State Constitutional Landmarks

Editor
George Winterton

Foreword
The Hon James Spigelman AC

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Foreword

The Hon James Spigelman AC
Chief Justice of New South Wales

This year is the sesquicentenary of the introduction of responsible government in New South Wales, Victoria, Tasmania and South Australia. A commitment was made to counter it on the road to be separated colony of Queensland. Eventually, as an almost uniform national model, it was applied to Western Australia. This is a particularly appropriate time to produce a work which contains definitive treatments of the most important turning points in the development of State constitutional law.

In 1856, three of the four judges of the Supreme Court, the fourth was usually on circuit in Brisbane, accepted nomination as Members of the Legislative Council. The then Chief Justice, Sir Alfred Stephen, accepted the post of President of the Legislative Council. His only regret was that the new Constitution failed to adopt his own recommendation that, as Chief Justice, he would also, like the Lord Chancellor in England, be a member of the Ministry with the title "The Chancellor of New South Wales". The judges' role in the Parliament became controversial. Stephen soon resigned the presidency and within a few years all the serving judges had left, never to return.

In this way Australia adopted, as a result of political controversy, a concept of the separation of powers which, notably in the case of the office of the Lord Chancellor, England and Wales have only implemented last year. Chapter III of the Commonwealth Constitution and its interpretation may have been quite different if this early confusion had not been so quickly resolved.

As chapters in this volume attest, the Legislative Council of New South Wales has shown itself a singularly fertile source of constitutional discord. I am particularly relieved that we avoided the conflicts that would inevitably have arisen if my distinguished predecessor, Sir Alfred Stephen, had had his way.

The chapters of this book cover the major landmarks, both cases and constitutional developments. Particularly for the early years they bring alive some of the personalities involved. Just as they have been for

over a century, to the overwhelming effects of Commonwealth constitutional law. State constitutional courts have arisen spontaneously but often with dramatic effect. They resolved deadlock between the Houses of Parliament, determined the effect of matters and form provisions and the powers and privileges of individual Houses.

As in the case of the Commonwealth Constitution, there is no authoritative statement of the source of legitimacy of contemporary State Constitutions. Once, it was clear, the source of legitimacy for both the Commonwealth Constitution and of all of the States was by enactment of the British Imperial Parliament. That basis has long since been obsolete and was finally removed by the Australia Acts. There remain two general approaches to answering the question, and it may never prove necessary to choose between them.

The first approach is to assert that the legitimacy of the Constitution lies in popular sovereignty. In the case of the Commonwealth, the relevant act of the sovereign people was the referendum held in each of the former Colonies which adopted the text of the Constitution of the Commonwealth. The second approach is to assert that legitimacy lies in the historical development of each Constitution, a development that can be traced back to common law foundations. The source of legitimacy of this analysis is the legal validity of each of the steps taken along the constitutional path.

The people of New South Wales have not voted for their Constitution except on one occasion. That was when the people of the then Colony voted in favour of the adoption of the Constitution of the Commonwealth. By s 116, that Constitution provides that the Constitution of each State continues in effect. Indeed, it was the Constitution of the Commonwealth that transfigured the Colonies into States. It may well be that the State Constitutions will come to be regarded as having been adopted by reason of s 116, based on the sovereign people who adopted that Constitution.

On the other hand, historical continuity as a source of legitimacy reflects more accurately our common law legal tradition which has traditionally adhered abstract concepts such as popular sovereignty. In his famous essay on “The Common Law as an Ultimate Constitutional Foundation”, Sir Owen Drom emphasised the unique character of the common law as an antecedent system of jurisprudence.

I congratulate Professor George Williams on editing this impressive collection of essays. I also applaud the Singapore Committee of Responsible Government Committee of the State of New South Wales for providing financial assistance for this publication.


3 O’Toole, Justice Pyle (Melbourne: Law Book Co, 1965), pp 293-300.

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Preface

The 150 years of responsible government enjoyed by the Australian States have certainly not been marked by constitutional turmoil. On the contrary, they have been filled with all the drama and poignancy of constitutional boundaries one would expect from a young and restless nation seeking to adapt notions of law and government, evolved over centuries in England, to a new, more egalitarian society in an expansive, but underdeveloped, continent on the other side of the world. Nevertheless, the ultimate commitment of Australians to moderation and the rule of law ensured that, although occasionally stretched, the boundaries of legality were never broken.

One of the books which commemorated the centenary of the High Court of Australia in 2003 was Australian Constitutional Controversies, edited by HP Lee and me. That book demonstrated that leading judicial decisions and other constitutional controversies could be made intelligible to an audience beyond the narrow circle of constitutional lawyers if they were explained in their political and social context. This book has a similar objective, which seems a very appropriate way to celebrate those 150 years of responsible government. The cause for celebration is not the mere effusion of time, but the notable achievement of Australians in containing the passions and drama of political dispute within essentially stable democratic government governed by the rule of law. Despite fears expressed in New South Wales in the early 1900s, not once was there resort to violence, the rule of law always ultimately prevailed, and the judgments of courts were always complied with. That alone is surely worth celebrating.

Opinions will, inevitably, differ on which "landmarks" should be included in a work such as this. Attorney-General (Vic) v Monopol (2003) 217 CLR 485 has a strong claim to inclusion; but was omitted because it was decided after the content of the book had been settled and space constraints excluded further additions. However, the omission is diminished by substantial reference to the case in several chapters.

I thank the Sesquicentenary of Responsible Government in NSW Committee for its financial and other support; Chris Hall of Federation Press for his patience, encouragement and support; Ian Jordan for research assistance; Kathy Priestley for editing the book; Professors Ian McCallum and Patrick Parkinson of Sydney Law School for their support in bringing this book to fruition; and, above all, my wife Ros for her slobod encouragement and support.

