# The Shifting Balance in Federal/State Relations: Its Impact on the Australian Judicial System

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## I INTRODUCTION

This article concerns the steady march of 'federalism' in the constitutional arrangements in Australia. It will be suggested that the boundaries have been fundamentally redrawn. I should begin by laying my philosophical cards on the table. For most of my practice at the Bar over perhaps 30 years I dealt with industrial law issues, usually at a federal level. In the early years of my practice, particularly, before the federal government elected to base its industrial legislation on the corporations power, federal industrial legislation was based on the conciliation and arbitration power in s 51(xxxv) of the *Australian Constitution*. That was a power given to the Federal Parliament to legislate for:

> (xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

In those earlier days there was a keen and jealous examination in many cases of whether industrial disputes were 'federal' or not. In my examination of those issues, and particularly in the application of the then existing body of legal principles, I came to appreciate that the constitutional arrangements had been fashioned with the principle firmly in mind that the Federal Parliament, which was established at the beginning of the 20th century, was intended to have identified, and not comprehensive, powers which were to be exercised in a way that kept interference with State autonomy to the minimum consistent with the existence of the new federation.

I was probably, at heart, a bit of a 'states' righter' and I confess to having always had a soft spot for the position of the less populous States, which is addressed, for example, by the arrangement for Senate representation. However, the march of federalism is implacable and it would be disingenuous of me to say that my perspective has not changed with my

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current appointment. All I will claim at the outset, therefore, is that I understand the position of those who yearn for the full application of the ideas of the founding fathers – but I think time has moved on.

I must also make an immediate disclaimer. The points which I am going to make should be regarded as the product of a (fairly) neutral process of observation. They should not be regarded as a criticism of the direction of change, or of the result. I will endeavour to point out the distance we have travelled in some areas, and how unlike the beginning of the journey is the current landscape, but, in many ways the journey was inescapable and the outcome neither really surprising nor unacceptable, nor even troubling.

That brings me to another note of caution. Despite the adage that the key to the future lies in the lessons of the past, it is difficult to see where you are going if your attention is fixed firmly behind you. It is relatively easy to express opinions based on a survey of the past. It is much less easy to make responsible, or reliable, predictions for the future. Change is a natural occurrence in any 'living' process, and there is little basis for an assumption that change in constitutional understandings was expected not to occur. Those who debated the constitutional arrangements that we now have knew they were setting the country on a new and unexplored path. We may, I think, be fairly confident that people of that mould were not unaccustomed to some sense of adventure in life.

## II A LOCAL CONNECTION TO A LARGE ISSUE

I want to commence with the examination of a Tasmanian decision – *Commonwealth v Wood* (2006) 148 FCR 276 ('*Wood*'). First, let me make a further local connection – to the judge who decided the legal point I wish to begin from. Peter Cadden Heerey is Tasmanian born and bred. He was a judge of the Federal Court of Australia from 17 December 1990 until 16 February 2009, when he was forced into retirement at the age of 70 as a result of the operation of s 72 of the *Constitution*. He was, and is, regarded with considerable respect and, one may fairly say, affection by his fellow judges. After 15 years on the Federal Court he declared in *Wood* that the *Anti-Discrimination Act 1998* (Tas) bound the Commonwealth of Australia and its agents and that a complaint against the Commonwealth could be pursued before the Tasmanian Anti-Discrimination Tribunal.

The case was a tragic one. Eleanor Tibble had committed suicide at the age of 15. Her mother alleged that her suicide arose from her enforced resignation from the Tasmanian Squadron Air Training Corps. She brought proceedings against the Commonwealth under the *Anti-Discrimination Act*. The Commonwealth applied to the Federal Court for an order that the proceedings be terminated. A number of issues required

consideration. The premise that hearing and determining the complaint would involve the exercise of judicial power was not in dispute in the proceedings. Heerey J accepted that disposition of the complaint under the *Anti-Discrimination Act* would require the exercise of federal judicial power because the proceedings were brought against the Commonwealth. Accordingly, a finding that the proceedings were validly commenced would require a conclusion that the Tasmanian Anti-Discrimination Tribunal, which was established by the *Anti-Discrimination Act* and to which the complaint was made, was a 'court of a State' within the meaning of ss 71 and 77(iii) of the *Constitution* and, correspondingly, a court to which federal judicial power had been assigned under s 39 of the *Judiciary Act 1903* (Cth). I shall, in due course, give some further attention to each of these provisions in their general operation.

Heerey J held that the Tasmanian Anti-Discrimination Tribunal was a court of a State. He implicitly rejected an argument that there were characteristics accompanying the exercise of its functions which infringed the principle stated by the High Court in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ('*Kable*'), although he did not do so by reference to *Kable* itself. *Kable* concerned a challenge to the *Community Protection Act 1994* (NSW) which was enacted by the NSW Parliament to ensure the continued detention of Gregory Wayne Kable. Kable had stabbed his wife to death in savage circumstances, been convicted of her manslaughter and sentenced to a total term of imprisonment of five years and four months. While in prison he sent threatening letters through the mail, mainly to relatives of his deceased wife. The *Community Protection Act* permitted Mr Kable to be detained without charge and without trial.

There is no indication that Heerey J regarded the case before him as raising issues of the character actually dealt with in *Kable*. He was not asked to declare any part of the *Anti-Discrimination Act* invalid, for example. *Kable* was referred to only to support the more general proposition that:

> subject to such qualifications as may arise from the Kable doctrine [reference given], the separation of powers, strictly applied in relation to the federal judiciary, does not apply at the State level.[1]

The 'separation of powers' to which Heerey J referred, in the context of the federal judiciary, was the constitutional principle expressed in the *Boilermakers' Case*[2] to the effect that the Federal Parliament did not have power to confer both judicial and non-judicial power on the one body.

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[1] *Commonwealth v Wood* (2006) 148 FCR 276, [59].

[2] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (High Court); *Attorney-General of the Commonwealth of Australia v R* (1956) 95 CLR 529 (Privy Council).

This limitation, which was found in the text and structure of the *Constitution*, was not thought to apply in the same way to bodies created by the States. I shall say more about the issue in due course.

Although the issues in *Wood* were decided without further explicit reference to *Kable*, the discussion by Heerey J of the argument about the Tasmanian Anti-Discrimination Tribunal, and the exercise of its powers and functions, proceeded by reference to matters which have become familiar in later discussion about the application of the *Kable* doctrine. Thus, his Honour said:

> The Anti-Discrimination Act holds out to the Tasmanian public a clear promise that the Tribunal will hear and determine complaints of unlawful discriminatory conduct, that in doing so it will act fairly and independently and make orders remedying breaches of the Act, if necessary against the Tasmanian Government. A public expectation that the independence of the Tribunal will be respected by the government is in itself a circumstance of some significance.[3]

Within a year or two the judgment in *Wood* was overruled (by majority, Goldberg J dissenting) on the ground that the *Anti-Discrimination Act* did not bind the Commonwealth.[4] Only Kenny J discussed the further constitutional issues dealt with in *Wood* (which were described by Goldberg J and Weinberg J as 'complex'). Kenny J would have concluded that the Tasmanian Anti-Discrimination Tribunal was not a court of a State.

Again, there was no specific discussion of the *Kable* doctrine which had not at that time been embraced as unreservedly as it since has. Kenny J's view turned, it would seem (see [235]), on the fact that members of the Tribunal could be removed at will by the responsible Minister.[5] Her Honour said: 'The absence of any provision as to tenure compromises the institutional independence of the Tribunal.' Her Honour referred also to a judgment of the New South Wales Court of Appeal, decided after *Wood*, in which it had been held in *Stockland*[6] that the Administrative Decisions Tribunal of New South Wales was not a court of a State. In *Stockland*, Spigelman CJ observed (referring to *Kable*) that the words 'court of a State' must be understood as a constitutional expression. His Honour referred to *Wood* but apparently thought that insufficient weight had been given to the non-judicial aspects of the Tasmanian Anti-Discrimination Tribunal and its work, including the lack of security of tenure and the fact that it was not composed necessarily of judges.

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[3] *Commonwealth v Wood* (2006) 148 FCR 276, [73].
[4] *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85.
[5] Ibid [235].
[6] *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77.

The significance of *Wood* for the purpose of the matters I wish to discuss (apart from the fact that it involved Tasmanian issues and was decided by a Tasmanian Federal Court judge) is threefold. First, it provides a good example of a constitutional understanding about the authority and autonomy of the States which we are leaving behind, as I will endeavour to show. Secondly, it shows the beginnings of the real significance of *Kable. Wood* took a conservative view of *Kable*. *Stockland* took a much broader view of its significance. Perhaps Spigelman CJ had a more intimate appreciation of what had happened in *Kable*. It was his court, after all, which had been corrected. Whether that is so or not, history has shown that *Kable* has a much wider significance than was first appreciated. Indeed, it was at first treated as something of an aberration. That is certainly no longer the case. Thirdly, it is significant that when *Wood* and *Stockland* were decided 10 years had passed since *Kable* without much positive response to it. In the last couple of years recognition of the significance of *Kable* has accelerated to the point where it is possible to say that a new constitutional principle has emerged.

