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Seventy Five Years of Australian Federalism

by Geoffrey Sawer

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SEVENTY FIVE YEARS OF AUSTRALIAN FEDERALISM*

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It is a great honour and privilege to give this oration; it is also for me a great pleasure, since I had a warm friendship with Sir Robert Garran from the time of my arrival at the Australian National University in 1950 until his death in 1957. I helped him with his delightful memoir entitled *Prosper the Commonwealth*, and often sought his views on constitutional questions. He was a great man, a great Australian and a great citizen of Canberra.

The subject of my remarks chose itself. Seventy five years of the federalism which Garran helped to establish is a milestone; it invites looking back, and looking back one cannot miss the first scholarly milestone in that journey—Quick and Garran's *Annotated Constitution of the Australian Commonwealth*, published in 1901. A facsimile reprint of that extraordinary work appeared this year, an event which would have astonished as well as delighting Sir Robert, since he was among other shining qualities very modest about his work, and thought it had become of historical importance only. He refused to be drawn on the question how much of it was due to Quick and how much to Garran. My own guess is that the greater part of it was due to Garran. I think it is fair to say that even three years ago, a reprint would have been regarded as unlikely, partly because of the book's size—the reprint sells at fifty dollars—and partly because the law, the politics and the practical working of the Constitution, even the type of federalism established on that foundation, have developed or changed so vastly; the changes were not anticipated in detail in 1901, though dimly sensed by some at that time, notably by Deakin, whom Garran greatly admired. However, the events of the last three years, particularly of 1974 and 1975, have sent all of us rushing back to origins in our endeavours to understand, and to support or criticize, defend or attack, the course of events which culminated in the general election of December 1975. It was soon found that Quick and Garran was the handiest key to an understanding of those origins, both because of its masterly historical summary of the federal movement, still far the best available, and partly because of the guide to the dreary wastes of the debates of the Constitutional Conventions of 1891 and 1897-8 which it provides.

Since recent events are still so much in the minds of all of us, let me give two examples of specific points of federal constitutional history which are relevant and perhaps even decisive for the interpretation of the text of the Constitution today. The first concerns the power of the Senate with respect to money Bills under s. 53 of the Constitution, and the second concerns the disqualification of members of Parliament by paragraph (iii) of section 45. The Senate question was of critical importance in the events of April 1974 and October 1975; the Senate on the first occasion threatened to defer Appropriation and Supply Bills until the Whitlam government should dissolve Parliament, and on the second occasion carried out that threat. The disqualification question was of critical importance

*The 1976 Sir Robert Garran Oration

for a consideration of the contention of the Whitlam government in April 1974 that Senator Gair had, by agreeing to be appointed as Ambassador to Eire, automatically vacated his seat in the Senate, so that there would be six instead of five Senate vacancies to be filled by the voters of Queensland at the half-Senate election then contemplated for May 1974. It will be recalled that the intense indignation, and fear, generated by the Gair operation, and designed to secure a Senate majority for the Australian Labor Party, were the direct cause of the Senate threat to supply in 1974; that threat in turn caused Mr Whitlam to beat the Senate gun by advising and obtaining a double dissolution of the Houses of Parliament under s. 57 of the Constitution.

First, then, as to the question of Senate powers under s. 53. It has always seemed to me, on a plain reading of the section, that it gives the Senate the legal power to refuse or defer Appropriation Bills. Statutory provisions are often best read backwards, and this is the case with s. 53. The last sentence gives the Senate the same powers as the Representatives as to all "proposed laws", which include Appropriation and Supply Bills, and must therefore include power to reject or defer—subject in each case to the risk of providing the grounds of a double dissolution under s. 57. But then we have to subtract from this general power the particular denials of power in the earlier paragraphs of the section. These subtractions are: money Bills, defined, are not to originate in the Senate; tax Bills, and Appropriation Bills for ordinary annual services of government, are not to be amended by Senate, though it may *suggest* amendments to the Representatives. The power to reject or defer is not subtracted so it remains.

