The Australian Constitution and the End of Empire – A Century of Legal History

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This article considers the Australian Constitution and the end of empire – it is an examination of, and a reflection on, effectively a century of legal history. It canvasses five particular topics: the assumption by Australia of international legal personality; the sovereign's position and authority; the Governor-General's office; the scope of various legislative powers; and the Australian judicial structure. This examination illustrates how, with the diminishing impact of the British Empire and its institutions in the past century, the Australian Constitution's operation has been modified, and the High Court's position in the judicial structure has changed significantly.

I INTRODUCTION

In *Australian National Airways Pty Ltd v Commonwealth*,¹ Dixon J disposed of the submission that the scope of the legislative power conferred by s 51(i) of the Constitution did not extend to a law providing for the Commonwealth itself to operate an inter-State airline (known as 'TAA') because 'on its bare reading' the power is one to regulate activities in inter-State trade, not to undertake them. His Honour said of the argument:

It plainly ignores the fact that *it is a Constitution we are interpreting*, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances (emphasis added).

The phrase emphasised was an invocation of the statement to that effect by Marshall CJ in *McCulloch v Maryland*.² The notion that a written Constitution provides not merely for the exigencies of a few years but for a long lapse of ages gives the lie to much 'originalism', with what Professor Amar describes as its 'unsuitable understanding of how [the] words [of the Constitution] were actually designed to work over time'.³

But in Australia (as in Canada before it) there are added dimensions to the study of the Constitution, not present in the United States. The preamble to its Constitution proclaims that: 'We the People of the United States ... do ordain and establish this Constitution for the United States of America'.

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1 (1945) 71 CLR 29, 81.

2 4 Wheat [17 US 316, 415-416] (1819).

3 Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books, 2012) 231.

In contrast, the Australian Constitution was not created sufficiently unto itself. Rather, the Constitution drew its first breath as the appendage to s 9 of a statute of the Imperial Parliament, the *Commonwealth of Australia Constitution Act 1900* (Imp).⁴ The federating colonies had been included in what was known as the British Empire. The sovereign was Queen of the United Kingdom of Great Britain and Ireland. The preamble to the Imperial Act spoke of the agreement of ‘the people’ of the colonies to unite, but to do so ‘in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland’.

However, as Justice Gageler has pointed out,⁵ the invocation of ‘the people’ in the preamble to the Imperial statute was an expression of confident optimism in popular government; this involved none of the fear by the Founding Fathers of majoritarian excesses, to be assuaged by setting up in the United States Constitution rival institutions of government which might yield a deadlock.

As the 20th century unfolded, the strength of the Imperial connection weakened, but there was no relevant change to the text of the Constitution. The particular subject of this article is the relationship between what might be called the history of the end of the Empire and the development and operation of the Australian constitutional structure, as seen through the course of High Court decisions during that century.

Justice Scalia recently wrote that, ‘[h]istory is a rock-hard science compared to moral philosophy’ and opined that in the United States ‘[t]oday’s lawyers, when analyzing historical questions, have more tools than ever before ... [and] no law faculty would consider itself complete without its share of expert historians’.⁶

This prompts two responses. The first is to recall the admonition by Rich J in *Woolworths Ltd v Crotty*⁷ with respect to the arguments in that case by Menzies KC and Barwick KC. His Honour said that whilst not detracting from the industry of counsel in their researches concerning the state of the common law in England before the passage of *Lord Campbell’s Act*⁸ in 1846, he was mindful of the dangers of hastily acquiring knowledge of legal history for a special occasion.

The second response is stimulated by the remark of Sir Robert Menzies, as a retired Prime Minister lecturing in the United States. He observed that ‘constitutional development is much more than a lawyer’s exercise’ and is ‘the product of a fascinating mixture’ of matters, including ‘legalism’, ‘politics’ and ‘public psychology’.⁹

4 63 & 64 Vict c 12.

5 Stephen Gageler, ‘Beyond the Text: A Vision of the Structure and Functions of the Constitution’, the 2009 Byers Lecture, in Nye Perram and Rachel Pepper (eds), *The Byers Lectures 2000-2012* (Federation Press, 2012) 195, 203.