Naturally, there are two aspects to the *Kable* reasoning which must be borne in mind. One is the question of when an established body, like the Tasmanian Anti-Discrimination Tribunal, should be regarded as a 'court of a State', permitting it to exercise the judicial power of the Commonwealth. That was the question which was answered one way in *Wood* and differently in *Stockland* and *Commonwealth v Anti-Discrimination Tribunal (Tas)*. The other question arises when, as in *Kable* itself, a State government attempts to invest an unmistakeable and constitutionally entrenched 'court of a State' (a Supreme Court of a State is the easiest example) with powers and functions incompatible with the exercise of federal judicial power. Mixed up in both questions is the tension between the idea that, as Heerey J felt, the Commonwealth must take State courts as it finds them and the idea, as discussed in *Kable*, that there are some features of State courts which a State government may not compromise.

Having introduced this more general topic with a little local flavour, one issue to which (amongst others) I will return in more detail is the development of the principle that there are now new limitations on the powers and discretions of the States in relation to their own courts which arise from the circumstance that those courts might exercise 'the judicial power of the Commonwealth', often referred to simply as federal judicial power.

Before coming to that subject directly, however, I want to go back in time and set the scene by reference to the expectations which were about at the time of Federation.

## III THE FOUNDATIONS OF FEDERATION

It is sometimes said that the *Australian Constitution* (formally an Act to constitute the Commonwealth of Australia) represents a compact amongst the States, and their peoples. That may be seen from the opening words of the *Constitution*:

> WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established …

and the provisions of covering clause 3 which contemplated acceptance of Western Australia and its people.

There was no doubt that an essential premise of the federation of the States was the creation of a new, single polity under the Crown. In an opinion provided to the Prime Minister on 28 May 1901 Mr Alfred Deakin, then Attorney-General, said:

> The whole scope and spirit of the Constitution require that save for the purposes of their domestic policies within their own domains the States shall be blended and absorbed into one political entity. They may still appear in some respects as a body of allied States but to the Empire of which they form a part and to the world without it they have become and must remain a nation and a Commonwealth one and indivisible.

Nevertheless, the arrangements for the new Commonwealth of Australia, and its governance, were predicated upon the preservation and continued existence of the States and upon some fundamental notions concerning the distribution of power and authority as between the new Federal Parliament, Executive government and judiciary and the corresponding organs of the States.

In an opinion provided on 16 December 1907 to the Prime Minister, the then Attorney-General, Mr Littleton E Groom, described the structure of the new Commonwealth of Australia in the following terms:

> The leading features of the Australian Commonwealth may be conveniently summed up as follows:
>
> (1) The Commonwealth is formed of communities which were at the time immediately preceding the union separate and independent in their relation to each other.
>
> (2) The Commonwealth Government is a government of limited and enumerated powers, and the Parliaments of the States retain their residuary power of government over their territory (as pointed out above).

> (3) The Commonwealth Government and the State Governments are each organised separately and independently for the performance of their functions, whether legislative, executive, or judicial. The powers of the States come from the organisation and the powers which were theirs prior to the establishment of the Commonwealth.
>
> (4) The legislative powers of the Commonwealth Parliament are not in general exclusive powers. A few exclusive powers are expressly conferred, including the power over certain matters of administration taken over by the Commonwealth. Others arise from the fact that some of the powers conferred on the Commonwealth are not derived from the existing powers of the States. As to concurrent powers, in the case of inconsistency, the law of the Commonwealth prevails, and the law of the State is void to the extent of the inconsistency (vide section 109).
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> (5) Subject to what has been said in (4), the Commonwealth and State Governments are in their relations independent. There is no such supervision of the States in the exercise of the powers belonging to them as is exercised in Canada by the Dominion Government over the Provincial Governments.
>
> (6) The observance by the Commonwealth and the States of the limits set to their respective powers is secured generally but not universally, by the action of the courts whose judicial duties may involve the determination of the validity of the authority under which acts are done.

In an opinion provided on 11 August 1908 the Secretary of the Attorney-General's Department, Mr R R Garran, co-author of the famous constitutional text, made a related point:

> In the distribution of legislative power between the Commonwealth and the States, two main points stand out:
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> (1) the grant to the Federal Parliament of legislative power as to specified subjects only, leaving the general residue of legislative power to the States; and
>
> (2) the fact that the Federal legislative power was, for the most part, not expressed to be exclusive so that the laws and legislative powers of the States, on subjects as to which the Federal Parliament had power to legislate, remained unimpaired till superseded by Federal legislation.

The powers which were given to the new Federal Parliament exclusively of the States were limited. The clearest examples are contained in ss 52 and 90, although scattered through the *Constitution* there are other specific powers given to the Federal Parliament which are, of their nature and essence, powers inapt for exercise by a State and which may, for that reason, also be fairly regarded as exclusive. Apart from its exclusive powers the Federal Parliament was endowed with a list of non-exclusive powers to legislate set out in s 51. These are sometimes referred to as the 'concurrent' powers.

At the same time, the *Constitution* of each State was to continue in force (s 106), the powers of State parliaments were undiminished unless assigned exclusively to the Federal Parliament or withdrawn from a State parliament by the *Constitution* (s 107) and all State laws were to continue in force (s 108). Full faith and credit was to be given to the laws, public acts and records and judicial proceedings of every State (s 118).

It was only in those areas where a law of a State, subsisting under the *Constitution*, was inconsistent with a law of the Commonwealth, that the Commonwealth law prevailed. The State law was to be 'invalid' but only to the extent of the inconsistency and, as became clear subsequently, only for such time as the inconsistency endured (s 109).

An important matter must be borne steadily in mind when assessing the passage of events after Federation was achieved. Apart from acceptance by the British Government and the British Crown of the idea of federation, and of substantial autonomy for a new national polity, the principal issues for resolution in the Convention Debates were debated by representatives of the States in the absence of the new polity itself. The States were certainly required to evaluate the likely relations between themselves and the new Commonwealth but, in a practical sense, the accord required at that point was one which established a balance from only their own perspective. Once Federation was achieved the balance to be struck in any future dialogue would be almost universally a balance between the interests of a State or States, on the one hand, and the Commonwealth on the other. From that time forward, the Commonwealth had a powerful self-interest to consider, and an opportunity to articulate it which eventually has far outstripped the States' attempts at the end of the 19th century to forecast how things might work out in practice.

Furthermore, any idea that the Commonwealth would function as a national shell for limited external purposes (protected no doubt by Britain) while the States went about their ordinary business, progressively faced the grim reality of two world wars, as well as the dissolution of the British Empire and then the disintegration, as a cohesive force, of the British Commonwealth. All of these events compelled consideration of a national, rather than colonial, identity. In the area of judicial administration the final abolition of appeals to the Privy Council from the Supreme Courts of the States (and earlier from the High Court) eventually severed the formal relations with, and earlier dependency on, British law. The High Court was then left, undeniably, as the ultimate guardian of Australian legal standards and principles.

The last appeal from a Supreme Court of a State to the Privy Council was concluded in 1987 in *Austin v Keele*.[7] The progressive limitation on, and then abolition of, appeals to the Privy Council was accomplished by the *Privy Council (Limitation of Appeals) Act 1968* (Cth), the *Privy Council (Appeals from the High Court) Act 1975* (Cth), the *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK). Although s 74 of the *Constitution* continues to provide the theoretical possibility of a certificate from the High Court for the agitation of an 'inter se' question, the High Court pointed out in *Kirmani v Captain Cook Cruises Pty Ltd (No 2)*[8] that only one such certificate had ever been issued and declared that the provision was obsolete.

At the same time as Australia was emerging as a nation from its colonial (European) past, other powerful forces were at work which may now be seen with a clarity denied to the representatives of the States in the late 19th century. There are many potential examples but two will suffice for the purposes of the present discussion. One was the development of corporations, and their regulation, as the principal vehicle for economic activity in Australia. Incorporation and the creation of an artificial legal personality, in this country at least, have a special place in the national economic fabric. Our taxation system is adjusted to it, as are our employment systems and our legal system. There is widespread regulation at all levels, from overall corporate conduct to the conduct of individual directors. This development dovetailed neatly with the constitutional power given to the Federal Parliament, by s 51(xx) of the *Constitution*, to regulate the affairs of foreign and trading or financial corporations, to which I shall return.

Another example is the increasing use of treaties to express economic and environmental objectives and aspirations, rather than essentially military ones. A grant of power to the Commonwealth with respect to 'external affairs' (s 51(xxix) of the *Constitution*) was inevitable, but an increasingly liberal view of what that term embraces has afforded the Federal Parliament a degree of legislative competence and authority which the representatives of the States would surely not have anticipated in 1900 and shortly before.