However, among various arguments put forward to counter this simple bit of propositional arithmetic, Sir Richard Eggleston has pointed out in letters to the press that the drafting history of s. 53 at the Convention of 1897-8 provides a basis for an implication that s. 53 does not give the Senate power to reject appropriation for ordinary annual services—nor perhaps to defer, though that does not necessarily follow. The history to which Sir Richard referred is as follows, and it can be traced through Quick and Garran's note to s. 53. The composition and powers of the Senate were a key, perhaps *the* key, issue at the Conventions, and without a compromise solution to the disputes on this point it is unlikely that federation would have occurred in 1900. At the 1891 Convention, a compromise on the question of money Bills was achieved, the drafting of which remained substantially unchanged until the penultimate stage of drafting at Melbourne in 1898. In the original draft (clause 55 of the 1891 document), the relevant provision *began*: "The Senate shall have equal power with the House of Representatives in respect of all proposed laws, except Laws imposing taxation and Laws appropriating the necessary supplies for the ordinary annual services of the Government, *which the Senate may affirm or reject*, but may not amend". (My italics.) The clause then went on with provisions some of which have finished up in other sections, and concluded with the power to *suggest* amendments to the Representatives. Hence at this stage the general power was stated first, and expressly included power to reject, and this order and the express power to reject continued through the subsequent drafting adventures of the clause, until 7 March 1898. The provision as so drafted, by then numbered clause 45, was approved by Convention vote (after a final valiant attempt by George Reid to remove the Senate power of *suggesting* amendments was defeated). The clause then went off to the Drafting Committee for final redrafting, and was changed in number, wording and arrangement to its present form—general power at end, no reference to power to reject. In that form the clause was adopted by the Convention without comment (Melbourne, page 2450). Now, says Sir Richard Eggleston, is it not a reasonable inference that since power to reject had been expressly included, and was at this stage omitted, the intention is that the Senate should *not* have power to reject? By arguing thus, Sir Richard is adhering scrupulously to the accepted view of the High Court that the course of debate at the federal Conventions may *not* be used for purposes of interpretation, but stages in the drafting history *may* be used as a basis for inference (see Lane, *The Australian Federal System*, pp. 886-7).

It should be noted that the Drafting Committee did not omit only the reference to rejection; they also omitted the reference to the power to *affirm* money Bills, and the same inference should therefore produce the result that the Senate may not affirm such Bills either. If it was really intended that money Bills can only be *debated* by the Senate, with a view to *suggesting* amendments, and are to become law on the sole vote of the Representatives, one would have expected to find this clearly stated, with consequential provisions relating to the Royal assent, such as appear in sections 57 and 128; s. 58, dealing with Royal assent, would have required qualification, though not I think (as has been suggested) s. 1, since the latter is in any event inconsistent with s. 128, and can reasonably be regarded as subject to later sections. Moreover, it should be repeated that an inference of no power to reject does not necessarily carry an inference of no power to defer. One of the awkward consequences of the Eggleston inference is the need for implying a provision to reconcile a sole power to affirm or reject in the Representatives with giving the Senate opportunity to suggest amendments under the fourth paragraph of s. 53.

However, there can be no question that the sort of inference suggested by Sir Richard is one which courts often make when considering textual problems, and like a great deal of law and legal interpretation it is a simple application of common sense. If a writer changes his words, it is a reasonable expectation that he may be intending to change his meaning. However, it is an equally reasonable expectation that he may not be intending to change his meaning at all, but merely to express the same thing more clearly, economically, forcefully or what have you. Only history and context can settle such arguments. This brings us to what I regard as the most important aspect of the present argument. Let us disregard the obscurantist attitude of the High Court to Convention debates, on which Professor Lane makes trenchant and justified remarks. Let us look at the circumstances in which the last stage amendment to the present s. 53 was made by the Drafting Committee.

It is plain from Quick and Garran, and from the debates, that the Convention worked on the assumption that the authority of the Drafting Committee was to put into appropriate words the sense of the resolution of the Convention; if the Drafting Committee wished or was compelled by some legal or logical consideration to depart from the sense of a Convention resolution, this would be drawn to the attention of the Convention and approved or disapproved. This was made particularly clear by Edmund Barton, the Chairman of the Drafting Committee, when on 16 March 1898 he laid before the

Convention the draft Bill resulting from the final remit to that Committee on 12 March. As Barton explained, redrafting had been going on continuously at Melbourne, but even so a great deal of reworking must have been accomplished in the previous four days and nights. He assured delegates that "the sense of the Bill has been preserved", meaning the Bill as last reported, and that "while honourable members may sometimes think the Drafting Committee have freely interpreted the instructions given to them, they will nevertheless find that either the meaning of the amendment is plain upon a comparison of it with the Bill as it stood before, or they will find when there is any apparent difference that the questions asked and answered and the explanations given in debate have accounted for the difference, and that the Drafting Committee has in all instances endeavoured to faithfully interpret the wishes of honourable members". He accordingly undertook to draw their attention to changes which the Committee felt should be considered, and the Convention proceeded on the basis that any member could question any clause on the basis of these expectations.