6 Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson Reuters/West, 2012) 401-402.

7 (1942) 66 CLR 603, 620.

8 9 & 10 Vict c 93.

9 Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassel, 1967) 7.

The subject of this article is reflected in five particular topics. They are the assumption by Australia of international legal personality, the position and authority of the sovereign, the office of the Governor-General, the scope of various legislative powers, and the Australian judicial structure.

II INTERNATIONAL PERSONALITY

In what might be called classical international law, as practised at the time of Federation, those political entities recognised as nation States enjoyed full international personality. This was manifested by the exchange of representatives, by responsibility for acts wrongful in international law, and, in particular, by making of treaties. Under the municipal legal system of Great Britain these activities were conducted in the name of the Crown and as part of the executive government. But throughout the Empire, on the advice of which set of Ministers did the Crown act in these matters?

In 1900, the self-governing colonies had no power to enter into treaties, declare war or make peace or to send and receive ambassadors.¹⁰ But, as so often with Imperial affairs, form was one thing, practice another. The Imperial government consulted with the 'senior' colonies before entering into commercial treaties affecting them; some treaties provided for adherence by those colonies wishing to do so; and the local legislature might decide what legislation was necessary to give effect to treaties in which the colony had a direct interest.¹¹

Section 61 of the Constitution vests the executive power of the Commonwealth in the sovereign and states that this power is exercisable by the Governor-General. Upon the establishment of the Commonwealth, s 61 presented several questions of practical importance for the operation of government. One question was whether the Imperial authorities would look now to the government of the Commonwealth (and not to the States) at Imperial Conferences and when consulting with respect to proposed international agreements affecting Australia. Alfred Deakin, by 1908, had won that argument for the Commonwealth.¹² But the executive power identified in s 61 did not in practice 'cover the field'. There was no requirement in the text of the Constitution that all communications between State Governors and Premiers and the Imperial authorities be conducted through the Governor-General. Indeed, until 1986 appointments of State Governors were to be made by the sovereign on the advice of United Kingdom Ministers albeit after consultation by the Ministers with the State government.¹³

It has been generally accepted that World War I and its consequences provided external circumstances which supplied 'constitutional facts' for the

10 *Victoria v Commonwealth* (1996) 187 CLR 416, 476.

11 *Ibid*, 477.

12 *Victoria v Commonwealth* (1996) 187 CLR 416, 477; Anne Twomey, *The Chameleon Crown – The Queen and her Australian Governors* (Federation Press, 2006) 20-22.

13 *Sue v Hill* (1999) 199 CLR 462, 494 [72].

assumption by the Commonwealth of international personality. In *Bonser v La Macchia*,¹⁴ decided in 1969, Windeyer J put the position as follows:

With the march of history the Australian colonies are now the Australian nation. The words of the Constitution must be read with that in mind and to meet, as they arise, the national needs of the 'one indissoluble Federal Commonwealth' under the Crown. The law has followed the facts. The *Statute of Westminster* has, by removing restrictions, real or supposed, affirmed the legal competence of the Commonwealth Parliament. The Commonwealth has become, *by international recognition*, a sovereign nation, competent to exercise rights that by the law of nations are appurtenant to, or attributes of, sovereignty (emphasis added).

But in 1969 the Privy Council still entertained appeals from State Supreme Courts in non-federal matters, British Ministers still advised the sovereign with respect to certain State matters, and significant Imperial legislation still applied by paramount force.¹⁵ These 'residual links', bonds of the British Empire, meant that, while under the law of nations the Commonwealth of Australia had long since assumed international personality, it was difficult to describe the Australian constitutional structure as fully autonomous, 'independent' or 'free standing'.

The executive power of the Commonwealth to conduct international relations had carried with it the potential for conflict between the relations of Australia and foreign governments, and those of the United Kingdom with such governments. The potential conflict had been remarked by Higgins J in 1921,¹⁶ but here, at least, the subsequent facts do not appear to have realised that legal potential.