The theme I want to develop is that the constitutional arrangements determined at the time of Federation have been fundamentally redrawn to the point where the modern functioning of the Federation proceeds in ways which were rejected at the time of Federation. This is a large topic, and the proposition just stated is too unsophisticated to survive scrutiny without accepting many exceptions to it. However, it serves to provide a general theme against which to take some specific examples of

[7] (1987) 72 ALR 579.
[8] (1985) 159 CLR 461.

constitutional development. The examples concern the grants of power in s 77(iii) and s 51(xxxv), (xx) and (xxix) of the *Constitution*.

## IV EXPECTATIONS ABOUT THE JUDICIAL SYSTEM IN A FEDERATION

Some idea of the expectations of the States, at the time that Federation and its features were debated, about distribution of legislative power generally may be gleaned from the following robust contention by Mr Thomas Playford (South Australia) at the Federation Conference held in Melbourne in 1890, which preceded the Federation Convention Debates which began the following year:

> Mr T. PLAYFORD – Although unity is a grand thing, it is not everything. As far as the local legislatures are concerned, I contend that it will be the wiser course to adopt to leave to them all the powers we possibly can, apart from such powers as they cannot exercise individually.
>
> Sir HENRY PARKES – We all say that.

This concept (which found substantial expression in the final constitutional arrangements) had implications in a wide range of areas. Let me concentrate first on the organisation of the judicial system. Views differed. Some favoured a national judicial system, incorporating existing State courts. Some wanted minimal interference, restricted to the establishment of the new High Court, but otherwise leaving the State systems unaffected. Some favoured the middle course. Exchanges at the Federation Conference revealed the division of opinion:

> Mr DEAKIN – What we shall require will be, not simply some Federal Court of Appeal to hear cases after they have been dealt with in the Courts of the colony, but a Federal Judiciary, with Federal Courts in all the colonies.
>
> Mr T. PLAYFORD – We shall establish a lot of additional courts at a great deal of unnecessary expense.

One of Justice Heerey's great favourites is Andrew Inglis Clark. At the time of the Federation Conference, Inglis Clark was the Attorney-General for Tasmania. Inglis Clark supported Deakin's position, saying:

> The honourable gentleman also referred to the advantages which would arise from a Federal Judiciary. I think he said all that could be said upon that question.

Inglis Clark is credited with having been highly influential in drafting many aspects of the *Constitution*al arrangements concerning the judiciary and judicial power. His position is more clearly stated at the first Convention Debate in Sydney on 11 March 1891:

> I will proceed now to the question of the judiciary. The resolution as it stands provides for only a court of appeal. I hope that when we get into Committee an amendment will be moved establishing a system of federal courts independently of, and in addition to, the state courts…
>
> What we want is a separate federal judiciary, allowing the state judiciaries to remain under their own governments. If you have your various governments moving in their respective orbits, each must be complete, each must have its independence. You must have an independent legislature, an independent executive, and an independent judiciary, and you can have only a mutilated government if you deprive it of any one of these branches. I therefore hope to see a complete system of federal courts, distinct from the provincial courts. I will not enter fully into the question now. I could give many other reasons why we should have a double system, and could mention many benefits which would flow from it. I content myself now by saying that I hope that in addition to a separate federal system of courts we shall have a court of appeal, as the resolution contemplates.

The system of federal courts was slow in coming but we now have something of the kind of which Inglis Clark spoke. Inglis Clark had considerable support for his views, which had two aspects: establishment of a separate federal judiciary; and freedom for the States to maintain their own. Mr Cuthbert, from Victoria said:

> Mr CUTHBERT: While he was careful not to express any decided opinion, I am inclined to think that the Attorney-General of Tasmania was perfectly right in one portion of the views which he presented – namely, that we ought not to interfere with the appointments made, and to be made by the states of their respective judges. Leave that altogether to the states; do not seek to deprive them of that power.

There were even more ambitious approaches. Mr Wrixon QC, from Victoria, said:

> It would be one of the greatest advantages of the federation to have one judiciary, and I trust that the result of the arrangements we shall make will be to make the supreme court judges, and also the county court judges all through the dominion, the judges of the dominion government, under its authority and appointed by it.

That day is yet to come, if ever it does. In the meantime, we have to contend with the legacy of our establishment as a nation. That need not be a matter for particular complaint – it is just an aspect of our history. At the time of the Convention Debates the battle lines were drawn (using Canada and the United States of America as examples) between proponents of 'unification' and proponents of 'federation'. The latter group prevailed. What we have is a federal system, not a unified one.

The expectation, at the time of Federation, was that the States would be left unfettered in the administration of their own court systems. In the

case of each of the States, of course, its system of justice had a common ancestry in the British Crown but, nevertheless, each State had a constitutional existence independent of the others and, after Federation, a continued independent constitutional existence drawing legislative and judicial authority directly from the Crown through the local representative, the Governor.[9] The tradition lives on in Tasmania, with the present Governor, a very fine judge, bringing great distinction to the office, as he did earlier to the Supreme Court of Tasmania.

The constitutional structure agreed at the Convention Debates was premised, as I have said, upon an assumption that the authority of the States need be diminished only so far as was necessary to permit the proper functioning of the new Commonwealth, whose Parliament was to have only such powers (and most of them not exclusive ones) as were necessary for truly national decisions. We have become so used to this notion in our ordinary lives that for the most part we accept without much reflection the fact that, in a nation with a relatively small population, we have many different systems for the administration and delivery of health care, education, criminal and civil justice, road traffic regulation, drivers' licensing and regulation of the legal profession (to name only some) in each State. Perhaps it is our herding instinct which has seen the development of a reasonable level of commonality of standards in those matters but visitors to this country may be forgiven for wondering why such basic elements of public administration are not uniform in content and overall supervision throughout the nation.

Lawyers, in the same way, are accustomed to the idea that each State has its own system of courts and law enforcement. That consequence of Federation has not enjoyed universal support. Both Ronald Sackville (then a judge of the Federal Court)[10] and James Spigelman (then Chief Justice of NSW)[11] referred to the views publicly expressed by Sir Owen Dixon in 1927, and later, regretting that a more 'unified' approach was not taken to the system of courts in Australia, to produce 'a judicial system which was neither state nor federal but simply Australian'.

## V DISTRIBUTION OF FEDERAL JUDICIAL POWER

The judicial system which has resulted from the constitutional arrangements is a rather complicated one. One particularity of the Australian system is the strict demarcation which was discovered (it does

[9] His Excellency the Honourable Peter Underwood AC.
[10] Ronald Sackville 'The Re-emergence of Federal Jurisdiction in Australia' (2001) 21 *Australian Bar Review* 133.
[11] James Spigelman 'Towards a National Judiciary and Profession' (2010) 33 *Australian Bar Review* 1.

not exist in the United Kingdom and did not exist in the Australian States) between judicial and non-judicial power. That distinction came to be applied initially to federal courts.

Section 71 of the *Constitution* provides (in part):

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.

Apart from the High Court of Australia, the establishment of which was directed by s 71 itself, it was not until comparatively recently that the federal courts of modern authority were established (the Federal Court, the Family Court of Australia and, more recently, the Federal Magistrates Court of Australia). I shall, shortly, identify some features of the jurisdiction which each exercises, as well as the mechanism by which federal judicial power is given to those courts, and to courts of the States.

Of course, there were federal courts from a much earlier time. The Commonwealth Court of Conciliation and Arbitration was created in 1904 by the *Conciliation and Arbitration Act 1904* (Cth). It survived until the *Boilermakers' Case*. In the *Boilermakers' Case* the Privy Council said, in stern terms, that (at 538–9):

> … it would make a mockery of the *Constitution* to establish a body of persons for the exercise of non-judicial functions, to call that body a court and upon the footing that it is a court vest in it judicial power.

This apparently straightforward idea had not been so apparent in the first half-century since Federation and, during the latter part of the 20th century, a keen expectation developed that the High Court would revisit, and perhaps reverse, the *Boilermakers' Case*. That moment never arrived and the tide seems now to have turned decisively in the other direction.

Following the *Boilermakers' Case*, the judicial power which had been assigned to the Court of Conciliation and Arbitration was given to the Commonwealth Industrial Court, until the establishment of the Federal Court (the arbitral (non-judicial) power exercised for over 50 years by the Court of Conciliation and Arbitration was given to a new body – the Commonwealth Conciliation and Arbitration Commission). The Federal Court of Bankruptcy, which was created by the *Bankruptcy Act 1924* (Cth), also exercised the judicial power of the Commonwealth until the creation of the Federal Court.

With the establishment of the Federal Court the attention of the Federal Parliament was focused for the first time upon the exercise by a federal court of the judicial power of the Commonwealth in a wide and increasing range of civil matters. The jurisdiction of the Court in criminal matters was at first extremely limited. It has been recently expanded to

include cartel offences but the Court is not required to exercise the judicial power of the Commonwealth with respect to the vast bulk of criminal offences arising under the laws of the Commonwealth. Those powers continue to be exercised by State courts.