The Committee did not feel it necessary to say anything about its redraft of s. 53, nor did any member question it. At no stage in the previous debates was anything said which could possibly be regarded as an instruction to the Committee to remove from the Senate the power to affirm or reject money Bills, and the last resolution of the Convention on that clause before the redraft of 12-16 March emphatically reaffirmed the then clause, including the express power to affirm or reject. Hence the inference is that the Drafting Committee by its redrafting of s. 53 intended only to express the same meaning as that previously expressed more economically and neatly, and as indicated above its language is easily capable of being read in that sense. I am indebted to Sir Richard Eggleston for putting me on to this means of confirming my own first impression, while hastening to add that this was not his purpose.

However, this discussion leads one also to suggest that the High Court should at least modify its view about using Convention debates, to the extent of allowing reference not only to stages in drafting but also to the sort of information concerning the background of those stages which I have summarized above. Otherwise the use of drafts can lead to quite incorrect conclusions, as I fear was the case with Sir Richard Eggleston's letters to the press. There is much to be said for abandoning altogether the historical approach to constitutional interpretation, and confining attention to the words as they stand, as understood today, and in the light of contemporary conditions. I would support such a course, and perhaps one Justice of the present High Court, Mr Justice Murphy, would do likewise. But if there is to be reference to the past, let it be an attempt at ascertaining genuine history, not the pseudo-history which a narrow reference to drafting stages is likely to produce.

My second example, concerning disqualifications under s. 45(iii) of the Constitution, was not the only difficult question of law raised by the Gair case, but it is the only aspect of that case which illustrates a problem of drafting history similar to the s. 53 example. S. 45(iii) provides for the vacating of a member's seat if he "directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State". On first impression, the first leg of this did seem to describe what Senator Gair had done when he committed himself to accepting the post of Australian Ambassador in Dublin. He had certainly not *taken* any fee by the critical date—2 April 1974—but it was at least a tenable view that he had *agreed* to do so. However, the point of interest for the present discussion concerns not that argument as to the facts, but a more basic question concerning the meaning of the words quoted. If one traces the history of this sub-section through its drafting stages, again with the help of Quick and Garran, it becomes evident that before the final redraft by the Drafting Committee, in Melbourne, the Convention had first adopted in clear terms a principle of disqualification for taking a fee or honorarium for service to the Commonwealth only where the service was rendered to the Commonwealth *while the member was purporting to be and remain a member*, that is, during a period in which but for the disqualification he would continue in his membership. It was not intended to cover the situation where he agreed to render paid services *after* his membership should terminate by expiry of time or by resignation. The characteristic example cited in the debates was that of a barrister-member accepting, *while a member*, a brief from the Crown. Later, the different point dealt with in the second part of the quoted passage—services rendered *in Parliament* otherwise than to the Commonwealth—was also adopted. Then the Drafting Committee, I think unwisely, ran these two disparate provisions together, and when doing so left out of the first part of the provision the words "while sitting as such member" which had until then been in the provision as approved by the Convention, immediately following the words "the Commonwealth" in the provision as it now stands. The same argument applies as in the s. 53 case; the Drafting Committee did not invite attention to the change, no member challenged it, and the presumption is that the Committee intended the sense to remain the same. I think this sense can also be supported by implication from the structure of the present section, though it is more disputable than is the meaning of s. 53. Hence Senator Gair was not disqualified under s. 45(iii), since he intended to resign before taking up the Dublin post. I understand that he actually remained on the payroll of the Senate, and did not go on the payroll of Foreign Affairs, until the double dissolution of 11 April 1974.