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BLF v Minister for Industrial Relations: The Limits of State Legislative and Judicial Power

Fiona Wheeler

Introduction

The struggle between capital and labour has produced some of Australia's most significant and absorbing constitutional cases. The 1986 decision of the New South Wales Court of Appeal in BLF v Minister for Industrial Relations is one example. The case provides an enduring study of the limits of legislative and judicial power in the Australian States. The question before the Court was whether the New South Wales Parliament could validly interfere with the work of the judiciary by directing the outcome of litigation pending in a State court. The Court of Appeal unanimously concluded that Parliament was able to do so. In particular, it held that the Constitution Act 1902 (NSW) did not contain a binding separation of legislative and judicial power. In addition, the judges deemed that a doctrine of fundamental common law rights restricted the capacity of the New South Wales Parliament to interfere with State courts. Nonetheless, the decision left open the question whether courts could strike down legislation under the Constitution Act contrary to the "peace, welfare, and good government" of the State. This judicial suggestion was opposed by the High Court, however, which subsequenctly reaffirmed the traditional understanding of those words as part of a plenary grant of law-making power.

The facts underlying BLF v Minister for Industrial Relations involved one of the great political battles of the 1980s - the fight over the deregistration of the powerful and militant Builders' Labourers Federation ("BLF"). The case was triggered by the enactment of the Builders Labourers Federation (Special Protection) Act 1986 (NSW). The Act sought to cancel the registration of the union under State industrial law. In so doing, however, the Act determined the outcome of deregistration litigation already on foot in the Court of Appeal between the BLF and the Government. Accordingly the union sought to show that the Act was invalid as an interference with judicial power. For both the BLF and the Government, the success or failure of this argument had significance beyond the borders of New South Wales. The Commonwealth and Victoria had also passed legislation directly deregistering the BLF. Thus for the New South Wales Government, the legislation under scrutiny in BLF v Minister for Industrial Relations was part of a wider scheme to eliminate the BLF from the building industry. Conversely, for the BLF whose motto was "Dare to Struggle, Dare to Win" - the case was part of a larger campaign of resistance against its statutory deregistration and disemberment in the jurisdictions in which its industrial power was the greatest.

History records that the BLF lost its struggles for survival, at least on its own terms. BLF v Minister for Industrial Relations upheld the validity of the New South Wales legislation. Weakened by deregistration in three jurisdictions and subject to other attacks by the interests organised against it, the BLF was ultimately ousted as a major force in the building sector. It must be said however that the consequences of the BLF were not that the constitutional position has evolved since BLF v Minister for Industrial Relations was decided. The 1996 High Court decision in Kelly v Director of Public Prosecutions (NSW) ("Kelly's Law") now establishes that CH III of the Commonwealth Constitution restricts the power of State Parliaments to control the activities of State courts. Indeed, in light of Kelly's case it has been suggested that if the facts in BLF v Minister for Industrial Relations were to reoccur today the New South Wales Act might be found invalid. Given the forces assembled against the BLF in the mid-1980s.

* I would like to thank Jim Moore for his research assistance. I would also like to acknowledge the assistance I gained from working with Peter Grogan, The Regulation of Unions and Legislative Interference with Judicial Function: A Comparative Analysis (Monash University of New South Wales, 2004).

1 Builders' Labourers Federation v Minister for Industrial Relations (1986) 7 NSWLR 562 ("BLF v Minister for Industrial Relations").
however, it is unlikely that a different result in BLF v Minister for Industrial Relations would have altered the union’s fate.

This chapter begins by looking at the background to BLF v Minister for Industrial Relations, discussing the deregistration legislation challenged by the BLF and the industrial environment that prompted its enactment. The Court of Appeal’s reasons for upholding the validity of the Builders Labourers Federation (Special Provisions) Act 1989 (NSW) are then explored. In particular, the decision of the BLF’s arguments based on separation of powers and fundamental rights is examined. The significance of BLF v Minister for Industrial Relations in the wider compass of State constitutional law is then examined. It is argued that BLF v Minister for Industrial Relations is not a law-making case indeed. Its importance as a constitutional landmark lies in the vivid illustration it provides of the far-reaching nature of State legislative power and the corresponding limits on the power of the courts. The chapter ends by considering the post-deregistration fate of the BLF.

The deregistration of the BLF

Ironically, the deregistration of the BLF occurred at the hands of Labor Governments in New South Wales, Victoria and the Commonwealth led by Neville Wran, John Cain and Bob Hawke respectively.7 The BLF was “one of Australia’s most militant unions ever."8 It rose to prominence in the 1970s and was at the height of its power in the early 1980s.9 The building industry at the time was in a state of “chronic disputation”, a situation in which the activities of the BLF were a significant contributing factor.10 The union was notoriously confrontational in approach. It persisted in battling building employers over improvements to wages and conditions and in using disruptive bans and strikes to enforce its claims. It also clashed with other unions over membership in disputation disputes. For example, in the early 1980s, work in Victoria on the Lytton Power

7 See generally Rose, above n 2, especially pp 28-30 and later chapters.
9 Rose, above n 2, pp 25-6.
10 See generally Rose, above n 2, pp 36-31 and also p 30 (quoting a Sydney Morning Herald editorial of 3 July 1984 in which the BLF was described as "new officially in the building industry").
11 New South Wales, Royal Commission into the Building Industry in New South Wales, First Report (Government of the State of New South Wales, Sydney, 1985), vol 1, p 150 and generally, p 125-7 (Appendix C: History of Industrial Relations in the Building Industry in New South Wales).
In this volatile industrial setting, the New South Wales Government was the first to deregister the B.L.F. The Attorney Generals of all three provinces were the enactment of "special legislation" to achieve this goal. "Special legislation" was introduced to the New South Wales Parliament in 1981 to deregister the B.L.F. The 1981 Act was applied only to the B.L.F. It provided that if the Minister certified to the Governor that the New South Wales B.L.F. had acted "contrary to the public interest" a declaration could be made by the Governor. Once a declaration was made, the union's registration under the Industrial Arbitration Act 1940 (NSW) was cancelled. The Minister for Industrial Relations, Pat Hills, in his Second Reading speech, described the 1981 Act as "extraordinary legislation to meet extraordinary circumstances." The Government was moving against the B.L.F. to "prevent tyranny in the workplace" and was acting with the full support of those unions that used "proper ethical methods" to promote their cause.22 The Act had widespread support and speakers for both the Government and the Opposition referred to claims of violent and threatening conduct by the B.L.F. against other workers.23 Industrial conflict involving the B.L.F. at the Sydney Police Centre site in Cootamundra was an immediate cause for concern.24 But some members remained a pattern of B.L.F. malpractice going back to the early 1970s.25