Sections 75, 76 and 77 of the *Constitution* should be read together. They provide:

> 75 In all matters –
>
> (i) arising under any treaty:
>
> (ii) affecting consuls or other representatives of other countries:
>
> (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
>
> (iv) between States, or between residents of different States, or between a State and a resident of another State:
>
> (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:
>
> the High Court shall have original jurisdiction.
>
> 76 The Parliament may make laws conferring original jurisdiction on the High Court in any matter –
>
> (i) arising under this Constitution, or involving its interpretation:
>
> (ii) arising under any laws made by the Parliament:
>
> (iii) of Admiralty and maritime jurisdiction:
>
> (iv) relating to the same subject-matter claimed under the laws of different States.
>
> 77 With respect to any of the matters mentioned in the last two sections the Parliament may make laws –
>
> (i) defining the jurisdiction of any federal court other than the High Court:
>
> (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:
>
> (iii) investing any court of a State with federal jurisdiction.

For my present purposes it is upon s 77 that the focus may be placed. By necessity, the jurisdiction of federal courts (other than the High Court,

whose original jurisdiction is identified or described in the *Constitution*) is one which depends upon adequate identification in a law made by Federal Parliament. In the case of the Federal Court, identification of the jurisdiction of the Court and the extent to which it is exclusive requires some diligence. For example, s 19 of the *Federal Court of Australia Act 1976* (Cth) provides simply:

> (1) The Court has such original jurisdiction as is vested in it by laws made by the Parliament.
>
> (2) The original jurisdiction of the Court includes any jurisdiction vested in it to hear and determine appeals from decisions of persons, authorities or tribunals other than courts.

The principal legislative mechanism by which jurisdiction is thereafter vested in the Federal Court is s 39B of the *Judiciary Act* which includes (s 39B(1A)(c)):

> (1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:
>
> …
>
> (c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

This provision is accompanied by the following note:

> Paragraph (c) does not prevent other laws of the Commonwealth conferring criminal jurisdiction on the Federal Court of Australia.

There are other areas in which the Federal Court is invested with jurisdiction by s 39B of the *Judiciary Act* but it is not necessary to dwell upon them for present purposes. Various other pieces of federal legislation also invest the Federal Court with jurisdiction or particular powers. Few of those grants of jurisdiction are exclusive, although some are (some examples are, or were: s 81 of the *Native Title Act 1993* (Cth); s 850 of the *Workplace Relations Act 1996* (Cth) (as at 15 May 2008); s 154 of the *Patents Act 1990* (Cth); s 27 of the *Bankruptcy Act 1966* (Cth) (concurrently with the Federal Magistrates Court); s 191 of the *Trade Marks Act 1995* (Cth)).

It is always necessary to bear in mind also that the jurisdiction of the Federal Court extends to matters which are "associated with" matters in respect of which it is given original jurisdiction (s 32 of the *Federal Court of Australia Act*). For this reason, the Federal Court has jurisdiction to deal with many causes of action arising under State legislation or at common law, provided they are 'associated with' matters in respect of which the Federal Court is otherwise given jurisdiction. In practice, this increasingly tends towards a wide and expanding jurisdiction.

Section 10 of the *Federal Magistrates Act 1999* (Cth) provides:

> (1) The Federal Magistrates Court has such original jurisdiction as is vested in it by laws made by the Parliament:
>
> (a) by express provision; or
>
> (b) by the application of section 15C of the Acts Interpretation Act 1901 to a provision that, whether expressly or by implication, authorises a civil proceeding to be instituted in the Federal Magistrates Court in relation to a matter.
>
> (2) The original jurisdiction of the Federal Magistrates Court includes any jurisdiction vested in it to hear and determine appeals from decisions of persons, authorities or tribunals other than courts.
>
> (3) The process of the Federal Magistrates Court runs, and the judgments of the Federal Magistrates Court have effect and may be executed, throughout Australia.

Moreover, s 15C of the *Acts Interpretation Act 1901* (Cth) provides:

> Where a provision of an Act, whether expressly or by implication, authorises a civil or criminal proceeding to be instituted in a particular court in relation to a matter:
>
> (a) that provision shall be deemed to vest that court with jurisdiction in that matter;
>
> (b) except so far as the contrary intention appears, the jurisdiction so vested is not limited by any limits to which any other jurisdiction of the court may be subject; and
>
> (c) in the case of a court of a Territory, that provision shall be construed as providing that the jurisdiction is vested so far only as the Constitution permits.'

Again, with very few exceptions, the jurisdiction of the Federal Magistrates Court, where it exists, is not exclusive of the jurisdiction of State courts.

The Family Court was given its own grant of jurisdiction by s 31 of the *Family Law Act 1975* (Cth), and also has jurisdiction in associated matters (s 33). The jurisdiction of the Federal Magistrates Court is now concurrent with the jurisdiction of the Family Court and, indeed, proceedings may not be commenced in the Family Court if proceedings in an associated matter are pending in the Federal Magistrates Court (subject to some exceptions) (s 33A).

The limitations introduced by the *Boilermakers' Case* apply to the work of all the federal courts. The result, for many years after the *Boilermakers' Case*, was that the work and jurisdiction of federal courts

was more limited in its scope, in some respects, than that of State courts. At least that was so when a State court was not exercising federal jurisdiction. That circumstance makes it necessary, often, to bear in mind the source of judicial power being exercised by a State court. Is it federal judicial power or State judicial power? (That question never arises with federal courts which may exercise only federal judicial power.)

The position of State courts in relation to the possible exercise of federal judicial power was, initially at least, relatively straightforward. By s 39 of the *Judiciary Act* the State courts are invested with jurisdiction in all matters in which the High Court has original jurisdiction (i.e. under s 75 of the *Constitution*) or in which original jurisdiction may be conferred on the High Court (i.e. under s 76 of the *Constitution*) except for matters declared by s 38 of the *Judiciary Act* to be exclusive to the High Court. This grant of jurisdiction by s 39 of the *Judiciary Act* occurs, however, in a context where the grant of federal jurisdiction to the State courts is preceded by an initial reservation of jurisdiction to the High Court. Section 39(1) of the *Judiciary Act* provides:

> 39(1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.

There follows in s 39 the grant of federal jurisdiction to the State courts. That legislative mechanism has the effect that there is no possibility of the concurrent exercise of federal and non-federal judicial power. Where federal power is granted to State courts it is granted upon the premise that federal judicial power has been first reserved as an exclusive source of judicial power.[12] In *Felton v Mulligan*[13] Barwick CJ said:

> … if federal jurisdiction is attracted at any stage of the proceedings, there is no room for the exercise of a State jurisdiction which apart from any operation of the Judiciary Act the State court would have had. In my opinion, s. 109 of the Constitution, working with the Judiciary Act, ensures that there is no State jurisdiction capable of concurrent exercise with the federal jurisdiction invested in the State court.[14]

These conclusions were explicitly approved of in *ASIC v Edensor Nominees Pty Ltd*[15] by Gleeson CJ, Gaudron and Gummow JJ with whose reasons Hayne and Callinan JJ generally agreed.

The mechanism in the *Judiciary Act* whereby federal jurisdiction is invested and exclusively exercised does not, however, have the effect that

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[12] See *Ffrost v Stevenson* (1937) 58 CLR 528, 573 (Dixon J).
[13] (1971) 124 CLR 367.
[14] Ibid 373.
[15] (2001) 204 CLR 559, [7].

State laws thereby become inoperative or inapplicable. Section 79(1) of the *Judiciary Act* 'picks them up'. Section 79(1) provides:

> The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

To complete the picture, s 80 of the *Judiciary Act* preserves the common law where not modified by federal or state statute:

> So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

Sections 79 and 80 do not require consideration of the application of s 109 of the *Constitution* because, in their terms, they operate only except as otherwise provided by (s 79), or as not inconsistent with (s 80), the *Constitution* and laws of the Commonwealth. If those requirements are not met a state law is not 'picked up' and does not operate as a surrogate law of the Commonwealth.[16]

## VI STATE COURTS AND FEDERAL JUDICIAL POWER

What then of the power of State parliaments to shape or control the exercise of jurisdiction by State or federal courts? It is well established that a State parliament may not invest a federal court with jurisdiction or limit or control its exercise[17]. For a very long time however (in our relatively short legal history) it was thought that State courts had relatively unconfined control over the jurisdiction and operation of their own judicial systems. That view was in apparent conformity with the structural foundations upon which the constitutional arrangements were based, to which I earlier referred. Those foundations were shaken in *Kable*.

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[16] See *Northern Territory v GPAO* (1999) 196 CLR 553, [80] (Gleeson CJ and Gummow J) [80]; *Macleod v Australian Securities and Investments Commission* (2002) 211 CLR 287, [44].