Coming now to my second theme, I wish to reflect briefly on the general course of constitutional development in the last seventy five years. Similar reflections occurred at the fiftieth anniversary in 1951, with contributions by, among others, Sir Robert Garran, Sir Kenneth Bailey, and myself, and I think that a number of our several generalizations have become well known and have not been rendered less true by subsequent inquiry. Australia started with dual, coordinate federalism and this picture of the system still influences the High Court of Australia in a considerable degree. We proceeded to a cooperative type of federalism, a particularly important component of the process being the amendment of the Constitution in 1928 by the addition of s. 105A, and the consequent constitutional entrenching of the Financial Agreement of 1927 with its Loan Concil system for supervising the loan programs of all seven governments. However, even in 1951 the movement of politics, administration and judicial decision had caused the Commonwealth to become the dominating partner in this cooperative federalism. So far as judicial doctrine was concerned, the changes, though on balance favourable to the Commonwealth, had been cautious and followed something of a sine curve rather than a straight line. Initial doctrines protecting the States had apparently been swept away by the *Engineers' Case* in 1920 (28 C.L.R. 129). Then there was a partial restoration of federal-balancing doctrines in the 1940s, culminating in the *State Banking Case* of 1947 (74 C.L.R. 31). Reasonably generous constructions of the scope of Commonwealth powers had continued, if the implied comparison was with the pre-*Engineers' Case* trend or with some of the dissents, though if compared with what happened in the U.S.A. after 1937, the High Court was conservative; in particular it retained a relatively narrow approach to the interstate trade power, and after 1942, with the assistance of the Privy Council, it established an interpretation of the free trade guarantee in s. 92 which severely restricted the legislative competence of Commonwealth and States alike to deal with interstate business. Section 92 was turned into a substantive due process clause. In one respect, however, the High Court had facilitated a giant move in the direction of Commonwealth dominance. In the *Uniform Tax Case*, 1942 (65 C.L.R. 373), it held valid the Curtin legislation which forced the States out of the field of income taxation and made them substantially dependent on Commonwealth grants under s. 96. The full significance of this was not yet clear by 1951.

What has happened since 1951? In general, more of the same, and through 1972-5 at a faster rate, but with quirks. On other occasions I have expressed the view that Australia is moving and ought to move from cooperative to organic federalism, in which the Commonwealth sets all major policies but the States retain a considerable degree of constitutionally-guaranteed discretion in the administration and local adaptation of such policies. Although Mr. Whitlam adumbrated such developments in many public addresses before the 1972 election and his government put in train many programs in that direction, some surviving the Senate and some not, not a single main *federal* development of his period was due to an original constitutional idea, either by amendment of the Constitution under s. 128, or by political and administrative practice, or by judicial decision. It was all based on what had already been achieved by 1951 together with some further developments between 1951 and 1972.

First, the Commonwealth monopoly of income taxation established in 1942 was confirmed for peacetime by the High Court in the *Second Uniform Tax Case* of 1957 (99 C.L.R. 575), and the dependence of the States on Commonwealth grants under s. 96 progressively increased; that case also established that there are virtually no limits to the conditions which the Commonwealth can place on s. 96 grants, so that the Commonwealth's ability to direct State policy by such means was also confirmed. The Court also eroded State powers of indirect taxation by its interpretation of the denial to States of power to impose excise duties in s. 90. I played some part in devising ways of getting around those ridiculous decisions, and the outcome of one such adventure—the Tasmanian tobacco tax of 1973—is to be found in *Dickenson's Arcade*, 1974 (130 C.L.R. 177); a majority of the Court endorsed my view that the States could still impose consumption taxes, but with a qualification making it virtually impossible for such taxes to be collected. However, the franchise tax in the same Act was held valid, and has been imitated by three other States. I should have patented the idea and collected a modest royalty, say .001 per cent.

Secondly, the proportion of *conditional* grants to all grants steadily increased, from under 20 per cent in 1951 to nearly 30 per cent by 1972 to over 40 per cent by 1976.

Thirdly, the Commonwealth supported State *capital* expenditure from revenue, partly by underwriting the programs approved by the Loan Council, and loans became less important for development, so that the voting majority of the States in the Loan Council became of little importance.