III THE POSITION AND AUTHORITY OF THE SOVEREIGN

Section 2 of the Constitution reads:

A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

At common law, the phrase 'during the pleasure of the Crown' indicates that the tenure of the office in question might be terminated at any time and without notice.¹⁷ But upon whose advice was the sovereign to act in appointing and recalling any Governor-General, and in formulating and issuing the Instructions to the Governor-General referred to in the closing words of s 2? The answer given at the inauguration of the Commonwealth and for some time thereafter was that the sovereign in these matters acted on the advice of the United Kingdom government.

¹⁴ (1969) 122 CLR 177, 223-224.

¹⁵ For example, the *Merchant Shipping Act 1894* (Imp) and the *Copyright Act 1911* (Imp).

¹⁶ *Roche v Kronheimer* (1921) 29 CLR 329, 339.

¹⁷ *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 24, 64-67 [64]-[74].

But in 1919 Prime Minister Hughes caused consternation at the Colonial Office by proposing that the Commonwealth and other Dominion governments should be able to submit to the Colonial Office their own nominations for appointment as Governor-General, and that these might include citizens of the Dominion in question.¹⁸

Thereafter, the Imperial Conference of 1926 resolved to the effect that: (a) Governors-General no longer represented the British government and that relations between the United Kingdom and each Dominion were to be conducted directly between the governments; and (b) the Governor-General was representative of the Crown, 'in all essential respects' occupying the same position as the sovereign in the United Kingdom. But in this changed situation, who was to advise the sovereign upon appointments to the office of Governor-General?

In the events leading up to the appointment of Sir Isaac Isaacs in January 1931, 'the Palace' (that is, King George V and his Private Secretary, Lord Stamfordham) sought to fill the gap opened by the departure from the scene of British Ministers by creating a personal role for the sovereign with respect to each Dominion. That attempt failed in the face of opposition by Prime Minister Scullin.

One shortcoming in much discussion of the evolution of Australian national identity has been the failure to appreciate the difficulties in the position of what I have described as 'the Palace' with respect to each body politic. It now appears that the opposition by the Palace to the appointment of Sir Isaac Isaacs was based upon an apprehension that this would set a precedent for local appointments in Canada and South Africa. In those Dominions there were ever-present tensions between those of British and French descent, and of British and Dutch descent respectively; the Palace feared that a local Governor-General might be seen as rendering the sovereign a representative of sectional interests.¹⁹

I have written elsewhere of the position initially taken by the Palace 50 years later with respect to the proposed severance of those residual links between the Australian States and the United Kingdom government whereby the latter continued to tender advice to the sovereign upon State matters.²⁰ These events were long after the appointment of Sir Isaac Isaacs, but, to a degree, history was repeating itself.

Two further points should be made here. The first is that all of these events occurred behind the curtain provided by the bland but unspecific terms of s 2 of the Constitution. The framers of the Constitution from time to time are criticised for not spelling out in detail various aspects of the system by which the Commonwealth is governed. One example is

18 Christopher Cunneen, *Kings' Men; Australia's Governors-General from Hopetoun to Isaacs* (George Allen & Unwin, 1983) 151.

19 A letter from Mr RG Casey to Prime Minister Scullin of 21 November 1930 which reports upon a conversation with Lord Stamfordham, is set out in Cunneen, *Kings' Men*, above n 19, 179-181. Casey was 'London Political Liaison Officer' from 1924 to 1931.

20 William MC Gummow, 'Books: The Australia Acts 1986 by Anne Twomey' (2010) *Federation Press* (2011) 33 *Sydney Law Review* 319.

the limited hinge provided by s 64 (requiring Ministers to be, or become within three months, members of either chamber of the Parliament, but without mentioning the office of Prime Minister) for the adoption of the principles and practices which may be identified as comprising the system of responsible government. But, as explained in *Re Patterson; Ex parte Taylor*,²¹ when upholding the validity of the appointment of Parliamentary Secretaries, the limited terms of s 64 were designed to allow for modification and development of the system of responsible government, not the least with respect to the Cabinet system. The same may be said of the terms of s 2 of the Constitution, behind which were room for change in the nature and strength of the Imperial connection.