[17] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

The argument mounted by Sir Maurice Byers QC in *Kable* is recorded in the statement of the argument in the following way:

> Chapter III of the *Constitution* applied to State courts from 1 January 1901; they were impressed with the characteristics necessary for the possession and exercise of Commonwealth judicial power. No legislature, State or federal, might impose on them jurisdiction incompatible with the exercise of that judicial power. Nor could it control the manner of the exercise of judicial power whether conferred by the Commonwealth or States. Since Ch III envisages State courts as being capable of investiture with and exercise of the judicial power of the Commonwealth, it grants to them or prevents their deprivation of those characteristics required of recipients of that power. A State law which controlled the State court in the exercise of jurisdiction granted by the State is invalid if it is inconsistent with the court's possession of the constitutional characteristics. Chapter III means that the separation of the judicial from the legislative power applies to courts created by the *Constitution* and by Commonwealth and State legislatures.

It was a masterful synthesis. The response by the Solicitor-General of NSW (later the President of that State's Court of Appeal) included the following:

> The Act is not invalid because it confers a function which is incompatible with the Court's capacity to exercise judicial power as the Commonwealth Parliament must take State courts as it finds them. No prohibition arising from the Constitution prevents the conferral on State courts of authority which does not have the character or quality of the judicial power of the Commonwealth. The *Constitution* offers the Commonwealth Parliament no more than a facility it may or may not use. State courts have no constitutional relationship with the federal judicature.

The issue was thus sharply defined, but not between any of the relevant polities. The States of Victoria, South Australia and Western Australia, and the Commonwealth, united behind New South Wales. Queensland and Tasmania apparently abstained.

Brennan CJ (who dissented) pointed out:

> Of course, novelty is not necessarily a badge of error but a suggestion that the power to invest State courts with federal judicial power might be limited or that the power of a State to invest the State's courts with non-judicial power might be limited would surely have provoked debate in the Constitutional Conventions. Yet they are as silent on the subject as the law reports. There is no textual or structural foundation for the submission.[18]

Dawson J (who also dissented) put the case in more detail, saying:

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[18] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 68.

> There is no one court system in Australia. Each of the States has its own hierarchy which is governed by State legislation. The federal courts created under s 71 of the Constitution constitute a different system. Of course, the whole can be regarded as an entirety. After all, the different parts have a common origin in law and the common law precedes the emergence of the different jurisdictions and applies in them all. Not only that, but the creation of the High Court as a court of appeal — now the final court of appeal — from the courts of all jurisdictions, federal and state, has a unifying influence upon both the common law and also in a more general way. But our legal system, though integrated, is not a unitary system. The States are distinct jurisdictions and the enactments of each of their legislatures are confined in their operation so that in other States their recognition is governed by common law principles and such requirements as flow from the full faith and credit required by s 118 of the Constitution. Federal law, of course, is binding on all courts whether exercising federal jurisdiction or not. The system is a federal system and, whilst the framers of the Constitution might have established a judicial system which was neither State nor federal but simply Australian [a reference to Sir Owen Dixon's views], they did not do so. It is therefore dangerous to attempt to draw conclusions from the fact that the Australian legal system may be regarded as a whole. It may be, but as a matter of legal analysis that is to stop short of an appreciation of its different parts.[19]

The position of the dissenting judges resonated strongly with the expectations which emerged from the Convention Debates.

Three of the majority of four (of six) justices (Gaudron, McHugh and Gummow JJ) based their reasoning directly on the principle that a State court in which federal jurisdiction also had been invested was required under the *Constitution* to possess, and remain possessed of, qualities of institutional integrity, independence and impartiality. A law of a State which compromised those qualities would be invalid (Gaudron J at 103, 107; McHugh J at 116–119; Gummow J at 127–8). Gaudron, McHugh and Gummow JJ also held that the constitutional position of primacy of the Supreme Court in each State, with an accompanying appeal to the High Court, could not be abrogated. The later decisions in *K-Generation v Liquor Licensing Court*[20] and *Kirk v Industrial Court (NSW)*[21] entrenched this idea.

The majority judges found implied in the *Constitution* 'an integrated Australian judicial system for the exercise of the judicial power of the

[19] Ibid 84.
[20] (2009) 237 CLR 501, [151]–[153].
[21] (2010) 239 CLR 531

Commonwealth.'[22] McHugh and Gummow JJ referred explicitly to the views of Sir Owen Dixon.

There is no doubt that *Kable* broke new ground. It went further towards the concept of unification than had earlier been approved. But the circumstances in *Kable* were extreme and it was some time before anything like the same exceptional circumstances arose again for consideration. An attempt was made to invoke *Kable* in *Nicholas v The Queen*,[23] but there is little reference to it in the judgments. A short time later the principle was invoked in an attempt to challenge mandatory sentencing laws in the Northern Territory, but the High Court appeared to take little interest in the point in *Wynbyne v Marshall.*[24] A further attempt was made to invoke the *Kable* principle in *H A Bachrach Pty Ltd v Queensland*,[25] but failed. It did also in *Silbert v Director of Public Prosecutions (WA)*,[26] *Baker v The Queen*,[27] *Fardon v Attorney-General (Qld)*,[28] *Forge v Australian Securities and Investments Commission*,[29] and *Gypsy Jokers Inc v Commissioner of Police (WA)*[30].

One difficulty about the application of the *Kable* 'principle' was identified by Kirby J in his dissenting judgment in *Baker* when he said:

> The decision in *Kable* does not yield a clear, single statement of principle. There are differences in the way the judges in the majority express the implication of incompatibility (or repugnance) that led them severally to the conclusion that the *Community Protection Act 1994* (NSW), in contest there, was constitutionally invalid.[31]

Kirby J went on to suggest the following reconciliation of the differently expressed views:

> The principle expounded in *Kable* was one of general operation, derived from the Constitution; from the integrated character of the Judicature, federal and State; from the peculiar arrangement for the vesting of federal jurisdiction in State courts; and from the role of this Court at the apex of the entire system. From these constitutional characteristics of the Australian Judicature, this Court derived the conclusion that a State Parliament may confer jurisdiction upon a State Supreme Court as it

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[22] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 102 (Gaudron J), 112 (McHugh J), 137-8 (Gummow J).
[23] (1998) 193 CLR 173.
[24] Transcript of Proceedings, *Wynbyne v Marshall* [1998] HCATrans 191 (21 May 1998).
[25] (1998) 195 CLR 547.
[26] (2004) 217 CLR 181.
[27] (2004) 223 CLR 513.
[28] (2004) 223 CLR 575.
[29] (2006) 228 CLR 45.
[30] (2008) 234 CLR 532.
[31] *Baker v The Queen* (2004) 223 CLR 513, [74].

> chooses, but only so far as that jurisdiction is not incompatible with the exercise of federal jurisdiction by such a court.[32]

In *Fardon* (decided on the same day as *Baker)*, where Kirby J also dissented, he declared (at [136]–[137]):

> 136 …Too much has been made of the differing ways in which the majority in *Kable* expressed their respective reasons for upholding the constitutional objection to the Community Protection Act 1994 (NSW), challenged in that case. The essential idea was relatively clear and simple. Because State courts (and unavoidably State Supreme Courts named in the Constitution) may be vested with federal jurisdiction which they are then bound to exercise, they must exhibit certain basic qualities as "courts" fit for that function.
>
> 137 In short, State courts must remain at all times curial receptacles proper to the exercise of federal jurisdiction. Although they are not, as such, federal courts, subject to the express strictures of Ch III, their inclusion in the integrated judicature of the Commonwealth, the provisions for appeals from them to federal courts and the facility for the vesting of federal jurisdiction all imply that they cannot be required by State law to perform functions inconsistent with (repugnant to) Ch III.

In *Forge* (where he again would have applied *Kable*), Kirby J said, in a frank statement about the way in which the thinking about *Kable* was developing (even though it had not yet been applied a second time by the High Court):

> When Kable was expressed, its insight was new. This Court is still discovering *Kable*'s applications.[33]

At this stage, Kirby J's acceptance of the generality of the *Kable* principle appeared to be in advance of the other members of the High Court. As he said in *Gypsy Jokers* (again in dissent):

> I fully recognise that, in a number of decisions, I have adopted a more ample view of the application of the *Kable* principle than some of my colleagues.[34]

Notwithstanding the failure of the initial attempts to extend the operation and effect of *Kable,* the pressure was constant and it was aimed at legislative initiatives in areas where State governments had not been accustomed to supervision by the courts. It was inevitable that other cases would present themselves where the principle commanded more general acceptance of its application. That happened next in *International*

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[32] Ibid.
[33] (2006) 228 CLR 45, [197].
[34] (2008) 234 CLR 532, [100].