18 In 1968, the Board of Trade, in its letter to the B.L.F. regarding the B.L.F. at the federal level. The proceedings were later abandoned in 1969. See, for instance, p. 962. As quoted in: 1984 Statutory, "deregisteration deprived a union of a significant advantage in the representation of membership in the B.L.F.'s" (1989) 7 NSWJ & 94 at 94.

19 Statutory, p. 964 at 964.

20 Ibid, p. 965 at 965. Boarder makes this point in relation to the federal deregistration legislation. However, there is no reason to suppose that the conditions for trusting deregistration legislation applying only to the B.L.F. were different at the Federal level.


23 Ibid, p. 107. Pat Hills, Minister for Industrial Relations.


The declaration under the 1984 Act cancelling the B.L.F.'s registration was made in early 1985. The B.L.F., however, challenged the cancellation in the Supreme Court. There the B.L.F. argued that it had suffered a breach of natural justice since it had not been given a hearing prior to the Minister certifying to the Governor that the union's conduct contravened the public interest.26 I rejected this argument on the basis that the 1984 Act excluded any natural justice entitlement.27 The B.L.F. appealed to the Court of Appeal. In late April 1986, however, a week before the appeal was due to be heard, the New South Wales Parliament passed the Builders Labourers Federation (Special Provisions) Act 1986 (NSW) ("1986 Act"). The 1986 Act was clearly intended to pre-empt the outcome of the B.L.F.'s appeal. Like the 1981 Act, the 1986 Act applied only to the B.L.F. Its key provision was s(3)(c) which stated:

The registration of the State Union under the Industrial Arbitration Act 1940 shall, for all purposes, be taken to have been cancelled on 30 January 1965 by the operation of, and pursuant to, the Industrial Arbitration (Special Provisions) Act 1944.

The effect of this provision was underscored by s(3)(d) which directed the Board to make a new determination of the rates of pay and wages and the conditions of employment of the B.L.F. in the building industry.26

The timing of the 1986 Act was not linked solely to the B.L.F.'s pending appeal, however. In mid-1986, the Commonwealth and Victorian legislation deregistering the B.L.F. took effect.22 Joint action between the three Governments was important in supporting the B.L.F. for unless the union was deregistered at both State and Federal levels it could continue to operate by moving between the two systems.29 Significantly, the Commonwealth legislation did not simply cancel the B.L.F.'s registration under the Constitution and Arbitration Act 1944 (Cth). In a related move, it included provisions to facilitate coverage of former B.L.F. members by the Federal Constitution.


28 M. Gardner, "Australian Trade Unions in 1986" (1987) 29 Journal of Industrial Relations 525 at 525; Banks, above, n. 175. The legislation was the Builders' Labourers Federation (Special Provisions) Act 1986 (Cth). Builders' Labourers Federation (Constitution and Recognition) Act 1986 (Cth); B.L.F. (De-registration) Act 1985 (Cth). The Commonwealth legislation cancelled the B.L.F.'s registration under the Constitution and Arbitration Act 1944 (Cth). The Victorian Act terminated the B.L.F.'s recognition under the Industrial Relations Act 1974 (Vic) and contained other measures to exclude the B.L.F. from participation in the State industrial system.

29 See, eg, NSW Parliament, Legislative Assembly, 30 October 1981, pp. 107-107. Pat Hills, Minister for Industrial Relations. For a full account of this dispute see above in 12, p. 127.
The decision in BLF v Minister for Industrial Relations

Although the 1986 Act was intended to defeat the BLF's appeal, the union did not abandon its Court of Appeal proceedings. Instead, it argued that the 1986 Act was invalid. Specifically, it claimed that the 1986 Act interfered with the exercise of judicial power in the litigation between the union and the Government thereby breaching a constitutional requirement that judicial functions be kept apart from legislative functions. The battle in the New South Wales courts for the BLF's survival thus became a test of the powers of State Parliament vis-à-vis the State judiciary. In BLF v Minister for Industrial Relations, Street CJ acknowledged the importance of these issues and the context in which they arose:

Did the 1986 Act interfere with judicial power?

For the BLF's challenge to succeed, it was first necessary to show that the 1986 Act invaded the judicial function as opposed to merely changing the law to be applied in the Court of Appeal. This distinction had been discussed by the High Court a few months earlier in Australian Building Construction Employees' and Builders' Federations' Federation v Commonwealth. There it was held that the Commonwealth Act directly deregistering the BLF was invalid. In particular, it was found that the Act did not offend the Commonwealth Constitution's strict separation of legislative and judicial power. Citing King v Hanbury, Parco Milk Pty Ltd, the High Court said:

'It is well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution ... It is otherwise when the legislation in question interferes with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings.'

The Commonwealth Act had simply stated that the BLF's federal registration "is, by force of this section, cancelled." The High Court reasoned that, although this altered the law to be applied in any dispute concerning the BLF's status under the federal industrial regime, the judicial
process itself remained unimpaired. Accordingly, there was no interference with the judiciary contrary to Ch III of the Commonwealth Constitution.