The second point concerns the juristic nature of ‘the Crown of the United Kingdom of Great Britain and Ireland’ referred to in the preamble to the *Commonwealth of Australia Constitution Act 1900* (Imp).²² It was ‘under’ this Crown that the ‘one indissoluble Federal Commonwealth’ was formed. The effect of the resolutions of the 1926 Imperial Conference was to recognise each Dominion as a distinct body politic, albeit with the one head of State. The statement made by the High Court as late as 1920²³ that the Crown was ‘one and indivisible throughout the empire’, had dissolved into what Latham CJ described in 1944 as ‘verbally impressive mysticism’.²⁴ Rather, the ‘divisibility’ of the Crown after 1926 had the effect of transmitting it into something of a supranational institution.

IV THE OFFICE OF THE GOVERNOR-GENERAL

In the period in which the Constitution was drafted, that is to say, after Imperial legislation had established parliamentary systems of government, to a significant degree the colonial Governors had remained representatives of the Imperial government.²⁵ The Imperial government spoke through the Colonial Office. The position with respect to the enactment of colonial legislation was described as follows in *Yougarla v Western Australia*:²⁶

Upon passage of a Bill through a colonial legislature, three courses were open to the Governor upon it being presented for the assent of the Crown. First, the Governor might assent in the name of the Sovereign; it was nevertheless the obligation of the Governor to transmit a copy of the statute to the Colonial Office in order that the Imperial authorities might have an opportunity to exercise the power of disallowance, and, as will appear

21 (2001) 207 CLR 391, 457-465 [205]-[221].

22 63 & 64 Vict c 12.

23 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152.

24 *Minister for Works (WA) v Gulson* (1944) 69 CLR 338 (Latham CJ).

25 Susan Kenny, ‘Colonies to Dominion, Dominion to Nation’ in Justin T Gleeson, JA Watson and Ruth CA Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) Vol I ‘Institutions, Concepts and Personalities’, 245, 251-252.

26 (2001) 207 CLR 344, 361 [36].

later in these reasons, in some colonies that requirement to transmit a copy was expressly imposed upon Governors by Imperial statute. Secondly, the Governor might withhold the Royal Assent in accordance with his Instructions, but failing such Instructions, the Governor of a self-governing colony exercised the veto only on the advice of the local Ministers. Thirdly, the Bill might be reserved for the signification of the pleasure of the Sovereign until that assent was given on British Ministerial advice.²⁷

This state of affairs was carried across to the text of the Constitution dealing with instructions (s 2), withholding of assent and reservation (ss 58, 60) and disallowance (s 59).

With the withdrawal by 1926 of Imperial authority these provisions became dead letters. The reason for their presence in the Constitution had ceased by operation of political events at the Imperial level.²⁸ But to what degree had the exercise of the powers of the Governor-General come wholly under the control of the Australian government of the day, in particular of the Prime Minister, as the sole and necessary source of advice upon which action might be taken by the Governor-General to prorogue the Parliament and dissolve the House of Representatives (ss 5, 28) and dissolve both chambers of the Parliament simultaneously (s 57)? It is the shift in the Imperial kaleidoscope, without any change to the text of the Constitution, which lies behind (and to a degree has been concealed behind) the disputation as the existence and content of so-called 'reserve powers' of the Governor-General, in particular with respect to the appointment and dismissal of the Prime Minister.

V LEGISLATIVE POWERS

Reference has been made above to Imperial legislation operating in Australia by paramount force. The most significant statute was the *Colonial Laws Validity Act 1865* (Imp),²⁹ s 2 of which constrained colonial legislation by the notion of 'repugnancy' to English law. Attempts by the Colonial Office to include an express acknowledgment in the text of the Constitution of the application to it of s 2 failed. But did that omission have the result that the Constitution, as appended to an Imperial statute of 1900, effected an implied repeal of any operation of s 2 of the 1865 statute upon the legislative powers of the Commonwealth? Did this mean, for example, that the federal Parliament in reliance upon s 51(i) and s 98 of the Constitution might legislate to an effect contrary to the *Merchant*

27 Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Clarendon Press, 1902) 77-78.

28 However it was to be not until 1987 that the Queen revoked all extant assignments to the Governor-General under s 2 of the Constitution; this was on advice of the Hawke Government that all of the powers which in the past had been assigned to the Governor-General in Instructions issued under s 2 were powers in any event exercisable under s 61 of the Constitution: Constitutional Commission, *Final Report of the Constitutional Commission 1988* (Australian Government Publishing Service, 1988) Vol 1, 5.172, 173.