*Finance Trust Co Ltd v New South Wales Crime Commission*.[35] *Kable* was re-affirmed and applied by the High Court for the first time. Heydon J said:

> At least at the time when it was decided, *Kable v Director of Public Prosecutions (NSW)* had its critics. Whatever the force of their criticisms, there is no doubt that the decision has had extremely beneficial effects. In particular, it has influenced governments to ensure the inclusion within otherwise draconian legislation of certain objective and reasonable safeguards for the liberty and the property of persons affected by that legislation. It is true that apart from the *Kable* case itself there has been no successful invocation of the doctrine associated with that case in this Court, and no challenge to the correctness of that doctrine. In these very proceedings the parties did not challenge the correctness either of the *Kable* case or of anything said in it. It is accordingly not necessary to evaluate the criticisms. The case stands. It must thus be applied if circumstances which attract its operation arise. One central proposition in the *Kable* case which has never been challenged is Gummow J's statement that a provision in a State statute conferring an authority on a State court capable of exercising federal jurisdiction which is 'repugnant to the judicial process in a fundamental degree' is not constitutionally valid.[36]

Shortly thereafter came another case that crossed the line, *South Australia v Totani*.[37] French CJ said:

> The absence of an entrenched doctrine of separation of powers under the constitutions of the States at Federation and thereafter does not detract from the acceptance at Federation and the continuation today of independence, impartiality, fairness and openness as essential characteristics of the courts of the States. Nor does the undoubted power of State Parliaments to determine the constitution and organisation of State courts detract from the continuation of those essential characteristics. It is possible to have organisational diversity across the Federation without compromising the fundamental requirements of a judicial system.[38]

His Honour went on:

> 69 The text and structure of Ch III of the Constitution postulate an integrated Australian court system for the exercise of the judicial power of the Commonwealth with this Court at its apex. There is no distinction, so far as concerns the judicial power of the Commonwealth, between State courts and federal courts created by the Parliament.[39]

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[35] (2009) 240 CLR 319.
[36] Ibid [140].
[37] (2010) 242 CLR 1.
[38] Ibid [66].
[39] Ibid [69].

Heydon J was part of the majority in *International Finance*. However, he dissented in *Totani*. He referred to the fact that the *Constitution* deprived the States of very few areas of potential legislative activity,[40] and then said:

> 244 To that list of express limitations on State legislative power must be added various limitations arising out of constitutional implications, some rather recently perceived. One of these concerns the freedom of political communication – for ninety years unrecognised, then the subject of wide claims, now much reduced in scope. Another concerns "due process", which at one stage showed a little vigour but is apparently dormant, at least under that name, though perhaps only for a time. Another is the '*Kable* doctrine', invoked in this case.
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> 245 Lawyers commonly think that the *Kable* doctrine has had a beneficial effect on some legislation. But it is a doctrine which intermediate appellate courts have found difficult to understand. Many constitutional scholars have welcomed it. But not all. No counsel has ever sought leave to argue that *Kable*'s case be overruled. Hence it must be faithfully applied, whatever its meaning. That meaning remains controversial. Some aspects of its reasoning are now given less significance than formerly, others more. For example, the decision itself turned on the legislative requirement of detention without proof of criminal guilt. That requirement is not sufficient for invalidity. There are statements in *Kable*'s case indicating that the jurisdiction conferred on State courts must not damage "public confidence" in them. But that damage is not now seen as a criterion of invalidity, merely an indication of it.
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> 246 Speaking very generally, the meaning of the *Kable* doctrine and other constitutional implications affecting the States must in part be limited by the lack of restrictions on State legislative power to be found in the express terms of the *Constitution*. The *Constitution* must be read as a whole. It would be surprising if the quite wide field left for State legislatures by the relatively precise express prohibitions were to be radically constricted by somewhat general implications. It would also be surprising if the role of the States as jurisdictions in which experiment may be conducted and variety may be observed were to be significantly reduced by doctrines resting on opinions – which are very likely to be divergent – about the fitness of a State court to exercise federal jurisdiction.[41]

These are sobering observations which call attention to the very premises on which 'federation', not 'unification', was agreed. Nevertheless, there was little surprise when, last year, the High Court handed down its judgment in *Wainohu v New South Wales*,[42] and again applied *Kable*.

[40] Ibid [243].
[41] Ibid [244]-[246].
[42] (2011) 243 CLR 181.

Heydon J again dissented. *Wainohu* involved an extension of the *Kable* doctrine. The legislation that was attacked did not deal directly with the functions of a State court. It provided for the use of the services of judges of the Supreme Court of New South Wales to make administrative declarations – control orders. In one joint judgment giving the majority view French CJ and Kiefel J said:

> The Act also creates an impression of a connection between the performance of a non-judicial function and the following exercise of judicial power, such that the performance of that function may affect perceptions of the judge, and of the court of which he or she is a member, to the detriment of that court. The plaintiff's challenge to the validity of the Act should succeed.[43]

and:

> The principle in Kable also leads to the conclusion that a State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member. Although the function may be conferred upon the judge in his or her capacity as an individual, the statute may create a close connection and therefore an association with the person's role as a judge. Where this is the case, the potential for incompatibility of the non-judicial function is brought more sharply into focus.[44]

The other joint majority judgment (Gummow, Hayne, Crennan and Bell JJ) expressed the fatal characteristic of the flawed provisions as follows:

> The vice in s 13(2) as it presently stands is that ss 9 and 12 confer new functions on Supreme Court Judges in their capacity as individuals with the result that an outcome of what may have been a contested application cannot be assessed according to the terms in which it is expressed. This is unlike the outcome under Pt 3 of the Act. The opaque nature of these outcomes under Pt 2 also makes more difficult any collateral attack on the decision, and any application for judicial review for jurisdictional error. The effect of Pt 2 is to utilise confidence in impartial, reasoned and public decision-making of eligible Judges in the daily performance of their offices as members of the Supreme Court to support inscrutable decision-making under ss 9 and 12.[45]

This represents a further extension of the approach in Kable. It gives effect to a statement about the constitutional arrangements made a little earlier in the judgment:

> The Commonwealth Solicitor-General correctly submitted that the reasoning in the decisions in *Wilson* and *Kable v Director of Public*

[43] Ibid [7].
[44] Ibid [47].
[45] Ibid [109].

> *Prosecutions (NSW)*, delivered respectively on 6 and 9 September 1996, share a common foundation in constitutional principle. That constitutional principle has as its touchstone protection against legislative or executive intrusion upon the institutional integrity of the courts, whether federal or State. The principle applies throughout the Australian integrated court system because it has been appreciated since federation that the *Constitution* does not permit of different grades or qualities of justice.[46]

The references given to support that statement are *Kable, Fardon* and *Totani*, the earliest of which was decided only 15 years earlier. The idea or, perhaps more accurately, the objective of an integrated (even if not unified) court system is obviously not new. Sir Owen Dixon felt keenly the desirability of working towards the attainment of such an objective and the High Court has in very many areas been at pains to emphasise the doctrinal cohesion of Australian law throughout Australia. However, before *Kable*, at least the States were subject to incentives (generally political in nature) rather than imperatives of a constitutional kind to achieve it.

It seems to me that there has been a very large shift from the assumptions and understandings on which the *Constitution* was originally drafted and agreed. That may be no bad thing. However, *Kable* is an illustration of the fact that the trend is all one way. I think Sir Own Dixon saw the position clearly. Even though more than 80 years have passed since his expression of the idea in 1927, there now is steady and inexorable pressure for 'unification' in many areas. The judicial system is one of them.

I shall deal with my further illustrations of the general theme more briefly, in order to show that the impetus for change towards a more 'unified' (rather than 'federated') approach is not confined to the administration of justice.

## VII THE CONCILIATION AND ARBITRATION POWER

The power given to the Federal Parliament to legislate with respect to industrial disputation by s 51(xxxv) of the *Constitution* was a limited one. The most obvious limitation arose from the requirement to identify an industrial dispute extending beyond the limits of any one State (conveniently, if not strictly accurately, usually referred to as an inter-State dispute). There were also other limitations which were progressively distilled by the High Court from the text of s 51(xxxv). Four limitations which were for many decades very significant were: the need for a dispute to be an "industrial" dispute; the need for an inter-State

[46] Ibid [105].

industrial dispute; the need for identified parties who could be bound by an arbitration of such a dispute; and the notion that use of a legislative power with respect to 'conciliation and arbitration' excluded the use of direct legislative control of terms and conditions of employment, and required the intervention of an 'industrial umpire'.

The first limitation involved the notion that only certain forms of employment were, or could be, involved in a struggle for improvement in terms or conditions of employment of an 'industrial' kind. Thus, teachers, firefighters, members of the police force and others providing their labour in the provision of public services were for a long time thought incapable of becoming involved in 'industrial' disputes.[47] This approach by the High Court left such employees to be dealt with in systems established by State legislatures, where no such considerations applied. The view upon which those cases were decided was finally discarded by the High Court in *R v Coldham; Ex parte Australian Social Welfare Union*.[48]

The requirement for identified parties in any 'arbitration' also led the High Court to reject the possibility that federal awards could be made as a 'common rule', a technique which was in common use in the State systems.[49] This led to the need to identify specific employers upon whom demands could be made, in order (upon rejection or non-satisfaction of those demands) to claim the existence of an industrial dispute (the so-called 'paper dispute'). The theory of the paper dispute avoided the need for actual industrial turmoil. That was accepted without much difficulty having regard to the history of the shearers and waterfront disputes in the 1890s which had focused attention on the need for effective powers of arbitration between competing parties in serious industrial disputes spilling over the boundaries of any one State.