In BLE v Minister for Industrial Relations, however, the two judges who specifically considered this aspect of the case, Street CJ and Kirby P, distinguished the 1986 Act from the Commonwealth legislation. Section 3(1) of the 1986 Act provided that the State registration of the New South Wales BLE "shall, for all purposes, be taken to have been cancelled on 2 January 1986 by the [1986 Act]." Section 3(2) similarly provided that the action of the Minister in issuing a certificate under the 1986 Act "shall be treated, for all purposes, as having been valid". Section 3(5) said that these sub-sections operated despite any existing litigation under the 1986 Act. Section 3(4) expressly applied to all existing litigation, providing that:

except in so far as the parties to any such proceedings...otherwise agree, the costs of or incidental to the proceedings instituted by a party to the proceedings shall be borne by the party, and shall not be the subject of any mandatory order of any court.

In Street CJ's opinion, these provisions did not directly derogate the BLE, but instead involved a particular legal characterization of steps taken in the existing deregistration process. Thus, s(1) and (2) were "commands to this Court as to the conclusion that it is to reach in the issues about to be argued before it." Section 3(5) was an even clearer example of this "directive" done by Parliament. It said, "Parliament had "directly intruded legislative power into the judicial process by directing the outcome of a specific case." Likewise Kirby P described the 1986 Act as a "legislative judgment". He emphasized that the Act only applied to the BLE and dealt directly with "incidents at particular litigation involving the BLE".

The remaining members of the Court of Appeal - Gleeson, Mahoney and Priestley JJA - in their separate judgments did not directly discuss whether the 1986 Act intruded on the judicial sphere. Instead they decided the case solely on the basis that Parliament's power was not limited in the way claimed by the BLE. Nonetheless, it is widely accepted that the finding of Street CJ and Kirby P that the 1986 Act interfered with the exercise of judicial power was correct. So regarded, the 1986 Act undermined important constitutional values. As Street CJ pointed out in his judgment, the separate exercise of judicial power by courts promotes the rule of law by ensuring that legal controversies are determined in accordance with settled features of the judicial process. These include the "protections of natural justice, absence of bias [and]...appellate control". Thus, when a legislature direct the outcome of pending litigation, this diminishes the natural justice entitlement of the parties. It is also apt to undermine public confidence in the independence of the courts from political control. Yet as Peter Crona suggests has pointed out, the separation of powers also demands that courts apply laws made by Parliament. Consequently, the line between legitimate parliamentary law-making and unwarranted legislative intrusions into the judicial function will often be uncertain. In BLE v Minister for Industrial Relations, Street CJ acknowledged it had been "plainly open to the New South Wales Parliament to cancel the BLE's registration in the same way as the Commonwealth had done." Nonetheless, the way the 1986 Act sought to achieve that goal crossed the line into the judicial domain. Could the New South Wales Parliament validly interfere with judicial power?

Accepting that the 1986 Act interfered with judicial power, the question remained in BLE v Minister for Industrial Relations whether the New South Wales Parliament could validly do so. In particular, the BLE needed to identify a principle of positive law capable of invalidating the Act. Two considerations, however, made this a less than easy task. First, like other State constitutions the New South Wales Constitution is "uncontrolled" in nature and does not impose norms of validity which other laws must comply. Second, the New South Wales Constitution is not "higher law" and, subject to the overriding effect of the Commonwealth Constitution, is amenable only to the authority of the New South Wales Parliament. Generally, at the time BLE v Minister for Industrial Relations was decided, the Constitution Act 1902 (NSW) did not contain:

22. Ibid, 431 at 435-436 (Street CJ).
32. See, in a related context, Kahler v Director of Public Prosecutions (NSW) [1986] 189 CLR 959.
34. See, eg, ibid, 1-2, 24-5; Westminster, "Implied Bill of Rights", above n 39, 196.
35. BLE v Minister for Industrial Relations [1986] NSWR 422 at 431.
39. Furst and form requirements must, however, be met: generally see General Motors (1974) 1 NJ 23. 40. STATE CONSTITUTIONAL LANDMARKS
provisions dealing with the State judiciary. Instead, other State legislation dealt with State courts. The difficulty those considerations posed for the BLF was evident, for example, from the Court of Appeal's decision in *Clyne v East.* There it was affirmed that the New South Wales Constitution did not contain a binding separation of judicial power from legislative and executive power. Thus, Herron CJ accepted that the New South Wales Parliament could, if it wished, validly intrude into the activities of State courts.

Against this unpromising backdrop, the BLF argued that the New South Wales judiciary was protected from legislative interference in pending cases on two bases. First, the BLF claimed that the New South Wales Constitution incorporated an enforceable separation of judicial power by analogy with the reason that led the Privy Council in *Lipman v The Queen* to find an entrenched separation doctrine in the Ceylonese Constitution. Secondly, the BLF argued that a doctrine of fundamental common law rights prevented the New South Wales Parliament from interfering with the exercise of judicial power. As can be seen, these arguments focused on State constitutional arrangements. In particular, there was no attempt in BLF v Minister for Industrial Relations to show that the separation of federal judicial power in Ch III of the Commonwealth Constitution had significance for New South Wales. While Ch II provides the strongest argument today for binding limits on State legislative power to interfere with State courts, it is not surprising that Ch II received no attention in 1986. In the mid-1980s, the federal separation of judicial power was widely regarded as in "deteriorating" as a doctrine. In contrast, if in the federal sphere in doubt, it was an unlikely source of novel limitations on State power. Thus, the arguments put to the Court of Appeal in BLF v Minister for Industrial Relations represented the BLF's best

60 Ibid, pp 714-15. As Towsen explains, the judiciary is still largely dealt with in New South Wales by Acts other than the Constitution Act. However, in 1995 a new Act was added to the Constitution Act dealing with aspects of judicial independence. Section 79(1) of the Constitution Act requires a referendum to amend Part 4, but Towsen doubts the legal effectiveness of this. See Towsen, Chapter 11, pp 366-7.


62 Ibid 295 (Herron CJ) 402 (Supreme JA with whom Herron CJ and Aspin JA signed on this aspect of the case). Clyne's Test was also found in *Lipman v The Queen* (1967) 1 AC 239.