Fourthly, the course of judicial interpretation continued to be somewhat unpredictable, and the laissez-faire implications of s. 92 interpretation remained considerable, but on the whole the trend was favourable to the Commonwealth. The new era of "balanced federalism" and State protection implications suggested by the *State Banking Case* of 1946 did not eventuate; on the contrary the *Payroll Tax Case* of 1971 (122 C.L.R. 353), upholding Commonwealth taxation of State government payrolls, severely qualified the doctrines of the majority in *State Banking* and may be found eventually to have virtually overruled that decision. Indeed, in the *Cigamatic Case* (1962), the High Court went to what I consider lunatic extremes in the assertion of Commonwealth immunity from State laws, without any corresponding protection to the States. But—a quirk; the Court was persistently unable to make up its mind about the Commonwealth's spending power. In *Pharmaceutical Benefits* 1946 (71 C.L.R. 237), two Justices thought that the power was limited, two that it was unlimited, and two were non-committal though inclined to the limited view. In the *Australian Assistance Plan Case* 1975 (50 A.L.J.R. 157), three were for a limited view, three for the unlimited view, and one non-committal. I think the present Court would have a 5-2 majority for the limited view and that it is the correct one.

But the Court took another giant step in the direction of expanding Commonwealth powers. In the *Concrete Pipes Case*, 1971 (124 C.L.R. 468), it overruled a 1908 decision and gave the corporations power, s. 51(xx) a new and wide interpretation on which much subsequent Commonwealth legislation depends—restrictive trade practices, consumer protection, prices justification, projected securities, company controls and so on. In three cases, *Fairfax*, 1965 (114 C.L.R. 1), *Herald and Weekly Times*, 1966 (115 C.L.R. 418) and *Murphyores*, 1976 (50 A.L.J.R. 570), the Court overruled the celebrated *Barger's Case* of 1908 (6 C.L.R. 41), and held that the Commonwealth can use conditional taxing and licensing to regulate conduct in fields otherwise beyond its powers. To offset all this, the Court continued its niggardly treatment of the interstate trade power, as in the *Airlines Case No. 2*, when it resolutely turned its back on the facts of economic life, and declined to treat the feeder air service from Sydney to Dubbo as part of interstate trade. Mr Whitlam attempted to change the course of judicial interpretation by appointing Justices Jacobs and Murphy to the High Court in 1974 and 1975, and it is already obvious that winds of change are blowing there, though the Justices in question blow, to continue the metaphor, in somewhat different directions; however, the resignation of Justice McTiernan, sole survivor of a similar effort by the Scullin A.L.P. government (or more strictly the caucus behind it) in 1930, has given Mr Fraser the opportunity to revive the federal spirit of the late Chief Justice Dixon by the appointment of Justice Keith Aickin, who was Dixon's associate and close friend and remains his admirer.

The effect of this long drift from cooperative towards organic federalism under Commonwealth leadership, culminating in the short rush in that direction under Mr Whitlam, has inevitably been a backlash towards State reassertion. This was evident in the origins of the new Constitutional Convention, promoted by Victoria's Sir Henry Bolte in 1972 in an effort to restrain Commonwealth aggrandizement, nearly taken over by Mr Whitlam for the contrary purpose in 1973, suspended in 1974, rendered farcical in 1975, and now resuscitated as an agent of Fraser's "New Federalism" in 1976. I do not believe, however, that Mr Fraser or Senator Carrick or anyone else is capable of stemming the growth of Commonwealth authority, and certainly the deal on income tax promoted by Mr Fraser in 1976 is far from being a return to cooperative federalism. It is but a difference in the style of Commonwealth domination. For some years after 1959, I made myself unpopular with the Commonwealth and States alike by pointing out that the amendment to the States Grants Act made in 1959 by Mr Menzies left the way completely clear, as a matter of law, for the States to resume the imposition of income taxes. They only needed to act together in order to overcome the practical obstacles as well. History shows that actually they never wanted to resume income taxation. Now we are having the same thing demonstrated in a different way. If Mr Fraser really wanted to revive cooperative federalism, he would need only to vacate a large slice of the personal income field, cease all grants to the States save those for purposes of horizontal equilibrium, and tell the States to raise their own income taxes. It is hard to say who would be more horrified at such a thought—the State Premiers, irrespective of party, or Mr Fraser. So whether or not the A.L.P. returns to power in three or six years, as I hope it does, the drift towards organic federalism will continue, and of course if the A.L.P. is returned then the drift will again become a rush on much the same constitutional basis.