It must be remembered that, in the absence of an effective system of compulsory arbitration, each side was entitled (if it were able) to maintain its position indefinitely in any industrial dispute, even if there were some legal limits on the tactics which could be employed. Often the use of the courts to enforce those legal limits did little or nothing to deal with the underlying issues, which were eventually resolved simply on the basis of economic supremacy, with one side and then the other prevailing, usually at great cost to the losing side, and sometimes both sides. The development in Australia at the turn of the 20th century of a system of compulsory arbitration was ground-breaking. So, the notion of paper disputes generated no real resistance. It was even viewed as a most

[47] See, eg, *Federated State School Teachers' Association of Australia v Victoria* (1929) 41 CLR 569; *Pitfield v Franki* (1970) 123 CLR 448.
[48] (1983) 153 CLR 297
[49] *Australian Boot Trade Employee's Federation v Whybrow & Co* (1910) 11 CLR 311.

civilised approach to the problem, avoiding the need for industrial warfare to make the point.

However, a practical problem soon arose. Written demands required delivery and, usually, proof of delivery. Use of the postal service was the obvious method but it was often expensive in light of the need to identify and serve each employer to be bound to any subsequent award made in 'settlement' of the dispute. Not surprisingly, perhaps, unions began to make claims which were sufficiently ambitious that some portion of the demand would remain outstanding even after an award was made. In this way a part of the dispute would remain unresolved, providing continuing evidence of an inter-State industrial dispute, without the need to serve a further written demand. Ambitious demands of this character became known as 'ambit logs of claims'. Over time they changed from being ambitious to being fictitious and often derisory in character. Finally, they usually bore such little relationship to reality that the whole system of 'ambit logs', which was fundamental to the creation of federal award-making jurisdiction, had become mired in institutionalised dishonesty. Eventually, after a number of reminders over the years of the need for a 'genuine' dispute, the High Court struck down a log of claims as not genuine.[50] However, the ambit log technique was integral to the operation of the federal award-making system based on s 51(xxxv) of the *Constitution* and the artifice survived the next major challenge.[51]

The limitations imposed on the width and operation of the conciliation and arbitration power in s 51(xxxv) were (apart from the need for an inter-State industrial dispute) largely unintended by those who debated its terms at the Convention Debates. They were introduced as textual limitations by decisions of the High Court.[52] Gradually the limitations were ameliorated or removed by the High Court itself as it revised its earlier decisions, but the system continued to function in substantial part through the artificial approach permitted by the 'ambit log' approach. As will be seen shortly, in due course reliance on the conciliation and arbitration power in s 51(xxxv) was abandoned altogether.

It is worth noting, although there is no need to develop the point in this paper, that the difficulties and restrictions connected with the use of the conciliation and arbitration power had been overcome to some limited extent in particular areas by use of other powers in s 51 of the *Constitution*, including the trade and commerce power (s 51(i), as supplemented by s 98), the power of the Commonwealth to deal with its

[50] *Re State Public Services Federation; Ex parte Attorney-General (WA)* (1993) 178 CLR 249.
[51] *Attorney-General (Qld) v Riordan* (1997) 192 CLR 1.
[52] R J Buchanan and I M Neil, 'Industrial Law and the *Constitution* in the New Century: An Historical Review of the Industrial Power' (2001) 20 *Australian Bar Review* 255.

own employees (see generally s 51(xxxvi), s 52(ii), s 67) and the Territories' power (s 122)). In due course, one State (Victoria) referred its own powers to the Commonwealth (s 51(xxxvi)).

These were patchy and complicated arrangements and it is no real surprise that, when an opportunity arose in the light of new developments, more radical steps were taken. It may, however, be said of these various forms of reliance on particular, enumerated, heads of power to be found within the *Constitution* that this method of dealing with the problem accorded with conventional learning about the structure of the *Constitution* and the implications arising from that structure, namely, that the Federal Parliament had been granted identified, and limited, legislative powers.

Meanwhile, constitutional developments in relation to corporations law led the federal government to begin active consideration of the possibility that an alternative constitutional foundation for the regulation of employment matters might be found to supplement the grant of power in s 51(xxxv). The corporations power in s 51(xx) of the *Constitution*, gives the Federal Parliament authority to legislate with respect to:

> Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

I propose shortly to give some attention to the development of the corporations power but first I want to refer to its ultimate use as a replacement for the conciliation and arbitration power in relation to industrial disputes and the regulation of terms and conditions of employment.

The restrictions upon award-making power in s 51(xxxv) of the *Constitution* were finally swept away by a five to two majority in the *Work Choices Case*.[53] The new legislation to regulate the conduct of industrial and employment relations, which survived the challenge made to it in the High Court, did not depend on s 51(xxxv) (except for some limited transitional provisions), but almost entirely on s 51(xx). The headnote to the report distils the position of the two dissenting justices (Kirby J and Callinan J) in the following way:

> Per Kirby J (dissenting). Section 51(xx) does not sustain a law which is with respect to the subject matter of s 51(xxxv) but does not comply with the safeguards, restrictions or qualifications contained in that sub-section, the need for an actual or potential dispute extending beyond the limits of one State and the requirement to provide for an independent process of conciliation or arbitration to resolve the dispute.

[53] (2006) 229 CLR 1.

> Per Callinan J (dissenting). Section 51(xxxv) contains the whole of the Commonwealth's power to control industrial affairs and it gives rise to an implication of the absence of a conferral of industrial power elsewhere under s 51, except in relation to limited categories of employees such as employees of the Commonwealth. Accordingly, s 51(xx) should be construed so as to exclude its application to industrial affairs.[54]

I venture to suggest that these propositions are an accurate reflection of the evident intent, manifest in the distribution of powers generally, which was agreed at the Convention Debates and that they reflect the tenor of the debate and settlement concerning the legislative authority to be granted to the new Federal Parliament to deal with industrial disputes, which was to be limited expressly to disputes extending beyond the limits of any one State. Other (local) disputes were to receive the attention of the State and its organs.

Notwithstanding those considerations, the position put in the joint judgment of the majority is captured by the following statement:

> The course of authority in this Court denies to para (xxxv) a negative implication of exclusivity which would deny the validity of laws with respect to other heads of power which also had the character of laws regulating industrial relations in a fashion other than as required by para (xxxv).[55]

Use of the corporations power as a constitutional foundation for legislation also removed the fourth restriction I earlier identified. The Federal Parliament was free to legislate directly about terms, conditions and standards of employment. The current legislation (the *Fair Work Act 2009* (Cth)) deals directly with standards of employment.

The federal legislation approved by the High Court in the *Work Choices Case* replaced more than a century of legislation drawing its principal authority from s 51(xxxv) of the *Constitution* and all the restrictions arising from the use, for over a century, of the conciliation and arbitration power in s 51(xxxv) have disappeared. The Federal Parliament now has recognised authority to legislate about employment throughout Australia and, if necessary, about the resolution of industrial disputes, which the representatives of the States at the Convention Debates had refused to give to it as part of the new constitutional arrangements. Although that authority operates on the involvement of a 'constitutional corporation', at a practical level this permits the Federal Parliament to set standards, and provide a dispute settlement framework, in a way which has radically overhauled the earlier arrangements.

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[54] Ibid 4.
[55] Ibid [223]; see also [219]-[221].

The view of the corporations power which was taken in the *Work Choices Case* left no doubt that a new era of federal legislative authority had begun. Use of that authority may be seen in the decision by the Federal government to deal nationally with occupational health and safety, a field traditionally the province of the States. The Commonwealth Work Health and Safety Bill 2011 (Cth), which was introduced into the House of Representatives on 6 July 2011, is intended to be the basis of a new federal Act providing model work health and safety laws throughout Australia. The initiative has the support of the States.

## VIII THE CORPORATIONS POWER

The use of the corporations power which was approved in the *Work Choices Case*, and the changed approach to its constitutional significance, must be seen in the light of practical changes which have emerged since the late 19th century in the way in which business is organised. That use of the corporations power might have the potentially pervasive character now fully apparent, would probably not have occurred at all to those in the Convention Debates. The majority judgment in the *Work Choices Case* records that the emergence of the corporation as the chief means through which individuals conduct business ventures post-dates *Salomon v A Salomon & Co Ltd.*[56] The primacy of the corporation as an economic instrument, and the use of the power in s 51(xx) to regulate the affairs of corporations, was clearly not seen at that time as a source of centralised power to deal with the vast majority of industrial disputation. The majority judgment in the *Work Choices Case* pointed out, for example:

> [T]he place of corporations in the economic life of Australia today is radically different from the place they occupied when the framers were considering what legislative powers should be given to the federal Parliament.[57]

Furthermore, the corporations power was not seen, initially, as such an ample grant of power, in its own right, as the High Court has progressively declared it to be. In a case decided shortly after Federation, *Huddart, Parker & Co Pty Ltd v Moorehead*,[58] the High Court decided:

> …that the legislative power of the Commonwealth did not extend to enable the Parliament to make a valid law controlling the intra-State trading operations of foreign corporations and trading or financial corporations formed within the limits of the Commonwealth …

[56] [1897] AC 22.
[57] *New South Wales v Commonwealth* (2006) 229 CLR 1, [121].
[58] (1908) 8 CLR 330.