63 Clyne v East (1967) 55 SR (NSW) 365 at 393. However, all members of the Court agreed that the procedure under consideration in Clyne v East did not impair the effect.

64 (1967) 55 SR (NSW) 365.

65 See eg Kirby J's summary of the BLF's main arguments in BLF v Minister for Industrial Relations (1986) 7 NSWLR 372 at 388.

66 Ibid 379 (Kirby J).

67 See NM J s summary of the BLF's main arguments in BLF v Minister for Industrial Relations (1986) 7 NSWLR 372 at 388.

68 (1967) 55 SR (NSW) 365 at 393 (Herron CJ), 397-402 (Supreme JA with whom Herron CJ and Aspin JA signed on this aspect of the case).

69 (1967) 7 NSWLR 372 at 390 (Kirby J).

70 See the summary of the legislation in *Clyne v East* (1986) 7 NSWLR 372 at 393.

71 Ibid 390-91 (holding that the legislation invalidly interfered with the exercise of judicial power. Clyne is now set aside).

72 The judicial system in Ceylon traced its origins to the Charter of Justice (1893) (42 C 264).

73 Ibid 267.

74 Ibid 266-9 (holding that the Ceylonese Constitution contained an enforceable separation of judicial power).
vision for the judiciary either in a separate part or "at all". With the Constitution Act silent on the judiciary, there was no textual foundation for a constitutional requirement that judicial power be exercised solely by courts. Moreover, even if the Constitution Act had explicitly said that the judiciary would not have changed matters. The Court recognised, as it had in Chalmers v Burt, that the New South Wales Constitution, being uncontrolled in nature, can be altered by ordinary enactment. That is, in the absence of a restrictive legislative procedure for amendment as in Queensland v The Queen, the New South Wales Constitution could not constrain the content of general legislation like the 1863 Act. Even arguments based on history did not necessarily support the BLF's case. Street CJ pointed out that Parliament's practice of investing non-judicial tribunals with judicial power implied the existence of Parliament's own authority to adjudicate. In addition, Kirby P drew attention to statutory provisions dating from the beginning of responsible government in the colony that allowed the New South Wales legislature to reconstitute or abolish courts.

In short, the structural features of the New South Wales Constitution were loaded against the BLF's argument from the start. Indeed, in Kehoe v State the High Court affirmed that the Constitution Act 1902 (NSW) does not contain a binding separation of judicial powers. This was an unusual move, even though the Constitution Act had been amended in 1992 to include new provisions dealing with judicial independence and purport to entrench them.

A doctrine of fundamental common law rights in New South Wales?

The BLF's second argument against the 1863 Act was significantly more ambitious than its first. It claimed that common law constitutional principles prevented the New South Wales Parliament from validly interfering with the exercise of judicial power in pending cases. In other words, the BLF asserted that the grant of law-making power to the New South Wales Parliament in s 5 of the Constitution Act was controlled by general law that denied Parliament the capacity to intrude into judicial functions. Although not all members of the Court of Appeal described this argument in the same way, the basic question was whether Parliament's power was limited by the common law to an extent relevant to the BLF's case.

The idea that there may be certain fundamental common law rights beyond Parliament's reach draws its force from natural law thinking. The BLF's argument, like its first, is a fortiori argument that rules repugnant to basic standards of humanity should not be recognised as having the quality of law. The contrary view, associated with legal positivism, denies that laws can lose their force in this way. Instead, from the positivist perspective the "natural law" presents a political rather than a legal dilemma. As it was put in an example familiar to generations of law students cited by both Kirby P and Priestly JA in BLF v Minister for Industrial Relations:

If a legislature decided that all blue-eyed baboons should be barred, the pronouncement of blue-eyed baboons would be illegal, but baboons must go mad before they could pass such a law, and subjects be abducted before they could submit to it.

In England following the constitutional conflicts of the 17th century it became established that Parliament was supreme and, consistently with the "blue-eyed baboons" example, had authority to pass any law regardless of its nature or effect. Legislation based on Westminster inherited this capacity, subject to the requirements of their written constitutions and any colonial limitations on power. Despite these historical developments...
ments, however, the idea that the common law might allow courts to strike down Acts of Parliament in "extreme" situations — as was suggested in a famous statement by Coke CJ in 1601 in *Dr. Blackstone's case* — was never wholly extinguished. In particular, certain well-known dicta by Coke CJ in the New South Wales Court of Appeal in the late 1970s and early 1980s rekindled arguments over whether common law courts possessed this power.

However, the BLF's fundamental rights argument was unanimously dismissed by the Court of Appeal. Their Honours either rejected outright the existence of a doctrine of fundamental common law rights or denied that any such doctrine operated to prevent legislative interference with the courts. Either way, the decision was opposed to the existence of common law limitations on legislative power, their Honours reasoning that this ran counter to several centuries of precedent and practice. For Street CJ this outcome was a matter of regret. He was clearly troubled by "unbridled" legislative power and expressed his "strong affinity" for a concept of fundamental rights. He denied, though, that the 1986 Act would have breached such a doctrine. This was because Parliament could have achieved its object (of deregistering the BLF) "without interference with the judicial process." By contrast, Kirby P believed that arguments for entrenched common law rights misconceived the respective roles of Parliament and the courts in a modern representative democracy. In particular he warned that:

> [The dangers which may attend the development by judges (as distinct from the development by the people's representatives) of a doctrine of fundamental rights more potent than Parliament's]

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85 *Ibid.*, 258-60 referring to "extreme examples" of cases.

86 *Ibid.*, 211 at 113, 77, 78, 94, 96, 126, 129. "To oppose in our books, that in many cases, the common law will ... control Acts of Parliament, and sometimes override them to be utterly void; for when an Act of Parliament is against common law right and remedy, or equitable, or impossible to be performed, the common law will control it, and annul such Act to be void." 


