved their disputes in the same way as we resolve ours: by force of argument and weight of numbers.

## VIII AN ADMONITION TO THE PRIVY COUNCIL

What appears above covers only some of the instances of disagreement among the first five Justices of the High Court about the Constitution they had helped to frame. On one subject, however, they were in firm agreement: the Judicial Committee of the Privy Council, sitting in London, should keep its hands off those issues reserved by the Constitution for the final decision of the High Court. They might broadly be described as issues of federalism. The problem was that section 74 of the Constitution, which defined those issues, was unclear.

Who drafted section 74? That is no easy question. As was noted earlier, section 74, in its final form, as accepted and enacted by the Imperial Parliament, was different from the clause that had been drafted in Australia, and agreed by the colonial parliaments and by the Australian people in the referendum process. Sir Samuel Griffith, then Chief Justice and Lieutenant Governor of Queensland, appears to have had a hand in it. This is not the occasion to reflect upon what was involved in giving encouragement to the Imperial authorities in London to alter the federal agreement that had been hammered out by a long process of negotiation and referendum and finally accepted in Australia.

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55 *Colonial Sugar* (1912) 15 CLR 182, 194.

Section 74 limited the powers of the Privy Council to hear appeals from Australian courts on constitutional issues. The details of the limitation are presently irrelevant. Early on, there were conflicting decisions of the High Court and the Judicial Committee of the Privy Council about the powers of Commonwealth and State governments to legislate so as to impose a tax on other government instrumentalities.<sup>56</sup> Again, this was an important issue of federalism. The High Court considered that this was a question on which, under section 74, it had the last word. London disagreed.

In *Baxter v Commissioner of Taxation (NSW)*<sup>57</sup> all five Justices sat. Unusually, there was a joint judgment of Griffith CJ, Barton J and O'Connor J of which Griffith CJ was identified pointedly as the author.<sup>58</sup> The identification of the author of a joint judgment in the High Court is very rare. No doubt it was intended to make plain to the Imperial authorities that the judgment was as a message from the Chief Justice personally. He referred to the Privy Council's lack of understanding of federal constitutional law, and its unsatisfactory history of decision-making on the Canadian Constitution. In one of the most strongly worded judgments in the Commonwealth Law Reports, after referring to the reliance the framers had placed on the American Constitution in developing the Australian Constitution, the Chief Justice said:<sup>59</sup>

It was common knowledge [in 1901], not only that the decisions of the Judicial Committee in the Canadian cases had not given widespread satisfaction, but also that the Constitution of the United States was a subject entirely unfamiliar to English lawyers, while to Australian publicists it was almost as familiar as the British Constitution. It was known that, even if there should be any members of the Judicial Committee familiar with the subject, it was quite uncertain whether they would form members of a Board that might be called upon to determine a question on appeal from an Australian court, by which it must necessarily be dealt with in the first instance. It could not be predicted of the Board, which would sit to entertain an appeal, that it would be constituted with any regard to the special familiarity of its members with the subject. And no disrespect is implied in saying that the eminent lawyers who constituted the Judicial Committee were not regarded either as being familiar with the history or conditions of the remoter portions of the Empire, or as having any sympathetic understanding of the aspirations of the younger communities which had long enjoyed the privilege of self-government. On the other hand, the founders of the Australian Constitution were familiar with the part which the Supreme Court of the United States, constituted of Judges imbued with the spirit of American nationality, and knowing that the nation must work out its own destiny under the Constitution as framed, or as amended from time to time, had played in the development of the nation, and the harmonious working of its political institutions.

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56 *Deakin v Webb* (1904) 1 CLR 585; *Webb v Outrim* [1907] AC 81.

57 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087.

58 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, 1099.

59 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, 1111-1112.

When Sir Samuel said that no disrespect was implied he appears to have meant that the disrespect was express.