29 28 & 29 Vict c 63.

Shipping Act 1894 (Imp)? In 1925 the answer given by the High Court in *Union Steamship Co of New Zealand Ltd v Commonwealth*,³⁰ was in the negative. Starke J emphasised ‘the absolute nature of the legislation of the Imperial Parliament’.³¹

The result was that the provisions of the Constitution with respect to the legislative power of the Commonwealth had an operation otherwise than was apparent on their face. They were subject to restraint, not just by reasons of federalism, but by the retention and exercise of legislative power in the Imperial Parliament. That state of affairs was to continue with respect to the Commonwealth until 9 October 1942 when, by operation of ss 2 and 10 of the *Statute of Westminster 1931* (Imp) (‘the *Statute of Westminster*’) and s 3 of the *Statute of Westminster Adoption Act 1942* (Cth), s 2 of the 1865 statute ceased to apply to laws made by the Parliament (the operation of s 2 with respect to State Parliament was to continue until 1986³²).

The *Copyright Act 1911* (Imp) continued in Australia by paramount force even after it had been repealed with respect to the United Kingdom itself.³³ When the time came to exclude and replace the 1911 statute by the *Copyright Act 1968* (Cth), in drafting that legislation great care was taken by the Attorney-General, Mr Nigel Bowen QC, to deal with subsisting copyrights. They were not carried across, but replaced by rights under the new legislation. Those new rights were created subject to and limited by compulsory licensing provisions so that there was no engagement of the ‘just terms’ provision of s 51(xxix) of the Constitution: *Phonographic Performance Co of Australia Ltd v Commonwealth*.³⁴

But what, after 1942, of the scope of the power of the Parliament with respect to external affairs (s 51(xxix))? Part VIII of the *Merchant Shipping Act 1894* (Imp) applied indifferently to interstate and intrastate shipping. The validity of the repeal of Pt VIII by the *Navigation Amendment Act 1979* (Cth), was considered in *Kirmani v Captain Cook Cruises Pty Ltd (No 1)*.³⁵ The validity of the 1979 legislation was upheld by a majority of 4:3, and by Mason, Murphy and Deane JJ as a law with respect to external affairs. In that regard, Mason J observed:

The proposition that the Commonwealth Parliament could in the exercise of the power conferred by s 51(xxix) repeal a provision in the *Merchant Shipping Act* in its application to intra-State shipping in Australia would have excited astonishment in 1900. To minds attuned to the legal supremacy of the United Kingdom Parliament, the status of a colony as a dependency of the British Empire, s 2 of the *Colonial Laws Validity Act* and the doctrine of repugnancy, and aware of the Commonwealth Parliament’s

30 (1925) 36 CLR 130.

31 (1925) 36 CLR 130, 164. See, further, Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 426.

32 *Australia Act 1986* (Cth) s 3.

33 *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958) 100 CLR 596.

34 (2012) 246 CLR 561, 574-575 [24]-[29].

35 (1985) 159 CLR 351.

lack of legislative power with respect to intra-State shipping, it was unthinkable that the Parliament could repeal by resort to the external affairs power an Imperial statute expressed to apply to Australia or to the colonies generally. However, now that these obstacles to the exercise of the power have been outgrown or eliminated, the question must be considered in a new light.³⁶

Here then was another example of the reach of the federal legislative power being extended by reason of changes in the legal and political realities of the British Empire.

One such further example may be given. It concerns the status of 'British subject'. In *Re Patterson; Ex parte Taylor*, Gleeson CJ noted:

In 1901, Australia was part of the British Empire; a status considered vital to its security and prosperity. The people of Australia were British subjects, owing allegiance to a Crown then regarded as one and indivisible. Other British subjects included, not only the people of the United Kingdom, but also those of the other units of the Empire.³⁷

But how was this status of 'British subject', common to large numbers in Asia and Africa, to be accommodated to what was known as the White Australia policy?