88 *Ibid.*, 375-7 (Street CJ). See also at 376 (Corry P). See also at 387-8 (Mahoney JA). See also 393-4, 404, 405 (Kirby P).


90 *Ibid*, 381.


93 *Ibid*, 386.

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95 *Ibid*, 463 referring to "unconstitutional limitations on the freedom of speech (or association) with respect to the public interest".

96 Section 5 of the Constitution Act 1982 (Cth) provides that "The Legislative Assembly shall have power to make laws for the peace, welfare, and good government of the Commonwealth in all cases whatsoever".

97 *Ibid*, 393 (see also generally at 395-6).


diverse range of rights and interests. However, the High Court in 1968 in Union Steamship Co of Australia Pty Ltd v King134 forestalled any such development. All members of the Court deemed that the relevant words, which appear in like form in the grants of power to other Australian legislatures,135 were having in effect. This view is surely correct. As noted, Stirling CJ’s view contradicts traditional understandings about the meaning of the words in question which provide an inherently uncertain measure of constitutional validity. Whether recognition of the statutory limitation was consistent with Stirling CJ’s rejection of common law rights is also doubtful. Moreover, the Chief Justice did not explain how s 5 of the Constitution Act could operate to invalidate legislation in an “uncontrolled” constitution—a curious omission in light of the Court’s rejection of the BLE’s argument based on Language v The Queen.136

Constitutional significance of the decision

Unlike many leading constitutional cases, the significance of BLE v Minister for Industrial Relations does not lie in its development of the law. In keeping with its commitment to “dare to struggle, dare to win”, the BLE’s arguments challenged the Court of Appeal to overstep settled legal principle. The Court resisted, however, affirming the orthodox view that New South Wales lacks a binding separation of legislative and judicial power. Clearly, the Court’s rejection of fundamental common law rights in reaching this decision was an important outcome at a time when some like Cooke J were wrestling with ideas of “deep rights” and suggesting that the common law might be capable of invalidating “extreme” legislation, but these suggestions hardly amounted to a groundswell of support for changes to the conventional doctrine of parliamentary sovereignty.137

134 (1968) 106 CLR 1. The BLE did not seek special leave to appeal to the High Court from BLE v Minister for Industrial Relations.

135 See generally (1968) 106 CLR 1, p 1409. However, the Constitution Act 1855 (Vic) s 51(e) provides: “The Parliament shall have power to make laws in and for Victoria in all other matters.”

136 Denham v St John Co. Ltd v King (1988) 166 CLR 1 at 110. The conclusion between the words and territorial limitations on legislative power were, however, discussed at 109-114.


139 See Goldsmith v Steele (1986) 1 WR 256.
from federal legislative and executive power. This entrenched separation doctrine is widely regarded as a "fundamental" feature of the Commonwealth Constitution and a safeguard of individual liberty. Moreover, the High Court cannot be abolished by any Australian Parliament.

A series of cases since BLF v Minister for Industrial Relations has now begun to probe this gap between the constitutional protections for the judiciary at State and federal levels. Chief among these is the High Court decision in Reilly's case. At the forefront, Reilly's case places an important new gloss on the Court of Appeal's findings concerning the separation of judicial power.

Reilly's case is considered below. Before that, however, developments since BLF v Minister for Industrial Relations concerning the protection of fundamental rights in Australia are explored. Finally, the effect of the decision in BLF v Minister for Industrial Relations on the BLF's right to remain "alive" is discussed. After all, for most Australians, the "big questions" posed by the case were the future of the BLF.

**Fundamental rights post-BLF**

Two decades after BLF v Minister for Industrial Relations, the Court of Appeal's rejection of fundamental common law rights continues to prevail. In *Durham Holdings Pty Ltd v New South Wales*, (decided in 2001), the High Court considered that an argument that a New South Wales Act providing for the acquisition of property without just compensation was invalid for being a "deeply coercive" right. The High Court

116. See Kirby, "In pursuit of Australian Federation" (1994) 84 CLR 234. Although the Commonwealth Constitution has the Bill of Rights, it includes a limited number of express and implied guarantees that are protective of individual rights and interests, such as in *McDermott v Nitschke* [1994] 2 VR 116 and the implied right to political communication affirmed in *Boyce v Australian Broadcasting Corporation* (1997) 189 CLR 229.

117. See *New South Wales v Commonwealth* (Minor case) (1973) 2 CLR 54. See also *Barnett J* referring to "the fundamental principle of the separation of powers as worked out in the Australian Constitution" and *Williams v Minister for Aboriginal and Torres Strait Affairs Office* (1996) 188 CLR 21 at 74-75 (Buhai J), *Booth v Cohen* (1998) 190 CLR 322 at 343 (Hayman J).

118. See *Re Governor Goldsmith Correctional Centre at Parklea* (1999) 200 CLR 322 at 343 (Hayman J).


120. See for example, *Re Governor Goldsmith Correctional Centre at Parklea* (1999) 200 CLR 322 at 343 (Hayman J).


In other words, to accept that courts could review the validity of legislation according to common law rights and interests would transform basic elements of our constitutional system. And although their Honours left it unsaid, it is worthy of note that the judges have such a unilateral power to reshape our legal and political framework.

The separation judgment of Kirby J in *Durham Holdings* was broadly similar in its treatment of fundamental common law rights to his Honour's judgment in BLF v Minister for Industrial Relations. Once again, he drew the existence of such rights.