Lastly, since the special theme of this gathering is the relation between government and business, I wish to pay some particular attention to constitutional developments affecting business activities in a more direct fashion.

The Commonwealth has for long had ample power to direct the general shape of the Australian economy—the macroeconomic situation. It does this through the foreign trade power, the banking, taxation, currency and loans powers, and, with limitations, by the industrial arbitration and interstate trade powers. Since the *Concrete Pipes Case* (1971) it has acquired a control over foreign, trading and financial corporations whose limits are still tantalizingly unsettled by High Court decisions, notwithstanding the ample provocation to judicial challenges set up under legislation of the Whitlam period. Particularly tantalizing, indeed maddening for a teacher of constitutional law like myself, though I suppose gratifying to the Commonwealth government, has been the failure of any commercial concern to tackle the Prices Justification Act. However, it has to be said that such wavering light as the only two High Court decisions of any importance throw on s. 51(xx)—the *Concrete Pipes Case* and the *St George County Council Case* 1974 (2 A.L.R. 371)—suggests that there can be few limits to the rules which Parliament may prescribe as to the conduct of the named classes of corporations in their trading relations with one another and with the general public. Price control certainly appears to be unchallengeable.

The uncertain areas are three. First, as to dealings between corporate and non-corporate persons, can the Parliament confer enforceable *rights* on individuals? (probably yes), and impose *duties* on individuals? (possibly not). Secondly, can the internal structure of the subject corporations, such as the rights of shareholders and debenture holders be regulated? Thirdly, can the Commonwealth provide for the *formation* of trading and financial corporations? My opinion as to the answers to the last two questions has long been that the Commonwealth can provide for incorporation and regulate every feature of the corporate life of the named corporations, and I wish that Mr J.W. Howard, the Minister in the Fraser government responsible for these matters, would set up a Commonwealth Companies Act so as to settle the question. It is utterly ridiculous that this country should have nine different Companies Acts, and for that matter nine different basic sets of law relating to contracts, property, trusts and so on. We should have a uniform system of civil law, and the sad history of the Committee of Attorneys-General and of uniform law efforts, in particular the so-called Uniform Companies Act which I helped to draft, proves that we can get a national uniform law and keep it uniform only by handing the subject over to the Commonwealth. The regulation of stock exchanges and stock brokers is another matter. I think many provisions of the Whitlam government's projected legislation on those topics were unconstitutional; there may be less bull-headed methods which would be upheld, but better still would be a reference of power from the States, and in any event decentralized administration is desirable.

The federal industrial arbitration power has become, if anything, more and more of a Serbonian bog since the days when Higgins J. so described it, not least during the past quarter century. The ludicrous doctrine of division of powers constructed by the High Court and confirmed by the Privy Council in *Boilermakers*, 1957 (95 C.L.R. 529), continues to bedevil the administration of the system, although Barwick C.J. and Mason J. have shown some willingness to reconsider it (see *R. v. Joske,* 2 A.L.R. 449, 459) and I understand that a suitable case now awaits trial. The relation between registered federal unions and their separately organized State affiliates creates corporate personality problems of Freudian and even theological dimensions (*Moore v. Doyle*, 15 F.L.R. 59); the High Court has insisted on ludicrous demarcations between what is said to be industrial in nature and what not (*Pitfield v. Franki*, 123 C.L.R. 448). However, these legal problems may be less important than the abandonment by federal governments of all parties, since the gaoling of Clarrie O'Shea in 1969, of any attempt at achieving Higgins' new province for law and order. (See generally Maher & Sexton in 46 A.L.J. 109, and J.E. Isaac in *Australian Lawyers and Social Change*, 321-349).