At the Diamond Jubilee celebrations in London in 1897, the Colonial Secretary, Joseph Chamberlain, had reminded the visiting Australian colonial premiers of the traditions of the Empire which made no distinctions of race or colour. He emphasised that the exclusion of Indian and Asian subjects of the Crown would be so offensive to those people as to make it 'most painful' to the Imperial authorities to sanction it.³⁸

But, as is well known, the response after federation was reliance by the Parliament upon the power in s 51(xxvii), with respect to 'immigration' and the passage of the *Immigration Restrictions Act 1901* (Cth). However, s 51(xxvii) had a limitation. It was spent when a person, including a British subject, ceased to have the character of an immigrant by absorption into what was described as the Australian community.³⁹ On the other hand, an alien would retain that status unless and until naturalised by legal process to acquire the new status of citizen. But while British subjects might be immigrants they were not seen as objects of the exercise of the power with respect to aliens (s 51(xix)).

Once again the operation of federal legislative power was adjusted to reflect changes in the Imperial system. In *Nolan v Minister for Immigration and Ethnic Affairs*,⁴⁰ six Justices said:

The transition from Empire to Commonwealth and the emergence of Australia and other Dominions as independent sovereign nations within the

36 (1985) 159 CLR 351, 379. Mason, Brennan and Deane JJ also held that s 2(2) of the *Statute of Westminster* conferred additional legislative power upon the Parliament to repeal or amend an Imperial statute.

37 (2001) 207 CLR 391, 398-399 [2].

38 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 626-627.

39 *R v Director General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369.

40 (1988) 165 CLR 178, 184.

Commonwealth inevitably changed the nature of the relationship between the United Kingdom and its former colonies and rendered obsolete notions of an indivisible Crown. ... It is not that the meaning of the word 'alien' had altered. That word is and always has been appropriate to describe the status, vis-a-vis a former colony which has emerged as an independent nation with its own citizenship, of a non-citizen who is a British subject by reason of his citizenship of a different sovereign State.

And so it is that the present successor to the immigration restriction legislation of 1901, the *Migration Act 1958* (Cth), has now for many years been based primarily and expressly (s 4) on the aliens power.

VI JUDICIAL STRUCTURE

To lawyers at least, the most apparent manifestation of the Imperial system was the jurisdiction exercised in Australian litigation by what s 74 of the Constitution identifies as 'the Queen in Council'. The final draft of the Constitution was presented to the Colonial Office by the Australian delegation at a time when Joseph Chamberlain had under consideration a proposal 'for securing a permanent and effective representation of the great Colonies on the Judicial Committee and for amalgamating the Judicial Committee with the House of Lords, so as to constitute a Court of Appeal for the whole of the British Empire'.⁴¹

The proposal for an Imperial Court of Appeal never matured. Judges from the Dominions who were Privy Councillors were to sit on the Judicial Committee from time to time. Sir Owen Dixon was not one of those who did sit. At the present time, the Supreme Court of the United Kingdom and the Judicial Committee occupy different court rooms in the same building at Westminster.

But Chamberlain's Imperial preoccupations help explain the resistance in London to any exclusion by the Constitution of the Privy Council appeal from the High Court. The course of negotiations with the Imperial authorities, in which from his position as Chief Justice and acting Governor of Queensland, Sir Samuel Griffith also placed himself on the wrong side of history, is described in memorable terms by Alfred Deakin in the account published as 'And Be One People'.⁴²

All appeals from the High Court in matters of federal jurisdiction ended with the decision of the Privy Council in *Kitano v Commonwealth*,⁴³ delivered by Lord Wilberforce, upholding the validity of the *Privy Council (Limitation of Appeals) Act 1968* (Cth). Appeals in other cases remained until the commencement of the *Privy Council (Appeals from the High Court) Act 1975* (Cth).

41 Colonial Office Memorandum, 29 March 1900, reprinted in John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 1189, 1192.

42 Alfred Deakin, 'And Be One People': *Alfred Deakin's Federal Story* (Melbourne University Press, 1995) Chs 20-22.

43 (1975) 132 CLR 231.

But there remained the principal structural impediment to the assumption by the High Court of authority as the final source of case law in Australia. This was the retention until 1986 of the avenue in non-federal matters of direct appeal (as of right in many cases) from State Supreme Courts. And, as Sir Owen Dixon is reputed to have complained, Australian counsel appearing in London were apt to present successfully submissions they would not have had the effrontery to put to the High Court.