Yet despite the views expressed in *Durham Holdings*, it is clear that many judges share Kirby CJ's concern—albeit to varying degrees—about the dangers of "unbridled" legislative power. For example, the High Court's expansion since the late 1980s of limitations in the Commonwealth Constitution on State and federal legislative power arguably reflects this concern. Indeed, it is possible that some of the more adventurous of these decisions may reflect a formalism of legal reasoning. The High Court has also been reluctant to remould the concept of rights for all time and in all circumstances. In *Union Steamship*, after rejecting Street CJ's "peace, welfare, and good government" limitation, all seven members of the Court said:

"Whether the exercise of that legislative power is subject to some restraint by reference to rights deeply rooted in our democratic traditions..."
system of government and the common law ... a view which Lord Reid firmly rejected in *Riley v British Anthracite Board*. It is another question which we need not explore.\textsuperscript{116}

Recently, despite continuing concern about judicial "modification" of the law, Gaudron, McHugh, Gummow, and Hayne JJ in *Gough v Jenkins* referred to this passage from *Unwin v Stannage* without directly endorsing Lord Reid's view.\textsuperscript{117} Conceivably, this might provide space for an argument that "deep rights" are not entirely discarded in Australia.\textsuperscript{118}

The extent to which statements like that just quoted from *Unwin v Stannage* pose a genuine challenge to rejection of fundamental rights is a matter for debate. George Williams, while opposing to the doctrine of fundamental common law rights, has observed that "judicial concern to ensure that 'extreme cases can be invalidated is understandable, especially after the barometer of the twentieth century'\textsuperscript{119} In addition, though, some judges may be genuinely unsure how they would answer the "big question" of the limits of judicial authority vis-a-vis Parliament in an actual situation in which basic constitutionalism is at stake. Leaving the relationship between Parliament and the courts "[un]identified" \textsuperscript{120} at its margins may in fact be consistent with the pragmatic common law tradition with its emphasis on case-by-case development of legal principle.\textsuperscript{121} In any event, even if courts took a "never ever" stand on fundamental common law rights, it is unlikely that such arguments -- with their natural law foundation -- would be suppressed for all time.\textsuperscript{122} Only a Bill of Rights is likely to direct these arguments down a different path. The first statutory Bill of Rights in Australia came into force in the Australian Capital Territory in 2001 with Victoria to follow suit in 2002.\textsuperscript{123} A Bill of Rights for New South Wales, on the other hand, has recently been considered and rejected.\textsuperscript{124}

**Effect of Kable's case**

Speaking extra-judicially, Justice Michael Kirby has claimed that BFL v *Mansour for Industrial Relations* "needs reconsideration.\textsuperscript{125} In light of the High Court decision in Kable's case,\textsuperscript{126} Although Kirby J did not elaborate, the High Court in *Kable's case* recognised two new applications from the Commonwealth Constitution that bear directly on the issues considered by the Court of Appeal. First, various members of the High Court held that under the Commonwealth Constitution, State legislatures cannot validly abolish their Supreme Court\textsuperscript{127} or deny the State a jurisdictional system.\textsuperscript{128} Second, and more controversially, the High Court held that Ch III prohibits State legislatures from conferring functions on State

\textsuperscript{116} See also George Williams's related suggestion that statements like that in *Unwin v Stannage* might constitute a judicial "proclamation against some unenforceable future tyranny", Williams, "Constitutionally Entrenched Commonwealth Law Rights", above n 82, 124 (footnote omitted).

\textsuperscript{117} It has been said that natural law purports "almost miraculous power of survival," Kirby, "Lord Cooke and Fundamental Rights", above n 87, 335 quoting Lord Cooke of Thorndon in turn quoting Lord Lloyd of Hampstead in the *Admiralty v BBC*, 1973 1 All ER 509 (HL).


\textsuperscript{120} Kirby, "Lord Cooke and Fundamental Rights", above n 87, 240 (68). Kirby resisted the view without waiting for it to be in the article published in 2005 Kirby, "Deepening Rights", above n 120, 324 64 (66). See also Karmel, above n 127, 132. For Mr Williams, above n 118, 148, suggesting that Kable's case would not necessarily affect the outcome in 261 is "Acme for Industrial Relations".

\textsuperscript{121} (2005) 215 ALR 551.

\textsuperscript{122} (2005) 215 ALR 551.

\textsuperscript{123} (2005) 215 ALR 551.
courts incompatible with the exercise by those courts of federal judicial power (the "Kable doctrine"). The reasoning underlying these implications has been considered by H.L. Lee and will not be repeated here. The basic rationale of the Kable doctrine, however, is in the need to shield State courts from legislative intrusions that would compromise their integrity as components of the wider Australian judicial system. In particular, the state of the Commonwealth Constitution which places the High Court at the apex of the integrated Australian judicial system bearing appeals from State and federal courts. Also significant are ss 71 and 77(b)(3) which envisage that State courts will exercise both federal and State jurisdiction.

On the facts of Kable's case, the High Court found the Community Protection Act 1984 (NSW) invalid. The Community Protection Act, like the 1986 Act considered in BLE v Minister for Industrial Relations, was a large ramification of its objective was "to protect the community by providing for the preventive detention ... of Gregory Wayne Kable" (s 3(1)). It empowered the State Court to make an order for Mr Kable's detention in prison if satisfied on "reasonable grounds" that he was "more likely not to commit a serious act of violence" (s 3(2)). Accordingly, an order was made not on Mr Kable's past conduct, but on what he might do in the future. The standard of proof was on the balance of probabilities (s 15). The Act further provided that community protection was to be the "paramount consideration" in its construction (s 3(5)). Other provisions modified the ordinary rules of evidence in proceedings involving Mr Kable by widening the range of admissible materials (s 17).

The High Court's decision that the Community Protection Act constituted Ch III of the Commonwealth Constitution was based on the combined features of the Act which gave the Supreme Court a function that differed markedly from its usual responsibilities. Gaudron J held that the Act was incompatible with the Supreme Court's exercise of federal judicial power because it required the Court to act otherwise than in accordance with ordinary judicial process. McHugh J said that the Community Protection Act had "the tendency to undermine public confidence in the impartiality of the Supreme Court". It made the

Court "the instrument of a legislative plan, initiated by the executive government, to impose the appellant by a process that is far removed from the judicial process."