How fares freedom of trade, commerce and intercourse among the States? The Dixonian attempt at creating a pure analytical doctrine for the application of the section has been a failure. The recent appointment of Justice Aickin may produce some attempt at reinstating the Dixonian doctrines, with the help of Justices Gibbs and Stephen, but that is in the future. As things stand at present, the score is as follows. Justice Murphy is prepared to overrule all the doctrines established by the Court since *Fox v. Robbins*, 1909 (8 C.L.R. 115) and treat the section as preventing only fiscal burdens on import and export from State to

State; see his judgment in *Buck v. Bavone* 1976 (9 A.L.R. 481). Justice Jacobs is not prepared to go so far, but is probably prepared to treat the section as referring chiefly to interstate protectionism, which was beyond question its original purpose. Chief Justice Barwick is also in explicit revolt against the intricate logic of the Dixonian approach, but he would substitute a doctrine—espoused by the Privy Council in *Bank Nationalization*—1949 (79 C.L.R. 497)—which invalidates any *direct* burden, including purely "economic" as distinct from "legal" consequences, on interstate trade interpreted in a very broad sense. This would make s. 92 even more of a guarantee of minimally regulated private enterprise in interstate trade than does the Dixonian doctrine. Justices Gibbs and Stephen tend to adhere to a form of the Dixonian doctrine, under which the protection of s. 92 is great but the area of trade regarded as interstate and so protected is relatively narrow. Justice Mason may be inclining to Jacobs' view—looking for interstate protectionism as the key consideration. Thus the Court is now more divided on the subject than it has ever been, but nevertheless the scheme by which New South Wales had for so long kept dirty interstate competitors out of the Sydney market, to the advantage of various New South Wales dairy farmers and members of the State Parliament, finally fell foul of most of the views of s. 92 mentioned above in the *North Eastern Dairy Case*, 1975 (7 A.L.R. 433) and was duly invalidated with the momentous political consequences for that State which we are now seeing. You may notice that I have not attempted to state what is the Dixonian doctrine on s. 92; this is because to do so would require another two or three lectures. For my part, I think that most of the actual decisions of the Court in the past seventy-five years could have been reached in a more commonsense view of s. 92; one of the few decisions which I think was clearly wrong and ought to be overruled was the *Bank Nationalization Case*.

Some general reflections on the trade powers. It is high time that the High Court at least caught up with the facts of Australian economic life to the extent of adopting the view of interstate trade which the U.S. Supreme Court had adopted by 1905 (*Swift v. U.S.*, 196 U.S. 375). It is not necessary for them to go to the absurd lengths of such more recent American decisions as *Wickard v. Filburn* (1942, 317 U.S. 111) in order to avoid absurdities such as *Airlines No. 2*. A considerable extension of the scope of s. 51(i) is highly desirable as an adjunct to the possibilities of s. 51(xx), in order to achieve a national commercial law applicable to both corporate and non-corporate traders. Without some such development, we can have such a fragmentation of commercial law between Commonwealth and States that the average trader cannot safely pursue his business without a squad of constitutional lawyers to advise him and at the constant risk of becoming the victim of a leading case. Provided the powers of Commonwealth and State are concurrent, it is not difficult to pursue a planned course of federal intervention without achieving anarchy. There is, however, great danger in any attempts at marking out areas of exclusive Commonwealth power, as we have seen from the unfortunate and unnecessary decision of the High Court in the *Seas and Submerged Lands Case* 1975 (50 A.L.J.R. 218). Having declared the exclusive sovereignty of the Commonwealth over that territorial sea, the Court has had to indulge in contortions in order to preserve the necessary operation of various State laws in that area. (*Pearce v. Florenca*, 1976, 9 A.L.R. 289.) In a federation such as ours, the central government requires paramount powers but none should be exclusive.

I have not attempted in this survey to deal with the melodramatic events of October-November 1975, partly for reasons of time, partly because we are too close to them, and partly because although they have a federal bearing in view of the historical significance of the Senate, their main thrust is in the non-federal part of the constitutional structure, the working of responsible, parliamentary cabinet government. Garran wrote equivocally on the topic. In some passages (pp. 404-6, 703) he stressed the principle that the Crown and its representatives must act on ministerial advice, and in others he quoted without criticism, though also without express approval, the opinions of contemporary writers which conceded a surviving power in Crown and Governor-General to act independently of advice (pp. 407-9). I think that the events of last year would have disturbed him greatly. However, I also think that he would have regarded the events as merely demonstrating the truth of Hackett's prediction in 1891 that either responsible government would destroy federalism, or federalism would destroy responsible government. Garran himself restated that view in clear and indeed prophetic terms, in his note to s. 62 of the Constitution (p. 706).

I trust that it will not take another seventy five years to resolve that dilemma.

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