In reading High Court judgments dealing with the common law, particularly those before, say, 1965, it is important to bear in mind that the Justices of necessity were writing with an eye to what might be said thereafter in an outflanking appeal brought directly to the Privy Council from a State Supreme Court.

Occupier's liability cases are an instance in point. The present writer can attest that the rough handling by Viscount Radcliffe in *Commissioner for Railways (NSW) v Quinlan*,⁴⁴ an appeal from the New South Wales Full Court, of the High Court decisions in *Thompson v Bankstown Corporation*⁴⁵ and *Commissioner for Railways (NSW) v Cardy*,⁴⁶ occasioned much comment at the time within the local profession.

As Justice Hayne recently reminded us,⁴⁷ the dissatisfaction of Sir Owen Dixon with the work of the English courts came to a head in 1963. In *Parker v The Queen*⁴⁸ he said that the reasons of the House of Lords in *DPP v Smith*⁴⁹ concerning the doctrine of *mens rea* in murder contained propositions so misconceived and wrong that he could never bring himself to accept them, and he announced that he was authorised by the whole court to say that *Smith* should not be used at all as authority in Australia.

The sequel was that shortly thereafter, in *Australian Consolidated Press Ltd v Uren*,⁵⁰ an appeal from the High Court, the Privy Council accepted that it was open to the High Court to decide that the common law in Australia concerning exemplary damages in tort should not be modified to accommodate the English common law stated in the House of Lords by Lord Devlin in *Rookes v Barnard*.⁵¹

While the way then was clear for the development of a specifically Australian common law, the continued presence of the direct appeal to London from State Supreme Courts denied the High Court any position at the apex of an integrated Australian court structure.

That had to await the coming of the Australia Acts. Since 1986, the High Court speaks regularly of the common law of Australia, of the

44 [1964] AC 1054.

45 (1953) 87 CLR 619.

46 (1960) 104 CLR 274.

47 KM Hayne, 'Sir Owen Dixon' in Justin T Gleeson, JA Watson and Ruth CA Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) Vol I 'Institutions, Concepts and Personalities', 372, 399.

48 (1963) 111 CLR 610, 632.

49 [1961] AC 290.

50 (1967) 117 CLR 221.

51 [1964] AC 1129.

exposition of which it is the ultimate authority, and s 80 of the *Judiciary Act 1903* (Cth) was amended in 1988 to reflect this state of affairs in federal jurisdiction.⁵²

In several respects, the position of the Supreme Courts in that integrated structure has been strengthened by recent decisions of the High Court. It is generally accepted that s 73 of the Constitution not only refers to State Supreme Courts but assumes the continued existence of bodies answering that description. It was held in *Kirk v Industrial Court (NSW)*⁵³ that this involves a measure of superintendence by Supreme Courts of inferior State courts and tribunals. The relevant principles were most recently explained in *Public Service Association of South Australia Inc v Industrial Relations Commissioner (SA)*.⁵⁴

The Constitution provides in s 77(iii) for the Parliament to invest federal jurisdiction not only in Supreme Courts but in ‘any court of a State’. This was held in *Kable*⁵⁵ and succeeding decisions as requiring a measure of institutional integrity in those State courts (and Territory courts⁵⁶). There are limits thereby imposed upon the power of State legislatures as to the functions which may be conferred upon State courts and the procedures to be followed in those courts.

VII CONCLUSION

In the various ways described in this article, while the relevant text of the Constitution has not changed, its operation has been modified to adjust to the diminishing authority of the British Empire and its institutions. That modification has been recognised and explained in a number of decisions of the High Court. Moreover, the position in the judicial structure of the High Court itself has changed significantly over the past century. The upshot is an affirmation that, at least in matters of constitutional development, ‘a page of history is worth a volume of logic’.⁵⁷

52 *Law and Justice Legislation Amendment Act 1988* (Cth).

53 (2010) 239 CLR 531.

54 (2012) 249 CLR 398.

55 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

56 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393.

57 Cf *New York Trust Co v Eisner* 256 US 345, 349 (1921) (Holmes J).