That distillation of the effect of *Huddart Parker* is taken from the judgment of Barwick CJ in *Strickland v Rocla Concrete Pipes Ltd.*[59] However, the view taken in *Huddart Parker* was a restrictive view of the grant of power in s 51(xx) of the *Constitution* which did not survive. It was disapproved in *Rocla Pipes* but, because there were other reasons for declaring invalid the provisions of the *Trade Practices Act 1974* (Cth) which were attacked in that case, the precise limits of the power were not then determined. That exploration occurred in subsequent cases over the next 35 years or so.

One feature of the corporations power which sets it apart from almost all of the other concurrent powers (cf s 51(xix) – aliens) is the fact that it is expressed by reference to a legal personality or entity which is the object for legislative attention (the corporation) rather than by reference to a subject, topic or field of activity. Thus, in *The Incorporation Case*[60] the majority judgment pointed out that:

> The power conferred by s 51(xx) is not expressed as a power with respect to a function of government, a field of activity or a class of relationships but as a power with respect to persons, namely, corporations of the classes therein specified …[61]

Earlier, in *Actors and Announcers Equity Association v Fontana Films Pty Ltd*,[62] Gibbs CJ said:

> The limits of the power granted by s 51(xx) have not yet been defined. That paragraph of the Constitution presents considerable difficulties of interpretation. In the first place, the power is conferred by reference to persons.[63]

In similar vein, Brennan J said:

> A problem arises when the relevant head of power is expressed as a power to make laws with respect to persons. Section 51(xx) confers upon the Parliament power to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. The power conferred by par. (xx) is not expressed as a power to make laws with respect to a function of government, a field of activity or a class of relationships.[64]

Mason J said, dealing with the matter more broadly:

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[59] (1971) 124 CLR 468, 480-481.
[60] *New South Wales v The Commonwealth* (1990) 169 CLR 482.
[61] Ibid 497.
[62] (1982) 150 CLR 169.
[63] Ibid 181.
[64] Ibid 216.

> I should not wish it to be thought from what I have said that the corporations power is confined in its application to trading corporations to laws that deal with their trading activities. The subject of the power is corporations — of the kind described; the power is not expressed as one with respect to the activities of corporations, let alone activities of a particular kind or kinds. A constitutional grant of legislative power should be construed liberally and not in any narrow or pedantic fashion.[65]

and:

> Nowhere in the *Constitution* is there to be found a secure footing for an implication that the power is to be read down so that it relates to 'the trading activities of trading corporations' and, I would suppose, correspondingly to the financial activities of financial corporations and perhaps to the foreign aspects of foreign corporations. Even if it be thought that it was concern as to the trading activities of trading corporations and financial activities of financial corporations that led to the singling out in s 51(xx) of these domestic corporations from other domestic corporations it would be mere speculation to say that it was intended to confine the legislative power so given to these activities. The competing hypothesis, which conforms to the accepted approach to the construction of a legislative power in the *Constitution*, is that it was intended to confer comprehensive power with respect to the subject matter so as to ensure that all conceivable matters of national concern would be comprehended. The power should, therefore, in accordance with that approach, be construed as a plenary power with respect to the subjects mentioned free from the unexpressed qualifications which have been suggested.[66]

This was a very different approach from that initially approved in *Huddart Parker*.

In the course of the progressive use by the Federal Parliament of the corporations power, the Tasmanian case of *Re Dingjan; Ex parte Wagner*[67] also went to the High Court. The case tested further limits in the application of the corporations power. The Federal Parliament had amended the *Industrial Relations Act 1988* (Cth) to give the federal Industrial Relations Commission power to make orders adjusting the rights of certain contractors. The power to make such orders was based on the corporations power. The provisions were an example of the use of additional heads of constitutional power to supplement the regulation of terms and conditions of employment, or of work, to which I earlier referred.

Mr and Mrs Wagner were a timber harvesting partnership typical of such arrangements in the forest industry in Tasmania. They had been engaged

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[65] 207.
[66] Ibid 207-208.
[67] (1995) 183 CLR 323.

to log and cart timber to the Triabunna woodchip mill. Mr and Mrs Wagner subcontracted the haulage work to others. The subcontractors included two other family partnerships. The lorry driver members of those latter two family partnerships (Messrs Dingjan and Ryan) were members of the Transport Workers' Union. No corporation was involved in the relations between the Wagners, on one part, and the Dingjans and the Ryans on the other part. The Industrial Relations Commission made orders adjusting the contractual obligations of the partnerships. That provided the occasion for the challenge in the High Court to the legislative provisions authorising the orders. The corporate connection relied upon to support the orders was that Mr and Mrs Wagner's own contract was with a corporation. That was found insufficient by the barest majority.

The signs were clearly there, that the corporations power might be available as an independent source of constitutional authority to deal with terms and conditions of employment without any regard to State boundaries or, for that matter, to the need to identify a prior 'industrial dispute'. It was only a matter of time before the Federal Parliament would enact legislation of the kind which survived the challenge in the *Work Choices Case*. More broadly, the analysis in that case confirmed an ample source of constitutional authority to regulate very many aspects concerning and touching corporations in a way which will doubtless see s 51(xx) used as a dominant source of power hereafter in a way never envisaged in 1900.

## IX THE EXTERNAL AFFAIRS POWER

There remains only to mention briefly that other Tasmanian connection – the *Tasmanian Dam Case.*[68] The fact that the majority was only four to three no longer matters. This was another watershed case (with an obviously local colour). The proposition that the Federal Parliament might, in reliance upon a treaty concerning a world heritage list maintained in another country, legislate to prohibit domestic civil engineering works being undertaken wholly within a State by the government of that State in the exercise of its own undoubted powers and capacities would, I have no doubt, have been rejected as fanciful by those debating the distribution of legislative powers at the Convention Debates. I am saying nothing about the worthiness of the cause – I do not doubt it for a moment – but it could not have been seen as anything other than the entire business of the State, and as a matter solely between the government of that State and its electors. The case is such a graphic illustration of the way things have changed that I do not need to elaborate

[68] *Commonwealth v Tasmania* (1983) 158 CLR 1.

further for the current audience, regardless of their personal views on the issue itself.

## X THE PLACE OF HISTORY

In the *Work Choices Case* the majority judgment dealt in considerable detail with the place, in constitutional analysis, of proposals and discussions which led to the final text of the *Constitution* and directed restraint in any appeal to history of that kind. The majority said, for example:

> To pursue the identification of what is said to be the framers' intention, much more often than not, is to pursue a mirage. It is a mirage because the inquiry assumes that it is both possible and useful to attempt to work out a single collective view about what now is a disputed question of power, but then was not present to the minds of those who contributed to the debates.[69]

That judgment also examined the question of the 'federal balance',[70] and rejected the notion that the *Constitution* depended upon any particular assumption about the content of the legislative power which was reserved to the States, even though it clearly contemplated the continuation of the States as separate bodies politic.[71]

Those observations, and others, contributed to an emphasis in the majority judgment in the *Work Choices Case* to the effect that identification of the scope of federal legislative power was ultimately to be found in the text of the *Constitution*, rather than in assumptions about the collective intent at the time of Federation (where it is possible to discern it) or to any assumption about a federal/State balance.

However, whatever view is taken of the correct approach to the identification of the (current) meaning of the text in the *Constitution* there can be no serious argument that the powers in s 51 of the *Constitution* which I have discussed now operate in practice in ways which were (for whatever reasons) unforeseen at the time of Federation and radically different from the assumed (or intended) position then obtaining.

## XI CONCLUSION

The representatives of the States who spoke at the Federation Conference and at the Federation Convention Debates in 1891 and 1896 no doubt hoped that the compact they were agreeing and drafting would stand the test of time and provide a satisfactory framework well into the future. So

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[69] (2006) 229 CLR 1, [120].
[70] Ibid [183]-[196].
[71] See particularly, ibid [194].

it has come about. It is not surprising that matters have arisen, and continue to arise, for consideration and decision by the High Court which were not anticipated, or that there have been changes in emphasis or even in direction. Provided there is a sense of stable continuity in such developments most of us would not be unduly anxious. There seems to me to be no doubt that a very substantial shift has occurred in the federal/State balance in the last 15 years. I sense acceleration – like the expansion of the universe itself. I am not anxious about it because, frankly, it seems inevitable. I do think, as a matter of history, the balance is, at least in the areas with which I have dealt, effectively the opposite of the bargain struck about those matters at the time of Federation.