At the least this early and aggressive assertion of British lack of expertise in federalism puts paid to any idea that a useful source of contemporary understanding of the Constitution is to be found in London. We have Sir Samuel Griffith's assurance that such a possibility may be disregarded.

## IX CONCLUSION

Depending upon the nature of the problem of constitutional interpretation that arises, historical information may be useful in establishing context and purpose and thereby throwing light on the meaning of the text. Sometimes, what was said by those who participated in the framing of the instrument may fall into that category. Two examples illustrate the point: the first from the Convention Debates; the second from an early High Court decision. At the second Convention, on 4 March 1898, there was an exchange between Mr Barton and Mr Isaacs about section 80 (which mandates trial by jury in the case of indictable offences against federal law). The exchange shows that, at least in the eyes of those two framers, the provision was intended to mean exactly what it said. This is not insignificant, as a literal reading of the provision gives it a narrower scope than might plausibly be suggested to have been its purpose. The historical information has been found useful in interpreting the provision, because it confirms the literal meaning.<sup>60</sup> The second example concerns one of the best known difficulties with the text: understanding how section 122, which gives the Parliament power to make laws for the government of any territory, relates to the rest of the Constitution. That difficulty has not been fully resolved even yet. An issue that arose in 1915 was whether section 80 applied to proceedings in the Territory of Papua. The judgments of Griffith CJ and Isaacs J in *R v Bernasconi*,<sup>61</sup> which were both to the same effect, reveal part of the historical context, showing that the territories in contemplation were of many different kinds, ranging from internal territories whose people might for all practical purposes be indistinguishable from residents of the States, to, in that case, a recently conquered territory, of mixed Polynesian and German population, described as being 'in a state of dependency or tutelage'.<sup>62</sup> This aspect of the context of section 122 was relied upon by three members of the Court in *Re Governor; Goulburn Correctional Centre; ex parte Eastman*.<sup>63</sup>

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60 *Cheng v The Queen* (2000) 203 CLR 248, 269.

61 *R v Bernasconi* (1915) 19 CLR 629.

62 *R v Bernasconi* (1915) 19 CLR 629, 637.

63 *Re Governor; Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 331.



On the other hand, at the time of the drafting of the Constitution, there were some matters, relevant to its meaning, that were well known to be in a state of change and development. For example, section 51(xix) gives the Commonwealth Parliament power to make laws with respect to naturalisation and aliens. The Court has recently held that Parliament has wide, although not unlimited, power to decide who will be treated as an alien, noting that in 1900 there were current, in various parts of the world, different theories about the status of alienage and concluding that, in such a context, it was inappropriate to interpret the power as binding the Parliament to the acceptance of any one of those theories.<sup>64</sup>

Knowledge of the historical context in which the Constitution was written may be an important aid to understanding its meaning, making necessary allowance for the fact that it was drafted as an instrument of government, expressed in broad and general terms, and intended to apply in a future which the framers understood they could not foresee. What is not relevant, however, is the subjective belief of individuals who participated in the drafting of the Constitution about what it meant. The five Founding Fathers who played such an important part in framing the Constitution, and who later became members of the High Court, all had strong opinions about what the Constitution meant. In important respects those opinions were different. In some respects, individual opinions changed. It was in the nature of the Constitution that it would throw up questions that the framers did not consider, or did not think through, at the time. It is in the nature of the Constitution that changing circumstances would give rise to problems the framers did not foresee. They understood perfectly well that this would happen. They were far-sighted. Their work in creating a Federation was a great political and legal achievement. Their decisions on the High Court gave invaluable guidance to their successors. Nevertheless when, on occasions of disagreement, these framers accused one another of mistaking, or abandoning, the intentions of the framers, they were merely demonstrating the point made by Lord Halsbury in 1902. In interpreting a legal instrument, including a Constitution, what finally matters is the meaning of what the instrument says. The task is to construe the text. The authors of the text employed particular language, and it is the effect of that language, not their beliefs about that effect, that is legally binding.

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64 *Singh* (2004) 222 CLR 322.