As already noted, the relative weakness of Ch III limitations in the mid-1980s doubtless explains why a Kable style argument was not attempted in BLE v Minister for Industrial Relations. Today, Kable's case is part of a reinvigorated Ch III jurisprudence that places significantly greater limitations on State and federal power than two decades ago. How fundamentally, that these arguments transform the constitutional relationship between State Parliaments and State courts that was found to exist in BLE v Minister for Industrial Relations? To say, as Gaudron, McHugh and Gummow J in Kable's case, that the Commonwealth Constitution guarantees the existence in each State of a State judicial system is clearly upon the Constitution's text and structure. Moreover, from that perspective of constitutional values, such an implication should be supported as an affirmation of the rule of law. Many muscles on deep rights, including those explored in BLE v Minister for Industrial Relations, have considered whether Parliament can abolish the courts. Thus, by bringing State courts within the protective of the Commonwealth Constitution, at least to some extent, Kable's case has addressed one of the "big questions" that has traditionally impelled fundamental rights thinking.

Focusing specifically on the 1986 Act, however, it is unclear whether the Kable doctrine would invalidate it today. In Kable's case the Court accepted that the Kable doctrine restricts the functions that can be given to State courts but does not prevent State level to the protections that the Commonwealth Constitution applies to federal judicial power and federal courts. Thus, although it is widely accepted that the 1986 Act could not validly be enacted by the Commonwealth in relation to a...
pended federal case. It does not follow that the Act violates the Kable doctrine. 109 Instead, the doctrine requires that functions given to a State court be examined to ascertain whether they undermine the court’s integrity as a vehicle for the exercise of judicial power. The High Court decision in 2004 in Freedom v Minister for Industry (Queensland) (2004) 210 CLR 645 suggests that the test will be applied strictly. 110

There is no empirical evidence that the 1986 Act undermined the “institutional integrity” of the Supreme Court. However, the Act was an “unreasonable” exercise that directed the Court to reach a specific finding — that the BLF had been voluntarily deregistered — in litigation involving that question. To this extent the Act breached the “disciplinary independence” of the Supreme Court. The Act did not in terms exclude the ordinary functions of the judicial process. For example, the ordinary rules of evidence and the burden and standard of proof remained unchanged. But as Street CJ recognized in Australia v Commissioner of Superannuation (2004) 210 ALR 15, the 1986 Act did not need to alter the judicial process to achieve its objectives because the legislative direction effectively made such processes redundant. 111 Given these factors, it is arguable that the 1986 Act lacks sufficient similarities to the Community Protection Act to infringe the Kable doctrine. 112 On the other hand, the leading judgments in Kable’s case emphasized the substantive function given to the Supreme Court by the Community Protection Act and, in particular, that it involved the Court in impeaching and punishing Mr Kable contrary to the judicial process and without a finding of criminal guilt. 113 A High Court anxious to confine the Kable doctrine could distinguish the 1986 Act on this basis. Ultimately, Kable’s case is at best only a partial response to the questions posed by BLF v Minister for Industrial Relations concerning the appropriate limits of State legislative and judicial power. In substance, it is directed to the difficulty in framing normative standards in this area, when the Constitutional Court considered the Commonwealth Constitution should be amended to introduce a separation of judicial power at State level, it divided in its opinion. A majority believed that a “judicial separation of judicial power should not pose an obstacle, be introduced in the States.” 114 There were said to be “considerable practical problems associated with such a reform.” 115 For example, the separation doctrine would end many current arrangements that had “given general community satisfaction” whereby certain State judicial functions are discharged by specialist tribunals and other non-judicial bodies. 116 The work of small claims tribunals was specifically mentioned. 117 The Commission also believed that to prevent State magistrates from exercising non-judicial functions “could result in a diversion of funds and resources for other essential purposes.” 118 While legislative interference with judicial power should be condemned, the question whether a separation of judicial power should be introduced at State level clearly raises wider questions.

Conclusion: the fate of the BLF

Litigation ultimately failed to save the BLF. The deregistration of the union in New South Wales, Victoria and the Commonwealth was intemperate.


111 Ibid, p 265.

112 Ibid, p 266.

113 Ibid, p 298. The Constitutional Commission, however, recommended that the Commonwealth Constitution be amended to prevent the arbitrary removal of judges of inferior courts. It was pointed out that such courts may include some bodies usually described as tribunals, pp 297-413. 114 Ibid, pp 306-7. The Commission pointed out, however, that it had not specifically examined the work of State tribunals in its inquiry. See also, for example, the concerns expressed about the inefficiency and inconvenience of a binding separation of judicial power at State level in D Maugham, ‘Should the Victorian Constitution be Reformed to Strengthen the Separation of Judicial Power?’ (2002) 2 Constitutional Law and Policy Sydney 65 at 64-5, 70.

115 Constitutional Commission, above n 153, p 295.
160. Bennett, above n 7, 18, 24, 26, 37; see also, eg, Commans, above n 74, 112.

161. Gordon, above n 24, 189.

162. Ibid, above n 7, 18, 24, 26, 37.

163. Ibid, above n 24, 189. See also, eg, Rose, above n 2, pp 146-61.


166. Ibid, pp 180-7 (though it is possible that this figure is for Sydney only) and see also p 271. In any event, BLF numbers in New South Wales did, interestingly, following deregistration not Bennett, above n 7, 37.


169. The Commonwealth deregistration legislation had originally set a period of five years before the BLF could apply for deregistration. However, in 1988 the period was extended to 20 years. For further discussion of the Commonwealth Deregistration Amendment Act 1990 (Cth) see Royal Commission into the Building and Construction Industry, above n 15, vol 6, p 385. As indicated in the Royal Commission papers the prospects of a BLF revival continued as late as 1996 and 1997, above n 16, vol 6, pp 415, 416. On the extension of deregistration, see also Rose, above n 2, pp 229-30.

170. Commans, above n 7, 97. For Ross’s account, see above n 2, pp 231-4.